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CPER Journal Online

Letter From the Editor



Dear *CPER* Readers,

Predictably, fiscal insolvency once again is a predominant theme in this issue of *CPER online*. As the City of Stockton tries to negotiate away from the brink of bankruptcy, authors Charles Sakai and Genevieve Ng, who were heavily involved in the City of Vallejo's bankruptcy proceedings, give us their perspective on the new AB 506 pre-bankruptcy process enacted last year. There are benefits to the new law, they say, but limitations, as well. Cities won't be able to avoid negotiating with employee organizations or compliance with AB 646 mediation procedures if they reach impasse. Meanwhile, although there is no evidence on the efficacy of the new process, the Assembly has already passed AB 1692, which would eliminate some AB 506 provisions on deadlines and voluntariness that local agencies fought for last year.

One of the limitations highlighted by Sakai and Ng is the inability to make binding agreements with retirees concerning retirement medical and pension obligations. Retirement benefits are the bogeyman that haunts city halls around the state, and unions are being asked to agree to two-tier benefit plans and higher employee contributions to stave off the specter of fiscal insolvency. As this *CPER* issue shows, some cities have successfully used the ballot box to pare back obligations to current and future employees when agreements could not be reached with employee unions. These victories, however, may ward off one threat to see another — lengthy legal battles. As covered in the Local Government section, the cities of San Jose and San Diego are facing claims under the Meyers-Milias-Brown Act and the state constitution's contract clause.

Recent cases at the Equal Employment Opportunity Commission prompted author Elizabeth Arce to offer practical advice on how to approach issues of reasonable accommodation, along with factors that distinguish between undue employer hardship and mere employer inconvenience of a proposed accommodation. A case summarized in the Discrimination section offers a real world example of undue hardship issues in the hospital setting.

CPER's Recent Developments section also includes an important holding of the United States Supreme Court that states and their political subdivisions have sovereign immunity and cannot be sued under the Family and Medical Leave Act for violation of the provisions guaranteeing leave for an employee's own medical care. In another case, the court addressed a different kind of immunity, qualified immunity, which protects public employees and officials — and now public contractors — from liability for wrongdoing if their conduct was not clearly illegal. A cluster of cases in the journal illustrate the defense.

State courts also parsed the Education Code to determine whether temporary teachers have rights to probationary status, a step toward tenure. But, a case filed by student advocates seeks to dismantle the system of tenure laws, blaming it for the unequal education of poor and minority children in violation of equal protection rights.

It's not light summer reading, but we hope you enjoy this issue nonetheless.

Katherine J. Thomson, Editor, *CPER*

CPER Journal Online

Fiscal Insolvency Under AB 506: Death by a Thousand Meetings



By Charles D. Sakai and Genevieve Ng, Renne Sloan Holtzman & Sakai

On February 28, 2012, following two declarations of fiscal emergency, the City of Stockton became the first city to enter into pre-bankruptcy mediation under Assembly Bill 506.^[1] Signed into law by Governor Brown on October 9, 2011, AB 506 requires a public entity to participate in a neutral evaluation process with its creditors before petitioning for bankruptcy protection. Prior to the bill's passage, a public entity in California could seek bankruptcy protection at its own discretion with no prior procedural steps. While many factors led to Stockton's entry into the AB 506 process, retirement and labor costs played a significant role in the city's declarations of fiscal emergency and its ultimate entry into the AB 506 process. After Stockton, Mammoth Lakes quickly followed suit, and other cities have asked how the AB 506 process works and how it could affect labor relations.

The purported goal of AB 506 is to make filing for bankruptcy protection "a last resort," one that is "instituted only after other reasonable efforts have been made to avoid a bankruptcy filing or otherwise appropriately plan for it."^[2] The bill creates a process for the municipality and its creditors to engage in "reasonable efforts" to resolve their disputes outside of bankruptcy or, if the disputes cannot be resolved, to begin negotiations that will continue in the bankruptcy action.

Although the requirements of AB 506 are not onerous and may provide the municipality with some benefits, a municipality needs to understand the limitations of the law and how creditors (including labor unions) may exploit those limitations. Furthermore, a municipality that wants to impair its obligations under collective bargaining agreements, either within or outside of the AB 506 process, must

understand its negotiation obligations and the time involved to fulfill them.

This article outlines the parameters and limitations of the AB 506 process: the roles of unions and retirees, coordination with other state law rights and obligations (such as declarations of fiscal emergency and the duty to bargain under the MMBA), and the impact of factfinding pursuant to AB 646.

Overview of State Laws Allowing Municipalities to File for Bankruptcy

Federal municipal bankruptcy law arose out of the financial crisis of the Great Depression, when in 1934 Congress enacted chapter 9 of the federal Bankruptcy Code. Since then, fewer than 500 municipal bankruptcy petitions have been filed.^[3] The most significant petitions filed recently have been Harrisburg, Pennsylvania; Vallejo, California; and Jefferson County, Alabama.

Under chapter 9, discussed below, a municipality cannot file for bankruptcy protection unless state law authorizes it to do so. Until the passage of AB 506, California provided broad authorization that granted all California public agencies blanket approval to seek bankruptcy protection.

Other states take a variety of approaches in addressing whether local governments can file for protection under chapter 9 bankruptcy. Only Georgia specifically prohibits municipalities from claiming chapter 9 protections.^[4] In at least 20 other states, no statute specifically provides authorization. Some states permit bankruptcies but require that the municipality or a separate commission declare a fiscal emergency prior to filing.^[5]

Municipal Bankruptcy Under Chapter 9

Chapter 9 applies solely to public agencies. According to the U.S. courts, the purpose of chapter 9 is to “provide a financially distressed municipality protection from its creditors while it develops and negotiates a plan for adjusting its debts.”^[6] Unlike bankruptcy protection under chapters 7 or 11, a public agency cannot be shuttered entirely or have its assets liquidated. Under chapter 9, the bankruptcy court has limited ability to interfere with the day-to-day activities of the public agency.^[7] For example, a public agency may hire consultants and other professionals without approval from the court. The court can review these fees only as part of the public agency’s plan of adjustment and may opine only on the reasonableness of the fees.^[8]

In order to file for relief under chapter 9, the public agency must not only be authorized to do so, but must be insolvent^[9] and desire a plan to readjust its debts. Additionally, the public agency must either have obtained some agreements with a majority of its creditors, attempted to negotiate in good faith with these creditors unless such negotiations are impracticable, or have believed that the creditor may attempt an avoidable transfer under the Bankruptcy Code.^[10]

History of Municipal Bankruptcy Filings in California

Although California has allowed municipalities to file bankruptcy for over 70 years,

not many have sought such protection. Only three general government agencies in the state have filed for protection during that time: Orange County, Desert Hot Springs, and Vallejo.[11]

Orange County's highly publicized 1994 bankruptcy led many to question whether the state should be more active before allowing financially distressed municipalities to seek bankruptcy protection. The California Law Revision Commission, an independent state agency that assists the legislature and governor by recommending reforms to California law, recommended that the legislature revise California's municipal bankruptcy statute to conform its definitions to those used in federal bankruptcy law. In 2002, the commission's proposed changes were enacted as law under SB 1323 (Ackerman).[12] The commission did not recommend the legislature enact any substantive policy changes or pre-conditions.

In contrast, as a result of the Orange County bankruptcy, the legislature debated substantially revising California law to establish state oversight for public agency bankruptcies. Senate Bill 349[13] would have established a "Local Agency Bankruptcy Committee," which would have determined whether a municipality met the requisite criteria to file a chapter 9 bankruptcy petition.[14] Though this bill passed the legislature, it was vetoed by then-Governor Pete Wilson, who stated, "State denial of access to Chapter 9 may create the implication that the state has assumed responsibility for the debts of distressed municipality." [15] The law remained in effect without any significant modification.

Thereafter, legislation lay relatively dormant until the City of Vallejo's declaration of bankruptcy in 2008 brought on a new demand for revisions to the law.[16] Labor organizations spearheaded a change because of the experience with Vallejo's bankruptcy filing.[17]

Vallejo was arguably the first structural municipal bankruptcy in California in that the move was driven largely by rapidly increasing personnel costs, whereas the County of Orange bankruptcy rested on poor investments, and other bankruptcies (such as Mammoth Lakes) have stemmed from litigation awards.[18] In an effort to stave off bankruptcy, Vallejo engaged its labor organizations in discussions to modify its existing collective bargaining agreements.[19] When that failed, Vallejo filed for bankruptcy protection and filed motions to reject all of its collective bargaining agreements. The unions strongly opposed Vallejo's actions and filed eligibility challenges asking the courts to reject Vallejo's bankruptcy petition.

While the bankruptcy filings were pending, Vallejo continued to meet and confer with its four labor organizations, but without any real progress. To maintain solvency, Vallejo unilaterally implemented changes to wages, hours, and other terms and conditions of employment under bankruptcy pendency plans.[20] Though it ultimately reached agreements with its police and managerial unions, Vallejo initially was unsuccessful in renegotiating terms and conditions with its fire and general employee unions.[21] The court rejected the unions' objections to Vallejo's bankruptcy petition and approved the city's rejection of the fire and general employee collective bargaining agreements. [22] This set Vallejo on a path to negotiate new terms with these unions. At the time, this path included impasse procedures as

prescribed in the city's charter, which culminated in binding interest arbitration.[23]

In response to their concern arising from the events of Vallejo's bankruptcy, organized labor heavily backed revisions to the law.[24] Assembly Member Bob Wieckowski sponsored AB 506, which labor organizations strongly supported. Wieckowski explained the legislation was in direct response to the Vallejo bankruptcy. He stated, "By bringing all sides together, we were able to reach an agreement that establishes a neutral evaluation process that can save taxpayers' money and avoid lengthy and expensive municipal bankruptcy cases. That is my No. 1 goal with this bill — to save taxpayers' money by avoiding bankruptcy." [25]

AB 506

Governor Brown signed AB 506 on October 9, 2011, and the statute went into effect on January 9. It provides that a public entity can seek federal bankruptcy protection only if either of the following has occurred: (1) the public entity has participated in a neutral evaluation process, or (2) the public entity has declared a fiscal emergency.[26] A public entity[27] is defined as "any county, city, district, public authority, public agency or other entity, without limitation, that is a municipality as defined in Section 101(40) of the United States Code (bankruptcy),[28] or that qualifies as a debtor under any other federal bankruptcy law applicable to local public entities." [29] The legislation expressly excludes school districts from having to comply with the procedures.[30]

The neutral evaluation process. If a public agency believes that it is, or will be, unable to meet its financial obligations when those obligations become due, the public agency may initiate the neutral evaluation process.[31] The process is comprised of the following steps.

(1) *Notification to interested parties of request for neutral evaluation and response.* To begin the process of neutral evaluation, the public agency must notify all "interested parties" by certified mail of its request.[32] An "interested party" is "a trustee; a committee of creditors; an affected creditor; an indenture trustee; a pension fund; a bondholder; a union that, under its collective bargaining agreements, has standing to initiate contract or debt restricting negotiations with the municipality; or a representative selected by an association of retired employees of the public entity who receive income from the public entity convening the neutral evaluation." [33]

Additionally, "a local public entity *may* invite holders of contingent claims to participate as interested parties in the neutral evaluation if the local public entity determines that the contingency is likely to occur and the claim may represent five million dollars or comprise more than 5 percent of the local public entity's debt or obligation, whichever is less." [34]

The interested parties must respond to the public entity within 10 business days of receipt of the request.[35] If the interested party fails to respond in that time, it has waived its right to participate in process. [36]

(2) *Selection of neutral evaluator.* The public agency and those interested parties that timely responded must mutually select the neutral evaluator.[37] A neutral evaluator must have training in conflict and alternative dispute resolution, and meet one of the following criteria:

- At least 10 years of high-level business or legal practice involving bankruptcy or service as a United States bankruptcy judge; or
- Professional experience or training in municipal finance and one or more of the following areas: municipal organization, municipal debt restructuring, municipal finance dispute resolution, chapter 9 bankruptcy, public finance, taxation, California constitutional law, California labor law and/or federal labor law.[38]

If the parties are unable to mutually agree on the neutral evaluator, the public agency will furnish the names and resumes of five qualified candidates.[39] A majority of the participating interested parties must then strike up to four names from the list, and the remaining candidate will serve as the neutral evaluator.[40] The legislation does not define what constitutes a “majority of interested parties.” Reasonable interpretations could be that it is the majority of the number of interested parties, or it could be that it is the majority of the claims against the municipality. Because most cities have a limited number of bond insurers but several unions, it may be that labor and CalPERS will be the most significant interested parties for AB 506 purposes.

The cost of the neutral evaluator is divided between the public entity and its creditors. The public entity shall pay 50 percent of the cost of the neutral evaluation, and the creditors shall pay the balance.[41] Under the statute, “creditor” is defined more narrowly than an “interested party.”[42] Smaller creditors are spared from having to share the cost of what could be an expensive process. However, this creates the first test of cohesiveness between interested parties as they jockey to determine how much each will pay.

(3) *Neutral evaluation process.* The parties must engage in neutral evaluation and negotiations in good faith. Good faith means that the parties will participate in the process with an “intent to negotiate toward a resolution...including the timely provision of complete and accurate information to provide the relevant parties through the neutral evaluation process with sufficient information...”[43] This requires that each representative at the neutral evaluation has the authority to settle and resolve disputes.[44] The new law does not provide for any consequences if an interested party fails to participate in the neutral evaluation process in good faith.

The neutral evaluator does not have the power to impose a settlement on the parties, but instead will “use his or her best efforts to assist the parties to reach a satisfactory resolution of their disputes.”[45] In this process, the neutral evaluator appears to work as a mediator, referee, lawyer, and educator, often wearing more than one hat simultaneously. For example, the evaluation process must be voluntary, comprised of “uncoerced decision-making” that allows the parties to make free and educated decisions.[46] Although not an advocate for any party or holding any sort of fiduciary duty towards any party, a neutral provides counsel, guidance, and assistance to the parties in negotiating a “prepetitioned, preagreed

plan of readjustment.”[47]

The proceedings are confidential unless mutually agreed otherwise by the parties or disclosure is required by a bankruptcy judge in any subsequent eligibility determination.[48]

The neutral evaluator may make “oral or written recommendations for the settlement or plan of readjustment” to a party in private or to all the parties jointly.[49] To that end, the neutral may request documents and other information from the parties that he or she believes would be helpful toward reaching resolution.[50] The documents may include “the status of funds of the local public entity that clearly distinguishes between general funds and special funds, and the proposed plan of readjustment prepared by the local public entity.”[51]

(4) *Timing and end of the evaluation process.* The neutral evaluation process *shall not last for more than 60 days* following the date the neutral evaluator is selected, unless the public agency or a majority of interested parties choose to extend the process for up to an additional 30 days if no agreement is reached.[52] The public agency may also end the process early if the fiscal condition of the agency deteriorates to the point that a fiscal emergency is declared.[53] Of course, the process may also end if the parties reach an agreement even if such an agreement requires the approval of a bankruptcy judge.

Fiscal emergency alternative. If the public agency is unable to proceed through the neutral evaluation process, the public agency may — in the alternative — declare a fiscal emergency prior to filing a petition under chapter 9.[54] The agency must adopt, via resolution by a majority vote of the governing body at a noticed public hearing, a declaration of fiscal emergency.[55] Accompanying this declaration, the governing body must include findings that “the financial state of the local public entity jeopardizes the health, safety, or well-being of the residents of the local public entity’s jurisdiction or service area absent protections of Chapter 9” of the federal Bankruptcy Code.[56] Additionally, the resolution of the public agency must include a finding that it will be unable to pay its obligations within the next 60 days.[57] The declaration of fiscal emergency must comply with the open meeting requirements of the Brown Act.[58]

Application of AB 506

Benefits of the law. The requirements of AB 506 do not impose an onerous burden on a municipality. As seen with the City of Vallejo, this process of negotiating with creditors is one in which a financially strapped municipality most likely would have engaged before seeking bankruptcy protection, even without AB 506. Thus, AB 506 turns an *ad hoc* process into a standardized one. On the downside, it does create a structural impediment to the filing of bankruptcy and increases the time pressure on municipalities, which now have to plan for a minimum of 60 to 90 days before seeking bankruptcy protection. However, this law provides the municipality many benefits as examined below.

(1) *Encourages open dialogue under the guidance of a trained mediator.* The parties

will be able to have an open dialogue and exchange of information with the aid of a trained mediator knowledgeable about the limitations of bankruptcy law. At best, the AB 506 process may allow a public agency and its creditors to reach agreements that would avoid bankruptcy.

(2) *Attempts to bring all interested parties to the table.* In the negotiations leading up to the Vallejo bankruptcy, the institutional creditors refused to negotiate with Vallejo until the city could achieve some measure of labor peace and stability by obtaining agreements with the labor organizations, which it was unable to do prior to declaring bankruptcy. Under the neutral evaluation process, the goal is for all interested parties to participate. Nonetheless, an interested party may decide not to respond to a municipality's notice requesting neutral evaluation. However, a non-responsive interested party would have difficulty objecting to the municipality's chapter 9 bankruptcy on the ground that the municipality failed to participate in good faith.

(3) *Completes the legwork required for bankruptcy, should it be required.* Even if the municipality cannot avoid bankruptcy, the AB 506 process will fulfill the requirements mandated under the federal bankruptcy laws, arguably resulting in a quicker and more efficient bankruptcy process. As detailed above, federal law requires that in order for a municipality to file for bankruptcy, the municipality must have negotiated in good faith to obtain the agreement of creditors holding at least a majority of the claims that will be impaired in the bankruptcy. [59] The only exceptions are when the municipality is unable to negotiate with the creditors because such negotiations are impracticable or when the municipality believes the creditor may attempt to obtain a transfer that is avoidable. The negotiations under bankruptcy differ from a public agency's obligations to meet and confer in good faith over matters within the scope of representation as required by the Meyers-Milias Brown Act.[60]

Furthermore, the neutral evaluation process will likely result in the municipality having prepared a plan of adjustment that can be used in the bankruptcy filing. Although the law does not specifically require that the municipality have such a plan ready at the beginning of the evaluation process, the law appears to assume that will be the case.[61] Through the efforts of the neutral evaluator and the negotiation with creditors, the municipality would likely draft a settlement and/or create a plan of adjustment. Thus, by the end of the neutral evaluation process, the municipality will likely have a workable plan that it can use in its bankruptcy filing.

Therefore, engaging in the neutral evaluation process will allow the municipality to have met its negotiation obligation and thus have "its ducks in a row" prior to any bankruptcy filing.

Limitations of the law. The AB 506 process leaves many questions unanswered and may allow parties to exploit these limitations of the law.

(1) *Limited resources of the neutral evaluator.* The neutral evaluator faces a herculean task. The selection of an appropriate neutral will be critical to the potential success of the process. But, it may be difficult to find an evaluator with the breadth of experience and knowledge in the many diverse and complicated areas necessary to handle the challenges that will arise.[62] In all likelihood, bankruptcy attorneys or

retired bankruptcy judges will most likely fit the bill, as Judge Mabey has in Stockton. However, even these highly educated and experienced professionals will have blanks in their resumes as municipal bankruptcies are few and far between. Nonetheless, a comprehensive understanding of public finance and public sector labor law is essential if the neutral evaluation process is to be effective.

Furthermore, an issue that is not addressed is whether the neutral evaluator has adequate support. Unlike a mediator who generally is called in to broker a dispute between two parties, this process involves many interested parties with as many disparate views: bondholders, labor organizations, retirees, and other creditors. The amount of data, alone, could be overwhelming without staff or support to make sense of it, analyze it, and then help devise a plan that is acceptable to all parties. If the goal of the neutral evaluation process is to circumvent the need for bankruptcy, then the role of the neutral evaluator is — at the very least — to help draft an acceptable settlement and readjustment plan for getting the public agency out of fiscal distress.

Earlier language in the bill provided for the neutral evaluator to be able to consult with “alternative dispute resolution service providers, the California Debt and Investment Advisory Commission, the California State Mediation and Conciliation Service, the Executive Office for U.S. Trustees, retired bankruptcy judges or other appropriate entities” on matters that were not confidential. The bill, however, did not provide for any compensation for these consultants.^[63] Additionally, the limitation on not allowing the neutral evaluator to discuss anything “confidential” would severely limit any benefit that these consultants could provide. The benefit of assistance was stricken from the bill signed into law.

Notably, other states do provide a staff to individuals in roles similar to the neutral evaluator. For instance, in New York State, governing control boards may hire experts or engage professional assistance to help the boards create their own budgets. Under Michigan law, the governor appoints an emergency financial manager who has the right to engage outside professional help, which is typically comprised of four to six full-time staff members with relevant expertise.^[64] In California, however, due to economic limitations, it is unlikely that a neutral evaluator will be allowed to hire a staff.

Larger stakeholders will undoubtedly hire their own lawyers, financial advisors, and advocates, which will make the process inefficient and could place the more well-resourced interested parties at an advantage.

(2) *Inability of neutral to sanction parties.* The law does not provide repercussions for a party that fails to engage in the process in good faith. In the earlier version of the bill, the public entity would have been prohibited from filing for bankruptcy if the mediator determined that the public entity “failed to participate in good faith mediation..., which includes... the failure to provide accurate and essential financial information, the failure to reach a settlement with all interested parties to avert bankruptcy, or evidence of manipulation to delay and obstruct a timely agreement.”^[65] Furthermore, the mediator could end the mediation if one or more parties did not “participate[] in good faith,” and “further efforts at mediation would not

contribute to a resolution.”[66]

Because the legislature removed that language from AB 506, the mediator has no power to compel the parties to negotiate in good faith. Nonetheless, the municipality will be motivated to do so because failure can be the basis for an objection to its bankruptcy filing.[67] The difficulty, thus, will occur when interested parties fail to negotiate in good faith. It is conceivable that an interested party may engage in delay tactics. If so, neither the evaluator nor the municipality will have any way to curb an interested party’s shenanigans.

(3) *Failure to define “majority of the interested parties.”* As noted above, although the law provides that the “majority of the interested parties” will make crucial decisions regarding the process, the law does not define the term “majority of the interested parties.”[68]

Given that the definition provides that a collective entity, such as a union representing multiple members or an association of retired employees of the public entity, is only *an* “interested party,” an argument that a collective entity by itself can be a majority appears weak. Although this argument is unlikely to prevail, an interested party may attempt to use such an argument to delay the process. As the 60-day process does not begin until the neutral evaluator is chosen, a challenge to who is the “majority of the interested parties,” and thus who can choose the neutral evaluator, will put the brakes on the process.

(4) *Difficulty of effective retiree participation.* One of the most significant weaknesses of AB 506 is one that may have no solution: the inability to bind retirees during the process. Retiree medical and pension obligations are some of the most significant unfunded liabilities on the books of many agencies, and reform of retiree medical was a major component of the Vallejo bankruptcy. Although AB 506 does provide for a representative of retirees to participate in the process, it provides no means by which the representative can bind individual retirees. Without that, the AB 506 process has little hope of affecting retiree medical or other post-employment benefit (OPEB) obligations, thus making an ultimate filing of bankruptcy more likely.

(5) *Possible outcomes not addressed.* There are additional scenarios not addressed by the legislation. For instance, during neutral evaluation, what if one interested party and the local entity can settle their differences, but the rest of the interested parties and the local entity are not able to settle? Is it likely that the first interested party to settle may receive more favorable terms than the holdout? If a local entity seeks bankruptcy protection, could the “beneficial terms” given to the settling interested party be set aside as a preference?

How to address these issues in application. In order to maximize the benefits of the AB 506 process and minimize the problems, there are several steps a public entity should take.

(1) *Investigate and compile information.* It is imperative that a municipality immediately begin gathering data on its financial condition and the extent of its debt to prepare for the neutral evaluation. This should happen before the neutral

evaluation begins so that the public agency is armed with information to help secure a settlement. Unfortunately, many public agencies facing the prospect of bankruptcy may also lack resources and/or be poorly managed. With limited resources, it may take some time to gain an accurate understanding of the extent of all the problems, and due to the short timeframe of the neutral evaluation process, time will be of the essence.

(2) Prepare a settlement plan or plan of adjustment before neutral evaluation begins. This provides a starting place for negotiations and demonstrates that the city is not only prepared to move towards bankruptcy protection if necessary, but also presents to the neutral evaluator — and to the public — a picture for its future solvency. Given the short time table in the neutral evaluation process, it would take a significant amount of time to work with the interested parties in crafting a settlement plan that in all likelihood will only address the “low hanging fruit.” Additionally, attempting to craft a settlement plan with the interested parties may give those with the loudest voice the greatest amount of control over the process. The plan of adjustment should address both short-term needs and long-term goals so that the municipality can balance its budget and remain solvent in the near future.

Parallel Negotiations Before Contract Impairment

Unfortunately, the requirements set out under AB 506 and the Bankruptcy Code are not the only obstacles a municipality must manage prior to modifying its obligations under a collective bargaining agreement. As described below, additional requirements are mandated by a number of sources, including case law regarding contract impairments under fiscal emergency declarations, a new law that requires mandatory factfinding for impasses, and impasse procedures contained in certain city charters. Not only must municipalities be aware of these additional hurdles, they must consider the additional time necessary to complete these requirements.

Contract impairment under the fiscal emergency resolution. Prior to the enactment of AB 506, a fiscal emergency declaration by California public entities was especially significant because it allowed local governments to revisit otherwise fixed contracts, such as collective bargaining agreements under the Meyers-Milias-Brown Act.^[69] Although both the United States and California constitutions prohibit government from enacting legislation that changes or impairs contracts, courts have long recognized that this prohibition is subservient to government’s power “to protect the lives, health, morals, comfort and general welfare of the public,” i.e., a public agency’s inherent police powers.^[70] A declaration of fiscal emergency enunciates the reasons for triggering this police power so that local governments can impair contracts.

The declaration of fiscal emergency under AB 506 appears to be very different than the declaration of fiscal emergency that stems from a public agency’s inherent police power. Under AB 506, the declaration of fiscal emergency is a procedural step on the way to declaring bankruptcy, whereas the common law declaration of fiscal emergency is an exercise of authority allowing legislative impairment of a contract.^[71] Under the common law, a public agency has wide latitude in determining what it believes to be a fiscal emergency. However, to comply with the

Constitution, the impairment of the contract itself must be appropriately tailored to the emergency it was designed to address, and the result must be reasonable.^[72] Legislative enactments that impair contracts, including declarations and resolutions of fiscal emergency, are subject to judicial review. Courts will consider various factors in determining whether or not to uphold a contract impairment.^[73] It thus does not appear that the definition of fiscal emergency under AB 506 is intended to alter a public agency's right to declare fiscal emergency under its inherent police power. Instead, it is a separately defined emergency measure limited solely to the "emergency off-ramp" from the AB 506 process.

It is important to note that the criteria under AB 506 are prerequisites to declaring a fiscal emergency, while the courts consider the factors *after* a fiscal emergency is declared and the contract is impaired. Nonetheless, meeting the AB 506 requirements to declare a fiscal emergency and gain access to federal bankruptcy provisions may ultimately enable public entities to impair contracts under federal law.

Under AB 506, a fiscal emergency declaration and resolution does not independently authorize a public entity to impair contracts but rather acts as a procedural prerequisite that allows it to file for chapter 9 bankruptcy. Accordingly, AB 506 requires that a fiscal emergency declaration meet specific procedural and substantive criteria. For example, the public entity must provide an opportunity for public comment before declaring a fiscal emergency and adopting a resolution by majority vote at a noticed hearing. The resolution must specifically find that financial conditions jeopardize the "health, safety, or well-being of the residents," and that "the public entity is or will be unable to pay its obligations within the next 60 days."^[74] A public entity may find it relatively easy to meet these requirements because they are specific and encompass the totality of the requirements to declare a fiscal emergency. Presumably, these hurdles are lower than those imposed by the courts in constitutional contract clause cases because they merely serve as a segue to chapter 9 bankruptcy, which imposes strict guidelines on contract impairments.

In contrast, local governments may face higher hurdles when seeking to impair contracts solely through a fiscal emergency resolution. For example, courts will consider — among other factors — whether the enactment serves to "protect basic interests of society" and has "an emergency justification"; it must also be "appropriate for the emergency."^[75] Generally, courts have been less deferential to a public entity's impairment of its own contractual obligations. Some courts will consider an impairment reasonable and necessary only if the public entity shows it did not: "(1) 'consider impairing the...contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances.'"^[76] Ultimately, the vagaries of these hurdles provide both more flexibility and pose a more significant challenge for public entities to uphold contract impairments through a fiscal emergency declaration.

Stockton recently impaired its collective bargaining agreements under a number of emergency declarations. The impairments, which have effectively reduced salaries, imposed furloughs, and curtailed benefits, are being challenged in several venues,

including grievance arbitration and by petitions for a writ of mandamus in the superior courts. Though Stockton's contractual impairments impact current employees, any attempt by the city to control its spiraling costs also must address retiree health care. The city recently initiated the AB 506 process.[77]

Contract impairment under bankruptcy proceedings. Even when municipalities have sought bankruptcy protection, they still must negotiate with their labor organizations before rejecting the collective bargaining agreements. In *NLRB v. Bildisco & Bildisco*,[78] the U.S. Supreme Court held that an employer in chapter 11 could reject a collective bargaining agreement without committing an unfair labor practice — by showing that the agreement was burdensome, that the balancing of the equities favored rejection of the agreement, and that “efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution.” Provisions of the agreement cannot be selectively rejected, but must be rejected in their entirety. Once an agreement is rejected, it is “no longer immediately enforceable, and may never be enforceable again.” However, even if the agreement is not enforceable, it becomes the basis for the creation of claims.

As the law currently stands, once a municipality files a petition under chapter 9, it may unilaterally modify collective bargaining agreements. The bankruptcy court in *In re County of Orange* looked to state law to determine whether the county's actions were appropriate. Though the *In re County of Orange* court concluded that *Bildisco* applied in chapter 9 cases, the court was not persuaded that municipalities could unilaterally breach collective bargaining agreements without limitations; instead, it required a showing consistent with the fiscal emergency language in the California Supreme Court's decision in *Sonoma County Organization of Public Employees v. County of Sonoma*. Unlike the court in *County of Orange*, the court in *Vallejo* dismissed this rationale, finding that the imposition of state labor law onto 11 USC Sec. 365 would be unconstitutional.[79]

Significantly, *Vallejo* is factually distinguishable from *County of Orange* because the city took great pains to negotiate with the unions both prior to and after filing its chapter 9 petition. Orange County unilaterally eliminated employee seniority and grievance rights, whereas Vallejo modified agreements with its unions *only after* many months of negotiations and mediation. Though the city could have outright rejected the agreements, the modifications it made were circumspect and principally aimed at controlling costs — deferring increases and ultimately reducing wages, eliminating minimum staffing that generated tremendous overtime costs, and implementing a payment schedule to employees leaving city service. These economically driven modifications were substantially different from the modifications made by the County of Orange.

In short, neither *Bildisco* nor *City of Vallejo* eliminated the requirement that the parties meet and confer in an attempt to resolve disputes prior to unilateral modifications. Chapter 9 contains requirements that the municipality engage its creditors — including its unions — in negotiations at all stages of the process. This requirement is found in the *Bildisco* decision: a municipality “should continue to try to negotiate with key creditors to avoid [bankruptcy], and it should carefully document what steps are taken to reach agreement.” Under the protection of the automatic

stay in bankruptcy, any “unfair labor practice” with regard to negotiations is not heard by the Public Employment Relations Board, but is brought to the bankruptcy court by an adversary.

Impasse procedures under state law and local rule. A recent piece of legislation will likely impact municipalities that need to impair their contracts outside of the AB 506 process. AB 646 institutes a new mandatory impasse process for negotiations conducted under the MMBA. If a local public employer and its employee organization are unable to reach agreement in negotiations, the employee organization (but not the employer) “may request that the parties’ differences be submitted to a factfinding panel.” The panel consists of a union member, a management member, and a neutral chairperson appointed by PERB — typically someone with interest arbitration or factfinding experience. The factfinding panel can ultimately make recommendations but does not have final and binding authority.

Although some local charters provide for interest arbitration as a method for resolving disputes, most public agencies are not subject to interest arbitration. This law changes the landscape for public employers covered by the MMBA that do not already have binding interest arbitration. It imposes on local government a requirement for factfinding in any instance in which an employee organization requests it, regardless of the historic process that local agencies and employee organizations have agreed to and followed.

The factfinding panel hears evidence on the negotiation issues in dispute, provides findings, and recommends terms for settlement. The panel conducts an investigation, holds hearings, and may issue subpoenas for those purposes. Once the hearing is concluded, the AB 646 panel issues findings. It is not clear whether the factfinder must make findings on an issue-by-issue basis or choose between the proposals submitted by the parties. An employer may not unilaterally impose its last best offer until after holding a public hearing, and no earlier than 10 days after receipt of the findings and recommendations.

AB 506 and AB 646 were signed into law on the same day; however, neither law addresses the impact of the other. Given the fact that the legislature passed these two bills at essentially the same time, it would be reasonable to assume that it could have limited the scope of AB 646 so as not to apply to the AB 506 process. Such an exemption was not made.

The most sensible way to interpret AB 646 in light of AB 506 is to understand that AB 464 provides for expanded impasse procedures prior to implementation of a last, best and final offer. For example, in the City of Vallejo, once the bankruptcy court approved the rejection of the agreement with the fire union, the parties — undoubtedly at impasse — triggered the city’s charter impasse procedure. The city and the fire union engaged in mediation and interest arbitration pursuant to the then-existing terms of the city charter. A new agreement was reached.

Similarly, once an agreement is rejected by the bankruptcy court, or expires naturally, AB 646 requires factfinding if impasse occurs when it comes time to adopt a new agreement. Moreover, given the timelines of many negotiations (occurring

prior to the adoption of the next fiscal year's budget), it is conceivable that negotiations over successor bargaining agreements may occur simultaneously with the AB 506 process. While the parties could certainly agree to defer bargaining until after the completion of the AB 506 process, doing so puts the agency at risk if the governing body ultimately determines that it is unnecessary to proceed to chapter 9. Therefore, absent a specific agreement addressing this issue, we recommend negotiating concurrently with the AB 506 process.

Conclusion

Many municipalities are experiencing severe economic problems as a result of the financial crisis of the last few years. When faced with potential insolvency, a municipality must comply with AB 506 and a number of other laws regarding contract impairment. AB 506 may provide the municipality some relief if the interested parties and the municipality are able to settle their disputes, or allow the municipality to adequately prepare for bankruptcy. However, AB 506, AB 646, and other laws may simply create a number of hoops through which the distressed municipality must jump. Municipalities must plan for them accordingly.

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[1] AB 506, 2011-12 Leg. (enacted Oct. 9, 2011), codified at Gov. Code Secs. 53760, 53760.1, 53760.3, 53760.5, and 53760.7.

[2] AB 506 Sec. 1(a)(2011).

[3] Sakai and Ng, “We’re Bankrupt...Now What?” *CPER* No. 199, pp. 7-14 (May 2010), quoting U.S. Courts Bankruptcy Basics found at <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.aspx>.

[4] Ga. Code Ann. Sec. 36-80-5.

[5] E.g., Ohio (Ohio Rev. Code Ann. Sec. 133.36 [upon the Commission’s declaration of fiscal emergency]) and Illinois (50 ILCS Sec. 320 [for municipalities with populations less than 25,000, upon the Commission’s declaration]).

[6]
<http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.aspx>.

[7] 11 USC Sec. 904. Municipal bankruptcies must conform to the requirements of the 10th Amendment of the United States Constitution and avoid the potential that the federal government will substitute its control over the affairs of the state and the elected officials of the public agency. The public agency continues to maintain its ability to raise revenue and make expenditures as it deems appropriate.

[8] Sakai et al., “We’re Bankrupt...Now What?” *CPER* No. 199, *supra*, quoting U.S. Courts Bankruptcy Basics found at <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.aspx>.

[9] Insolvency as defined in 11 USC Sec. 101(32)(c) is generally not paying debts as they become due or inability to pay debts as they become due.

[10] 11 USC Sec. 109(c).

[11] Since 1991, 24 local public entities have filed for bankruptcy protection in California, the majority of which have been small healthcare districts.

[12] Bill Analysis of AB 506, Third Reading, as amended on Aug. 31, 2011, Senate Rules Committee [2010-11 Reg. Sess.], at 4 (“Bill Analysis”).

[13] SB 349, 1995-96 Leg. (Kopp).

[14] SB 349, 1995-96 Leg., as passed by the legislature and vetoed by governor, (1996), available at http://www.leginfo.ca.gov/pub/95-96/bill/sen/sb_0301-0350/sb_349_bill_960831_enrolled.pdf.

[15] Bill Analysis, at 10.

[16] Hearings on AB 506 Before the Senate Governance & Finance Committee, 2011-12 Leg. (July 6, 2011).

[17] In the “Background” section to the bill, it is noted that “[t]he City subsequently asked the bankruptcy court for permission to reject collective bargaining agreements with four unions representing city employees.” (Bill Analysis of AB 506,

Third Reading, as amended on Aug. 31, 2011, Senate Rules Committee [2010-11 Reg. Sess.], at 5 [“Bill Analysis”]).

[18] Henry N. Pontell and William K. Black, “Orange County Voices: The Financial Lessons Not Learned,” *Los Angeles Times* (February 23, 1995) found at http://articles.latimes.com/1995-02-23/local/me-35080_1_orange-county.

[19] See Charles D. Sakai, et al. “We’re Bankrupt...Now What?” *CPER* No. 199 (May 2010), at 10.

[20] Sakai, *supra*, note 28, at 10. The unilaterally implemented changes included reduced wages, elimination of minimum staffing requirements, and a deferred payment plan for employees separating from the City of Vallejo.

[21] Sakai, *supra*, note 28, at 11.

[22] Bill Analysis, *supra*, note 28, at 5.

[23] Since that time, Vallejo citizens voted to remove binding interest arbitration from the city’s charter.

[24] One assembly bill, AB 155 (Mendoza), would have required the approval of a state commission or the completion of a state audit prior to the public agency being able to file with the bankruptcy courts. That bill died on the Senate floor during the 2009-10 session. See Hearings on AB 506 Before the Senate Governance & Finance Committee, 2011-12 Leg. (July 6, 2011).

[25] Press Release, California State Democratic Caucus, “Assembly Sends Wieckowski Municipal Bankruptcy Bill to Governor Press Release” (Sept. 9, 2011), available at Assembly Member Bob Wieckowski’s website, <http://asmdc.org/members/a20/newsroom/press/item/2681-assembly-sends-wieckowski-municipal-bankruptcy-bill-to-governor>. Assembly Member Wieckowski is a bankruptcy attorney representing California’s 20th district (Fremont, Newark, Union City, and Milpitas). He previously served as vice mayor of Fremont and as a member of its city council. Wieckowski is currently sponsoring AB 1692, which he terms as a “cleanup bill” for AB 506 and seeks to undo concessions he made in an effort to get AB 506 passed and signed into law. AB 1692 eliminates the timelines for mediation and “allows the neutral evaluator to request and control the process of an independent investigation in an effort to obtain meaningful financial information and explore other areas of recovery.” Hearings on AB 1692 As Amended Before the Assembly Committee on Local Government, 2011-12 Leg. (April 25, 2012).

[26] Gov. Code Sec. 53760.5.

[27] Public agency and public entity are used interchangeably in this article.

[28] Note: Under the 101(40) of the Bankruptcy Code, the term “municipality” means “political subdivision or public agency or instrumentality of a State.”

[29] Gov. Code Sec. 53760.1(f).

[30] *Id.*

[31] Gov. Code Secs. 53760 et. seq., as amended.

[32] Gov. Code Sec. 53760.3(a).

[33] Gov. Code Sec. 53760.1(e).

[34] *Id.* (emphasis added).

[35] Gov. Code Sec. 53760.3(b).

[36] Gov. Code Sec. 53760.3(c).

[37] *Id.*

[38] Gov. Code Secs. 53760.3(d)(1) & (2).

[39] Gov. Code Sec. 53760.3(c)(2).

[40] *Id.* Once chosen, the neutral evaluator must make an inquiry to determine whether there are any facts a reasonable individual would consider likely to create a potential or actual conflict of interest. The parties can remove the neutral evaluator during the process.

[41] Gov. Code Sec. 53760.3(s).

[42] A creditor is defined as either of the following: (1) “an entity that has a noncontingent claim against a municipality that arose at the time of or before the commencement of the neutral evaluation process and whose claim represents at least five million dollars (\$5,000,000) or comprises more than 5 percent of the local public entity’s debt or obligation, whichever is less”; or (2) “[a]n entity that would have a noncontingent claim against the municipality upon the rejection of an executory contract or unexpired lease in a Chapter 9 case and whose claim represents at least five million dollars (\$5,000,000) or comprises more than 5 percent of the local public entity’s debt or obligation, whichever is less.” Gov. Code Sec. 53760.1(b).

[43] Gov. Code Sec. 53760.1(d).

[44] Gov. Code Sec. 53760.3(p).

[45] Gov. Code Sec. 53760.3(i).

[46] *Id.*

[47] Gov. Code Sec. 53760.3(m).

[48] Gov. Code Sec. 53760.3(q).

[49] Gov. Code Sec. 53760.3(i).

[50] Gov. Code Sec. 53760.3(k).

[51] *Id.*

[52] Gov. Code Sec. 53760.3(r).

[53] Gov. Code Secs. 53760.3(t)(1)-(5).

[54] Gov. Code Secs. 53760, 53760.5.

[55] Gov. Code Sec. 53760.5.

[56] Gov. Code Sec. 53760.5.

[57] Gov. Code Sec. 53760.5.

[58] See Gov. Code Secs. 54950-54962.

[59] 11 USC Sec. 109(c)(5)(B).

[60] See section below, “Parallel negotiations.”

[61] See Gov. Code Sec. 53760.3(k) (stating that the neutral evaluator may request “the proposed plan of readjustment prepared by the local public entity”).

[62] As noted above, AB 506 requires only that the neutral be a former bankruptcy judge or a person with experience in one or more of the following areas: municipal organization, municipal debt restructuring, municipal finance dispute resolution, chapter 9 bankruptcy, public finance, taxation, California constitutional law, California labor law, or federal labor law.

[63] *Senate Governance & Finance Committee*, hearing on September 7, 2011 (Lois Wolk, Chair).

[64] In 2011, the Michigan Legislature adopted changes to an existing provision for the appointment of an emergency financial manager that would give the EMF essentially the powers of a bankruptcy judge. There will be a citizen referendum on these changes in November 2012. In the last year, the City of Hamtramck, sought approval for petitioning for bankruptcy protection only to be rejected by the state. Monica Davey, *New York Times*, “Michigan Town Is Left Pleading for Bankruptcy,” December 28, 2010, A1.

[65] Assembly Committee on Local Government, AB 506 (as amended May 4, 2011, at Sec. 2(b).

[66] *Id.* at Sec. 38(c).

[67] *National Labor Relations Board v. Bildisco & Bildisco* (1984) 465 U.S. 513, 536.

[68] In language in an earlier version of the bill, the neutral evaluator could be removed by “a majority of the *representatives* of the interested parties participating

in the neutral evaluation. This language suggests each responsive interested party counts as one, no matter the amount of money at stake in the claim nor the number of claims the interested party represents. *Senate Governance & Finance Committee*, hearing on September 7, 2011 (Lois Wolk, Chair) (emphasis added).

[69] Gov. Code Secs. 3500 et seq.

[70] *Manigault v. Springs* (1905) 199 U.S. 473, 480.

[71] *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal. 3d 296, 8 CPER SRS.

[72] See Holtzman et al., “Declarations of Fiscal Emergency: A Resurging Option for Public Entities Attempting to Deal with the Current Economic Climate,” *California Public Law Journal*, Vol. 34, No. 2, Winter 2011 (citing *Buffalo Teachers Federation v. Tobe* [2d Cir. 2006] 464 F.3d 363, 371).

[73] A few of these factors include, but are not limited to: (1) the enactment serves to protect basic interests of society; (2) there is an emergency justification for the enactment; (3) the enactment is appropriate for the emergency; and (4) the enactment is designed as a temporary measure. *Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1154. (See also *Sonoma County Org. of Public Employees v. County of Sonoma* [1979] 23 Cal.3d 296.)

[74] Gov. Code Sec. 53760.5.

[75] *Board of Administration*, *supra*, 52 Cal. App. 4th at 1154.

[76] *Buffalo Teachers Federation v. Tobe*, *supra*, 464 F.3d 362, 371 (quoting *United States Trust Co. of New Jersey* [1977] 431 U.S. 1, 30-31).

[77] By the time of the publication of this article, it is very likely that the 60 or the 90 day AB 506 process in Stockton will have concluded.

[78] *Supra*.

[79] Only the federal government is empowered to enact a uniform bankruptcy law. “Incorporating state substantive law into chapter 9 to amend, modify or negate substantive provisions of chapter 9 would violate Congress’ ability to enact uniform bankruptcy laws.” The Supremacy Clause invalidates state laws that “interfere with or are contrary to federal law.” (See generally *NLRB v. Bildisco & Bildisco*, *supra*; *In Re Vallejo* [Bankr. App. 9th Cir. 2009] 408 B.R. 280.) Only the federal government — not the states — may impair contracts. Because Congress is provided the exclusive authority to enact 11 USC Sec. 365, state law is preempted. Rejecting the insertion of state law into the bankruptcy laws, the court concluded that inflexible and conflicting state law must yield to the purposes and the explicit provisions of the bankruptcy law.

CPER Journal Online

EEOC Lawsuits: A Reminder to Comply with the Americans with Disabilities Act



By [Elizabeth Arce, Liebert Cassidy Whitmore](#)

The Americans with Disabilities Act of 1990 prohibits private and public agency employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.^[1] Although the ADA has been in existence for over 20 years, disability discrimination persists.

In 2010, approximately 25 percent of the accusations or complaints filed by the California Department of Fair Employment and Housing against employers were for disability discrimination. This category ranked a close second only to sexual harassment, which comprised approximately 29 percent of the accusations filed by the DFEH. Since last fall, the U.S. Equal Employment Opportunity Commission has filed over three dozen lawsuits against employers around the nation for disability discrimination. And, these statistics do not include the countless civil lawsuits against employers filed by individuals who claim they were discriminated, harassed, or retaliated against because of a disability.

The numbers make apparent that there is still much to be learned about complying with ADA obligations when working with an employee with a disability. Unfortunately, there are no easy answers, “quick fixes,” or black and white guidelines because disability discrimination comes in many forms and is not always clearly recognizable. However, there are lessons to be learned from analyzing disability discrimination lawsuits filed by the EEOC in the last several months.

Don't Jump to Conclusions....Look for Solutions

A review of EEOC lawsuits shows how employers sometimes overreact or become fearful when confronted with a disabled employee. An employer's first thoughts may be on the welfare of the business as opposed to the employee's well-being and legal rights. However, fear can cause an employer's judgment to become clouded, which in turn may cause the employer to jump to conclusions or make snap decisions. Thus, employers should learn to remain calm and spend time exploring possible solutions for keeping disabled workers employed instead of taking an adverse action against them. Efforts should be channeled into looking for ways to keep the worker employed...not for a way to terminate.

The following example of an EEOC lawsuit against a national healthcare company shows the danger of assuming an employee should be terminated after a single manifestation of her disability.[2] Before being hired as a field nurse at a healthcare company, an employee informed her employer that she had had one seizure. After she got the job, the employee performed well and was even promoted. However, two months after her promotion, the employee had a seizure at work. Although her physician released her to return to work, the employer claimed that the seizures made her a "liability" to the company and terminated her employment. The EEOC criticized the company's actions and said this lawsuit should serve as a reminder to employers not to make employment decisions based on negative stereotypes or fears about individuals with disabilities.[3]

Avoid Forming Personal Opinions

Employers should not act on personal judgments as to whether an employee is medically or physically able to perform the essential functions of the job. Several of the lawsuits filed by the EEOC involved this type of discriminatory behavior. For example, the EEOC filed a lawsuit against Buy-Rite Thrift Store for firing an epileptic employee after he had small seizures at work.[4] The EEOC alleges that the company improperly "relied on its own judgment — which is not consistent with the law — to determine [the employee] was a danger to himself and others." Instead, it should have requested the employee "take a fitness exam or provide medical documentation of his ability to perform the job duties required of his position."

In another instance, the EEOC sued a global consulting company for failing to promote an employee it perceived as disabled.[5] One day after the employee applied for a promotion, she had a stroke and was out of work for approximately three months. The employee returned with a medical clearance and told her employer that she would need physical therapy "at some point." Later that day, the employee was notified that, although she was qualified for the promotion, she was not selected because, despite her assurances to the contrary, her need for physical therapy could cause her to miss mandatory training.

Finally, the EEOC filed a lawsuit against Safeway, Inc., when one of its stores discouraged an employee from applying for a promotion.[6] When the employee, who has cerebral palsy and physical limitations in both hands, expressed an interest in advancing within the company, his supervisor repeatedly told him he needed two hands to be promoted. The EEOC criticized all of the employers in the above cases because they preemptively rejected qualified employees based on myths,

stereotypes, and inaccurate perceptions about the employees' disabilities.[7]

The lesson learned from these lawsuits is that if there is a valid question as to the employee's abilities, the employer should request that the employee take a fitness-for-duty exam or provide medical documentation certifying fitness — if the concern is job-related and consistent with business necessity.[8] Courts have upheld a public employer's right to conduct fitness-for-duty examinations. When health problems have a "substantial and injurious impact on an employee's performance," the employer can require the employee to undergo a physical examination to determine the ability to work even if the examination might disclose a disability or the extent of the employee's disability. The rationale behind this is the government's interest in operating as effectively and efficiently as it can through a productive and stable workforce, which is expected from the citizens the agency serves.[9]

An employee should not be required to undergo a fitness-for-duty exam unless the employer has specific evidence that the employee is having difficulty performing one or more essential job duties or exhibits behavior that could cause a reasonable person to question the employee's ability to perform his or her job. This conduct can include excessive absenteeism, declining job performance, or erratic behavior.

Be Flexible

Employers must be flexible in accommodating disabled employees. This may mean providing accommodations if the employee experiences symptoms related to his or her disability in the workplace. For example, the EEOC filed a case against Walgreens Drug Store for failing to accommodate, and firing, a diabetic employee who was a cashier in the company's South San Francisco store. The employee, who had worked for Walgreens for nearly 18 years without a blemish in her work history, opened a bag of chips while on duty because she was suffering from an attack of low blood sugar. The bag cost less than two dollars and the employee paid for it. The company fired her after it learned of the incident although it knew she was diabetic. Walgreens could have avoided the lawsuit if it had accommodated the diabetic employee immediately by simply allowing her to eat the chips and take a break long enough to raise her blood sugar level.[10]

Flexibility can also include making facilities such as break rooms, lunch rooms, training rooms, and restrooms immediately available to employees. Two years ago, the California Court of Appeal upheld a \$200,000 judgment against grocery retailer Albertsons for not allowing an employee to use the restroom. The employee told Albertsons she needed access to the bathroom at all times because of the large amounts of water she was drinking as a result of cancer treatments. For the next year, Albertsons allowed her to take restroom breaks as necessary by having another employee cover her position. However, during one particular shift, the employee's new supervisor did not allow her to leave her post despite repeated requests. As a result, the employee soiled herself while standing at the check stand. The supervisor was unaware of the employee's medical condition. Albertsons argued that it should not be liable for failing to accommodate the employee because the event was only a single incident in a long history of successful accommodation. However, the appellate court rejected this argument because "a single failure to

make reasonable accommodation can have tragic consequences for an employee who is not accommodated.”[11]

The Interactive Process Is an Ongoing Duty

Employers should recognize that working with a disabled employee can be a long-term process which might continue through the employee’s tenure. This is because the interactive process imposes a continuing obligation on the employer to consider alternative accommodations if a presently implemented accommodation is ineffective.[12] Therefore, an employer should not be complacent simply because it has engaged in the interactive process and has provided a reasonable accommodation.

For example, the food company Dole was sued by the EEOC for failing to accommodate an employee’s disability.[13] An employee with epilepsy worked as a broccoli packer in Dole’s Salinas, California, facility. For eight years, Dole accommodated the employee’s condition by allowing him to take breaks when he had a seizure and to return to work when he recovered. However, following a seizure in 2010, the employee was sent home and not permitted to return to work for two weeks despite several notes from a physician clearing the return. The EEOC criticized Dole’s conduct because it should have continued to accommodate the employee’s disability based on its own past practice and the doctor’s notes.[14]

If the interactive process yields no reasonable accommodation, then the employer may separate the employee because of an inability to accommodate. However, before this decision is reached, all options must be considered and assessed. This may require the employer to consult with its legal counsel. If an employee has a property interest in continued employment, the employer cannot separate the employee without affording him or her pre-disciplinary due process. Further, if the employee works for a public agency, the employer cannot separate an employee who is vested in the agency’s retirement system (e.g., CalPERS) without first applying for a disability retirement.[15] Thus, no final notice of termination should issue until a decision has been made regarding the employee’s eligibility for a disability retirement.

Reasonable Accommodations Can Come in Many Forms

“Reasonable accommodation” is defined as any change in the work environment or way things are customarily done that enables an employee with a disability to enjoy equal employment opportunities.[16] In light of this definition and because the interactive process is designed to be flexible, reasonable accommodations can take many forms, and there are numerous ways for employers to accommodate employees with disabilities.

For example, the EEOC filed a disability discrimination case against Wal-Mart because a store failed to accommodate a disabled employee by allowing him to park his personal vehicle closer to the store.[17] The EEOC also sued a billing and collections agency for terminating an employee rather than accommodating her request for a three-week extension of her medical leave.[18] Finally, AT&T was sued

by the EEOC for failing to accommodate an employee who was losing his vision due to diabetes by not purchasing software that allows visually impaired people to use computers.[19]

These cases demonstrate the variety of ways an employer might be expected to accommodate an employee with a disability. Other examples of reasonable accommodation include, but are not limited to, modifying a workplace policy, job restructuring, providing a job coach, modifying work schedules, reassignment, and applying flexible leaves.

Determining whether a type of reasonable accommodation is appropriate is not a mechanical process because there is no such thing as “one size fits all” when it comes to accommodations. Rather, reasonable accommodations should be determined on a case-by-case basis depending on the nature of the employee’s disability and his or her essential job duties.

Exercise Caution When Changing Working Conditions

The disability discrimination lawsuits filed by the EEOC show that employers should proceed with care when altering the work conditions of an employee with a disability.

The EEOC filed a lawsuit against Merritt Restaurant and Bakery, an Oakland, California, eatery, for firing an employee who suffered from seizures.[20] The employee, a cook and kitchen manager, had a seizure during the night shift. Although the employee’s physician cleared him to return to work, the employer delayed his reinstatement and transferred him to the day shift, which resulted in fewer work hours and less pay. According to the EEOC, the employee complained about the change and was fired.

In another case, the owner of a McDonald’s was sued by the EEOC for demoting and causing the constructive discharge of an employee with cerebral palsy. The employee had worked for the prior owner since 2006 without incident. In fact, the employee had been promoted to a supervisory position. Within two months of new ownership in 2009, the employee was demoted to a janitorial position, with reduced hours and pay. The EEOC alleged that the employee was forced to quit his job as a result of the company’s treatment.[21]

The lesson is that, before initiating a change, employers should evaluate the reasons for changing the working conditions of a disabled employee to make sure it is for a legitimate non-discriminatory business purpose. And, as discussed above, employers should refrain from making employment decisions based on personal opinions about whether the employee can perform the job.

Generalized Fears About Health and Safety Are Insufficient

The EEOC sued a beverage distribution company for disability discrimination in connection with the company’s withdrawal of a job offer.[22] An employee whose job was eliminated applied for another position within the company as a night warehouse loader. The company offered the employee the position subject to a pre-

employment medical examination. Following the examination, the employer withdrew the offer because it believed the employee could not safely perform the job due to his poor eyesight. According to the EEOC, the job involved loading alcohol on the back of trucks, a task the employee could safely perform despite being legally blind.

In another lawsuit, the EEOC sued a restaurant for terminating an employee with a prosthetic leg.^[23] After successfully working as a kitchen helper without incident for one shift, the employee was told by his manager that he was being fired because his prosthetic leg posed a safety hazard for the company. The employer apparently concluded that the employee posed a danger based on sheer speculation.

These lawsuits show that generalized fears about threats to health and safety are not sufficient justification to alter employment conditions or fail to accommodate a qualified employee with a disability. Under the law, an employer is not obligated to hire, employ, or accommodate a disabled employee if he or she poses a direct threat to the health and safety of him/herself or other individuals in the workplace. A “direct threat” is a significant risk to the health and safety of the disabled individual or others that cannot be eliminated with a reasonable accommodation.^[24]

Determining whether an individual possesses a significant risk to others must be based on (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential problem.^[25] Employers should evaluate these factors objectively and with factual evidence, and not rely on fears, stereotypes, or speculation.

Mere Inconvenience Does Not Constitute an Undue Burden

No accommodation is required if it will impose an undue hardship on the employer.^[26] However, inconvenience is not enough to support a claim of undue hardship. Instead, undue hardship is any action requiring significant difficulty or expense as measured by the following factors:

- The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;
- The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;
- The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type, and location of its facilities;
- The type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and
- The impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.^[27]

An analysis of these factors should be based on an individualized assessment of the employee's disability, job duties, and working conditions. Further, if one particular reasonable accommodation would cause undue hardship but a second type would be effective and workable, the employer is obligated to provide the second accommodation.^[28]

Conclusion

Eliminating disability discrimination in the workplace is one of the hallmarks of employment law. Employers do not have to be fearful when dealing with employees with disabilities. While lawsuits like those filed by the EEOC are not pleasant, employers can empower themselves by reviewing them and learning from the mistakes of others.

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[1] See 42 USC Sec. 12112.

[2] *EEOC v. LHC Group Inc.* (S.D. Miss. 2011) U.S. Dist. Ct. Case No. 1:11-cv-00355.

[3] EEOC Press Release dated September 28, 2011, "EEOC Charges LHC Group/Gulf Cost Homecare with Disability Discrimination."

[4] *EEOC v. BRT Management Company, Inc. dba Buy-Rite Thrift Store and W. & J. Capitol and Mgt. Co., Inc. d/b/a Buy Rite Thrift Store* (N.D. Cal. 2011) U.S. Dist. Ct. Case No. CV 11-4536-HRL. The employer settled the case for \$50,000.

[5] *EEOC v. Maximus, Inc.* (E.D. Va. 2011) U.S. Dist. Ct. Case No. 1:11-cv-1022.

[6] EEOC Press Release dated September 30, 2011, "Safeway Sued for Disability Discrimination."

[7] EEOC Press Release dated September 21, 2011, "Maximus, Inc., Sued by EEOC for Disability Discrimination;" EEOC Press Release dated September 30, 2011, "Safeway Sued for Disability Discrimination;" and EEOC Press Release dated February 7, 2012, "Modesto Retailer Settles Disability Discrimination Suit."

[8] 42 USC Sec. 12112(d)(4)(A); 29 CFR Sec. 1630.14(c).

[9] *Yin v. California* (9th Cir. 1996) 95 F.3d 864, 868-873, 123 CPER 70.

[10] *EEOC v. Walgreens Co.* (N.D. Cal. 2011) U.S. Dist. Ct. Case No. 11-cv-4470.

- [11] *A.M. v. Albertsons, Inc.* (2009) 178 Cal.App.4th 455, 197 CPER 57.
- [12] *Humphrey v. Memorial Hospitals Assn.* (9th Cir. 2001) 239 F.3d 1128, 1138, 147 CPER 52.
- [13] *EEOC v. Dole Fresh Vegetable, Inc.* (N.D. Cal. 2011) U.S. Dist. Ct. Case No. 11-cv-4827.
- [14] EEOC Press Release dated September 30, 2011, “Dole Sued by EEOC for Disability Discrimination.”
- [15] Gov. Code Secs. 21153 and 31721.
- [16] 29 CFR Sec. 1630.2(o).
- [17] *EEOC v. Wal-Mart Stores, Inc.* (E.D. Cal. 2011) U.S. Dist. Ct. Case No. 11-AT-01806.
- [18] *EEOC v. GGNSC Administrative Service, Inc.* (E.D. Wis. 2012) U.S. Dist. Ct. Case No. 12-cv-00238.
- [19] *EEOC v. AT&T, Inc.* (Puerto Rico 2011) U.S. Dist. Ct. Case No. 11-cv-019.
- [20] *EEOC v. McKinney Griff, Inc. dba Merritt Restaurant and Bakery* (N.D. Cal. 2011) U.S. Dist. Ct. Case No. 11-cv-4468.
- [21] *EEOC v. Alia Corp. d/b/a McDonald’s* (E.D. Cal. 2011) U.S. Dist. Ct. Case No. 11-cv-01549.
- [22] *EEOC v. Beverage Distributors Co.* (Colo. 2011) U.S. Dist. Ct. Case No. 11-cv-02557.
- [23] *EEOC v. Lang’s Marina Restaurant* (S.D. Ga. 2011) U.S. Dist. Ct. Case No. 11-cv-00157.
- [24] 42 USC Sec. 12101(8).
- [25] *Hutton v. Elf Atochem North America, Inc.* (9th Cir. 2001) 273 F.3d 884, 893.
- [26] 29 CFR Sec.1630.2(p).
- [27] 29 CFR Sec.1630.2(p).
- [28] See EEOC Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act.

CPER Journal Online

Pension Measures Win, Litigation Redoubles

Current and future employees of the cities of San Jose and San Diego lost on June 5, as voters responded to pleas by city officials to reign in pensions. But the election is only a beginning step on some aspects of retirement benefits in both reform measures. New plans for future hires must be bargained with employee organizations, although within the constraints of the new charter provisions. And, while they are bargaining, the unions also will be challenging the measures in court and before the Public Employment Relations Board.

The San Diego Freeze and '401(k)' Plan

San Diego's Measure B will place all new city employees and elected officials except police officers in a 401(k)-style defined contribution plan rather than the existing defined benefit plan. The maximum city contribution will be 9.2 percent of an employee's salary, including the Social Security tax if new employees are enrolled in Social Security, unlike current employees.

New police officers may sign up for the defined benefit plan, but if the officer enrolls in the defined contribution plan, the city will contribute 11 percent of salary toward his or her retirement benefits. The maximum benefit payable to future police officers is capped at 80 percent of the average of the officer's highest three years of pay. The cap is lower for officers retiring before age 55.

Current city employees will be required to contribute half of the normal cost of their pensions. More novel is the freeze on base salary for purposes of the defined benefit pension calculations. From July 2012 through June 2018, the city council is authorized only to agree to calculate pensions at the salaries the employees received in 2010-11, unless it overrides this provision with a two-thirds vote.

The city will enter negotiations with the labor organizations concerning implementation of the measure's provisions, including creation of a defined contribution plan for new employees. A disability retirement plan for new employee also will need to be established. Deleted were prior charter terms requiring a majority vote of employees or retirees before amending retirement benefits.

The San Diego Municipal Employees Association asked PERB to file a petition for an injunction against placing the measure on the June ballot, as the city did not negotiate with employee organizations. The association contends the failure to bargain violated the Meyers-Milias-Brown Act, relying on *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 1984 Cal. LEXIS 205, CPER SRS 28. The city points out that the ballot measure is a citizen's initiative, not placed on the ballot by the city council. It also argued that it was constitutionally required to place a properly presented initiative on the ballot.

However, the union charges filed with PERB characterize the citizen's initiative as a "sham device," since the mayor has used "city-paid time, resources, power, prestige, visibility and 'good offices' to inspire, write, negotiate, endorse, and sponsor" the initiative, which he describes as his "legacy." Under the "strong mayor" form of government in San Diego, the mayor is both chief executive and chief negotiator for the city. The union charges that the mayor and city attorney both have used city property to promote the initiative and vouch for its legality, and that the mayor explained the upcoming initiative during his annual State of the City address. Another councilman helped draft the initiative.

PERB granted the SDMEA's injunctive relief request, but its complaint for injunctive relief was turned down by the court on the grounds that a pre-election injunction was not appropriate. The denial of the injunction is on appeal.

An expedited hearing on the merits of the unfair practice charge was set in April before a PERB administrative law judge. In March, however, the city asked the trial court to stay the hearing, asserting that PERB is biased against it, and that PERB and SDMEA had waived PERB's jurisdiction by going to court for an injunction. The trial court in San Diego granted the city's request for an order staying PERB administrative proceedings in the MEA case. MEA asked the Court of Appeal to overturn the order at a hearing on June 13.

[*Update:* As *CPER* was being published, the Court of Appeal ruled that the trial court erred in staying the PERB hearing. The court ruled the unfair labor practice claim was within PERB's exclusive initial jurisdiction, even though the case may have constitutional implications. The court rejected the city's arguments that it should be excused from using PERB's administrative procedures.]

The Deputy City Attorneys Association has also filed PERB charges against the city and requested injunctive relief. Immediately after the election, the city filed a petition in the appellate court, asking for a ruling that Measure B is a valid citizens' initiative about which the city has no duty to bargain. In addition to labor relations litigation, the measure faces a challenge under the election laws. Attorney Hud Collins claims the measure is so sweeping in its changes that it constitutes a revision of the city charter, rather than an amendment. A revision may be proposed only by the city council or a charter commission.

The San Jose Bill for Unfunded Liabilities

Measure B in San Jose hits current employees hard if they do not opt to join a voluntary election program. In addition to contributions to the normal cost of the pension, they will be required to contribute up to 50 percent of the amount necessary to amortize unfunded liabilities of the system. Beginning in June 2013, those employee contributions will rise 4 percent a year until they reach 16 percent of pay or 50 percent of the necessary contribution, whichever is lower. Employees may not have the option of joining the VEP if the IRS does not approve the plan.

If approved, employees will have only one chance to make the shift, which will be irrevocable. Past service accrued in the 2.5 percent pension plan will be preserved,

but future service will accrue toward a pension benefit based on 2 percent of pay averaged over the highest three consecutive years of compensation. The retirement age for the full 2 percent pension will rise by six months each year until it reaches age 57 for police and fire employees, and age 62 for other workers. Earlier retirement will result in a reduced pension. Employees in the VEP will not be on the hook for unfunded liabilities, but will continue to pay the current employee contribution rate for normal costs of the pension.

New employees will be placed in a tier 2 plan, which may be a hybrid plan with Social Security, defined benefit, and defined contribution components. The city will pay no more than 50 percent of the total cost of the defined benefit portion of the plan, including unfunded liabilities. It will contribute no more than 9 percent of payroll toward the retirement plan, including both the defined contribution and defined benefit contributions. The normal retirement age will be 65, except for police and firefighters, who must work until 60 for a full retirement benefit. The benefits in the defined benefit piece of the plan will accrue under a 2 percent formula, but cannot exceed 65 percent of compensation.

Employees will not be eligible for disability retirement benefits unless they are incapable of performing any city job, except for police, who will be eligible as long as they are unable to perform any job within the police department. If the employee could perform a city job, he or she will be denied the disability retirement benefit whether or not there is a vacancy.

Cost-of-living adjustments to benefits may be suspended for up to five years if the city council declares a fiscal emergency. Otherwise, COLAs will be capped at 1.5 percent annually for both the VEP and the new employees' defined benefit plan, and 3 percent for the current employees' defined benefit plan.

The San Jose Police Officers Association filed three court actions before election day. In one, the union charges that the city has refused to meet and confer over the ballot initiative since 2011, even though it revised its proposed measure in early March. The union also claims that the mayor knowingly made false representations about the pension plan's unfunded liabilities to put political pressure on the unions to make unnecessary concessions.

The POA also filed two motions to compel arbitration. One is based on the city charter and a side letter agreement it reached with the city a year ago, in which the parties agreed that either could reopen the contract to negotiate pension and health benefits for current and future employees. The side letter provides that if the parties reach impasse and no agreement is reached, they "shall" submit the issues to arbitration as spelled out in the charter. The parties did negotiate over the city's ballot proposals last fall, but without success. When the city put Measure B on the ballot in March, the POA demanded to arbitrate, but the city refused on the grounds that the side letter allowed a ballot initiative even if the union did not consent.

The second motion to compel interest arbitration stems directly from the charter provision requiring interest arbitration of matters on which the parties reach impasse. The city resisted arbitration until the motion was filed, according to the

union. Even afterward, the city asserted it was not required to proceed to interest arbitration on some of the retirement issues in dispute.

The allegation that the mayor used unsupported figures when discussing the pension plan's future costs also has led to investigations. In November, labor attorney Christopher Platten filed a complaint with the Securities and Exchange Commission, claiming that the city had failed to notify potential bondholders and other investors of the fact that pension costs would climb to \$650 million by 2015, a claim the mayor repeatedly made over the last year. But it was discovered in February that the number had no actuarial support, and the actual figure was \$400 million. Platten then filed an ethics complaint against the mayor and other city officials with the city elections commission.

On June 6, several San Jose firefighters filed in state court claiming that the initiative violates the vested rights of current employees in violation of the contract clauses of the state constitution. The city contends that the measure is not unconstitutional because provisions of the charter allow it to be amended, and therefore, any pension promises were subject to amendment. The POA filed another action based on due process, unconstitutional taking of property, separation of powers, freedom of speech, breach of contract, the MMBA, and the California Pension Protection Act, in addition to the contracts clause of the California Constitution.

The city also asked a federal court to declare that the initiative is constitutional. Platten told *CPER* he will be challenging that action for declaratory relief on grounds the federal court should abstain from ruling on a matter of state law and policy.

CPER Journal Online

Local Rule Precluding Mixed Unit of Peace Officers and Non-Peace Officers Is Unreasonable

In *SEIU Local 1021 v. County of Calaveras*, the Public Employment Relations Board found that a county did not violate the Meyers-Milias-Brown Act when it approved a mixed bargaining unit comprised of peace officers and non-peace officers, even though the county's local rule disallowed such a unit. The board held that a local rule precluding a mixed bargaining unit is unreasonable and its enforcement would have been contrary to the provisions of the MMBA.

Severance Petition

In 1972, the county approved a miscellaneous unit that included several classes which later became peace officers. The county employee relations ordinance adopted in 1975, however, prohibited mixed peace officer miscellaneous units. Despite several changes in exclusive representative, the unit had not been modified to exclude peace officers prior to 2005, when SEIU became the exclusive representative after a decertification election.

In 2007, the Calaveras County Public Safety Employees Association filed a unit modification/severance petition pursuant to the local rules of the county. It sought to sever 24 classes, including probation officers and correctional officers, from the miscellaneous unit represented by SEIU. The probation officers were peace officers, and the correctional officers at that time were not. The county approved the severance petition. SEIU appealed the decision to the county's board of supervisors. The board recommended a representation election. Although SEIU continued to object to the mixed unit, the county had a third-party neutral conduct the election. CCPSEA won, and the county recognized the association as the exclusive representative.

SEIU filed an unfair practice charge alleging that the county violated the MMBA by approving a mixed unit of peace officer and non-peace officer classifications. SEIU also charged that the county violated the act by unilaterally selecting a neutral third-party representative to oversee the election in violation of its own local rules. An administrative law judge dismissed both assertions included in the complaint, and SEIU filed exceptions with the board.

Right to Choose a Representative

The board noted that the MMBA grants peace officers the right to join or participate in peace officer-only units, but does not require that peace officers exercise this right or prohibit them from choosing to be in mixed units. In contrast, the local rule restricted the ability of peace officers from being represented in a mixed unit with non-peace officer employees.

In this case, PERB explained, SEIU sought to enforce a local rule that directly conflicted with Government Code Sec. 3508(d), which prohibits employers from restricting employees' rights to form and join employee organizations. Enforcement of the ordinance would be in conflict with the purpose of the act. Therefore, the board concluded, the local rule was unreasonable and could not be enforced to preclude the mixed unit requested by CCPSEA.

SEIU also argued that the county violated Sec. 3507.1 of the act because it did not follow its own ordinance. It acknowledged that the unit historically had included some peace officer classifications, but contended that was permissible, since Sec. 3507.1(b) allows a preexisting bargaining unit to remain in effect unless changed under rules adopted by the public agency. The unit could be changed only in compliance with the local rules, SEIU insisted.

The board was not persuaded. It did not accept the proposition that the definition of the unit could be "grandfathered" in for the purpose of a decertification election, but not in the case of a unit modification. In addition, the county had a longstanding practice of permitting a mixed unit of peace officer and non-peace officer employees, notwithstanding the language of its local rule. Here, the board said, the county sought to enforce its local rule consistent with past practice, and it did not violate the MMBA when it approved the mixed unit requested by CCPSEA.

Election Supervisor

The county's local rule allows for the use of a neutral third party to supervise contested elections. The board found the parties' past practice had been to go directly to the California State Mediation and Conciliation Service to obtain a neutral third party. It had not been the practice to require mutual selection of the neutral third party, despite a reference in the local rule to following representation election procedures in the MMBA "if necessary." In this case, CSMCS had declined to conduct the election during SEIU's appeal to the county board. As a result, the county had chosen to use a retired state mediator who previously had conducted elections and mediated disputes for the county. Absent evidence that she failed to perform her duties in a neutral manner or a showing that her participation tainted the outcome of the election, the board found no basis to overturn the ALJ's proposed decision. (*SEIU Local 1021 v. County of Calaveras; Calaveras County Public Safety Employees Assn., intervener* [2012] PERB Dec. No. 2252-M.)

CPER Journal Online

Pension Initiative in General Law City Upheld

When citizens of the City of Menlo Park could not persuade their city council to enact pension reform, they took a measure to the ballot box themselves. While citizens and elected governing bodies have been using this tactic more frequently in charter cities around the state, the initiative process is subject to more constraints in general law cities like Menlo Park. Nevertheless, a trial court ruled in May that the initiative was valid and did not contravene either the Meyers-Milias-Brown Act or the Public Employment Relations Law.

New Pension Plan

The city began trying to reach agreement with employee unions to reduce retirement benefits for new hires in early 2010. SEIU, which represents miscellaneous employees of the city, resisted a two-tier pension system. After bargaining to impasse, the city implemented its last, best and final offer, including a 2-percent-at-60 pension formula for new employees.

In November 2010, the voters passed Measure L, which limits pension benefits for future city workers other than police officers. Rather than being eligible to retire at 55 with a 2.7 percent formula based on the highest single year of earnings, a new employee will not be entitled to retire with a full pension until 60 and benefits will be calculated on the basis of the average of the highest three years of wages. The initiative also bans retroactive pension increases, caps benefits at 2 percent of average salary multiplied by years of service, and allows employee contributions to rise to 7 percent of pay. Most troubling to employee unions, Measure L prevents the city from entering into collective bargaining agreements that conflict with its dictates, unless approved by the voters.

SEIU Local 521 and AFSCME Local 829 challenged the initiative in 2011. Before the matter went to hearing, however, the city reached an agreement with AFSCME, which represents supervisory personnel, on the 2-percent-at-60 formula for employees hired after October 2011. Not long afterward, the city modified the plan for executive employees to implement the same formula. In January 2012, the city entered into a new contract with the Public Employees Retirement System for its 2-percent-at-60 plan.

Plan Established, Not Changed

In court, the unions argued that Measure L was an invalid exercise of the local initiative power because it usurped the power of the city council over pension benefits and was inconsistent with retirement law. They contended that Government Code Sec. 36506 delegates authority only to the “city council” to fix employee compensation, such as pensions. The caps and other restrictions of Measure L impermissibly limit the discretion of the current and future city councils, they

emphasized, relying on case law that forbids an enactment to bind future legislative bodies.

Since the city does not administer its own pension plan, but contracts with CalPERS, the unions also argued that the retirement statutes do not authorize a city's electorate to enact a plan that will be administered by CalPERS. In addition, the provision that caps a pension at the 2 percent salary nullifies the city's authority to contract with CalPERS because CalPERS' existing 2-percent-at-60 plan uses a richer formula for those who work after 60 years of age, the unions pointed out.

The court acknowledged that, unlike charter cities, which have plenary power over municipal affairs, general law cities have no power except for that granted by the legislature. But, the court noted, Government Code Sec. 45306 provides that an ordinance "establishing a retirement system" may be adopted by a majority of the electorate. It reasoned that Measure L was authorized by this provision because it did not modify the existing retirement system, but instead established a new system for new hires. The court dismissed the unions' argument that Section 45341 allows only a "legislative body" to establish a pension "plan," which the unions defined as a level of benefits to be provided by the retirement "system." It concluded that Measure L was a valid exercise of the initiative power.

No Evidence of Bad Faith Bargaining

SEIU and AFSCME also contended that the initiative constrains the city council so that it cannot bargain in good faith as it must do under the MMBA. "The City Council cannot 'consider fully' or negotiate a contract that, for example, would freeze salaries for new employees in exchange for pension benefits for new employees above the limits prescribed by Measure L — even if the City Council believed such a contract would be in the City's best interest," they asserted in their brief. Because the initiative requires that the voters approve any pension agreement that varies from its limits, it creates an "automatic referendum" on collective bargaining pacts in violation of *Voters for Responsible Retirement v. Board of Supervisors of Trinity County* (1994) 8 Cal.4th 765, 1994 Cal. LEXIS 6029, 110 CPER 36, the unions contended. In *Trinity*, the Supreme Court held that a referendum on a tentative agreement between the city council and a union would contravene the MMBA, as "the power to negotiate an agreement and the ultimate power to approve an agreement would be totally divorced from each other," undermining the good faith bargaining tenet of the MMBA. Even in a charter city, the city must meet and confer in good faith before going to the voters with a measure that affects terms and conditions of employment, the unions added.

Since the Public Employment Retirement Law mandates that a city comply with the MMBA before contracting with CalPERS, Measure L also violates the PERL, the unions contended. They asserted Measure L was passed before the city complied with its obligation to meet and confer in good faith with AFSCME about the pension plan.

On its face, Measure L does not violate the MMBA or the PERL, the court found. It observed that the unions conceded the state legislature has the power to enact the

same benefit limits, which would constrain bargaining in the same manner. The court saw no difference in the analysis resulting from the city voters having made the decision on pension benefits rather than the state legislature having done so.

It also found no indication that the city had bargained in bad faith when it negotiated with AFSCME after Measure L passed. The city may one day violate the MMBA due to Measure L, the court said, but the evidence is that the city *can* bargain in good faith even after the existence of Measure L. That fact convinced the court that Measure L did not violate any statute as a matter of law. If the city does bargain in bad faith or violate the PERL as a result of Measure L, the unions can pursue remedies under the MMBA and PERL, it advised.

Because the unions requested a writ of mandate, which requires certain criteria be met, the court ruled it had no power to grant the request. The unions had not shown that the city had any “clear, present and ministerial duty” to perform an act that the court could enforce. The city had not violated any law and was not due to enter into any further negotiations with SEIU or AFSCME until 2015. For the same reason, the unions did not meet the second criteria — a clear and present right to the performance of the duty. And, the court found, there was no evidence that the remedies under the MMBA or the PERL would be inadequate in the event of future statutory violations. Therefore, the court denied the unions’ petition. (*Local 829, AFSCME, AFL-CIO, and Local 521, SEIU v. City of Menlo Park* [5-4-12] San Mateo Co.Sup.Ct. CIV 508435.)

CPER Journal Online

Withholding of Vacation and Sick Leave Payout Continues During Stockton's AB 506 Process

Procedural obstacles doomed the Stockton Police Officers Association's court challenge to the City of Stockton's most recent breach of the collective bargaining agreement. The union asked for a preliminary injunction prohibiting the city from continuing to withhold vacation and sick leave cash-outs to workers leaving city employment. Although news accounts proclaimed the city won, the court did not rule that the city's attempt to preserve cash is lawful or justified by its emergency fiscal situation. Instead it ruled that it could not decide the question because of a stay of proceedings issued in the case. As a result, any legal issues arising from the city's unilateral reductions in compensation over the last two years will be sorted out, if ever, long after the city's pre-bankruptcy mediation process under AB 506 ends later this month. (See story on process in [CPER No. 205](#).) Stockton has been mediating with its creditors, labor organizations, and retiree association since the end of March.

Anti-SLAPP Ruling Appealed

The lawsuit started in 2010, after the city declared a fiscal emergency and reneged on compensation increases it had promised only months before. When SPOA sued, the city cross-complained that the union was negotiating in bad faith because it refused to reopen its contract during the emergency, and that SPOA had engaged in unfair pressure tactics under the MMBA when it bought the house next door to the city manager. It also charged that the union had harassed the manager in violation of Civil Code Sec. 51.7, which protects a person from threats of violence against his person or property because of his position in a labor dispute. Additionally, the city also asked for a declaration that its temporary modifications to the parties' MOU were justified due to the fiscal emergency.

In January, SPOA challenged the cross-complaint on several grounds, including the Strategic Lawsuit Against Public Participation (SLAPP) statute. The law allows a defendant in a lawsuit to ask the court to strike a court claim that was filed in retaliation for exercising First Amendment rights or for participating in a lawsuit against the alleged retaliator. The union claimed that the city had filed its cross-complaint in retaliation for the original lawsuit and had initiated "exceedingly broad, burdensome and intrusive discovery" of internal SPOA member communications and finances, including political expenditures and expenses for public communications.

The trial court ruled that the union had a right to refuse to reopen the closed contract, even in the face of the city's fiscal emergency; it dismissed that portion of the cross-complaint. It allowed the city to proceed on the claim that the union had engaged in unlawful pressure tactics and intimidation against the city manager. The

court also denied the union's anti-SLAPP motion, which the union appealed at the end of January. When the union appealed, all legal proceedings related to the lawsuit were stayed.

Related Issues Stayed

In February, the union asked the court for a temporary restraining order and preliminary injunction against the city's suspension of leave payouts to departing employees, citing the MOU. The city emphasized the harm to public safety if it were not allowed to preserve its cash by postponing the payouts. It also argued that the employees were trying to "jump to the front of the line" of creditors negotiating with the city in pre-bankruptcy mediation, and that paying the \$320,000 in cash would cause the mediation process to fail.

The judge found the new breach-of-contract allegations sufficiently "intertwined with" the issues on appeal that they were stayed and he could not rule on the merits. After that ruling, he indicated the union's contract claims were likely to prevail, but that he probably would have decided against a preliminary injunction — before a full hearing on the merits of the union's claim and city's defense — because an order to pay out the leave balances would harm city services more than the city's withholding of cash would harm departing employees.

The procedural ruling leaves the city free to continue withholding leave payouts, which amount to about \$1 million from attrition across all employee units. The city's attorney, Jon Holtzman, told *CPER* that the judge essentially gave deference to the pre-bankruptcy process, even though AB 506 requires no stay of pending lawsuits against the city. "The city had evidence that leave payouts tipped Vallejo into bankruptcy," he added. SPOA's attorney, David Mastagni, denounces the city's fiscal emergency declarations as "self-help debt-relief powers without the judicial oversight of bankruptcy."

Stockton's AB 506 mediation process ends on June 26, but the mediator is not available after June 16. The city and its creditors agreed to invoke the opportunity to extend the mediation for 30 days beyond the mandatory 60-day process. As the mediation is confidential, there is no word whether it is likely to succeed. On June 5, however, the city council authorized the city manager to file a bankruptcy petition if the AB506 process does not result in agreements that will prevent insolvency in 2012-13.

CPER Journal Online

Teachers Hired with Categorical Funds Are Probationary Where Section 44909 Terms Not Strictly Followed

The terms of Education Code Sec. 44909, which applies to teachers hired for a categorically funded project, must be strictly followed for the employees to be classified as temporary, according to the Third District Court of Appeal. In *Stockton Teachers Assn. v. Stockton Unified School Dist.*, the district did not comply with the statute's terms and, therefore, the employees must be treated as probationary, the court held.

STA filed suit on behalf of nine of its members, claiming that the district had improperly classified them as temporary employees whereas they should have been considered probationary. Each of the teachers had been hired under Education Code Sec. 44909.

The Classification System and Section 44909

The Court of Appeal recognized that section 44909 does not specify the classification of employees hired under its provisions. The court noted that section does, however, specify employees hired under its terms earn no credit toward obtaining permanent classification and "may be terminated at the expiration of the contract or specially funded project" without following the procedures required to terminate probationary and permanent employees. To determine whether the employees were temporary, the court examined the purposes behind the classification system as a whole.

Section 44915 requires a district to classify as probationary any certificated employee who has not been classified as permanent or substitute. While that section does not refer to temporary employees, "probationary status is the default classification when the Code does not specify another classification," the court clarified, citing *California Teachers Assn. v. Vallejo Unified School Dist.* (2007) 149 Cal.App.4th 135, 2007 Cal.App. LEXIS 469, [184 CPER 42](#).

"A temporary classification is strictly construed," said the court, and is authorized by the code in only a few instances. "The Education Code restricts a school district's use of temporary employees because 'otherwise the benefits resulting from employment security for teachers could be subordinated to the administrative needs of a district,'" the court instructed, quoting from *Haase v. San Diego Community College Dist.* (1980) 113 Cal.App.3d 913, 1980 Cal.App. LEXIS 2600. A school district may not circumvent the law through practices designed to avoid the tenure statutes. Even if an employee signs a written agreement specifying that he is being hired as a temporary employee, as did the teachers in this case, the district may not classify him as temporary unless his position is one the law defines as temporary,

the court explained, citing *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 1974 Cal. LEXIS 335, and *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 2006 Cal.App. LEXIS 1994, [182 CPER 41](#).

On the other hand, the court acknowledged, the legislature's purpose in enacting section 44909 was to permit districts to hire qualified persons for categorically funded programs without having to grant them tenured status based on those services. And, it was intended to give districts flexibility to supplement their regular program with special programs while avoiding a surplus of probationary or permanent teachers when the project ended, said the court, referring to language in *Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 2002 Cal.App. LEXIS 6593, 155 CPER 38.

Probationary and Temporary Employees Distinguished

The court considered the primary differences between probationary and temporary employees to assist it in interpreting the statute. It concluded that probationary employees have more procedural protections than temporary employees regarding termination or layoff; service as a probationary employee counts toward tenure, whereas a temporary employee's time does not, unless the employee is subsequently hired as a probationary employee; seniority is determined as of the first date of probationary service, and probationary employees have a superior right to be reemployed.

It found that section 44909 specifically addresses only two of these differences, service time and termination, and indirectly refers to reemployment rights. The statute provides that an employee hired for a categorically funded project, like a temporary employee, does not accrue service time towards becoming permanent unless he or she is subsequently hired as a probationary employee after serving at least 75 percent of the school days in a year.

Regarding the termination procedure, the statute states that a section 44909 employee may be terminated without following the requirements applicable to permanent or probationary employees when he or she is terminated "at the expiration of the contract or specially funded project..." The district argued that "contract" referred to the contract between the district and the employee, but the court disagreed, stating that it refers to "the only other 'contract' mentioned in section 44909 — the 'contract with public or private agencies,'" citing *Hart Federation of Teachers v. William S. Hart Union High Sch. Dist.* (1977) 73 Cal.App.3d 211, 1977 Cal.App. LEXIS 1813, and *Bakersfield*. The court agreed with *Hart* and *Bakersfield* "that the only time a section 44909 employee may be terminated 'without regard to other requirements of this code respecting the termination of probationary or permanent employees' is at the termination of the categorically funded program or the end of the contract with the public or private agency."

And, while the section does not directly address reemployment rights, it does so

indirectly by reference to section 44918, which provides reemployment rights for temporary certificated employees who have worked at least 75 percent of the number of days of the school year and have not been released, or if released, have been retained as a substitute or temporary employee for two consecutive years. Section 44909 specifies that a person hired pursuant to it “may be terminated at the expiration of the contract or specially funded project without regard to other requirements of this code respecting the termination of probationary or permanent employees *other than Section 44918*.” Because of this reference, the court interpreted section 44909 “to limit the re-employment rights of employees hired pursuant to its provisions only if such employees are terminated at the expiration of the contract or categorically funded project.”

Strict Adherence Necessary

Because classification of a certificated employee as temporary must be strictly construed, a district must “follow the letter of the statute” before it may treat a Section 44909 employee as temporary. “This means that the program for which the employee is hired must satisfy the requirements of the statute and the district must enter into a written agreement of employment with the person hired,” the court instructed.

Accordingly, section 44909 employees are either temporary or probationary depending on the duration of their employment, concluded the court. “A person employed under section 44909 is to be treated like a temporary employee, *provided* the person is employed for the duration of the contract with a public or private agency or categorically funded project.” However, said the court, “[w]hat a district may not do, is hire a person for *more or less than* the term of the contract or project, and treat such a person as a temporary employee.” Such a person must be treated like a probationary employee, the default classification.

The court was not dissuaded from its conclusion by language in *Vasquez v. Happy Valley Union School Dist.* (2008) 159 Cal.App.4th 969, 2008 Cal.App. LEXIS 166, 189 CPER 43, and *Zalac*, indicating that section 44909 employees are temporary employees, because the issues in those cases were not directly on point.

Employees Were Not Temporary

In this case, the district presented no evidence about the categorically funded programs. Because the court found no evidence to conclude that the STA members were terminated at the end of a categorically funded program, it held that they must be treated as probationary.

Michelle Cannon of Kronick, Moskovitz, Tiedemann & Girard, one of the attorneys who represent the district in this case, told *CPER* that the district’s petition for review is currently pending in the California Supreme Court. The district has also filed a request for depublication of the Court of Appeal decision, as have three other outside parties. (*Stockton Teachers Assn., CTA/NEA v. Stockton Unified School Dist.* [2012] 203 Cal.App.4th 1552, 2012 Cal.App. LEXIS 246, modified, rehearing

denied, [2012] 204 Cal.App.4th 446, 2012 Cal.App. LEXIS 371.)

CPER Journal Online

Lawsuit Challenges Teacher Protection Laws

A lawsuit, filed in the Los Angeles Superior Court on behalf of eight students, seeks to overturn five statutes that regulate teacher tenure, seniority, and dismissal. The suit, filed in May, names as defendants the Los Angeles Unified and the Alum Rock Elementary school districts, along with the state Department of Education, state Superintendent of Public Instruction Tom Torlakson, and Governor Jerry Brown.

The action is funded by the non-profit Students Matter, an organization started by David Welch, a Silicon Valley manufacturer of optical communications systems. One well-known supporter of Students Matter is Eli Broad, who has funded other education reform initiatives in the past. The organization's advisory committee includes representatives from Students First, headed by former District of Columbia schools chancellor Michelle Rhee; Democrats for Education Reform; Parent Revolution; the New Schools Venture Fund; and Education Trust-West. All are advocates for education reform.

A high-powered legal team — including Theodore B. Olson, a United States solicitor general in the George W. Bush administration, and Theodore J. Boutrous, Jr., of the Gibson, Dunn & Crutcher law firm — has been retained to represent the students. Olson and Boutrous worked together on the court case that overturned Proposition 8, the ban on gay marriage.

The suit claims that the following Education Code statutes are unconstitutional:

Section 44929.21(b) which provides that probationary teachers shall become permanent if they are reemployed after two years; Sections 44934, 44938(b)(1) and (2), and 44944, which govern teacher dismissal proceedings; and, Section 44955, which provides that layoffs are to take place according to seniority.

The plaintiffs' complaint states, "The California Supreme Court has long recognized that a child's right to an education is a fundamental interest guaranteed by the California Constitution." They argue that the challenged statutes protect "grossly ineffective teachers" and create "arbitrary and unjustifiable inequality among students." As a result of the statutes, state the plaintiffs, "grossly ineffective teachers are disproportionately assigned to schools serving predominantly minority and economically disadvantaged students." "Those statutes thus make the quality of education provided to school-age children in California a function of race and/or the wealth of a child's parents and neighbors in violation of the equal protection provisions of the California Constitution."

Inexperienced teachers are assigned to those schools because teachers with more seniority seek positions in more affluent, better-performing schools, the plaintiffs argue. And, it is to those schools that incompetent veteran teachers are assigned because they cannot be easily fired. The plaintiffs also seek to invalidate the laws

that require districts to lay off new teachers first, regardless of their effectiveness.

Both California Teachers Association President Dan Vogel and California Federation of Teachers President Joshua Pechthalt have spoken out in opposition to the lawsuit, blaming the current economic crisis resulting in massive teacher layoffs for creating the situation. They contend that if schools were given sufficient resources, the current system would work fine.

LAUSD Superintendent John Deasy has stated that he supports the suit's goals, in spite of the fact that the district is a defendant. Jose L. Manzo, superintendent of Alum Rock USD said, in a press release, that the district views the lawsuit "simply as a vehicle by which the complainants have the ability to challenge the State of California's education laws." He noted that the district has made enormous strides in student performance, and attributed much of this improvement to "our hard working teachers who come to work each and every day determined to make a difference in the lives of our students and their families."

CPER Journal Online

Teacher Properly Classified as Temporary When Number of Absent Teachers Exceeded Number of Temporary Hires

In *McIntyre v. Sonoma Unified School Dist.*, the Court of Appeal once again waded into the thicket of the statutes governing classification of public school teachers, and held that a teacher had been properly classified as temporary. The First District rejected the teacher's claim that she was entitled to be reinstated as a permanent tenured teacher.

Classification System

The court began its analysis with a review of the statutory classification system for certificated employees. A certificated teacher must be classified by the hiring district as permanent, probationary, or temporary at the time of employment. If a teacher who has been employed for two consecutive years in a probationary position is reelected for the following year, she becomes a permanent employee. Probationary is the default classification, defined as those who are not otherwise authorized by the Education Code to be classified as either permanent, temporary, or substitute. Temporary teachers include those who are employed in short-term temporary assignments and those who are employed for up to one year to replace certificated employees who are on leave or have a lengthy illness.

History with the District

Dawn McIntyre was first hired by the district for the 2006-07 school year. Prior to the start of her employment, she was given a written notice classifying her as a long-term temporary employee under Ed. Code Sec. 44920, "based on the need for additional certificated employees because of leave or illness of another employee." On March 15, 2007, McIntyre was notified that she would be released from temporary employment at the end of the school year.

Prior to the beginning of the 2007-08 school year, McIntyre was again offered employment by the district and notified of her classification as a long-term temporary employee. On March 13, 2008, McIntyre was given notice that she would be released from continued temporary employment at the end of the school year.

Prior to the beginning of the 2008-09 school year, the district once again employed McIntyre and gave her the same notice classifying her as a long-term temporary employee that she had received the prior two years. On October 21, 2008, the district notified McIntyre that her status had been changed from temporary to a second-year probationary employee, and that it had counted as probationary her service from the prior year. On March 12, 2009, McIntyre was notified that she was being released from continued employment with the district for the following school

year.

McIntyre filed a petition for peremptory writ of mandate asking the court to order the district to reinstate her as a permanent employee with back pay and benefits. She alleged that, but for the district's misclassification of her as a temporary employee, she would have completed her probationary employment status on March 15, 2008, and would have become a permanent employee entitled to tenure. The trial court denied McIntyre's writ, and she appealed.

McIntyre's Contentions Rebuffed

Section 44920. Section 44920 states, in part, that a district may classify as temporary a teacher whom it hires for a complete school year, provided that "[t]he employment of such persons shall be based upon the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, *and shall be limited, in number of persons so employed, to that need, as determined by the governing board.*" (Emphasis added.)

The rationale behind this code section, explained the court, is to permit districts to hire teachers to replace those who are absent, and then release them when they are no longer needed. If the replacement teachers were to obtain probationary or permanent status, districts would be left in the "untenable position" of employing two teachers for only one open position.

However, the court instructed, the district is not required to demonstrate a one-to-one match between a specific temporary teacher and an employee on leave. "Rather, all that is required under section 44920 is that 'the number of temporary teachers not exceed the total number of probationary and permanent employees on leave at any one time,'" it said, quoting from *Santa Barbara Federation of Teachers v. Santa Barbara High School Dist.* (1977) 76 Cal.App.3d 223, 1977 Cal.App. LEXIS 2103.

McIntyre submitted evidence purporting to show that the district employed a greater number of Section 44920 teachers than the number of teachers on leave in all three years of her employment. Based on this showing, McIntyre argued that the district did not have the right to classify her as temporary in either the 2006-07 or 2007-08 school years, and that she must be hired as a probationary employee for those two years under Section 44915. As a result, she claimed, she became a permanent employee during the 2008-09 school year under Section 44929.21(d), which specifies that a certificated probationary employee who works for two complete consecutive school years, and is then reelected for the next succeeding year, is deemed elevated to permanent status.

However, the court did not grant McIntyre the relief she sought. It noted that the district had submitted evidence that it had more probationary and permanent teachers out on leave than replacement temporary teachers during the same three years, and that the trial court had found the district's evidence to be determinative. The court declined to second-guess the lower court's resolution of the conflicting

evidence, citing *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 1988 Cal. LEXIS 33, in which the Supreme Court instructed that “an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict.”

Statutory scheme allows for perpetual temporary status. McIntyre argued that the district tried to circumvent the tenure statutes by continuing to classify her as a temporary employee year after year. The court responded by pointing out that there is nothing in the Education Code that precludes a district from doing exactly that. It pointed again to the *Santa Barbara* case, in which the court refused to compel the district to grant the plaintiffs probationary status based on three consecutive years of temporary employment, stating that “mere continuity of employment by a temporary or substitute teacher in a position regularly held by a probationary or permanent teacher does not, by itself, give rise to tenured status.”

The court found that McIntyre did not meet her burden of proving that she had a right to classification as a permanent employee and that the district had a “clear, present, and ministerial duty to classify her as such.” Nor was she able to show that the district acted arbitrarily, capriciously, fraudulently, or without due regard for her rights, as she was required to do in order to prevail on a writ of mandate.

Section 44917 abrogated. The court found that McIntyre was properly classified during each year that she was employed by the district. While it recognized that, in certain circumstances, either Section 44920 or Section 44918 can automatically elevate a second-year temporary employee to a second-year probationary employee, it did not find those circumstances present here.

Under Section 44920, if a temporary employee employed for one full school year is reemployed for the following year in a vacant position, the district is required to classify her as probationary and consider the first year probationary for tenure purposes. However, this statute is inapplicable to McIntyre’s situation because she was never reemployed to fill a vacant position, said the court.

Section 44918 is also inapplicable, the court concluded. That section provides that any temporary employee who performed duties of a certificated employee for a minimum of 75 percent of the school days in a year “shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.” McIntyre could not be deemed a probationary employee under Section 44918 because she was “never employed the following year as a probationary employee,” said the court. The section also states that any such employee must be reemployed to fill any vacant positions in the district unless terminated pursuant to Section 44954(b), which provides that a temporary employee may be released summarily by timely notice. Here, McIntyre was released pursuant to Section 44954 and so was not entitled to reemployment, the court explained.

McIntyre argued that Section 44917 required the district to classify her as a probationary employee. It reads: “Any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a position requiring certification qualifications, be classified by the governing board as

a probationary employee and the previous year's employment as a temporary employee shall be deemed one year's employment as a probationary employee for purposes of acquiring permanent status."

The present court adopted the *Santa Barbara* court's reasoning on this same issue. The court in *Santa Barbara* noted that the language of Section 44917 is "patently inconsistent" with the Section 44920's requirement that temporary teacher be reemployed in a vacant position in order for the previous year to be considered probationary. It recognized that districts need flexibility in hiring temporary teachers to fill in for teachers on leave and held that the language in Sections 44918 and 44920, which were adopted later, abrogated any contrary language in Section 44917.

The court affirmed the judgment. (*McIntyre v. Sonoma Valley Unified School Dist.* [2012] 206 Cal.App. 4th 170, 2012 Cal.App. LEXIS 608.)

CPER Journal Online

Management Employees Who Were Also Supervisory May Be Held Liable for Retaliation Under Statute

If a management employee is also acting in a supervisory capacity, he or she may not be exempt from liability for retaliation under the Reporting by School Employees of Improper Governmental Activities Act, according to the Fourth District Court of Appeal, in *Hartnett v. Crosier*. While the court concluded that Education Code Sec. 44113(a) does apply to management employees who are supervisory employees, it also ruled that the remedies provided by section 44114(c) were not available to the plaintiff because he, himself, was a management employee. A petition for review is pending in the Supreme Court.

Rodger Hartnett, a claims coordinator in the San Diego County Office of Education, was discharged for the stated reasons of incompetency, insubordination, and dishonesty. Hartnett filed a lawsuit under the act against several individual Office of Education employees, alleging that he actually was fired in retaliation for disclosing that they referred legal business to friends and family members in exchange for gifts and other considerations.

The trial court granted the defendants' motion for summary judgment on the grounds that section 44113(a) did not apply to them because they were managerial employees and that certain remedies for a violation of the statute were not available to Hartnett because his job was managerial.

Management Employees Not Necessarily Exempt

Section 44113(a) prohibits "an employee" of a public school from using his or her official position to retaliate against "any person" to deter the person from making a protected disclosure. An "employee," noted the Court of Appeal, is a "public school employee" as defined by Government Code Sec. 3540.1 to be "a person employed by a public school employer *except* persons elected by popular vote, persons appointed by the Governor or this state, *management employees*, and confidential employees." Further, the statute specifies that a "management employee" is an employee with "significant responsibilities for formulating district policies or administering district programs," and "management positions shall be designated by the public school employer subject to review by the Public Employment Relations Board."

While the record established that the individual defendants were management employees, said the court, the Third District Court of Appeal ruled, in a similar case, that section 44113(a) does not exempt management employees from liability if they were acting as supervisory employees when they committed the allegedly retaliatory acts. In *Conn v. Western Placer Unified School Dist.* (2010) 186 Cal.App.4th 1163, 2010 Cal.App. LEXIS 1192, [200 CPER 29](#), a probationary school teacher sued her

school district and certain of its employees, claiming that they prevented her reelection to a third year of employment in retaliation for her efforts to disclose that the district was not properly evaluating students or assigning them to appropriate special education services. The Third District overturned the trial court's dismissal of the case, explaining:

Section 44113(a)...makes an "employee" liable in damages for using his or her "official authority" to interfere with the right of a schoolteacher to disclose to an official agent improper governmental activities. Although the term "employee" generally excludes "management employees" by incorporation of provisions of the Government Code...it does not exclude "supervisory employees" who exercise authority over personnel actions. (Gov. Code, Sec. 3540.1, subd. (m).) This dovetails with subdivision (b) of section 44113 that defines "official authority" as including "personnel actions." Consequently, section 44113 makes persons who exercise supervisory authority over personnel actions liable when that authority is used to interfere with a schoolteacher's rights under the Act.

The court in this case was persuaded by the Third Circuit's reasoning and rejected the defendants' argument that the holding in *Conn* conflicts with the act's legislative history. Considering the language of the statute, the court concluded that the supervisory employee classification, which was neither included nor excluded by the definition of "employee" under section 44112(a) and Gov. Code Sec. 3540.1(j), "creates an ambiguity about the application of section 44113(a) to management employees who are also supervisory employees." However, a review of the legislative history clarified the ambiguity. The court determined that the California School Employees Association sponsored the legislation so that public school employees could "bring forward to their supervisors or managements improper activities without having to fear they are endangering their jobs," thereby giving them protections similar to those provided state employees under the California Whistleblower Protection Act.

The defendants' interpretation of the statute "would exempt from liability those most likely and able to retaliate against public school employees making protected disclosures," whereas the *Conn* court's construction "ensures [they would] face liability for their actions," said the court.

The court also rejected the defendants' argument that the *Conn* decision conflicts with the California Supreme Court's holding in *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 2008 Cal. LEXIS 2504, [189 CPER 89](#), that managers of private companies cannot be held personally liable for employment retaliation under California's Fair Employment and Housing Act. It found *Jones* inapposite because it involved a statutory scheme very different from the one in this case. Rather, this statute was modeled on the Whistleblower Act, which provides for individual liability for retaliatory acts.

Remedies Not Available to Managerial Employees

Section 44114(c) of the act provides for punitive damages and attorneys fees to be paid by a person who intentionally retaliates against a “public school employee” for making a protected disclosure. A “public school employee” does not include management employees. Here, the education office designated Hartnett as a management employee, and there was no evidence presented to conclude that PERB reviewed and overturned that designation. Accordingly, said the court, Hartnett was a management employee as a matter of law and could not benefit from the remedies provided in Section 44114(c).

Because the trial court did not have the opportunity to determine whether any of the individual employees were supervisory employees, the appellate court sent the case back to the trial court for further proceedings. (*Hartnett v. Crosier* [2012] 205 Cal.App.4th 685, 2012 Cal.App.LEXIS 495.)

CPER Journal Online

No Constitutional Violation Where City Civil Service Rules Applied to Classified School Employees

Education Code Sec. 45318, which places San Francisco municipal and public school classified employees under the same civil service system, does not violate the California Constitution, held the First District Court of Appeal in *San Francisco Unified School Dist. v. City and County of San Francisco*.

Section 45318 provides that, in every school district that shares the same boundaries as a city and county with a charter providing for a merit system of employment, non-certificated employees are subject to that merit system. It also provides, however, that the district's governing board shall have the right to fix the duties of those employees.

School District v. City

The San Francisco Unified School District is the only district in the state that meets the section 45318 criteria. District employees have been governed by the city's civil service system from well before 1945, when the statute was enacted, to the present. The system mandates a systemwide layoff procedure according to seniority, so that the least-senior employee in a department is the first to be laid off. That employee then has the right to take a vacant position in another department or to bump a less-senior employee in the same job classification in another department, and that bumped employee can then do the same to someone with less seniority in another department, and so on. If there is no less-senior employee to bump, the laid-off employee is placed on a holdover roster for up to five years. While on the roster, he or she continues to receive health benefits at the expense of the last department for which he or she worked.

In 2009 and 2010, city-initiated layoffs resulted in the displacement of some district employees by city employees. The district estimated that 11 of its employees with permanent civil service status lost their jobs in 2009, with an additional five bumped out in 2010.

The district sued the city, alleging that the systemwide layoff procedures constituted an unlawful transfer of the district's control in violation of Article IX, Section 6, of the California Constitution. That section states: "No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System."

The district asked the court to declare that the Constitution prohibits the city from applying its layoff procedures to non-certified district employees. It also sought a writ of mandate requiring the city to recognize the district as a separate legal entity with the power to determine whether to administer its own merit system. The trial court

denied the district's petition for writ of mandate and granted the city's motion for summary judgment. The district appealed.

No Constitutional Violation

There are two kinds of constitutional challenges to a statute, instructed the appellate court, a facial challenge and an as-applied challenge. This case concerned the latter because the district did not seek to overturn the statute, it concluded.

The district contended that the application of civil service rules to the classification and layoff of district employees infringed on the autonomy guaranteed to public schools under the Constitution. It argued that the court, in order to comply with the Constitution, should require the city's civil service commission to develop separate rules for district employees that would create a district-only classification system and insulate district employees from city layoffs.

The court noted that the district's proposed remedy posed "considerable" practical difficulties. The cost to the city of partially splitting the system that had been in effect for 85 years, and on which employee status and collective bargaining agreements had been based, would be significant.

But, said the court, there was no need to impose such a remedy because section 45318, as applied, did not violate the constitution. The court rejected the district's argument that the application of the civil service rules to district classified employees "effectively transfers management and control of the schools" from the district to the civil service commission.

The court agreed with the district that the civil service commission is not part of the public school system within the meaning of the Constitution, referring to *Mendoza v. State of California* (2007) 149 Cal.App.4th 1034, 2007 Cal.App. LEXIS 584, [184 CPER 30](#). In that case, the court held that the only entities which are part of the public school system within the meaning of the constitution are those that are "*constitutionally authorized to maintain public schools*" listed in article IX.

However, the court rejected the district's claim that the Civil Service Commission's application of classification and layoff rules to district employees transferred control of the schools from the district to the commission. The court again turned to *Mendoza* for assistance, noting that it is the only case to ever find a violation of article IX, section 6. In that case, complete operational control of several schools was transferred by legislation from the local board of education to the mayor of Los Angeles and entities he controlled. The *Mendoza* court found the transfer unconstitutional. It also found unconstitutional another legislative provision that gave one of the entities controlled by the mayor veto power over the selection of the local school superintendent because it transferred "ultimate control" over the selection to an entity outside the public school system.

The court found the facts in the SFUSD situation to be "far different" from those in *Mendoza*. "It is true that the civil service rules place limits on the School District's personnel decisions concerning classified employees but those limits do not

transfer ultimate control of those employees from the School District to the City Civil Service Commission,” it explained. The district still has the power to manage and to set the duties and qualifications of its employees. It controls for-cause dismissals, can terminate employees during their probationary period, and can seek district-only classifications.

“Functions, like the personnel functions here, may be delegated to entities outside the public school system provided that ultimate control remains in the system,” the court instructed. In support, it pointed to *California Teachers Assn. v. Board of Trustees* (1978) 82 Cal.App.3d 249, 1978 Cal.App. LEXIS 1761, in which the court held that the delegation of student driver training instruction to a private entity did not violate article IX, section 6. And, it noted, the court in *California School Employees Assn. v. Sunnyvale Elementary School Dist.* (1973) 36 Cal.App.3d 46, 1973 Cal.App. LEXIS 636, ruled that a school district’s contract with a private company for research and development did not constitute an article IX violation.

The court also found historical support for its holding. The enactment of section 45318 in 1945 placed district classified employees in the city’s civil service system. In 1946, the voters amended article IX, section 6, to prohibit the transfer of schools to an authority outside the public school system. The court found nothing to indicate that the voters intended to change the existing system under which the city administered a unified civil service system covering both city and district employees. “Although the unified civil service system does delegate certain personnel functions to the City, that delegation existed before the constitution was amended,” and “the implied repeal of a statute by a later constitutional provision is not favored,” it said, quoting from *Metropolitan Water Dist. v. Dorff* (1979) 98 Cal.App.3d 109, 1979 Cal.App. LEXIS 2259.

While the court had some sympathy for the district’s difficulties, they were not “the proper subject of judicial action,” it said, suggesting that any remedy must come from the legislature. (*San Francisco Unified School Dist. v. City and County of San Francisco* [2012] 205 Cal.App.4th 1070, 2012 Cal.App. LEXIS 530.)

CPER Journal Online

Reorganizations Affecting PERB and Agencies Serving State Employees

The Little Hoover Commission has issued a report supporting Governor Brown's recommendations to move the Public Employment Relations Board under the purview of the Labor and Workforce Development Agency (LWDA) and to create a new Government Operations Agency. The new entity would focus on services provided to state employees and other state agencies. Already in the works is a prior reorganization plan to merge the Department of Personnel Administration with some functions of the State Personnel Board as the California Department of Human Resources. And, as *CPER* announced in April, PERB will soon oversee the State Mediation and Conciliation Service.

Concern for PERB's Independence

PERB currently is an independent entity, like the State Board of Education, the Public Utilities Commission, and other commissions. In March, the governor proposed "aligning" PERB with the LWDA, which oversees the Department of Industrial Relations, the Employment Development Department, the Agricultural Labor Relations Board, and the Workforce Investment Board. The governor indicated the purpose was to increase administrative and operational coordination, not to change "the degree of policy independence" of PERB.

Nevertheless, the California Federation of Teachers, the California Labor Federation, and the Professional Engineers in California Government spoke against the move at the commission's hearings in April. They expressed concerns that a conflict of interest could arise if PERB were under the LDWA, since the board could be put into the position of adjudicating labor relations disputes involving agency employees. They were also concerned about the potential for delay in administrative decisionmaking due to increased bureaucracy.

The commission noted that PERB takes great pains to preserve confidentiality and independence. It leases offices from a private company rather than occupying a state building. The commission was assured, however, by LWDA Secretary Marty Morgenstern, that his agency would not influence the board on policy matters or the board's authority. He explained that the goal was the efficient administration of budget and expense paperwork, and assistance in processing the board's administrative requests. In addition, the commission took notice of testimony on the proposed creation of the LWDA in 2002, when witnesses told the commission that the Unemployment Insurance Appeals Board and boards within the DIR had made independent decisions even when handling cases involving their own agencies. It decided to support the proposed move.

If enacted, the move would also affect the State Mediation and Conciliation Service,

which is scheduled to be placed under PERB's direction in the fall. SMCS, which is currently a unit of the Department of Industrial Relations, would continue in its role of mediating bargaining and other disputes between employers and unions. It would also continue to administer elections to decertify or certify unions as exclusive bargaining agents, conduct agency shop elections, and run card check procedures. Its reach in the public sector is wider than PERB's jurisdiction, as it adjudicates mass transit collective bargaining disputes and mediates cases involving the City of Los Angeles and the County of Los Angeles, which have their own employment relations boards.

No immediate change in this scope of work is anticipated, Morgenstern told *CPER*, and SMCS' budget will remain intact with the transfer. But once SMCS is under PERB's direction, the board may decide to consolidate similar functions and tighten procedures. Both send out lists of neutrals to disputants — PERB for factfinders, SMCS for arbitrators. Their databases contain similar parties. Both conduct representation elections and attempt to settle labor relations disputes.

Government Operations Agency

Another part of the reorganization plan is the separation of government operations departments from the current State and Consumer Services Agency. Departments that serve the state, such as the Department of General Services, the State Personnel Board, the Department of Human Resources, and the retirement systems for state and local employees and teachers, will be placed in a new Government Operations Agency. Consumer services will move to a new Business and Consumer Services Agency.

The Department of Human Resources, known as CalHR, is itself the result of a plan to move the recruitment and selection process for state employees out of the SPB and merge it with DPA. Except for administrative law judges and staff involved in the disciplinary hearing process, merit principle oversight, and policymaking functions, SPB employees are being moved to CalHR effective July 1. All 235 DPA employees will join approximately 100 SPB workers in the new agency, which seeks to eliminate overlapping functions. Already, administrative costs related to personnel management have been reduced 3 percent since plans for implementing the merger began last September. Although CalHR would become part of the Government Operations Agency under the new plan, the director of the department would report directly to the governor on labor relations issues.

The commission approved the changes, which also include bringing the Department of Technology and the Office of Administrative Law under the new agency's umbrella. It predicted the grouping of the state services agencies will "give the agency secretary the ability to better manage the enterprise of government, through procurement, information technology, hiring, training and workforce planning, the management of state properties and employee benefits." The commission's report is available at <http://www.lhc.ca.gov/studies/211/report211.html>.

The legislature has 60 days to reject the plan by a majority vote in either house. If it does not act within that period, the plan will become law.

CPER Journal Online

Court Overturns SPB Decision Reinstating Correctional Officer

In *Cate v. State Personnel Board*, the Court of Appeal found that the State Personnel Board abused its discretion by reducing a correctional officer's punishment from discharge to a 30-day suspension. The court gave no deference to the witness credibility findings of the administrative law judge, since she had not presided at the hearing.

'Go Hang Yourself'

Thomas Norton had been a correctional officer at the California Institute for Women since 1997. He was assigned to the support care unit, which housed mentally ill prisoners.

The California Department of Corrections and Rehabilitation discharged Norton for an incident in November 2006. It alleged Norton was on duty at night when an inmate repeatedly asked him to turn on her light. He refused, even after she explained that she was delusional and afraid of the dark. When the inmate threatened to hang herself, the department charged, Norton responded that she should go ahead and do it. A short while later, another officer, Campos, found the inmate hanging by a torn sheet but was able to untie her before she harmed herself.

The department claimed that Norton had attempted to intimidate Campos, who had heard the exchange between Norton and the inmate. Norton asked Campos what he was writing in his report and called him denigrating names, including "snitch." Norton told other officers that Campos had cried after discovering the inmate hanging in her cell. He claimed Campos was lying. CDCR also alleged that Norton had documented the inmate in an attempt to discredit her, and that he falsified a date on her records after he was reassigned to another area of the prison. When seen in the support care unit, he lied about having permission to leave his new post, the department charged.

Norton appealed his discharge and went to a hearing before an SPB administrative law judge. Campos and another coworker in the unit the night of the incident, Villegas, testified. A supervisor testified that Norton had not been given permission to leave his post on the day that he returned to his old unit to change the inmate's records. Norton denied urging the inmate to hang herself, calling Campos names, or going back to the unit with the purpose of documenting the inmate's card. He testified he told fellow officers about his version of the incident because there were untruthful rumors.

Discipline Reduced

The ALJ who heard the case retired without issuing a decision. Another ALJ made a

decision on the record, without the benefit of having observed witnesses during their testimony.

The ALJ found that Norton's refusal to turn on the inmate's light was a show of power. She found that Norton had ridiculed Campos and had inaccurately accused him of lying. She pointed out that Norton had other avenues to protect the truth if he was concerned about false rumors. She found he had left his post without permission at a later date, and had added documentation of the incident to the inmate's record. He lied to a correctional sergeant about having permission to leave his post.

But, the department had not proved to the ALJ that Norton told the inmate to hang herself. The ALJ explained that the rumors surrounding the incident had affected the witnesses' testimony to the point they could not distinguish what they had heard from Norton and what they heard from Campos. Although Villegas testified that Norton had told him the inmate threatened to hang herself and that he had joked she should go ahead, the ALJ found his testimony unreliable. The ALJ wrote that Villegas did not remember this conversation until his memory was refreshed by reading an investigator's report. She was concerned that Villegas had conflated what Norton had told him with what Campos reported.

The ALJ concluded that Norton's conduct constituted an inexcusable neglect of duty, dishonesty, discourteous treatment, and a failure of good behavior. She reduced his discharge to a 30-day suspension. The board adopted her decision.

The department successfully petitioned the trial court to overturn the decision. The trial court did not find substantial evidence to support the ALJ's decision that the department had failed to prove Norton encouraged the inmate to hang herself. It also ruled that the SPB had abused its discretion in reducing the penalty. Norton appealed.

No Deference to SPB

Normally, the courts give some deference to an ALJ's assessment of witness credibility, since the ALJ has the advantage of watching the witness testify. In this instance, however, the ALJ decided the case on the written record. Since her credibility findings were not based on observations of witness demeanor, the court had no reason to give them any weight.

The court's freedom to make its own findings was fatal to Norton's appeal. It disagreed with the ALJ's characterization of Villegas' testimony. To the ALJ, it appeared that until Villegas read an investigator's report, he did not remember Norton's statement that he had jokingly told the inmate to go ahead and hang herself. That is not the way the court read the record. Villegas refreshed his memory with the report to answer a prior question, said the court, not the question about what Norton told him. Villegas testified that Norton told him the inmate said she was going to hang herself and that he jokingly told her to go ahead.

The court found Villegas' testimony credible in light of evidence that Norton accused

Campos of being a snitch, attempted to discover what Campos reported, and tried to discredit the inmate. The court concluded the evidence did not support the ALJ's finding that the department had failed to prove Norton encouraged the hanging.

SPB Abused Discretion

Courts will not disturb the SPB's decision about the appropriate penalty for misconduct unless it was arbitrary, capricious, or beyond the bounds of reason. If there is not substantial evidence supporting the agency's findings, however, the agency has abused its discretion.

In reducing the penalty to a 30-day suspension, the ALJ had acknowledged Norton's disrespectful behavior and suggested the department consider not assigning Norton to work with inmates with mental health concerns. The court found this recommendation "tantamount to a determination that Norton's misconduct might indeed be repeated, and that such misconduct would likely...result in harm to the public service." Since the major consideration in determining penalty is whether the employee's conduct may result in harm to the public service, the court found the SPB abused its discretion when it overturned the discharge.

Even the misconduct that the department proved to the ALJ was serious enough to support termination, the court said. Peace officers are held to higher standards of behavior than other employees, the court emphasized, particularly in relation to charges of dishonesty. Prior SPB cases have noted the importance of trust and cooperative, supportive work relations between correctional officers in the quasi-military environment of a prison. The court found persuasive a statement from *Kolender v. San Diego County Civil Service Comm.* (2005) 132 Cal.App.4th 716, 2005 Cal.App. LEXIS 1421, 174 CPER 38: "The safety and physical integrity of inmates is one of the office's paramount responsibilities."

The *Norton* court upheld the trial court's writ compelling the SPB to reinstate the penalty of dismissal. (*Cate v. California State Personnel Board [Norton]* [2012] 204 Cal.App.4th 270, 2012 Cal.App. LEXIS 284.)

CPER Journal Online

Bill Allowing AOC Employees to Unionize Passes Assembly

A group of employees neglected in previous labor relations bills may finally obtain the right to organize and choose an exclusive representative under a bill sponsored by SEIU and AFSCME. Employees of the Administrative Office of the Courts are not members of the state civil service system or employees of the trial courts, but they are public employees. The AOC is an agency that oversees the state court system at the direction of the Judicial Council, which is headed by the chief justice of the California Supreme Court, Tani Cantil-Sakauye.

Assembly Bill 2381 (Hernandez, D-West Covina) would amend the Dills Act to include employees of the Judicial Council, except for managerial, supervisory, and confidential employees. Supreme Court and Court of Appeal employees, as well as judicial officers, would continue to be excluded from the law's coverage. Bargaining units containing Judicial Council employees could not include employees from any other employer.

Employee organizations would negotiate with the administrative officer of the courts, who heads the AOC, but under the authorization of the Judicial Council. The scope of bargaining would be limited, due to the "unique and special responsibilities of the courts and judicial branch agencies in the administration of justice." Except for effects bargaining, unions would not be entitled to negotiate over:

1. The merits and administration of the court system and judicial branch agencies.
2. Coordination, consolidation, and merger of courts, judicial branch agencies, and the support staff of those courts and agencies.
3. Automation.
4. Design, construction, and location of facilities.
5. Delivery of services.
6. Hours of operation.

The Assembly Appropriations Committee estimated that the bill would increase the AOC's costs by \$500,000 or more, especially in the first year when bargaining units would be established and bargaining over initial contracts would begin. The Public Employment Relations Board would also incur increased costs associated with representation matters.

The right to representation likely will arrive too late for hundreds of AOC employees. The agency announced in May that it would be reducing its workforce by 180 employees by the end of this month through attrition and voluntary and involuntary layoffs. That was before the AOC received a report from the Strategic Evaluation Committee appointed by Chief Justice Cantil-Sakauye last year. In late May, the

committee released a highly critical report that recommended a “fundamental restructuring of the organization.” One of its conclusions is that the AOC must be down-sized. Due to the use of temporary and contract workers, staff numbered 1,100 in 2010-11, even though there were only 880 authorized positions. The SEC recommended staffing of 680 to 780 employees.

CPER Journal Online

Evidence Sufficient to Block Release of Names of UC Davis Officers Involved in Incident

Harassment of Lt. John Pike, a University of California officer who pepper-sprayed students at the Davis campus during an Occupy UC Davis rally, convinced a trial court judge to keep other officers' names out of a report the university released to the public in April. The court rejected the Federated University Police Officer Association's argument that the report should be confidential, but required the university to redact the names of officers involved in the incident. The case is not precedential but illustrates what evidence may justify a refusal to disclose officers' names after a controversial incident. In late May, however, two newspapers filed suit under the California Public Records Act for release of the officers' names.

Pepper Spray Report

On November 18, 2011, UC Davis ordered students and other Occupy protesters to take down tents they had erected in the campus quad. When the tents were not removed by the deadline, police took action. Several students seated on the ground were pepper-sprayed at close range by Lt. Pike, an incident that provoked criticism nationwide and led to further protests at the campus.

In the aftermath of the event, UC Davis Chancellor Linda Katehi asked UC President Mark Yudof to appoint a task force to review the incident and make policy recommendations concerning administration and police response to campus protests. Yudof appointed a former justice of the California Supreme Court and UC Davis law professor, Cruz Reynoso, to chair the task force. Kroll, a private investigation firm headed by former Los Angeles police chief William Bratton, was hired to conduct a factfinding review of the incident.

The Reynoso task force used Kroll's report as the basis for making findings that the pepper-spraying of students "should and could have been prevented." But, FUPOA, which represents UC police officers, obtained a temporary restraining order preventing the university from releasing the findings. FUPOA contended that the Kroll report, which was attached to the task force recommendations, contained confidential material from peace officer personnel files protected by provisions of the Penal Code.

Ten days later, UC and FUPOA faced off in court, where FUPOA sought a preliminary injunction to keep the report confidential after the restraining order expired. The American Civil Liberties Union intervened in the case to advocate for the public's right to the information.

Not a Personnel Record or Internal Investigation

The court rejected FUPOA's claims that the reports were protected from disclosure

under Penal Code Secs. 832.5, 832.7, and 832.8. The first two sections establish the confidentiality of information obtained using a procedure to investigate “complaints by members of the public” against officers. The court found that the task force and Kroll reports were not undertaken in response to complaints against specific officers or in compliance with a citizen’s complaint procedure. Instead, the task force report made “policy level recommendations” using the findings about the conduct of individual officers only as background. There were no disciplinary recommendations. In response to FUPOA’s concerns that the report could be used to affect officers’ employment, the court said, “If that happens, then any affected officer can assert his rights under [the Public Safety Officers Procedural Bill of Rights Act].”

The court also dismissed the assertion that the Kroll investigation was conducted “in concert” with a complaint investigation. The evidence did not support the contention, as Kroll did not interview officers who were the target of internal affairs investigations, did not obtain records from officer personnel files, and had not received any documents related to the internal affairs process.

For the same reasons, the court rejected FUPOA’s argument that the reports were personnel files protected by Penal Code Sec. 832.8. Under the statute, personnel records include those relating to “employee advancement, appraisal or discipline” and complaints or investigations of complaints about an event the officer witnessed or participated in “pertaining to the manner in which he or she performed his or her duties.”

There was no evidence that any of the contents of the report were from personnel files. The report did not recommend discipline or evaluate individual officers for employment purposes. The task force addressed only general complaints about police practices and procedures, the court explained, not complaints about individual officers to which the statute refers. The investigations referred to in Section 832.8 are internal investigations using internal information, the court concluded.

The court rejected the notion that Kroll could not publish information obtained from non-confidential sources merely because the same information could have been found in a personnel file. Even though some of the witnesses interviewed were other officers present at the incident, their statements were not deemed confidential as defined by the Penal Code. As a result, the reports as a whole were subject to disclosure.

Privacy Concern Not Speculative

FUPOA claimed that the officers’ constitutional right of privacy prevented release of the task force report. On balance, the court found that the public policy supporting government transparency outweighed the privacy concerns of the officers. The court found that the officers had no reasonable expectation of privacy, since they were operating in a public area in view of demonstrators and were wearing name badges. The court found that the UC regents would be harmed by not being allowed to discuss recommendations from the report. And, it emphasized the public interest in the conduct of police officers, who have a significant amount of power that they

can potentially abuse.

The only information the court decided to protect was the names and identifying information of the officers, other than Lt. Pike, whose identity and involvement already had been publicized. Whereas courts in other cases have found assertions of potential harm to the officers speculative, the court here had specific evidence of threats and harassment of Lt. Pike. Pike received over 10,000 text messages and 17,000 email messages, some of which contained death threats, according to FUPOA's attorney John Bakhit. In addition, anonymous persons ordered products such as magazines and food to be delivered to Pike's home.

The court ordered the redaction of names and ranks of officers other than Lt. Pike. To the extent that the reports were derived from independent sources and not confidential files, it allowed their disclosure. (*Pike v. University of California Board of Regents*, Alam.Co.Sup.Ct. 12619930.)

After the court's ruling, FUPOA and UC agreed to a stipulated order permanently enjoining the university from releasing the task force report and attachments without redactions and agreed not to appeal the court's decision.

The *Sacramento Bee* and the *Los Angeles Times*, however, believe the officers' names should be made public. Citing the court's order, the university denied their requests under the California Public Records Act for the officers' identifying information. The papers asked a different court for an order releasing the names. They claim that the judge in FUPOA's suit stressed that his ruling would not affect "any obligation of the Regents to provide the redacted information as required by law." The papers also assert that Pike's declaration in FUPOA's lawsuit did not present specific evidence of threats to his safety and did not speak to any potential harm to other officers. FUPOA's attorney characterized the newspapers' action as "irresponsible" because of the death threats Pike received, but he said his client has not yet decided to intervene in the new lawsuit.

CPER Journal Online

CSU and CFA Reconvene After Faculty Strike Vote

Next fall, classes may start late, warned the California Faculty Association. Its announcement came in May after faculty voted overwhelmingly to authorize the union's executive board to call a strike if impasse procedures do not produce a contract. Although a mediator certified the parties for factfinding in early April, they have returned to the table in the hopes of reaching agreement. The union must complete the impasse procedures before engaging in an economic strike.

CFA officially began bargaining with the California State University in May 2010, before the most recent contract expired at the end of June 2010. Talks did not actually turn to the successor agreement until August, however, because the parties were still enmeshed in bargaining on 2008 and 2009 reopener negotiations. CFA initially proposed extending the contract so it could join with CSU to fight for more state funding, but the administration refused. CFA's first proposal to strengthen layoff notice provisions and establish seniority as the predominant factor in layoff determinations was met with a CSU demand to reduce university-paid released time for union representatives.

The parties made little progress over the next year. CSU proposed no salary increases in 2011-12, and reopeners on wages and benefits in the next two years of the contract. It also proposed elimination of the equity program for tenured professors who are paid less than non-tenured assistant professors. (See story on equity increases in [CPER No. 204](#)) The faculty last received a raise of .045 percent in 2010-11, after a year of furloughs equivalent to a 10 percent pay cut. Prior to that, the last increase was in 2007-08, when professors received a total of 5.7 percent raises in two installments. As there were no raises in 2003-04 and 2004-05, CSU's proposals would result in an average general salary increase of 1.2 percent a year from 2003 to 2014, according to CFA.

The faculty was also upset with university proposals to reduce pay and teaching preference rights for Extended Education courses that the university offers for much higher tuition than the state-supported courses it offers to matriculated students. The union charges that the university has moved many sections of regular undergraduate courses to the Extended Education program, where it can charge higher fees. CSU also wanted to reduce the rights of non-tenure-track lecturers who, with three-year appointments, have preference over outsiders for available classes.

When the university met with the union in November 2011, it added a proposal to remove limits on parking fee increases; insisted on concessions in contract language on appointment of non-tenure track lecturers, summer session classes, and benefits. It said it had no room to move on the faculty's proposals relating to step increases, academic freedom, workload, and other benefits. CFA declared impasse, and the parties headed to mediation.

Six months later, the mediator from the State Mediation and Conciliation Service concluded that the parties should enter the factfinding process. CFA already had been gearing up for a faculty vote to authorize the executive board to call a strike if no agreement is reached during impasse procedures. The vote was held during the last two weeks of April. On May 2, the union announced that 70 percent of union members had turned out for the vote, and 95 percent had voted in favor of a strike.

The parties continued to meet during April and early May. According to a CSU summary of the meetings, the parties had reached agreement on all issues except university-paid union leave for CFA's president and political action chair, but CFA insisted on revisiting nine proposals it had dropped in negotiations on April 6. The summary says that university negotiators indicated they could draft language on some of the requested contract improvements but the union walked out. CFA insists that it ended the bargaining session only after the administration had "declared they were done negotiating." On May 8, CFA bargaining chair Andrew Merrifield told the CSU board of trustees that the administration had made "U-turns" on its "positions, explanations and attitude toward issues important to the faculty."

After some discussion, the CSU board asked the administration to return to bargaining. Although meetings in May did not result in agreement, more negotiation sessions are scheduled this month.

CPER Journal Online

FMLA Self-Care Provision Suits Against States for Damages Barred by Sovereign Immunity

In *Coleman v. Court of Appeals of Maryland*, the United States Supreme Court held that the doctrine of sovereign immunity bars suits against states for monetary damages for violating the self-care provision of the federal Family and Medical Leave Act. It concluded that its ruling in *Nevada Dept. of Human Resources v. Hibbs* (2003) 538 U.S. 721, 2003 U.S. LEXIS 4272, 161 CPER 5, which allowed damages suits against states brought under a family-care provision of the act, did not apply to the self-care provision because there was no evidence the self-care provision was directed at leave policies that discriminated on the basis of sex.

Daniel Coleman was employed by the Court of Appeals of the State of Maryland. When he requested sick leave, he was told that he would be fired if he did not resign. He sued the state court for damages, alleging that it had violated the FMLA by refusing to allow him to take leave to care for himself. The district court dismissed the suit on the basis that the court was an entity of the state for purposes of sovereign immunity and that the self-care provision did not abrogate the state's immunity from suit. The Fourth Circuit Court of Appeals affirmed, and Coleman's petition for certiorari to the Supreme Court was granted.

The Family and Medical Leave Act

The FMLA gives an employee the right to take up to 12 weeks of unpaid leave each year for (A) the care of a newborn son or daughter; (B) the adoption or foster-care placement of a child; (C) the care of an immediate family member with a serious medical condition; and (D) the employee's own serious health condition when it interferes with his or her ability to perform at work. It is this last provision, the self-care provision, which was at issue in this case.

Sovereign Immunity

"A foundational premise of the federal system is that States, as sovereigns, are immune from suits for damages save as they elect to waive that defense," explained the court. "As an exception to this principle, Congress may abrogate the State's immunity from suit pursuant to its powers under §5 of the Fourteenth Amendment."

The court acknowledged that Congress had made clear its intention to abrogate the states' immunity from suit under the FMLA by inclusion of explicit language to that effect in the statute. However, it questioned whether the attempt to abrogate the states' immunity was a valid exercise of congressional power under the Fourteenth Amendment.

The court explained that Section 5 grants Congress the power "to enforce" the guarantees of Section 1 of the Fourteenth Amendment, such as the right to equal

protection, but not to redefine its scope. Legislation enacted under Section 5 must be tailored to remedy or prevent conduct that violates the Fourteenth Amendment and, “there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,” it said, quoting from *City of Boerne v. Flores* (1997) 521 U.S. 507, 1997 U.S. LEXIS 4035.

Not a Sex Discrimination Remedy

In *Hibbs*, the court held that employees could recover monetary damages from states that violated subparagraph (C) of the act allowing an employee leave to care for a spouse, son, daughter, or parent with a serious medical condition. The *Hibbs* court concluded that Congress, in enacting the FMLA, based that provision on evidence of a well-documented pattern of sex-based discrimination such as family leave policies that gave longer periods of time to women than to men and facially neutral family leave policies that were administered in gender-biased ways. Congress found these practices to be a “pervasive sex-role stereotype that caring for family members is women’s work,” the *Hibbs* court noted. In that case, the court determined that requiring state employers to give their employees the right to take family-care leave was “narrowly targeted at the fault line between work and family — precisely where sex-based overgeneralization has been and remains strongest.”

However, the court did not agree with Coleman that the same conclusions applied to the self-care provision. “When the FMLA was enacted, ‘ninety-five percent of full-time state- and local-government employees were covered by paid sick leave plans and ninety-six percent of such employees likewise enjoyed short-term disability protection,’” said the court, quoting from a friend of the court brief submitted for States of Texas et al. It found that the evidence considered by Congress at the time of enactment did not indicate states had discriminatory self-care leave policies or practices. And, it said there was “scant evidence” in the legislative history to show that employers believed that women took self-care leave more often than men.

A review of the legislative history convinced the court that Congress was concerned about the economic burdens on employees and their families “resulting from illness-related job loss and a concern for discrimination on the basis of illness, not sex,” when it enacted the self-care provision. It did not believe that Congress was motivated by a perceived need for women to take leave for pregnancy-related illnesses, since most state employees already had sick leave and disability leave which could be used for this purpose. “It follows that abrogating the States’ immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy if the existing state leave policies would have sufficed,” said the court.

Nor was the court persuaded by Coleman’s argument that Congress enacted the self-care provision to address employers’ assumptions about the difference between men and women in the number of weeks of FMLA leave that would be taken. Coleman contended that because employers assume women are more likely to take family-care leave than men, by providing a maximum of 12 weeks of family care and self care combined, the perceived difference in the expected number of weeks of FMLA leave that each gender would use would be reduced. The court

noted that Congress made no findings — and took no testimony to support the conclusion — that employers made such an assumption in the first place or that the self-care provision is necessary to make the family-care provision work.

“There is nothing in particular about self-care leave, as opposed to leave for any personal reason, that connects it to gender discrimination,” the court concluded. “And when the issue, as here, is whether subparagraph (D) can abrogate a State’s immunity from damages, there is no sufficient nexus, or indeed any demonstrated nexus, between self-care leave and gender discrimination by state employers.”

The petitioner’s contention that the self-care provision helps single parents keep their jobs when they get sick, also fell on deaf ears. The court acknowledged that most single parents are women and that the self-care provision may have been enacted to remedy employers’ neutral leave restrictions which have a disparate impact on women. However, said the court, quoting from *Board of Trustees of Univ. of Ala. v. Garrett* (2001) 531 U.S. 356, 2001 U.S. LEXIS 1700, 147 CPER 50, “Although disparate impact may be relevant evidence of...discrimination...such evidence alone is insufficient [to prove a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny.”

Holding

In order to subject states to damages pursuant to Section 5 of the Fourteenth Amendment, Congress “must identify a pattern of constitutional violations and tailor a remedy congruent and proportional to the documented violations,” the court summarized. “It failed to do so when it allowed employees to sue States for violations of the FMLA’s self care provision,” it concluded, affirming the Court of Appeals decision.

Dissent

In a lengthy dissenting opinion in which she was joined generally by Justices Breyer, Sotomayor, and Kagan, Justice Ruth Bader Ginsburg wrote, “The FMLA’s purpose and legislative history reinforce the conclusion that the FMLA, in its entirety, is directed at sex discrimination.” In support, she pointed to the purpose stated in the statute to take reasonable leave in a manner that minimizes the potential for employment discrimination on the basis of sex and to promote equal employment opportunity for both sexes. She also traced the history of legislation to provide disability leave for pregnant women, pointing out that many believed that providing for disability leave only for pregnancy, as was done in California, meant that employers would not hire women. The FMLA, she posited, arose out of a desire to enact a national bill that would provide for gender-neutral leave so as to minimize workplace discrimination against pregnant women. Justice Ginsburg also related detailed testimony in congressional hearings of widespread discrimination in the workplace because of pregnancy, in both the private and public sectors.

In Ginsburg’s opinion, the fact that subsection (D) “entitles all employees to up to 12 weeks of unpaid, job-protected leave for a serious health condition, rather than singling out pregnancy or childbirth, does not mean that the provision lacks the

requisite congruence and proportionality to the identified constitutional violations.... Congress made plain its rationale for the prescription's broader compass: Congress sought to ward off the unconstitutional discrimination it believed would attend a pregnancy-only leave requirement."

Even if one mistakenly holds to the view that discrimination on the basis of pregnancy is not discrimination on the basis of sex, as proclaimed in *Geduldig v. Aiello* (1974) 417 U.S. 484, 1974 U.S. LEXIS 23, Ginsburg would nevertheless find that the FMLA is valid Section 5 legislation. Because of the pervasive view that taking care of family members is women's work, employers regard parental and family-care leave as a women's benefit and mandating gender-neutral parental leave would result in discrimination against women, Congress was told. Employers would be more likely to hire those least likely to take the leave. But men and women would use the self-care provision equally. "Congress therefore had good reason to conclude that the self-care provision...would counter employers' impressions that the FMLA would otherwise install female leave," Ginsburg explained. "Providing for self care would thus reduce employers' corresponding incentive to discriminate against women in hiring and promotion."

The majority of the court got it wrong, Ginsburg argued. "By reducing an employer's perceived incentive to avoid hiring women, [subsection] (D) lessens the risk that the FMLA as a whole would give rise to the very sex discrimination it was enacted to thwart."

Ginsburg emphasized that the court's opinion in this case does not allow state employers to violate the FMLA. Although an injured employee may not recover monetary damages for a violation of the self-care provision, he may still seek injunctive relief against the responsible state official. "Moreover, the U.S. Department of Labor may bring an action against a state for violating the self-care provision and may recover monetary relief on an employee's behalf," she instructed. (*Coleman v. Court of Appeals of Maryland* [3-20-12] ___ U.S. ___, 132 S.Ct. 1327, 2012 U.S. LEXIS 2315, 2012 DJDAR 3627.)

CPER Journal Online

Pending Legislation Would Expand California Family Leave Act

The California Family Rights Act currently requires both public and private employers with 50 or more employees to provide up to 12 weeks of unpaid leave for workers to care for their sick parents, spouses, and children. Assembly Bill 2039 would expand the CFRA to include care for independent adult children, siblings, grandparents, grandchildren, parents-in-law, and domestic partners. The bill, introduced by Assembly Member Sandré Swanson (D-Alameda), passed the Assembly by a vote of 52 to 26, largely along party lines, with Democrats voting overwhelmingly in favor. It is now pending in the Senate.

As currently written, the act defines “child” as a biological, adopted, foster, or stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under the age of 18 or an adult dependent child. AB 2039, if enacted, will eliminate the age and dependency elements. It will expand the definition of “parent” to include an employee’s parent-in-law, which is defined as a parent of a spouse or a domestic partner. The bill defines “sibling” as “a person related to another person by blood, adoption, or affinity through a common legal or biological parent.”

The California Domestic Partner Rights and Responsibilities Act already provides that registered domestic partners are entitled to CFRA leave. However, the proposed legislation specifically includes coverage for registered domestic partners in the CFRA itself.

“One of the major shortcomings of the CFRA is that the current definition of ‘family member’ does not adequately reflect the reality of California’s families, in which siblings care for one another, grandchildren care for grandparents, etc.,” a statement issued by Assembly Member Swanson’s office explained. The proposed changes “recognize the reality of California families who are trying to care for a loved one with a serious illness,” it continued. The statement also noted that eight states and the District of Columbia all use a more expansive definition of “family member” than does the current CFRA.

Republicans who oppose the bill call it a “job killer” that would cause businesses to struggle even more to find workers to fill in for those on leave. “This significant expansion of leave for employees would create such a substantial burden on employers that it would discourage employers from growing to more than 50 employees to avoid triggering CFRA/FMLA [the Federal Family and Medical Leave Act] or from locating to this state,” said the California Chamber of Commerce, in a statement issued opposing the bill. “California cannot afford to impede growth and overburden employers with such a requirement.”

(For a comprehensive overview of the CFRA and the FMLA, see CPER’s newest

edition of the *Pocket Guide to the Family and Medical Leave Acts*, just published in May 2012.)

CPER Journal Online

Prevailing FEHA Defendant Not Entitled to Expert Witness Fees Where Plaintiff's Claim Not Frivolous

In a case of first impression, the Second District Court of Appeal held that a defendant who prevails in a case brought under the Fair Employment and Housing Act may not recover its expert witness fees from the plaintiff unless the plaintiff's claim is frivolous. In *Baker v. Mulholland*, the court concluded that the same standard applicable to the recovery of attorney's fees also applies to expert witness fees.

The case involved a claim of retaliation by Eric Baker, a security guard who was fired after only 13 days of employment. The employer received two complaints from a client about Baker's job performance and decided to terminate him. Subsequently, the employer learned that Baker had complained about racist and discriminatory comments made by one of the client's employees. The employer proceeded to terminate Baker.

Baker filed a lawsuit against the employer, alleging that he was fired in retaliation for his complaints about the racist comments in violation of the FEHA. The trial court granted the employer's motion for summary judgment and ordered Baker to pay the employer's expert witness fees. Baker appealed.

Evidence of Retaliation

The appellate court determined that Baker had made out a prima facie case of retaliation by producing evidence that he complained about racist remarks, that he was terminated within a week of making those complaints, and that his employer knew about his protected activity before terminating him. However, said the court, the employer met its burden of showing a legitimate, non-retaliatory reason for the termination by producing evidence that it had received two complaints about Baker's job performance.

Baker was unable to show that the employer's reason for terminating him was pretext. He made his complaint of discrimination just after receiving the second complaint about his job performance from the client. The fact that the employer considered reassigning him instead of firing him was not probative of a retaliatory motive, said the court. It also concluded that the employer had conducted a sufficient investigation of Baker's complaints and was entitled to determine that they were unfounded. And, in these circumstances, no inference of retaliation could be drawn from the fact that he was not disciplined prior to his termination. The court upheld the judgment against Baker.

Expert Witness Fees

The FEHA permits a court, in its discretion, to "award to the prevailing party

reasonable attorney's fees and costs, including expert witness fees." (Government Code Sec. 12965[b].)

There is no question but that, under well-settled law, a prevailing defendant in a FEHA case is entitled to recover attorney's fees "only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith," said the court, citing *Chavez v. City of Los Angeles* (2010) 47 Cal. 4th 970, 2010 Cal. LEXIS 110, 198 CPER 51, and *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 1978 U.S. LEXIS 148.

However, there is a split of opinion among the circuit courts as to whether the *Christiansburg* standard applies to an award of ordinary litigation costs to a prevailing FEHA defendant, instructed the court, and no court has addressed the applicability of it to the recovery of expert witness fees under the FEHA. It noted that the court in *Holmes v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, 2010 Cal.App. LEXIS 1022, while not deciding the issue directly, offered its opinion that the *Christiansburg* standard should apply in FEHA cases because federal courts use it when considering whether to award expert witness fees to prevailing defendants in Title VII actions.

The court here agreed. "Like attorney's fees, expert fees should be treated differently than ordinary litigation costs because they can be expensive and unpredictable, and could chill plaintiffs from bringing meritorious actions." In support of its position, the court pointed out that the legislature, in drafting Section 12965(b), adopted the language of the Title VII section allowing for an award of attorney's fees and expert witness fees. "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes," it said, quoting from *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 2000 Cal. LEXIS 7498, 145 CPER 57.

The court concluded that Baker's claim was not frivolous because he made a prima facie case of retaliation. "Where some evidence of retaliation is presented, an action will not be deemed frivolous," it said, relying on *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1992 Cal.App. LEXIS 1474.

The court affirmed the trial court's grant of summary judgment and reversed its award of defendant's expert witness fees. (*Baker v. Mulholland Security and Patrol, Inc.* [2012] 204 Cal.App.4th 776, 2012 Cal.App. LEXIS 356.)

CPER Journal Online

Hospital's Failure to Accommodate Disabled Neonatal Nurse Did Not Violate ADA

A hospital's refusal to accommodate a neonatal nurse whose disability interfered with her ability to come to work on a regular basis was not a violation of the federal Americans with Disabilities Act, held the Ninth Circuit in *Samper v. Providence St. Vincent Medical Center*. The court found that regular attendance was an essential function of the nurse's position.

Monika Samper was a part-time neonatal intensive care unit nurse for 11 years. Since 2005, she has had fibromyalgia, a condition that interferes with sleep and causes chronic pain. During the entire period of her employment, the hospital's attendance policy allowed employees to take up to five unplanned absences during a rolling 12-month period. Each absence, no matter how long, counted as one absence. Unplanned absences for family medical leave, jury duty, bereavement leave, and other approved leaves were excluded from the five absence limit.

Starting as early as 2000, Samper regularly exceeded the five unplanned absences rule. After seven unplanned absences, she was informed that her attendance needed improvement. She continued to violate the policy and received more negative attendance reviews. In 2005, she met with her manager and a leave-of-absence specialist to address her attendance problems. At that meeting, the hospital agreed to allow her to call in when she was having a bad day and shift her work day to another day of the week, without having to find a replacement. However, she again exceeded the absence limit. In 2006, the hospital agreed not to schedule consecutively her two work days; yet she received a verbal warning at the end of that year for again exceeding the maximum. At that time, Samper requested that she be exempted from the attendance policy altogether.

During her employment, Samper had a number of other absences that did not count towards the unplanned absence limit, including several medical leaves lasting from two weeks to one month.

In early 2008, Samper was informed that her part-time position was being eliminated, and that she could transfer to another position or be terminated. She responded with inappropriate comments made in the presence of patients. In March 2008, she was issued a corrective action notice for seven unplanned absences over the preceding 12 months and another for her comments. After two additional unplanned absences, she was discharged.

Samper filed a lawsuit alleging that the hospital had failed to accommodate her disability in violation of the ADA. The trial court granted the hospital's summary judgment motion and dismissed the case. Samper appealed.

Attendance an Essential Function of the Position

The Ninth Circuit noted that Samper proved two of the three elements comprising a *prima facie* case for failure to accommodate: she is disabled within the meaning of the ADA, and she suffered an adverse employment action. However, she was unable to establish that she was able to perform the essential functions of the job with reasonable accommodation.

The hospital easily met its burden of producing evidence to show that regular attendance was essential to Samper's position, according to the court. The hospital provided the written job description, which required strict adherence to the attendance policy and specified that "attendance" and "punctuality" are essential functions. Samper's former supervisor explained in her declaration that NICU nurses receive specialized training, that it is very difficult to find replacements, especially for unplanned absences, and that understaffing compromises patient care.

"[A] majority of circuits have endorsed the proposition that in those jobs where performance requires attendance at the job, irregular attendance compromises essential job functions," said the court, citing a number of cases to prove the point. Those cases involved situations where the employee was required to work as part of a team, where face-to-face interaction with clients or other employees was necessary, or where the employee was required to work with equipment onsite.

"Samper's regular, predictable presence to perform specialized, lifesaving work in a hospital context was even more essential than in those cases," the court concluded. It emphasized that the at-risk patient population treated by a neonatal nurse "cries out for constant vigilance, team coordination and continuity."

Samper argued that the impact on staffing levels was the same for an employee's first absence as for his or her twentieth, citing *Humphrey v. Memorial Hospital*. (9th Cir. 2001) 239 F.3d 1128, 2001 U.S.App. LEXIS 2099, 147 CPER 52. In that case, the Ninth Circuit determined that job presence was not essential to job performance for a medical transcriptionist where other transcriptionists were allowed to work at home, noting that "regular and predictable attendance is not per se an essential function of all jobs."

The court had no trouble distinguishing the job at issue in *Humphrey* from the situation before it. "As the evidence easily establishes, Samper's engagement with patients is far more direct than that of a medical transcriptionist — although attendance may not be necessary to transcribe details regarding medical treatment, in the context of a neonatal nurse, it is necessary to provide that treatment in the first place. Not only is physical presence required in the NICU to provide critical care, the hospital needs to populate this difficult-to-staff unit with nurses who can guarantee some regularity in their attendance."

Reasonable Accommodation

The court had no patience with Samper's proposed reasonable accommodation, that is, that she be exempted from the attendance policy entirely. "An accommodation that would allow Samper to 'simply...miss work whenever she felt

she needed to and apparently for so long as she felt she needed to [a]s a matter of law...[is] not reasonable' on its face," it said, quoting from *Waggoner v. Olin Corp.* (7th Cir. 1999) 169 F.3d 481, 1999 U.S.App. LEXIS 3128. In essence, said the court, Samper was asking for a reasonable accommodation that would exempt her from an essential function of her job.

Samper argued that Providence's policy showed it can work around absences, and so additional absences by a single employee would hardly impact patient care. The court was not persuaded, finding that unplanned absences are a hardship to the NICU and that its policy represented the outside limit of what it could manage.

"Samper's performance is predicated on her attendance: reliable, dependable attendance," concluded the court. "An employer need not provide accommodations that compromise performance quality — to require a hospital to do so could, quite literally, be fatal." (*Samper v. Providence St. Vincent Medical Center* [9th Cir. 2012] 675 F.3d 1233, 2012 LEXIS 7278.)

(For a comprehensive overview of reasonable accommodation, see CPER's newest edition of the [*Pocket Guide to Disability Discrimination in the California Workplace*](#), just published in November 2011.)

CPER Journal Online

Court Finds Sufficient Evidence of Workplace Harassment Based on National Origin and Religion to Take to Trial

In *Rehmani v. Superior Court*, the Sixth District Court of Appeal determined that the plaintiff, a Muslim born in Pakistan, showed that triable issues exist as to his employer's liability for workplace harassment based on national origin and religion in violation of the Fair Employment and Housing Act. The Court of Appeal overturned the trial court's grant of summary adjudication in favor of the employer.

Mustafa Rehmani was a system test engineer for Ericsson, Inc. Rehmani complained to Ericsson's director of human resources that he had been harassed by Indian coworkers and that his salary was not commensurate with his years of experience. He also claimed that Indian employees were promoted while he was not. Rehmani was terminated shortly thereafter for sending a number of employees an email containing confidential salary information purportedly signed by a coworker and for disparaging the company to a customer.

After his termination, Rehmani filed a lawsuit against several coworkers and Ericsson, alleging harassment and discrimination based on national origin and religion, among other claims. Believing Rehmani had insufficient evidence to prove these claims at trial, the defendants moved for summary judgment. The trial court granted summary adjudication on the harassment claims and on the cause of action for discrimination based on religion. Rehmani appealed the dismissal of his harassment claims against Ericsson.

Hostile Work Environment Allegations

Under the FEHA, a plaintiff alleging prohibited workplace harassment must show that "the conduct of the alleged harassers was sufficiently severe or pervasive to create a hostile or abusive working environment," instructed the court. That determination depends on the totality of the circumstances. And, said the court, quoting from *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 2009 Cal. LEXIS 12374, [198 CPER 57](#), "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)."

In this case, Rehmani alleged that three Indian coworkers, Amit Patel, Aneel Chopra, and Ashit Ghevaria, were hostile toward him because he was Pakistani and Muslim. He claimed that, at first, they simply were unwilling to help him with his projects, but after the Pakistani terrorist attacks on Mumbai, India, the frequency and severity of their hostile acts increased. Patel told Rehmani that "Pakistan and Afghanistan needed to be bombed and wiped out because of the terrorist activity

there and because it was spreading to India.” Rehmani reported this remark to his manager, Afarin Daftari, but did not know if she had done anything about it. On another occasion, when Rehmani asked Patel for assistance, he replied, “You’re not going to blow me up, right?” When Rehmani reported this remark to Daftari, she told him to consider it a joke and not worry about it.

Choppa asked Rehmani, “What is going on in Pakistan? It is a messed up country and it is creating a mess in the region and in India. There is lots of terrorism. Why don’t people like you do something about it?” Rehmani also reported this incident to Daftari, who told him in a harsh tone that she did not want to hear his complaints and, once again, not to worry about it.

Rehmani contended that Ghevaria humiliated and harassed him in front of coworkers and, when Rehmani would ask him for help, would yell at him and say he had no time for him. He also alleged that Ghevaria was disrespectful to non-Indian engineers.

Rehmani called in sick on September 11, 2009. Another coworker, reportedly at Patel’s suggestion, sent an email to employees announcing that there were some Indian treats in the break room for Rehmani’s birthday, which actually is in May. While in the break room, Patel told some employees that Rehmani was out “celebrating 9/11 and planning terrorist attacks.” Ghevaria sent Rehmani an email wishing him happy birthday. Rehmani complained to Daftari and two other managers but was not aware of any response.

Ericsson argued that the interactions described by Rehmani were nothing but a few isolated incidents primarily about politics and were not so severe or pervasive as to constitute a hostile work environment. The Court of Appeal agreed that some of the reported comments could “be interpreted either as an angry response to political disputes in the Middle East or as hostility toward Rehmani based on his Pakistani background.” However, Patel’s remark about Rehmani blowing him up, his joke about Rehmani celebrating 9/11 and planning a terrorist attack, combined with alleged harassment of other non-Indian employees “could, taken together, convince a jury that this conduct was part of a hostile work environment,” said the court.

The court did not agree with Ericsson that Rehmani’s complaints about Ghevaria’s treatment of non-Indian engineers were immaterial because it did not specifically target Pakistanis or Muslims. “Rehmani’s underlying grievance is directed toward not only the Indian employees’ disparaging comments about Pakistanis, but also the expression of their general attitudes toward non-Indians, which created the hostile working environment that Rehmani claims seriously affected his work performance and well-being,” the court explained.

Daftari claimed that she did speak to Rehmani and the author of the 9/11 email about that incident and spoke to other managers to make sure they knew it was not professional or appropriate behavior. But she also asserted in a later interview that she had never heard any inappropriate comments.

Evidence Sufficient to Be Heard by a Jury

The court opined a jury might find that the alleged acts by the coworkers were not based on Rehmani's national origin or religion and that Daftari adequately responded to his complaints. "But considering these employees' conduct in the overall context of Rehmani's allegations of hostility by Indian employees toward non-Indians, we cannot determine as a matter of law that the evidence supplied by Ericsson establishes that Rehmani will not be able to convince a trier of fact that he experienced a hostile environment and that his reports of mistreatment were ignored by his supervisor," it said. The court acknowledged that Rehmani's case may be too weak to persuade a jury at trial, but "at this stage of the litigation we cannot say as a matter of law that the evidence he wishes to adduce is insufficient *in the aggregate* to establish a claim for harassment based on national origin." The court also commented that Rehmani's claim of harassment based on religion may be even weaker, "but considering the current international climate of tension between Muslims and non-Muslims and that factor's interaction with relations between various countries (including Pakistan and India), we cannot regard this cause of action as independent of the evidence related to national origin." (*Rehmani v. Superior Court of Santa Clara County* [2012] 204 Cal.App.4th 945, 2012 Cal.App. LEXIS 364.)

CPER Journal Online

Private Attorney Retained by City Entitled to Qualified Immunity

A unanimous United States Supreme Court has ruled that a private attorney who was temporarily retained to assist in a city's internal affairs investigation has the right to claim qualified immunity from suit brought under 42 USC Sec. 1983. In *Filarsky v. Delia*, the court concluded that the fact the plaintiff was not a permanent, full-time city employee was irrelevant to the determination of whether the defense was available to him.

Firefighter Suspected

The City of Rialto, California, suspected that Nicholas Delia, a firefighter out on leave for three weeks, was faking illness to do construction work on his home after he was observed purchasing building supplies at a home improvement store. The city hired a private attorney, Steve Filarsky, to conduct an administrative interview of Delia as part of a formal internal affairs investigation.

During the interview, Delia admitted purchasing the materials but denied that he had yet done any work on his home. Filarsky asked Delia if a fire department official could come to his home to see the unused materials. Delia refused. Filarsky then prepared an order, which was signed by the fire chief, requiring Delia to produce the materials for inspection. Immediately upon conclusion of the interview, two fire officials followed Delia to his home. Delia brought the unused materials out to his lawn for them to observe, and they left.

Delia filed a lawsuit under 42 USC Sec. 1983 against the city, the fire department, the two fire officials, and Filarsky, claiming that the order to produce the building materials violated his rights under the Fourth and Fourteenth Amendments. The trial court granted summary judgment to all the individual defendants, including Filarsky, finding that they were protected by qualified immunity. The Ninth Circuit Court of Appeals affirmed that decision for all defendants except Filarsky. It determined that Filarsky was not entitled to qualified immunity because he was not a city employee.

Section 1983 Assumed to Incorporate Common Law Immunity Principles

Chief Justice Roberts, who authored the opinion, began the court's analysis by looking to the common law as it existed in 1871 when Section 1983 was enacted. At that time, he said, government was smaller, had fewer responsibilities, and was primarily local. Local governments did not need, nor could they afford, professional employees, and private citizens were actively involved in government work.

Roberts gave a number of examples to illustrate 1871 American government. "It was not unusual, for example, to see the owner of the local general store step behind a window in his shop to don his postman's hat," he wrote. "Nor would it have been a

surprise to find, on a trip to the docks, the local ferryman collecting harbor fees as public wharf master.” At that time, said Roberts, private lawyers regularly conducted criminal prosecutions on behalf of the State,” including Abraham Lincoln himself.

“Given all this, it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities,” said Roberts. He noted, for example, that common law extended the protection of absolute immunity to those involved in adjudicative activities, including justices of the peace who were paid by the litigants, not the government. And, certain protections were also given by common law to those engaged in law enforcement activities, such as sheriffs, constables, and even private citizens who were members of a sheriff’s posse. “Indeed, examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as government itself,” he explained, citing cases in which a wharf master, notaries public, trustees of a public institution for the disabled, school board members, and others were given immunity.

Common-law principles of immunity are assumed to have been incorporated into the judicial system and should not be abrogated unless it is clear that the legislature intended to do so, Roberts explained, citing *Pulliam v. Allen* (1984) 466 U.S. 522, 1984 U.S. LEXIS 75. “Under this assumption, immunity under §1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis,” he concluded.

No Reason Not To

There is no reason not to apply this common law rule in Section 1983 actions, said Roberts. The rationale underlying immunity, that is to avoid “unwarranted timidity” in those who are performing public duties, “is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis.”

Government needs to be able to attract qualified individuals, and to do so it must be able to assure them that they will not be subject to damages suits for their efforts. This is particularly true in a case such as this, where a small government entity needs to bring in someone with specialized knowledge or expertise not possessed by any full-time employee. Because private individuals with these special qualifications do not rely on a government salary, without immunity they would engage in other work that would not expose them to liability for government actions, Roberts reasoned. And, where a private individual is working in tandem with public employees, if they are granted immunity and he is not, he could be held fully liable for all their actions, a significant deterrent to taking on government work.

Roberts also warned that determining immunity according to the nature of the individual’s relationship with the governmental entity raises significant “line drawing problems.” How would Filarsky be categorized if he worked part-time for the city and part-time in private practice? What if he worked full-time on only one project for only one year? If the right to immunity were to be decided using these kinds of considerations, prospective private contractors might have difficulty predicting when

their conduct might give rise to liability for damages. “An uncertain immunity is little better than no immunity at all,” cautioned Roberts.

Prior Cases Distinguished

Roberts had little patience for Delia’s claim that the court had come to different conclusions in other cases.

In *Wyatt v. Cole* (1992) 504 U.S. 158, 1992 U.S. LEXIS 2702, the court held that individuals who used a state replevin law to force a sheriff to seize disputed property were not entitled to qualified immunity. *Wyatt* had no bearing on this case, Roberts explained, because there the defendants were private individuals using the mechanisms of government to achieve their own ends, whereas this case involved an individual working for the government to achieve government objectives. “Put simply, *Wyatt* involved no government agents, no government interests, and no government need for immunity.”

In *Richardson v. McKnight* (1997) 521 U.S. 399, 1997 U.S. LEXIS 3866, the court determined that prison guards hired by a private company to work in a privately run facility were not entitled to qualified immunity because, under the circumstances, the significant private-market incentives would ensure that the guards would not be deterred from entering that line of work without immunity. The court intended its decision in *Richardson* to be a narrow one due to the particular characteristics of private prisons, said Roberts. It was not meant to deny claims of qualified immunity to all private individuals.

The court reversed the Court of Appeals’ judgment denying qualified immunity to Filarsky. (*Filarsky v. Delia* [4-17-12] ___ U.S. ___, 132 S.Ct. 1657, 2012 U.S. LEXIS 3105.)

CPER Journal Online

Agency Fee Payers Not Entitled to Vote on Contract Proposal

The Court of Appeal declined to overturn the Public Employment Relations Board's decision not to issue a complaint against the California Faculty Association for refusing to allow non-members to vote in a union election. Adhering to strict limits on its review of PERB's decisions not to issue complaints, the court held that the decision did not violate the professors' constitutional rights or rest on an erroneous interpretation of the Higher Education Employer-Employee Relations Act.

Vote on Furlough Proposal

Melanie Williams and Demosthenes Halcoussis, professors at California State University-Northridge, do not belong to CFA, which represents the bargaining unit of professors and lecturers. Instead, Williams and Halcoussis chose to pay agency or "fair share" fees to CFA. Agency fees are generally equal to dues reduced by the percentage of CFA's expenses attributable to political activities.

In January 2009, CSU proposed to CFA to furlough all faculty two days a month in order to avoid layoffs. CFA announced the proposal on its website and requested input from all bargaining unit members. The association notified faculty that they could post Twitter messages. At CSU-Northridge there was a two-hour meeting to discuss furloughs and layoffs. On its website, CFA advised that it would be conducting a vote among union members only, and encouraged faculty to become members.

In July 2009, CFA conducted the vote among members only. Williams wrote to CFA, asking to be allowed to vote and charging the union with discrimination against non-members in violation of its duty of fair representation. CFA refused her request but stated it would consider any views that she communicated to the union. After the vote, CFA and CSU reached an agreement on furloughs that was slightly better for faculty than CSU's proposal.

Williams and Halcoussis filed unfair practice charges with PERB, alleging that CFA's voting restrictions breached the union's duty of fair representation and violated the professors' constitutional rights to freedom of association. PERB's agent informed them that the board had decided in a prior decision that a union may exclude non-members from voting as long as all unit members have an opportunity to communicate their views to the union. The charges were dismissed. When the professors appealed to the board, PERB adopted the agent's dismissal letters. Williams and Halcoussis petitioned the court for an order forcing PERB to issue a complaint.

Limited Judicial Review

The Court of Appeal reiterated the limitations on its review of PERB's decision to dismiss a charge, quoting *International Assn. of Fire Fighters, Loc. 188 v. PERB* (2011) 51 Cal.4th 259, 2011 Cal. LEXIS 516, 201 CPER 29. In *Fire Fighters*, the Supreme Court set out three exceptions to the general rule that PERB's decision not to issue a complaint is not subject to judicial review. A court may review the board's dismissal of charges "to determine whether PERB's decision violates a constitutional right, exceeds a specific grant of authority, or is based on an erroneous statutory construction." A court may not overturn PERB's decision for ordinary error, however, such as issuing findings with insufficient evidentiary support.

No Constitutional Violation

The professors asserted that CFA's voting restrictions and PERB's refusal to issue a complaint violated constitutional rights to free speech, due process, equal protection, and freedom of assembly, in addition to the California constitutional right "to live with independence and privacy." In the appeal to the board, PERB had declined to consider the federal constitutional claim, stating that it had no authority to enforce the Constitution. Williams and Halcoussis argued that PERB had violated their constitutional rights to due process and equal protections by refusing to issue a complaint.

The Court of Appeal appeared to agree with the trial court's reasoning that the issue before it was PERB's decision, not CFA's action. It rejected the assertion that the professors could not sue CFA directly. Even though PERB has exclusive jurisdiction to decide whether an unfair practice has been committed, the employees could sue CFA directly on another legal theory, the court said. In the end, the court dismissed the constitutional challenge because the professors had not cited any authority under state or federal law that gave them a constitutional right to vote in a union election. It pointed to the U.S. Supreme Court's decision in *Lehnert v. Ferris Faculty Assn.* (1991) 500 U.S. 507, 1991 U.S. LEXIS 3017, 89 CPER 12, which held that free speech rights are not infringed merely because an employee disagrees with the union's positions in collective bargaining.

HEERA Interpretation Upheld

The court noted that it is not authorized to review PERB's decision unless the board made a clearly erroneous interpretation which might affect a large number of cases and impede an important legislative policy. Williams and Halcoussis asserted that HEERA prohibits discriminatory treatment, and that PERB should have found that they had alleged a prima facie case sufficient for a complaint, rather than dismissing their charges.

The court reviewed a line of PERB cases relating to internal union affairs. Unless the union's conduct has a "substantial impact on the relationship of unit members to their employer," it is not subject to the duty of fair representation, said the court, quoting *El Centro Elementary Teachers Assn. (Willis and Willis)* (1982) PERB Dec. No. 232, 55 CPER 67. In *El Centro* and more recent cases, PERB has concluded that a union may exclude non-members from voting on negotiations proposals and

contract ratification as long as the union gives them an opportunity to provide input and considers their views. As CFA's conduct met this standard, there was no breach of the duty of fair representation unless PERB's interpretation of HEERA is clearly erroneous, the court said.

Williams and Halcoussis argued that PERB's interpretation was improperly based on federal precedent under the National Labor Relations Act. They asserted that the NLRA is not as protective of employee rights as California law, and only forbids union conduct that restrains or coerces employees. The court did not find the federal courts' definition of the duty of fair representation substantively different than HEERA, which requires unions to represent employees "fairly and impartially."

While the professors acknowledged that some federal cases have stated the general rule that the duty of fair representation does not require unions to allow non-members to vote on contract ratification or bargaining proposals, they argued that their case was similar to the facts in *Branch 6000, National Assn. of Letter Carriers v. NLRB* (D.C. Cir. 1979) 595 F.2d 808, 1979 U.S.App. LEXIS 17479. The court in that case found that the duty of fair representation had been breached when the union "abdicated" its representational function by allowing a condition of employment to be decided by referendum, but excluding non-members from the vote.

In this case, the court found CFA's conduct to be very different. CFA offered several ways for non-members to provide their views. As found by PERB, the union was conducting an internal vote to determine whether faculty would support reopening the contract to implement a two-day furlough each month. CFA also continued negotiations after the vote. Under these facts, the court found that PERB's decision that CFA had fulfilled its duty of fair representation was not an erroneous interpretation of employee rights under HEERA.

The court also decided that the proper procedure for obtaining judicial review of this case was through traditional mandamus rather than administrative mandamus. (*Williams v. Public Employment Relations Board [California Faculty Assn.]* [2012] 204 Cal.App.4th 1119, 2012 Cal.App. LEXIS 394.)

CPER Journal Online

Lieutenant Sheriff Not a Policymaker, But Sheriff Entitled to Qualified Immunity for Demoting Him

In yet another case stemming from the scandal-ridden Orange County Sheriff's Department, the federal Ninth Circuit Court of Appeals found that a lieutenant was not a policymaker, and therefore was protected under the First Amendment from retaliation for campaigning against Sheriff Michael Carona. In *Hunt v. County of Orange*, the court found, however, that Carona reasonably could have believed the lieutenant was an unprotected policymaker when he demoted him. As a result, Carona was immune from suit under 42 USC Sec. 1983. Comparison of this case to another one involving Carona, *Bardzik v. County of Orange* (9th Cir. 2011) 635 F.3d 1138, 2011 U.S. App. LEXIS 6242, [CPER Online 202](#), illustrates the contours of the "policy-maker exception" to liability for civil rights violations.

Political Loyalty Not Essential

When Carona was running for his third term as sheriff, William Hunt, a lieutenant sheriff, decided to run against him. Hunt was serving as the chief of police services for the City of San Clemente. After Carona won, he demoted Hunt three ranks. Carona did not dispute that the demotion was based on Hunt's campaign statements about the sheriff.

The First Amendment generally protects public employees from retaliation for expressing political opinions or engaging in political activity. However, the general rule is subject to the policymaker exception, fashioned by the Supreme Court in *Elrod v. Burns* (1976) 427 U.S. 347, 1976 U.S. LEXIS 109, 30 CPER 45. In *Fazio v. City of San Francisco* (9th Cir. 1997) 125 F.3d 1328, 1997 U.S. App. LEXIS 27289, 127 CPER 27, the Ninth Circuit Court of Appeals set out nine factors it considers when determining whether an employee is a policymaker — "vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders." In *Hunt*, the court cautioned against mechanically applying the *Fazio* factors and losing sight of the purpose of the exception — to protect representative government from being undermined by obstructionists refusing to implement the policies of an elected official, policies that the electorate presumably favored.

The jury had found that Hunt did not make policy, either at San Clemente or departmentwide, and did not plan implementation of departmentwide policies. It determined that his superiors' trust and confidence was not necessary for him to adequately perform his duties. It also found that his campaign statements were not likely to, and did not cause, a disruption in the operation of the department.

Based on these findings, the court concluded that political considerations were not an appropriate job requirement for Hunt's position, and that consideration of the *Fazio* factors was not necessary to assess whether Hunt's position had any attributes of a policymaking position. To find otherwise, the court said, "could discourage some of the most capable and qualified people from running for higher office" and "have a chilling effect on whistleblowing." It held that Carona had neither sufficiently established a compelling interest in demoting Hunt nor met his burden to establish that Hunt was a policymaker.

Although it was not necessary to examine the *Fazio* factors, the court's examination of their application to Hunt and its comparison of Hunt and the lieutenant in *Bardzik* are instructive. The court did not agree with the lower court's analysis that the factors indicated Hunt was a policymaker. It explained that the jury's factual findings weighed against finding that Hunt had any authority to speak in the name of policymakers, as he needed prior approval. He had no influence on programs. And his responsibilities were not vague or broad. While Hunt had power to impose discipline and manage assignments of officers, he could not hire or promote them.

The court acknowledged that, as chief in San Clemente, Hunt interacted with the city council and therefore met the policymaker criteria of contact with elected officials, public perception of policymaker status, and responsiveness to partisan politics and leaders. However, the jury had found he seldom had any contact with the sheriff's department's political leadership.

By contrast, Bardzik was a lieutenant who had been appointed reserve division commander in charge of 600 officers, as opposed to Hunt's 56 subordinates. Bardzik reported directly to Carona and met with him several times a week. He had been instructed to "take command," clean up his division, and "get rid of dead wood." He created programs and departmentwide policy, such as recommending a decentralization of the division.

This fact-intensive inquiry of the *Fazio* factors led the court to conclude that Hunt did not meet the policymaker exception even though he, like Bardzik, was a lieutenant.

Hunt Not Clearly Protected

Despite the fact Hunt was entitled to the protections of the First Amendment, he recovered nothing. The court determined that it would not have been sufficiently clear to Carona that Hunt was not a policymaker at the time he demoted him. As a result, Carona had qualified immunity from damages for his wrongdoing.

The test for qualified immunity requires that the plaintiff set out facts showing that the official violated a statutory or constitutional right which was "clearly established" at the time of the allegedly wrongful act. Hunt's First Amendment right to be free from adverse action for campaigning against Carona was clearly established, as long as he was not a policymaker, the court found. But, Carona could have reasonably, although mistakenly, believed that the demotion was not unconstitutional because of Hunt's position as chief of police services, in which he implemented and affected policy at the San Clemente branch. The court affirmed the judgment in

favor of Carona. (*Hunt v. County of Orange* [2012] 672 F.3d 606, 2012 U.S.App. LEXIS 2815.)

CPER Journal Online

No Qualified Immunity for Supervisor Who Retaliated for Deposition Testimony

The assistant to the police chief could not escape liability for retaliating against a confidential administrative assistant for her deposition testimony in a civil rights suit under 42 USC Sec. 1983. It was clear at the time of the termination that deposition testimony in a civil rights lawsuit was protected by the First Amendment, the Ninth Circuit Court of Appeals decided in *Karl v. City of Mountlake Terrace*, so the supervisor was not immune from liability.

‘Get Rid of Her’

Martha Karl was a confidential administrative assistant in the police chief’s office when she was subpoenaed to testify at a deposition by a former police officer who was fired for criticizing the “war on drugs.” At the deposition, Karl testified that the chief and his assistant, Pete Caw, disapproved of the officer’s comments and that Caw had urged the police chief to terminate the officer. She also testified favorably about the officer’s reputation and unfavorably about the reputations of the chief and Caw. After the deposition, Caw was heard stating that Karl’s testimony had “hurt” the city, that she could no longer be trusted, and that the department should “get rid of her.”

A few months later, a new police chief was hired. Caw told the new chief that he had concerns about Karl’s work performance. At first, she was transferred to a job in which she reported directly to Caw and had to complete a new probationary period. After a few weeks, she was counseled about her performance. She was eventually terminated by the city manager.

Karl filed a civil rights suit against Caw and the city, alleging retaliation for exercising her First Amendment rights. During pretrial motions, Caw asked the court to dismiss the case against him on the basis of qualified immunity. The lower court ruled against him, and Caw appealed.

Testimony as a Citizen

A government official is not liable for monetary damages for violating civil rights unless the plaintiff can show the official violated a statutory or constitutional right that was “clearly established” at the time of the allegedly wrongful act. The court first analyzed whether Karl’s testimony was protected.

Although public employees have First Amendment rights, the courts use a five-step test to balance the state employer’s interest in regulating employee speech against employee free speech rights. An employee’s speech is protected if it is (1) on a matter of public concern, (2) spoken as a private citizen rather than as part of her duties as a public employee, and (3) a substantial or motivating cause for an

adverse action taken against her. If the first three criteria are met, the official can avoid liability only by showing that either (4) the state's legitimate interests do not outweigh the employee's First Amendment rights, or (5) the employer would have taken the action even if the protected speech had not occurred.

The court found Karl's speech was on a matter of public concern. It was offered in a lawsuit based on First Amendment rights involving speech about governmental wrongdoing and performance. It made no difference that Karl's own speech was not on matters of public concern or whether it affected the result of the litigation, the court explained, because the lawsuit was about a matter of public concern. The court dismissed Caw's assertion that only trial testimony should be protected because depositions are usually held in private rather than in open court. Whether in a deposition or open court, the testimony may help to expose wrongdoing or governmental performance issues, the court observed. And deposition testimony may become public in a later trial, it pointed out. Protecting testimony only after it becomes public would be "unworkable and unjustified," the court said.

Nor did the court accept Caw's argument that Karl was testifying as part of her job duties. Karl testified that her duties did not include making reports about police misconduct or the city's internal investigation processes. The fact that she gained the knowledge to which she testified while on the job and that she was paid her salary during her deposition did not convince the court that Karl testified in the course of her official duties. "The First Amendment protects some expressions related to the speaker's job," the court advised, quoting from *Garcetti v. Ceballos* (2006) 547 U.S. 410, 2006 U.S. LEXIS 4341, [179 CPER 21](#). The *Garcetti* court explained that payment for a report or advice may indicate that the employer commissioned or created the speech and should have the right to control it. But, payment of Karl's salary during her testimony did not make the testimony work product the city was entitled to control, the court determined; it was the product of a subpoena.

The court found Caw had a retaliatory motive when he informed the new chief that Karl's work performance as an administrative assistant was deficient, transferred her under his supervision, imposed unreasonable performance standards, and gave the chief unfavorable reports of her conduct and performance. Caw argued that he merely forwarded his objective observations of her work performance, which was a non-retaliatory basis for Karl's termination. He contended that the new chief conducted an independent examination into Karl's performance, which would have "sever[ed] the causal link between Caw's retaliatory motive and Karl's termination." However, the court pointed to the trial court's determination that Karl had produced evidence that the city manager terminated her based entirely on the chief's recommendation, which stemmed from information the chief received from Caw. Therefore, the appellate court upheld the lower court's ruling that Caw violated Karl's First Amendment rights.

Clearly Established Right

Under the doctrine of qualified immunity, a public official may escape liability for a civil rights violation if he could not reasonably have known that his conduct was

wrongful. The court explained that a ruling in a similar case is not necessary to defeat qualified immunity.

The court pointed to the holding in *Alpha Energy Savers, Inc. v. Hansen* (9th Cir. 2004) 381 F.3d 917, 2004 U.S.App. LEXIS 18238, that testimony which tends to expose governmental misconduct or testimony in an administrative or judicial proceeding which involves a matter of public concern is protected. After that decision, Caw should have been on notice that a First Amendment civil rights lawsuit was a matter of public concern and that retaliation for subpoenaed testimony in such a case was wrongful. He also should have known that Karl's testimony was given as a private citizen, and not as part of her public employee duties, and therefore was protected. And, after *Gilbrook v. City of Westminster* (1999) 177 F.3d 839, 1999 U.S. App. LEXIS 9764, 136 CPER 62, he could not reasonably have believed that he could hide behind his supervisor's non-retaliatory recommendation for termination, since there would have been no such recommendation if he had not set it in motion for retaliatory reasons.

The court upheld the trial court's denial of Caw's motion for summary judgment on the grounds of qualified immunity. (*Karl v. City of Mountlake Terrace* [9th Cir. 2012] 678 F.3d 1062 , 2012 U.S. App. LEXIS 9311.)

CPER Journal Online

Public Agency Not Required to Reimburse Employee for Attorney's Fees Incurred During Investigation

The law that requires public entities to pay for the defense of an employee who incurs legal costs for conduct in the course and scope of employment does not apply to costs of an attorney hired to assist with prelitigation investigations of the employee, held the Court of Appeal in *Thornton v. California Unemployment Insurance Appeals Board*. The court also found Labor Code Sec. 2802 not applicable to public entities.

Conflict of Interest?

Cynthia Thornton was appointed to the California Unemployment Insurance Appeals Board in 2000. During her term, she passed the examination and became eligible for a job as an administrative law judge with the agency. Toward the end of her term, she was offered an ALJ position, which she accepted after confirming with the agency's executive director and chief counsel that it was proper. After she left the board, it ratified the decision to hire her.

Three years later, the state auditor discovered her hiring. It referred the matter to the Sacramento County district attorney and the attorney general for investigation whether her hiring violated state conflict of interest laws. As a result, Thornton hired an attorney to assist her during the investigations.

Thornton requested the board provide her with a defense under Government Code Sec. 995, but the board refused. After the investigation was concluded and Thornton was told there would be no civil or criminal case, she filed a government claim for reimbursement of her attorney's fees. She then sued the board, claiming she was entitled to reimbursement under Gov. Code Sec. 996.4 and Labor Code Sec. 2802. The trial court dismissed her complaint because the investigations were not civil actions or proceedings to which the right to reimbursement applies. Thornton appealed.

Formal Court Proceedings Required

Section 996.4 of the Government Code, a provision of the Government Claims Act, entitles an employee to reimbursement from his or her public employer if the agency refused to pay for the "defense against a civil action or proceeding brought against him" and the employee retained counsel for expenses incurred "in defending the action or proceeding" that rises out of an act of the employee in the scope of employment. Thornton contended that the investigations constituted "civil actions or proceedings." The appellate court disagreed.

After consulting several sources, including the Code of Civil Procedure, the court concluded that the phrase "civil action" includes only legal proceedings that take

place in court. It acknowledged that the term “proceeding” has a broader meaning than “action,” but found that the phrase “civil proceeding” referred to the steps of a civil action, as well as judicial proceedings seeking a remedy for a civil right. It held that Section 996.4 limits the right to reimbursement of defense costs to “the defense of formal proceedings of a civil nature against the employee in a court.”

To buttress this conclusion, the court cited other sections of the Government Claims Act, such as the provision that clarifies that cross-complaints and counterclaims are civil actions or proceedings. It also pointed to law interpreting insurance company policies that require an insurer to defend against suits against the insured, where the courts have limited the right to a defense for investigations to those occurring during the lawsuit. The court dismissed as irrelevant Thornton’s citation to cases that interpreted statutes referring to “administrative proceedings” or “official proceedings.”

Thornton complained that the narrow reading of the term “civil action or proceeding” would be unfair, since only those who are more culpable of wrongdoing would be entitled to a defense, not those who cooperated with investigations as she did. The court, however, pointed out that its task was to interpret the laws, not rewrite them. Since courts in prior cases had found legislative intent to severely restrict potential government liability to situations meeting specific criteria, the court was not free to construe the statute to address unfairness. Because Thornton did not meet the requirements for entitlement to defense costs, the court denied her claim under Section 996.4.

Labor Code Not Applicable

Section 2802 of the Labor Code requires an employer to indemnify an employee for expenditures incurred as a result of performing her duties. Courts have held this language requires the employer to indemnify or defend an employee who is sued by third parties for acts within the course and scope of employment.

While the language of the Labor Code is not as restrictive as the provisions of the Government Code, Thornton did not prevail on this claim either. First, said the court, case law has restricted the application of Section 2802 to defense of lawsuits filed by third parties. Since Thornton was never sued, the provision did not apply.

More important to the court was its conclusion that, even if there was a conflict between the two sections, the Government Code provision would prevail. A rule of statutory construction provides that, when two statutes conflict, the more specific statute controls. Since Section 996.4 is specific to public entities, it would prevail over Section 2802 even if the Labor Code required employers to reimburse employees for costs incurred during investigations, the court said.

Thornton contended there was no conflict, citing Government Code Sec. 996.6, which indicates that rights under the act are in addition to those conferred by “any other enactment providing for his defense.” The court, however, pointed to *Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 1994 Cal.App. LEXIS 787, 108 CPER 30, in which the court explained that the

Government Claims Act was enacted by repealing all the prior statutes that related to defense of public entities and employees and replacing them with comprehensive new provisions on government immunity and liability; those provisions would be rendered superfluous if Labor Code Sec. 2802, which preexisted the act, was found to apply to public entities. The reference to other “enactments,” concluded the *Los Angeles* court, was to statutes to be enacted in the future relating to public entities or their employees.

The court denied Thornton’s claim for reimbursement. (*Thornton v. California Unemployment Insurance Appeals Board* [2012] 204 Cal.App.4th 1403, 2012 Cal.App. LEXIS 432.)

CPER Journal Online

Fear of Ex-Husband Not Sufficient to Excuse Illegal Possession of Gun at Work

In a case requiring interpretation of gun laws, arbitrator Robert Hirsch upheld the termination of a public safety dispatcher who carried a gun at work without a concealed weapon permit. However, the City of Dos Palos was required to pay a month's salary for violating the appellant's *Skelly* hearing rights.

The appellant was hired in 2009. She had been employed only a short time when she filed for a divorce from her husband, a deputy sheriff in a neighboring county. She began bringing a handgun to work because her husband had harassed and threatened her.

In March 2011, two city police officers saw the gun on her desk in the police dispatch center. They discovered it was loaded and that appellant did not have a concealed weapon permit in Merced County where she lived and worked. She admitted at a pre-termination interview that she knew she needed a permit to carry a loaded gun. In fact, she had a permit in another county.

The city terminated her for violating the penal statutes that prohibit carrying a firearm without a permit and carrying a loaded weapon in a public place, as well as various department policies. As an independent basis for her termination, the city charged that she lied during her pre-termination interview and on other occasions when she claimed that the police chief had given her permission to bring the gun to work.

At the hearing, the appellant argued that she had been denied her pre-termination hearing rights when the police chief refused to listen to her explanation that she was afraid of her husband. She contended that she qualified for a legal exception to the prohibition against carrying a concealed weapon for individuals in "grave danger." She also claimed she never had the gun in a public place, as defined by the Penal Code.

Skelly Violation

The police chief admitted that he had cut off the appellant's explanation at the *Skelly* hearing that she carried a gun because she was afraid of her husband. He thought her concerns were beyond the scope of the hearing and believed the purpose of the hearing was to "make a pleading" to him, not to introduce new evidence. He upheld the recommendation to terminate the appellant, and her discharge was effective that day. The city pointed out that the appellant was given a full hearing by the city manager several weeks later, and argued that hearing cured any deficiencies of the *Skelly* hearing.

Arbitrator Hirsch rejected the city's claim that giving the appellant the right to respond to the charges was sufficient. While an employee's due process rights at a

pre-termination hearing are less than her rights at a post-termination hearing, “an employee must be given a fair and reasonable opportunity to respond, even and particularly when ‘new evidence’ is to be brought to the attention of the Employer,” he explained. Unless the appellant was raising issues that were totally irrelevant, the chief should have listened to her reasons for bringing a gun to work, whether they were sufficient to negate the charges or not, Hirsch wrote.

The arbitrator found, however, that the city manager met with the appellant about a month later and did not preclude her from raising any defenses to the charges. Because she received due process at that time, Hirsch limited her back pay for the *Skelly* violation to that one-month period.

Legal Exceptions Not Met

From the beginning, the appellant insisted that the chief had given her permission to bring the gun to work, and had agreed to help her obtain a concealed weapon permit. The chief, however, disputed this claim. He testified he only had allowed her to bring the gun to work for a one-day handgun safety training course that she needed for her permit.

The appellant had started the application process for a permit in Merced County but had not completed it. The arbitrator found, however, that she had told several coworkers that she had a permit to carry a firearm.

The appellant claimed that she met the exception to the law against carrying a concealed weapon because she believed she was in grave danger. The city countered, however, that the exception is applicable only when the endangered person has sought a restraining order. The appellant explained that she had been reluctant to seek a restraining order because an order would cause her husband to lose his right to carry a firearm, which would lead to his termination. She predicted that if he had no job, he would not pay her child support.

Arbitrator Hirsch believed that the appellant feared her husband and sympathized with her plight. However, the appellant’s failure to comply with the legal options justified her termination.

The arbitrator interpreted Penal Code Sec. 12025 to require a restraining order before the “grave danger” exception to the prohibition against carrying a concealed weapon without a permit would apply. He found no basis in the record for ruling that she did not need to meet the restraining order prerequisite.

Arbitrator Hirsch also found that the appellant violated the law when she carried a loaded firearm in a public place, since she had it at work. He dismissed her argument that she was not in a public place at work. The dispatch was public property and the building was open to the public, he pointed out. It was not a place of business that she controlled, so she did not meet an exception for carrying a weapon at one’s place of business as a grocery store owner might.

Based on evidence that the appellant brought a loaded handgun to work for months

without a concealed weapon permit, the arbitrator upheld the discharge. He awarded her one month of back wages and benefits to remedy the *Skelly* violation. (*City of Dos Palos and Appellant; Representatives: Thomas Perez, for the appellant; Jesse Maddox, Liebert Cassidy Whitmore, for the city. Arbitrator: Robert M. Hirsch, CSMCS No. ARB-11-0031.*)

Binding Grievance Arbitration

CPER Journal Online

Resources

IRLE Library News

The [Institute for Research on Labor and Employment Library](#) will be making regular contributions to CPER's Resources page. The goal is to introduce readers to a variety of new and interesting sources of information in the labor and employment field.

The IRLE Library serves the faculty, staff and students of UC Berkeley, and also welcomes the general public. In 2006, the Institute dedicated a new Library Commons, which includes comfortable seating, an information gateway, and space for visiting scholars. Founded in 1945 by Clark Kerr, IRLE's first director, the library collects print and digital information resources that focus broadly on industrial relations, labor law, and labor economics. The staff offer research support that ranges from reference requests to in-depth research consultations.

This inaugural column alerts readers to the [California Labor Federation, AFL-CIO: Proceedings and Papers](#). It is a digital repository that includes a complete run of the Federation's proceedings, dating back to the 1890s. It also includes legislative "score cards" and the California AFL-CIO News. The repository was funded by the UC Labor and Employment Research Fund, and is freely available to all.

History of NCLB

[An Education in Politics: The Origins and Evolution of No Child Left Behind](#), by Jesse H. Rhodes (2012) Cornell University Press

Since the early 1990s, the federal role in education — exemplified by the controversial No Child Left Behind Act — has expanded dramatically. Yet states and localities have retained a central role in education policy, leading to a growing struggle for control over the direction of the nation's schools. In *An Education in Politics*, Jesse Rhodes explains the uneven development of federal involvement in education. While supporters of expanded federal involvement enjoyed some success in bringing new ideas to the federal policy agenda, Rhodes argues, they also encountered stiff resistance from proponents of local control. Built atop existing decentralized policies, new federal reforms raised difficult questions about which level of government bore ultimate responsibility for improving schools.

Rhodes's argument focuses on the role played by civil rights activists, business leaders, and education experts in promoting the reforms that would be enacted with federal policies such as NCLB. It also underscores the constraints on federal involvement imposed by existing education policies, hostile interest groups, and,

above all, the nation's federal system. Indeed, the federal system, which left specific policy formation and implementation to the states and localities, repeatedly frustrated efforts to effect changes: national reforms lost their force as policies passed through iterations at the state, county, and municipal levels. Ironically, state and local resistance only encouraged civil rights activists, business leaders, and their political allies to advocate even more stringent reforms that imposed heavier burdens on state and local governments. Through it all, the nation's education system made only incremental steps toward the goal of providing a quality education for every child.

Monthly Report on Black Employment Statistics

In 2010, the UC Labor Center launched a series of reports on Black workers in the labor market. The primary report in this series is the monthly [Data Brief: Black Employment and Unemployment](#). The report spotlights the data on Black unemployment rates and employment-population ratios and is released the same day the Bureau of Labor Statistics announces the results of its monthly Current Population Survey. The Data Brief conveniently captures information on Black workers that is not easily found elsewhere. Other reports in the series include a report on Black workers in the public sector and the state of Black workers prior to the Great Recession.

View the [reports](#) on the Labor Center website or [subscribe](#) to the series. For more information, contact [Steven Pitts](#), 510-643-6815.

PSOPBRA Guide

[Pocket Guide to the Public Safety Officers Procedural Bill of Rights Act](#), 14th edition (2012) by Cecil Marr and Diane Marchant; revised by Dieter Dammeier (Lackie, Dammeier and McGill) and Richard Kreisler (Liebert Cassidy Whitmore); CPER.

CPER's bestseller is known statewide as the definitive guide to the rights and obligations established by the act covering peace officer discipline. Specific topics covered by the new edition include:

- Latest amendment requiring notice of level of discipline within statute of limitations
- Privacy protections using personally owned communication devices
- Changes to appeal rights from demotions while on probation
- Appeal rights before being put on unpaid leave when facing criminal charges
- Circumstances under which the Act's protections can be waived
- Appeal rights when placed on unpaid medical leave
- Use of police officer personnel records in DMV hearings
- Unconstitutionality of Penal Code section prohibiting false complaints against officers

- Applicability of the Act once employment is terminated

The Pocket Guide offers a clear explanation of the protections relating to investigations, interrogations, self-incrimination, privacy, polygraph exams, searches, personnel files, administrative appeals, and more. The Guide also includes the text of act and summaries of all important cases, a table of cases, glossary, and index of terms.

FMLA Guide

[Pocket Guide to the Family and Medical Leave Acts](#), 14th edition (2012) by Peter Brown; CPER.

This “user friendly” guide to the federal Family and Medical Leave Act of 1993 and the California Family Rights Act of 1993 spells out who is eligible for leave, increments in which leave can be used, various methods of calculating leave entitlements, record keeping and notice requirements, and enforcement. The rights and responsibilities of both employers and employees under each of the statutes are discussed. The reader is given an understandable summary of the acts’ provisions that emphasizes the differences between the two laws and advises which provision to follow.

The fourth edition includes: updates based on 2012 California legislation requiring employers to provide health benefits during pregnancy disability leave; summaries of new FMLA and CFRA cases; and the 2010 amendments to FMLA-qualifying exigency and military caregiver leave.

This is a clear and concise reference for employees who are eligible for benefits, union officials questioned about employee entitlements, and labor relations managers charged with implementing the act. Use it as a training tool or for resolving practical, day-to-day questions as they emerge.

Education Reform

[Education Reform and the Limits of Policy: Lessons from Michigan](#), by Michael F. Addonizio and C. Philip Kearney (2012) Upjohn Institute.

During the last 20 years, the United States has experienced more attempts at education reform than at any other time in its history. Efforts to reform financing, the assessment of student performance, accountability and equity, and school choice have all been implemented—with varying levels of success.

Addonizio and Kearney use Michigan as a laboratory to examine a set of commonly implemented reforms in an attempt to answer three key questions: (1) What is the nature of these reforms? (2) What do they hope to accomplish? and (3) How successful have they been?

The authors begin by examining one of the most contentious issues facing education — money and schools. Does more money make schools better? They review existing evidence on the link between money and schools and then examine financing reforms resulting from the passage in 1994 of Michigan's Proposal A. Next, they examine accountability systems for Michigan's schools and whether they meet the federal directives of No Child Left Behind. Related to the issue of accountability are the key assessment programs—i.e., the Michigan Educational Assessment Program (MEAP) and the National Assessment of Educational Progress (NAEP)—that are used to measure academic achievement and how Michigan students' performance ranks compared to students in other states.

Addonizio and Kearney also address the growing trend of school choice, in terms of the options parents have to select charter schools for their children to attend or to send them out-of-district via a "school of choice" program. Charters are a fast-growing movement that, as the authors point out, present "somewhat mixed hopes for the future." They also identify the benefits and potential pitfalls of the school of choice program.

Finally, possibly no other school district in the country has suffered the decline that the Detroit Public Schools have. The authors discuss the many reasons for the district's problems, efforts—including state oversight—to right the ship, and where they see the district headed as it adapts to the splintering of the city's neighborhoods and the loss of population to the suburbs.

The book concludes with a discussion of what has been gleaned from the successes and failures of various reform efforts and, based on the authors' observations and analysis, their thoughts and ideas for the future of education reform.

CPER Journal Online

Public Sector Arbitration Log

ATTENTION ATTORNEYS AND UNION REPS

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

CPER is grateful for the assistance of the [State Mediation and Conciliation Service](#), which provided several of the awards summarized in this issue.

- Make-whole back pay
- Make-whole overtime pay
- Pay differential
- Make-whole health and pension benefits
- Make-whole holiday, sick leave, and vacation pay
- Interest on back pay
- Reconsideration
- Attorney's fees

County of San Joaquin and Grievant (2-24-12; 35 pp; 4-2-12 addendum, 5 pp). *Representatives:* Kimberly D. Johnson, deputy county counsel, for the employer; Kenneth Hedberg (Hakeem, Ellis & Morengo) for grievant. *Arbitrator:* Bonnie G. Bogue.

Remedy dispute: The grievant was reinstated pursuant to the award issued December 2009, but disputes the employer's calculation of the make-whole remedy, rejecting offer of payment. The parties invoked the arbitrator's retained jurisdiction, requesting a supplemental remedy ruling.

(1) Back pay calculation

Grievant's position: Make-whole pay should be based on the grievant's average earnings for the three years prior to her termination.

Employer's position: Back pay should be based on the salary schedule in effect during the period of separation, offset by earnings from alternative employment.

Arbitrator's ruling: Back pay must be based on the salary schedule for assistant lab manager in effect during her separation, offset by earnings from other

employment. Her “average” earnings in prior years included out-of-class premium for acting as lab manager, to which she is not entitled because the lab manager position was filled before her termination from the assistant manager position. Also her prior earnings included overtime, a separate element of the make-whole remedy.

(2) Overtime pay

Grievant’s position: The arbitrator’s interim ruling rejected the employer’s contention that overtime cannot be included in the make-whole remedy. The grievant is entitled to overtime pay, based on the average overtime she earned during the three years prior to termination. She would have continued working the same overtime because she had technical expertise to cover for ongoing lab tech shortages, expertise lacked by her replacement.

Employer’s position: The grievant is entitled only to the amount of overtime worked by her replacement as assistant manager. Previously, overtime was required when the grievant filled two positions, assistant manager plus acting lab manager, but the acting position ended prior to termination when the lab manager position was filled. Current policy directs supervisors, not the assistant manager, to work overtime required by lab tech shortages.

Arbitrator’s ruling: The grievant is entitled to overtime pay that is not speculative and is based on evidence of overtime she would have worked but for her termination. She is not entitled to the average of overtime she worked in prior years because she would no longer hold two managerial positions. She is entitled to more overtime pay than was paid to her replacement, since he lacked expertise to cover ongoing lab tech shortages that she would have continued to cover. She is entitled to the amount of overtime worked by her replacement, plus overtime to cover lab tech shortages, based on payroll records of increased overtime worked by supervisors who covered for all lab tech shortages in her absence.

(3) License differential

Grievant’s position: The grievant is entitled to a pay differential, above salary, for her lab scientist license. The new lab manager, a position she held on an acting basis for seven years, receives that differential. The grievant is entitled to receive the differential from the date the new lab manager was hired and began receiving it prior to grievant’s termination, and continuing to the present.

Employer’s position: The grievant is not entitled to the license differential. The new deputy director, who also fills the lab manager position, received that stipend in a negotiated salary package. The grievant was never deputy director, and was no longer acting lab manager at the time of her termination.

Arbitrator’s ruling: The grievant’s entitlement to the license differential is beyond the scope of the make-whole remedy for her improper termination because she was not earning the differential when terminated. The replacement assistant manager did not receive the differential. The differential was only granted to the new deputy

director, a position the grievant never held.

(4) Health care benefits

Employer's position: To make the grievant whole, her health benefits were restored to the date of termination in 2007. She could submit claims for medical expenses incurred during her separation, and family members did submit two claims. Her employee contribution for benefits that she would have paid in the 31 months of separation — \$13,900 — must be deducted from the back pay award.

Grievant's position: The grievant should be paid \$500 a month for the employer's share of insurance benefits she had to obtain during separation. The employer's retroactive restoration of benefits is illusory as she did not receive those benefits during her separation. The grievant cannot be required to pay the employer, which is self-insured, her share of premiums for health benefits that she did not receive.

Arbitrator's ruling: The employer cannot deduct from her back pay award the amount of the employee contribution for health benefits because she did not in fact have those benefits during her 31 months of separation. Retroactive restoration created an illusory benefit that did not make her whole. The grievant is to be reimbursed for premium costs incurred for health benefits obtained from her interim employer that exceeded what she would have paid as her share of the employer's benefit plan. She is to be reimbursed for any documented copays for specific medical services that were greater than the copays she would have had under the employer's plans.

(5) Retirement benefits

Employer's position: The retirement statute requires employees to participate in the employer's pension program. The grievant was restored as a plan participant retroactively to the date of termination, so she incurred no loss of pension credit. Her required contributions to the plan for the period of separation must be deducted from her make-whole back pay award.

Grievant's position: The award ordered the employer to make the grievant whole, not that she must contribute to the employer's cost of making her whole. Requiring her to contribute would allow the employer to benefit from its misdeeds.

Arbitrator's ruling: To make her whole, the grievant must be restored to the pension plan without loss of accrual caused by improper termination. Requiring her to pay her contribution restores her to the same position she would have been in had she not been terminated. Her contribution to the pension plan is required by law and does not benefit the employer.

(6) Holiday, sick leave, and vacation pay

Grievant's position: The grievant did not receive 16 paid holidays each calendar year and must be paid the equivalent daily wage for each holiday.

Employer's position: The employer's calculation of back wages included pay for

every holiday during the period of separation, and also assumed the grievant would have taken no vacation or sick leave had she remained employed.

Arbitrator's ruling: The employer's back pay calculations properly compensate for holidays, sick leave, and vacation days.

(7) Interest on back pay

Grievant's position: The 2009 award included interest on back pay at the "legal rate." The statutory rate is 10 percent per annum.

Employer's position: Under *California Federal Savings v. Los Angeles* (1995) 11 Cal.4th 342, 1995 Cal. LEXIS 5832, public employers are exempt from the statutory rate of 10 percent, so the constitutional rate of 7 percent applies. The employer should not be liable for interest for the entire period between reinstatement in January 2010 and the date the remedy is implemented, because of inexcusable delays by the grievant.

Arbitrator's ruling: The applicable legal interest rate is 7 percent. Accrual of interest on the monetary remedy is tolled for specified periods of time due to the grievant's lengthy and unexplained delays during the more than two years of communications over the remedy dispute, whereas the employer offered payment and responded promptly.

(8) Reconsideration

Grievant's position: The grievant requests the arbitrator to reconsider the ruling that tolled the accrual of interest for specific periods of time.

Arbitrator's ruling: Absent mutual consent of the parties, the arbitrator cannot reconsider any part of the remedy ruling, which was final and binding. The employer's request for clarification on the health benefit remedy, which the arbitrator granted, was not a request for reconsideration but rather a request for specificity to enable accurate calculation of the make-whole remedy, a request in which the grievant joined.

(9) Attorney's fees

Grievant's position: The employer should pay the grievant's attorney's fees and costs of appealing her wrongful termination.

Employer's position: The grievant is not entitled to attorney's fees or costs under the civil service rules, which state that the parties will equally share costs of arbitration. Since the grievant elected representation by private counsel rather than by the union, she is responsible for the cost of that attorney.

Arbitrator's ruling: Attorney's fees and costs are denied. Under the MOU and civil service rules, the grievant could appeal either to the civil service commission or to arbitration. She chose arbitration, incurring for both parties the cost of the arbitrator. She chose to be represented by private counsel, rather than by the union.

representing her bargaining unit, thereby incurring attorney's fees. The employer cannot be assessed for the grievant's costs because the civil service rules, incorporated by the MOU, state that arbitration costs, which include arbitrator fees, are borne equally by the parties. That rule reflects the established labor arbitration practice wherein the parties share mutual costs but each party pays the cost of presenting its own case, including its attorney's fees. The attorney's fee rule is stated in the arbitration statute, CCP Sec. 1242.2.

(Binding Grievance Arbitration)

- Teacher dress code
- Religious discrimination
- Disability discrimination
- Retaliation for union activity
- Just cause
- Framing the "issue"

Plumas Co. Office of Education/Plumas Unified School Dist. and Plumas County Teachers Assn., CTA (1-25-12; 42 pp.) *Representatives:* Michelle Cannon (Kronick, Moskovitz, Tiedeman and Girard) for the employer; Curtis Lyon (California Teachers Assn. Regional Uniserv) for the association. *Arbitrator:* Elinor S. Nelson (AAA Case No. 74-390-00226-11).

Issue: Did the district violate the agreement when, during an in-service training, the grievant was directed to remove his cap that bore religious symbols and his dark glasses?

Association's position: (1) The district violated and misapplied the contract when administrators directed the grievant to remove his prescription eyeglasses and cap with religious symbols during a staff training, arbitrarily enforcing a student dress policy, one day prior to his presentation of grievances and discrimination complaints to the school board.

(2) The district's action was retaliation against the grievant for filing a grievance that resulted in removal of a letter from his personnel file, for additional grievances protesting his removal from a coaching position, and for attempting to present complaints to the school board alleging discrimination based on race, religion, medical disability, national origin, and ancestry.

(3) The district failed to properly investigate the grievance, hold a contractually required grievance conference, initiate a good faith interactive process upon claims of religious and disability discrimination, and provide reasonable accommodation for the grievant.

(4) The district treated the grievant disparately, for only he was asked to remove his prescription lenses. A photo of the staff training shows other employees in the presence of administrators wearing baseball caps, glasses, shorts, and shoes

without heels and straps, which violated the student dress code policy, but only the grievant was disciplined.

(5) Application of the student dress code policy to staff was not an established past practice. The district violated the contract by attempting to enforce a the code when there was no written agreement between the parties.

(6) The administrator did not have just cause to issue an oral warning to the grievant that his prescription lenses and head cover with religious symbols violated the dress code, as there was no evidence of any “expected” professional protocol, and grievant was not adequately warned of the district’s application of a staff dress code policy and the consequences for noncompliance. The staff dress code and order to the grievant were not related to the efficient and safe operation of the district.

(7) The district violated the contract by discriminating on the basis of race, national origin, and religion, thereby violating state and federal laws. The district was aware the grievant is a Native American who firmly holds sincere beliefs, and is certified and recognized by the Shawnee Nation as a spiritual advisor and chief responsible for various tribal functions. There was no evidence that the grievant’s wearing a head cover with religious symbols created an undue hardship for the district, that the district provided reasonable accommodation to the grievant’s wearing head cover with religious symbols, or that it entered into an interactive process to learn about his religious beliefs.

(8) The district violated the contract by discriminating on the basis of physical disability, thereby violating state and federal laws. It failed to investigate the grievant’s need for prescription lenses and, after receiving a physician’s verification of this need, made no good faith effort to enter into the interactive process to find a reasonable accommodation, as required by state law.

(9) The association requests that the district be ordered to (a) remove the warning memo and any references to a dress code from all district files; (b) compensate the grievant for two days of sick leave when he was ill because of the harassment and discrimination; (c) issue a written apology; (d) investigate and take appropriate action, including discipline, against any district employee who engages in unlawful discrimination; (e) require administrators to attend additional training on discrimination; (f) cease discriminating against the grievant because of disability, protected activity, race, religion, and national ancestry; (g) cease retaliating against the grievant or disciplining him without just cause; (h) cease discriminating against the grievant and other employees by applying a student dress code; (i) cease interfering with the grievant and other employees in the exercise of their rights to participate in the lawful activities of their employee organization and interfering with the association’s right to represent its members.

Employer’s position: (1) The district properly directed the grievant, as well as other teachers attending the training, to remove their hats, as teachers are expected, to follow the student dress code policy, which prohibits wearing hats indoors. Teachers are expected to have a professional appearance and are evaluated against this expectation.

(2) The grievant was asked to remove his glasses because it appeared he was wearing sunglasses inside. He reacted angrily when responding that he needed them because of an old eye injury, causing his supervisor to take him outside to discuss the glasses and hat. After she reminded him that he had complied the prior year when told not to wear a hat, he temporarily removed his cap, only to return later in the day with it on, at which point he refused a second request to remove it.

(3) Prior to the day of the training, the grievant had not submitted any documentation stating he required the use of darkened glasses indoors for a vision condition or that he needed to wear a hat indoors for this medical condition or to practice his religion.

(4) The grievance claims violation of the agreement as well as of disability and discrimination statutes. A contract interpretation arbitration is not the proper forum for litigation and consideration of external laws such as the ADA, Title VII, or the FEHA. The arbitration decision must be based within the four corners of the agreement.

(5) The association has not borne its burden of proving a violation of any contract provisions. The district did not violate the provision that pertains to negotiation procedures. The argument that any dress code policy must be negotiated is faulty because the district is not required to negotiate a policy. The warning memo is the issue, not the dress code policy. The alleged failure to negotiate is a more appropriate subject for an unfair labor charge with PERB.

(6) No facts support the allegation that the warning memo violated the provision that pertains to organizational security, union dues, and bargaining unit members' right to participate in employee organizations.

(7) No evidence shows a violation of the contract's grievance procedure or that the oral directive was retaliation for prior grievances.

(8) The directive to remove his hat and glasses was not "discipline" but rather an oral, supervisory directive, so the action did not violate the progressive discipline provision.

(9) The grievant has failed to prove that the district violated federal or state non-discrimination regulations pertaining to religious discrimination or that any Native American beliefs he held conflicted with any employment requirement. The fact the cap bore religious symbols does not rise to the level of a protected religious activity, since he only wore it occasionally. It is distinguishable from a head covering such as a yarmulke or turban. A personal preference to wear a hat is not protected. The grievant never requested a religious exemption to the no-hat rule although he had been directed previously not to wear a hat. The grievant was not prohibited from wearing religious symbols on his clothing.

(10) The district had a longstanding practice of applying the student dress code to teachers, including the "no hat" rule, a rule that was enforced as to other teachers at the training. His refusal to remove his cap as directed and then leaving the training

was unacceptable, which rose to the level of insubordination.

(11) The grievant failed to prove he was discriminated against because of his visual disability. The district was unaware of any condition requiring he wear dark glasses inside, and it made good faith efforts to engage in the interactive accommodation process after he informed the district about his photosensitivity condition. The grievant made no effort to inform the district or avail himself of accommodation procedures until after the training day incident.

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

Arbitrator's reasoning: (1) In their stipulated statement of the issue, the parties unnecessarily and incorrectly narrowed the issue solely to the directive to remove his hat and glasses at the training, thereby disconnecting that incident from prior and subsequent events, including a disciplinary warning issued a mere two weeks later (and two days after the present grievance was filed) that was a direct result of the training day incident. Only at the insistence of the arbitrator, late in the hearing, did the parties divulge this disciplinary action, being arbitrated before a different arbitrator the next day.

(2) This undue narrowness of the issue serves to intentionally or otherwise obscure and mischaracterize some of the fundamental facts of this case and some of the evidence. It causes the arbitrator to view this case differently than the parties do.

(3) Contrary to the parties' characterization, the arbitrator perceives this as a discipline case that requires scrutiny under the just cause provision. Although the parties only submitted the issue of the training day incident regarding the directive to remove his hat and glasses, and did not include the disciplinary warning for "unprofessional conduct" issued two weeks after that incident (and the subject of a separate grievance and arbitration), the arbitrator addresses that written warning in this case because she found it to be a direct result of the training day incident.

(4) The district did not have just cause for the written warning because it was not preceded by an oral warning. Rather, the grievant was merely "directed" to remove his hat and glasses the day of the training, not warned of the disciplinary consequences of noncompliance. At no time prior to the training day incident or subsequent written warning was he advised of consequences of violating the student dress code.

(5) The district claims it has a "past practice" of applying the student dress code to employees, including teachers, and concludes that a teacher's attire is directly correlated with a teacher's "professionalism" and likelihood of serving as a "role model" for students. But the evidence does not show the policy was consistently applied, so the grievant did not have notice of the standards. To be binding, a past practice must be long standing and consistently applied.

(6) The arbitrator recognizes the district's right to adopt a dress code for employees. However, to comport with just cause, a dress code must be reasonable, sound, fair, and consistently applied. The district has offered no pedagogy or educational

research to support its rationale for applying a student dress code to adult teachers. The district's rationale that there is a direct correlation between a teacher's attire and his "professionalism" is a specious and unsupported notion. There is no evidence that the grievant's attire diminished his professionalism or decreased the likelihood of his serving as a role model.

(7) Just cause includes the due process requirement of a fair investigation. There is no evidence that the district investigated the training day incident or gave him an opportunity to be heard before issuing the written warning two weeks later.

(8) Consequently, the district has failed to establish "just cause" for disciplining the grievant for the training day incident via the written warning issued two weeks later.

(9) The association argues an array of contract violations, including the discrimination clause. Yet, the parties in their issue submission did not request the arbitrator to issue an advisory opinion on the law.

(10) The contract states that the parties shall comply with state and federal regulations regarding nondiscrimination in working conditions. Absent any bargaining history, the common usage of the phrase "working conditions" is applied. A dress code is a working condition.

(11) Although the district argues against applying external law to interpret this clause, this arbitrator will apply external law when the contract is phrased loosely. When language is susceptible to more than one interpretation, the interpretation consistent with the law will be applied.

(12) Because the parties so narrowly phrased the issue, evidence necessary to determining the claim of discrimination was excluded. The arbitrator must conclude that there is insufficient evidence in the record to sustain the allegations of discrimination in violation of the agreement.

(13) There is no convincing evidence that the subsequent warning memo was retaliatory for the grievant's exercising his rights under the grievance procedure. There is no evidence that at the training day incident, the district interfered with, or violated the grievant's right to participate in the employee organization.

(14) The remedy for the just cause violation is removal from the grievant's files of any reference to the training day incident and the subsequent written warning for unprofessional conduct that was the direct result of the incident. The district is directed to cease and desist from applying the student dress code policy to employees, including the last sentence (added to the policy after the training day incident), which states that employees, at a minimum, must comply with the student dress code.

(Binding Grievance Arbitration)

- Arbitrability — timeliness

- Arbitrability — continuing violation
- Tenure for administrators
- Shifting burden of proof
- Contract interpretation — bargaining history

California Faculty Assn. and California State University (10-27-10; 29 pp.)

Representatives: Steve Hirschfeld (Curiale, Hirschfeld & Kraemer) and Dawn S. Theodora (CSU General Counsel's Office) for the employer; Elizabeth Barba (California Faculty Assn.) for the association. *Arbitrator:* Matthew Goldberg.

Issues: Was the grievance timely filed? If so, did the employer violate, misinterpret, or misapply the agreement by the manner in which it awarded tenure to administrators?

Association's position: (1) The university granted tenure to administrators and executives without requiring the appropriate evaluations and departmental recommendations or having them satisfy the agreed-on standards/criteria, thereby improperly denying tenure to numerous applicants by applying a double standard where faculty are required to meet the university's tenure standards.

(2) The grievance was timely and should be considered on its merits. The university has not met its burden of proof on timeliness. Its repeated violation of the agreement is a classic continuing violation, renewed each time tenure is awarded without evaluation and recommendation under the appropriate criteria or standards.

(3) The association did not have knowledge of every grant of tenure to administrators because the university never gave notice that tenure was awarded without following the agreement's procedures. No association official was ever presented with the procedures or standards the university used to award tenure to administrators. Knowledge by some members cannot be imputed to the association, as such a finding would undermine the association's statutory "exclusive representative" status.

(4) The university's contention that the association does not have standing to bring the grievance must be rejected. The grievance states on its face that the association itself is the grieving party, not any individual members. The university erroneously assumed that the grievants are the three individuals named in an information request for the administrators awarded tenure, but those individuals were named only as examples of improper tenure awards.

Employer's position: (1) The grievance was not timely because it was filed more than 42 days after the association knew or should have known of the grant of tenure to the three administrators named in the grievance, their tenure being granted in 1993, 2003, and 2004. The grievance filed in September 2006 is not arbitrable.

(2) The association knew of the events giving rise to the grievance as of July 17, 2006, at the latest, when a newspaper article described the granting of tenure to these three and quoted the association president's objection to the procedures. The grievance was not filed for another 65 days. The grievance is thus time-barred.

(3) On the merits, the university did comply with the terms of the agreement governing grant of tenure to administrators and other executives. The grievance therefore must be denied in its entirety.

Arbitrator's holding: The grievance was timely filed and is arbitrable. The grievance is denied in part but sustained as to certain grants of tenure, pending further proceedings.

Arbitrator's reasons: (1) The triggering event for filing a grievance is the association's knowledge of the grant of tenure, not the grant of tenure itself. The grant of tenure to administrators is not publicly announced, nor are there any procedures for notifying the association. A university witness's speculation that "everyone" (meaning association members) knows when tenure is granted cannot impute knowledge to the association.

(2) The newspaper article shows that the association president had knowledge as of July 26, 2006, of tenure granted to three named executives. The president is an agent of the association and her knowledge is imputed to the association; so the grievance, filed 65 days later, is untimely as to the three named individuals.

(3) The grievance is not time barred as to tenure granted to other administrators. The grievance that challenges the university's practice of awarding tenure to administrators states a continuing contract violation, so the association's actual knowledge of each allegedly wrongful grant of tenure started a new filing period for that specific tenure decision.

(4) The news article did not inform the association of the extent of the tenure practice. The association learned of a number of tenure awards only after receiving information pursuant to the information request it filed in connection with the grievance. The grievance is, therefore, timely for individual grants of tenure discovered pursuant to that information request.

(5) The agreement requires an evaluation and a department recommendation as prerequisites to award of faculty tenure to administrators. Absent that process, tenure was granted in violation of the agreement and is void.

(6) The association's information request yielded no documentation that evaluations and departmental recommendations were made in several instances where tenure and "retreat rights" to teaching positions were awarded to administrators. Testimonial evidence revealed informality and varying approaches for different individuals on various campuses.

(7) There was no documentary evidence to show what procedures were followed. The university contends the lack of evidence means there is no evidence to prove a contract violation. That contention is rejected. The absence of documentary evidence creates a presumption there is no such evidence, which shifts the burden to the university to demonstrate that it did comply with the contract. Because it did not offer such evidence, the university has not overcome that presumption.

(8) Regarding evaluations, the contract language does not support the association's contention that the same criteria and standards for evaluating teaching faculty also apply to administrators. Bargaining history shows the parties created a new contract provision with different evaluation standards for administrators' tenure, with the mutual intent to supersede a prior arbitration award that held the criteria for faculty also applied to administrators.

(9) As a practical matter, since many administrators have no prior connection with the university, they could not have periodic evaluations over a six-year period, nor could they be subject to evaluations by students or by an elected peer-review committee. Those criteria can apply only to teaching faculty; so the evaluations called for in the separate provision for administrators' tenure are not subject to those criteria.

(10) Because the record contains insubstantial proof that the contract was followed when tenure was awarded to certain administrators, the parties are directed to determine if such evidence can be discovered. If it cannot, the tenure grants to those individuals are to be rescinded, pending compliance with the contract requirements.

(Binding Grievance Arbitration)

- Standby and call-back pay
- Past practice
- Contract's constitutional and statutory force

Monterey County and SEIU Local 521 (7-6-10; 11 pp.) *Representatives:* Robert Shulman, deputy county counsel, for the employer; Manuel A. Boigues (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* Paul D. Staudohar (CSMCS Case No. ARB-09-0158).

Issue: Did the employer violate the contract when it changed its practice on call-back pay?

Union's position: (1) For 26 years, the county has paid two hours minimum pay to employees who are on standby and are called back to work. Eliminating the two-hour minimum and paying only for hours actually worked changed the established past practice and violated the contract.

(2) Employees not required to work standby were induced to volunteer because of the two-hour guarantee.

(3) The county was aware of the department's consistently and frequently applied practice of paying the two-hour minimum to employees called in from standby, even though another department did not follow that practice.

(4) The practice is consistent with the contract. The standby clause says nothing about minimum pay. The separate clause regarding call-back pay stands alone,

applies only to employees not on standby, and is not a subsection of the standby clause.

Employer's position: (1) The contract's standby clause states that employees on standby receive \$2.55 an hour and can receive no other pay. The call-back clause, which guarantees two hours minimum, states that it applies to employees who are "not on standby duty or otherwise compensated." The employer complied with the language when it corrected a mistake and stopped paying the two-hour minimum to those on standby who are called in to work.

(2) When contract language is unclear or ambiguous, past practice may apply. However, the county's board of supervisors is not bound by a mistake in applying clear contract language.

(3) These clear contract provisions, adopted by the employer after bargaining with the union, cannot be modified by an arbitrator. The California Supreme Court held that a statute requiring counties to submit economic issues to binding arbitration was unconstitutional. The Court of Appeal, in *County of Sonoma v. Superior Court (Sonoma County LEA)* (2009) 173 Cal.App.4th 322, 2009, Cal.App LEXIS 620, [196 CPER 31](#), similarly held that compensation determined through interest arbitration is an impermissible intrusion on a local government's constitutional authority.

Arbitrator's holding: The grievance is granted.

Arbitrator's reasons: (1) The employer is bound by its long-standing past practice that was consistently applied to the department's employees and was an inducement to volunteer for standby.

(2) Nothing in the standby clause refers to a pay guarantee other than the standby pay of \$2.55 an hour. The grievants did not earn any other pay while on standby. The call-back clause states that employees not on standby are entitled to two hours minimum, which would seem to leave employees on standby out of the minimum. However, the call-back clause is not a subsection of the standby clause, but stands alone, which creates an ambiguity in how to read the two clauses. When contract language is unclear or subject to more than one interpretation, it is appropriate to examine past practice.

(3) Adopting the county's interpretation would mean changing a "mistake" that has been consistently and frequently applied for a quarter of a century. By waiting that long to realize its error, if indeed there was one, the county accepted the union's interpretation of the language.

(4) The cases cited by the county, which found that arbitration would violate the constitutional and statutory authority of a public employer, are not applicable. The cases addressed interest arbitration, where contract terms are being initially determined by an arbitrator. This case deals with grievance arbitration which involves an arbitrator interpreting an existing agreement.

(Binding Grievance Arbitration)

- Progressive discipline
- Harassment — hostile work environment
- Insubordination

Riverside Community Hospital and SEIU United Health Care Workers West (6-14-10; 8 pp.) *Representatives:* Catherine Hazany (Ford & Harrison) for the employer; James Rutkowski (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* Philip Tamoush.

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

Employer's position: (1) The grievant's four-day suspension and ultimate termination were justified by his consistent pattern of disrespect, discourtesy, intimidation, and harassment of fellow employees, which created a hostile work environment that could no longer be tolerated.

(2) The suspension was prompted by a coworker's formal complaint about his aggressive and intimidating conduct toward her, in front of a patient, in their dispute over whether a particular test should be performed.

(3) The termination was prompted by his failure to comply with a direct order not to contact another employee.

(4) Progressive discipline was followed over a two-year period with verbal warning, written warning, final warning with four-day suspension, and finally termination for insubordination. All discipline involved the same kind of unacceptable conduct toward coworkers as well as insubordination for failing to comply with a direct order not to contact a co-worker who had complained of being harassed.

Union's position: (1) The evidence is insufficient to support the suspension or the termination.

(2) The grievant was justified in disputing the need for the test, as the evidence supported his contemporaneous statement that the test had been canceled by a higher-level supervisor.

(3) The coworker involved in that verbal dispute filed a written incident report but refused to testify even though subpoenaed. Her written statement cannot support the discipline since she was not available to be cross-examined.

(4) The grievant was justified in contacting the second employee for his written statement when the grievant was preparing his grievance over the suspension. There was no grievous violation of the no-contact directive that could warrant termination. The incident was of no consequence, as shown by that employee's testimony. The grievant and that employee continue to work together without incident.

Arbitrator's holding: The employer did not have just cause to impose the

suspension or to terminate the grievant, but has cause to impose a four-day suspension in lieu of termination.

Arbitrator's reasons: (1) The four-day suspension cannot be upheld. The complaining employee did not appear, although she was subpoenaed and could have been ordered to appear, with sufficient "protections." The grievant had the right to confront her accusations in the written report, which he did through his own testimony.

(2) The grievant, through problematic verbalization, evidences a different attitude toward others than might be expected. Sensitivity or anger-management training would be appropriate, but the suspension was not justified by the evidence presented.

(3) The "no-contact" instruction regarding the second employee was appropriate. The grievant violated that instruction and exerted inappropriate pressure to obtain that employee's statement, when he could have relied on his union representative or attended subsequent hearings to learn about it.

(4) The employer has the right and obligation to maintain good discipline, but cannot discharge the grievant for insubordination. Some discipline is appropriate, as his conduct could lead to termination if he does not modify his attitude and behavior toward coworkers and superiors. Based on the employer's well-established progressive discipline construct, the insubordination charge should be reduced to a four-day suspension, which can be the same time off he already served.

(5) The grievant is to be reinstated but is required to obtain behavior modification training prior to returning to day-to-day contact with coworkers, or held back from his normal assignment until such training has been imposed, either on- or off-duty.

(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

Unfair Practice Rulings

Dismissal of transfer of work charge and failure to negotiate upheld: Dept. of Developmental Services.

(SEIU Loc. 1000 v. State of California [Department of Developmental Services], No. 2234-S, 1-31-12, 5 pp. + 13 pp. B.A. dec. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: The union's failure to allege that it previously and exclusively performed the work transferred from its bargaining unit resulted in dismissal of its charge; the allegation that the department failed to bargain regarding the installation of surveillance cameras was untimely filed.

Case summary: SEIU Local 1000 filed an unfair practice charge alleging that the Department of Developmental Services violated the Dills Act by unilaterally transferring work out of the bargaining unit, failing to negotiate in good faith about the installation of surveillance cameras, and failing to negotiate in good faith regarding SEIU's request for information.

A board agent partially dismissed the charge. On appeal to the board, the union challenged the dismissal of the allegation concerning the transfer of bargaining unit work and the failure to negotiate regarding the surveillance cameras.

The board agent concluded that, as a threshold matter, the charge failed to assert that Unit 15 employees represented by SEIU had previously and exclusively performed the transferred work. The board agent reasoned that camera-monitoring work was a completely new duty which neither bargaining unit had performed in the past. Finding no information presented on appeal that changed that conclusion, the board affirmed the board agent's dismissal of that portion of the charge.

As to the department's alleged refusal to bargain concerning the installation of surveillance cameras, the board agent dismissed the charge as untimely. On appeal, the board found that the union made its first request to bargain more than six months before it filed the unfair practice charge. Because the union did not allege that circumstances had changed between its first and subsequent requests to bargain, the board relied on precedent holding that absent changed circumstances, subsequent requests to bargain do not constitute new violations that bring the dispute within the statute of limitations.

Record does not support claim that charging party suffered retaliation for protected activity or denial of representation rights: Board of Equalization.

(*Gutierrez v. State of California [Board of Equalization]*, [No. 2237-S](#), 2-7-12, 8 pp. + 19 pp. ALJ dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: Accepting the ALJ's credibility determinations and her legal conclusions, the proposed decision dismissing the complaint alleging retaliation for protected activity and denial of *Weingarten* rights was upheld.

Case summary: The charging party alleged that his employer denied him his right to be represented by his employee organization during an investigatory interview and took adverse action against him because he sought to prepare a grievance. An administrative law judge issued a proposed decision that found the charging party had failed to establish by a preponderance of the evidence that the employer violated the Dills Act.

On appeal, the board upheld the ALJ's credibility determinations central to the retaliation claim. The board also rejected the charging party's contention that the ALJ had improperly permitted a prior notice of adverse action to be admitted into evidence. Comments by a witness referring to the ALJ's former position at the State Personnel Board failed to show that the ALJ was biased or prejudiced against the charging party.

The board also found that improper motive was not evidenced by a statement in the memorandum documenting disrespectful behavior that "grievances are to be prepared outside the work area." Citing the ALJ's reasoning, the board said the charging party's insistence on being able to prepare grievances in an open print shop rather than in a private area arranged for by management, as had been done in the past, provided an adequate basis for the conclusion that the employer would have taken the action it did absent any protected activity.

The charging party also filed exceptions to the ALJ's conclusion that he had not been denied his *Weingarten* right to union representation. The meeting in question was short, lasting only 10 to 15 minutes; the purpose of the meeting was informative and instructional; and the charging party was not questioned during the meeting. The board agreed with the ALJ that the meeting was not an investigatory interview.

Alleged changes to correctional officers' work schedule remanded to general counsel: Dept. of Corrections and Rehabilitation.

(*California Correctional Peace Officers Assn. v. State of California [Dept. of Corrections and Rehabilitation]*, [No. 2250-S](#), 4-18-12, 5 pp. By Member Huguenin, with Chair Martinez and Member Dowdin Calvillo.)

Holding: Because the board agent's dismissal of the charge failed to address CCPOA's allegation that the department did not meet and negotiate in good faith over the effects of scheduling changes affecting correctional officers, the board remanded this allegation to the general counsel.

Case summary: The association alleged that the department failed to meet and negotiate in good faith over the effects of various policy changes, including the work schedule of casework managers in the Division of Juvenile Justice and the scheduling of correctional officers in the California Rehabilitation Center. A board agent dismissed these allegations, and the association appealed.

Thereafter, the parties notified PERB that they had reached a settlement concerning their dispute regarding case work specialists. The board granted the parties' request to dismiss that portion of its appeal.

Regarding alleged changes to the schedules of correctional officers at the center, the association alleged that the board agent's warning letter failed to reference this allegation and, in the dismissal letter, failed to analyze it for purposes of establishing a *prima facie* case. The board accordingly remanded that matter to the general counsel for consideration of this allegation.

EERA CASES

Unfair Practice Rulings

Substitute teacher dismissed for falsifying timecard, not for engaging in protected activity: Santa Ana USD.

(*Heron v. Santa Ana Unified School Dist.*, [No. 2235](#), 2-7-12, 14 pp. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The charging party engaged in protected activity, but failed to establish that

the district would not have dismissed him from his position as a substitute teacher but for that conduct; the record established the charging party was removed because he falsified his timecard.

Case summary: The charging party, a substitute teacher, alleged that the district issued him an unsatisfactory performance report and discharged him from employment in retaliation for engaging in protected activities. The charging party disagreed with the district's substitute pay policy.

An administrative law judge found the charging party's participation in a union organizing campaign was protected activity, but found no evidence that the employer knew of that action. The ALJ also found that the charging party engaged in protected activity when he requested payment for a preparation period on October 6, 2008, but found the district's notice of unsatisfactory performance was not unlawful because it was based on the charging party's alteration of his timecard, which was not protected conduct.

However, the ALJ found the charging party engaged in protected activity when he submitted a response to the notice, again asserting his right to extra pay, and his discharge shortly thereafter was motivated by his protected activity. The district filed exceptions to this portion of the ALJ's proposed decision.

On appeal, the board first found that the charging party's termination from employment four days after he submitted his response to the notice of unsatisfactory performance established timing as an element linking the protected activity to the adverse action. Contrary to the ALJ, the board did not find other evidence of unlawful motive, such as failure to follow procedures or inconsistent justifications.

There was no evidence that district procedures required a second unsatisfactory performance report prior to terminating a substitute teacher. The district had previously discharged employees for falsifying their timecards.

The board also disagreed with the ALJ's finding that the district's offer of inconsistent justifications for its action was evidence of unlawful motive. The district gave no justification for its decision to remove the charging party from his position. Therefore, the evidence did not show a shift in the district's reasons for dismissing the charging party. The district's failure to give an "at-will" substitute employee a reason for dismissal does not indicate unlawful motive in the absence of evidence that the employer is legally obligated to do so. Here, the district was not required to give the charging party a specific reason for its action; nor did the record demonstrate a past practice of giving substitute teachers a reason for removal.

Assuming that the charging party established a prima facie case of retaliation, the board continued, the district established, as an affirmative defense, that it would have terminated the substitute teacher despite his protected activity. The record established that the charging party was dismissed for falsifying his timecard.

Union falls short of proving unlawful motivation for district's decision not to reelect probationary teacher: Lake Elsinore USD.

(*Lake Elsinore Teachers Assn., CTA v. Lake Elsinore Unified School Dist.*, No. 2241, 2-27-12, 17 pp. By Member Dowdin Calvillo, with Chair Martinez and Member McKeag.)

Holding: The association failed to prove by a preponderance of the evidence that the reason the district did not reelect a probationary teacher was because he had served as a member of the union bargaining team.

Case summary: The Lake Elsinore Teachers Association alleged that the district did not reelect a probationary teacher because he served as a member of the association's negotiating team. An administrative law judge found that, although the teacher's protected activity was known to the district and the decision not to reemploy him was close in time to his protected activity, the association failed to establish that the district's decision was motivated by anti-union animus.

In its exceptions, the association argued that the employee was not reelected because he attempted to enforce a co-teaching model addressing the delivery of services to special education students. The procedures for implementing that program were set out in a memorandum of understanding he had been instrumental in negotiating. In response, the district asserted that this was an unalleged violation which the board should not consider.

The board first clarified that the facts surrounding the teacher's involvement in the co-teaching MOU did not constitute an alleged *violation* of EERA, but an additional instance of *protected activity*. However, the board noted that neither the charge nor the complaint alleged that the teacher engaged in protected activity associated with the co-teaching model. The association failed to establish sufficient grounds for consideration of this basis for its retaliation claim, PERB explained, because the district was not afforded adequate notice and an opportunity to defend against the unalleged claim that it took adverse action against the teacher for engaging in protected activity concerning enforcement of the co-teaching MOU.

The board next considered whether the association had met its burden of proving by a preponderance of evidence that the district's decision not to reelect the teacher was unlawfully motivated.

The board deferred to the credibility determination made by the ALJ that the district's director of special education did not make the statements attributed to her, such as that the teacher would "run to the union" with his concerns and that it was "unwise" for a new probationary teacher "to get so involved in the association." PERB found the ALJ "properly weighed the evidence" presented at the hearing and that his conclusions were "supported by the record as a whole."

The association failed to demonstrate that the teacher was treated differently from any similarly situated probationary teacher or that the district departed from past practice by not reelecting him while giving him a satisfactory evaluation since others

with satisfactory evaluations also were not reelected. The district's failure to give the teacher reasons for his non-reelection does not raise the inference of unlawful motive, the board said, because the district is not required to give probationary employees a reason for dismissal and did not have a past practice of doing so.

The board emphasized that the issue before it was not whether the district had just cause to discipline or terminate the employee, but whether the motivation behind the employer's decision was his exercise of protected activity.

Failure to sign off on tentative agreement is not continuing violation: Santa Monica CCD.

(*Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.* No. 2243, 2-29-12; 5 pp. + 10 pp. board agent dec. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The district did not bargain in bad faith; its refusal to comply with the ground rule requiring the parties sign off on tentative agreements first occurred outside the statute of limitations period and was not a continuing violation that retained its unlawful character into the six-month limitations period.

Case summary: The association alleged that the district engaged in surface bargaining during negotiations for a successor agreement when it failed to adhere to the ground rules requiring that the parties sign off on tentative agreements as they were reached at the bargaining table. The association also argued that the district came to bargaining sessions without proposals or counter proposals, demonstrated a "take it or leave it" attitude, and exhibited inflexibility during negotiations.

A board agent found the allegation concerning the ground rules was untimely because the district had refused to sign off on tentative agreements on occasions that occurred more than six months prior to the filing of the charge. The board agent also found that the association had alleged insufficient facts to support its assertion the district failed to make or respond to proposals and that the district's maintenance of an adamant position did not demonstrate bad faith.

The association appealed the dismissal of its charge to the board. PERB affirmed the board agent's finding that the ground rule allegation referred to conduct outside the statute of limitations period. The board explained that the association knew or should have known that the district violated the ground rules when it refused to sign off on tentative agreements reached more than six months before the charge was filed.

The association's renewed request within the statutory period that the district sign off on the same tentative agreements "did not restart the limitations period." The district's refusal to memorialize tentative agreements is not a continuing violation, the board said, because the claim "cannot continue without end." While the district's duty to negotiate with the association continued throughout their bargaining

relationship, the board explained, that does not mean an alleged violation of that duty “retains its unlawful character on a continuing basis for that length of time.”

Assuming the allegation of failure to sign off on tentative agreements was a sign of bad faith, the board found none of the association’s additional allegations to be indicia of bad faith bargaining. The association’s charge therefore did not meet the futility of circumstances test.

Board orders complaint to issue on retaliation charge: LAUSD.

(*Raines v. Los Angeles Unified School Dist.*, No. 2244, 2-29-12, 12 pp. By Member McKeag, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party alleged sufficient facts linking her protected activity to the district’s decision to bar her from serving as a substitute teacher at a school where she had worked more than her average number of days.

Case summary: The charging party, a substitute teacher, alleged that the district retaliated against her for engaging in protected activities. A board agent found that the school principal and vice principal, who were responsible for making the decision to bar the charging party from substitute teaching at a school in the district, did not know of her protected activities. Therefore, the charge did not state a prima facie case of retaliation.

On appeal, the board found that, while the allegations in the charge were “sparse,” they were sufficient to issue a complaint. The charging party’s efforts to resolve her grievances occurred only one month before the adverse action, establishing timing as indicia of improper motive. The board also noted the vice principal’s comment at a retirement party that the reason given for barring her from teaching at the school was not the true reason, indicating inconsistent or contradictory justifications or vague and ambiguous reasons. Also noted was the vice principal’s statement that the charging party had had problems with other principals in the past and should not “take it out on [him] because of what others dictate.” The board found this comment suggested that the decision was made by a district director who had been involved in the charging party’s past grievances.

Good cause exists for district’s late response to appeal: Santa Monica Community College Dist.

(*Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.*, No. Ad-393-E, 2-29-12; 4 pp. By Chair Martinez, with Members McKeag and Dowdin Calvillo.)

Holding: The district’s untimely filing of its response to the faculty association’s appeal was excused because the district conscientiously tried to timely file its response.

Case summary: The faculty association appealed a dismissal of its unfair practice charge. The district's attorney instructed her secretary to file the district's response with both the Los Angeles office and the Sacramento headquarters. The response to the appeal was timely filed in the Los Angeles office and served on opposing counsel, but not filed with PERB's headquarters. When informed, the attorney promptly filed the response with the Sacramento office.

The board found the district's reasons for the untimely filing reasonable and credible. It also found that permitting the late filing would not result in prejudice to the faculty association. Because it found good cause, it excused the late filing and deemed the response timely filed.

Duty of Fair Representation Rulings

Amended charge, received before board agent's deadline, remanded to general counsel: UESF.

(*United Educators of San Francisco*, [No. 2232](#), 1-23-12, 3 pp. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: Because the charging party submitted his amended charge to the board prior to the deadline imposed by the board agent, PERB did not uphold dismissal and instead remanded the case to the general counsel for further investigation.

Case summary: The charging party filed an unfair practice charge alleging that the union breached its duty of fair representation by failing to pursue his grievance to arbitration. A board agent dismissed the charge, finding insufficient facts to establish the union's decision was arbitrary, discriminatory, or in bad faith.

On appeal, the board noted that the B.A. provided the charging party with a deadline for amending his charge with additional information to support his claim. PERB received the amended charge before the deadline imposed by the board agent. Accordingly, the board remanded the charge to the general counsel for further investigation of his claims as set out in the supplement to his amended charge.

No DFR breach where union's actions on behalf of another employee were unfavorable to charging party: CSEA

(*Erwin v. California School Employees Assn.*, [No. 2240](#), 2-24-12, 5 pp. + 8 pp. board agent dec. By Member Dowdin Calvillo, with Member McKeag; Member Huguenin concurring.)

Holding: The charging party's contention that the association breached its duty of fair representation by reaching a settlement agreement on behalf of another employee that was unfavorable to him does not state a prima facie case.

Case summary: An employee of the Vallejo Unified School District filed an unfair practice charge against the association, alleging that it failed to adequately represent him concerning an involuntary transfer. The thrust of his charge was that he was harmed by the manner in which the association represented another employee.

A board agent concluded that the charging party failed to state a prima facie violation of the duty of fair representation. The board agent explained that the association is not precluded from making an agreement that may have an unfavorable effect on an employee so long as its actions are not devoid of rational judgment.

On appeal, the board majority affirmed the board agent's dismissal. It also noted that the charging party failed to comply with PERB Reg. 32635(a) by specifically identifying those portions of the board agent's determination to which the appeal was taken. The majority also found the appeal included new allegations and evidence raised for the first time on appeal that all predated the dismissal letter without an explanation why they could not have been raised earlier.

Member Huguenin agreed with the result reached by the majority, but criticized it for affirming the board agent's dismissal on the merits and then "backtracking" by suggesting that the appeal was subject to dismissal on the basis of the charging party's failure to comply with PERB's appeal procedures. "If that is the case," Member Huguenin wrote, "PERB should so hold, and not reach the merits."

No good cause to consider new allegations on appeal: Barstow College Faculty Assn.

(*Cauble v. Barstow College Faculty Assn.*, [No. 2256](#), 4-25-12, 4 pp. + 11 pp. board agent dec. By Chair Martinez, with Members Dowdin Calvillo and Member Huguenin.)

Holding: The charging party failed to demonstrate good cause for consideration of new allegations presented for the first time on appeal.

Case summary: The charging party alleged that the association breached its duty of fair representation by entering into a memorandum of understanding modifying the collective bargaining agreement concerning adjunct instructor evaluations without providing proper notice, requiring a quorum, or giving the membership a vote in accordance with the association bylaws.

A board agent dismissed the charge, and an appeal was lodged with the board. The board agent concluded that the charge concerned internal union affairs over which PERB has no jurisdiction. An allegation that the association took reprisals against union members was not supported by facts demonstrating a substantial impact on the employment relationship between bargaining unit members and their employer.

The board affirmed the board agent's determination. Additionally, the board declined to consider new allegations and supporting evidence proffered for the first time on

appeal. The dates of events referenced in the appeal predate the dismissal of the charge; no evidence was presented as to why this information could not have been provided to the board agent during the processing of the charge.

Failure to assert Education Code violations on employee's behalf was beyond union's duty of fair representation: Beaumont Teachers Assn.

(*Grace v. Beaumont Teachers Assn./CTA*, [No. 2259](#), 4-26-12, 3 pp. + 9 pp. board agent dec. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)
JUDICIAL APPEAL PENDING

Holding: The association's alleged failure to represent an employee in her claim that the district failed to comply with applicable Education Code requirements was outside the scope of its duty of fair representation.

Case summary: The charging party, a probationary nurse practitioner, alleged that the association breached its duty of fair representation by failing to represent her in a dispute with the Beaumont Unified School District concerning the district's alleged failure to comply with the notice and service requirements imposed by the Education Code as they relate to the district's decision not to reelect her.

A board agent dismissed the charge, finding that the union's duty of fair representation does not require it to enforce rights in extra-contractual forums. Further, disagreement with the association's legal conclusion regarding her case was not sufficient to demonstrate arbitrary, discriminatory, or bad faith conduct, the board agent advised.

On appeal, the board affirmed the board agent's decision. Additionally, it found the appeal failed to reference any portion of the board agent's determination or otherwise identify issues of procedure, fact, law, or rationale to which the appeal was taken. It merely reiterated facts and arguments made during the charge-processing stage.

Negligent grievance handling did not breach duty of fair representation: Beaumont Teachers Assn.

(*Grace v. Beaumont Teachers Assn./CTA*, [No. 2260](#), 4-26-12, 3 pp. + 8 pp. board agent dec. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)
JUDICIAL APPEAL PENDING

Holding: The association's failure to file a timely level III grievance did not breach its duty of fair representation where the contract permits the employee to advance her claim independent of the union.

Case summary: The charging party filed two grievances against the Beaumont Unified School District alleging violations of the evaluation procedure in the collective

bargaining agreement. The association accompanied the charging party to the level I and II grievance meetings. The district denied the grievances, and the association failed to file a level III grievance within five days of the denial at level II. The association informed the charging party that it had missed the deadline.

A board agent dismissed the charge. While the duty of fair representation pertains to grievance filing, the board agent found, PERB has declined to find a duty of fair representation breach by merely negligent acts, such as missing a grievance filing deadline. Moreover, the board agent noted, the negotiated agreement between the association and the district permits employees to present grievances without the aid of the association. Here, even though the association attended the first two grievance meetings, the charging party filed the grievances herself at levels I and II. Therefore, the association's failure to file the grievance at the next step did not prevent her from pursuing her claims further. No facts were alleged to support the charging party's assertion that the association deliberately missed the deadline or happily informed her that it had done so.

The board affirmed the board agent's dismissal of the charge. Additionally, it found the appeal failed to reference any portion of the board agent's determination or otherwise identify issues of procedure, fact, law, or rationale to which the appeal was taken. It merely reiterated facts and arguments made during the charge-processing stage.

HEERA CASES

Unfair Practice Rulings

Ex parte communication during charge-processing stage is permissible investigatory practice: UPTE.

(*Witke v. UPTE-CWA Local 9119*, [No. 2253-H](#), 4-23-12, 8 pp. + 12 pp. board agent dec. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: A board agent investigating an unfair practice charge may use ex parte communications as a means of investigating the charge; an orally sought request for an extension of time was permitted absent a showing of prejudice to the charging party. PERB has no jurisdiction over a charge alleging an arbitrator failed to give notice of an agency fee arbitration

Case summary: The charging party alleged he was denied adequate pre-hearing notice from an arbitrator conducting an agency fee challenge. The board agent found that PERB has no jurisdiction over the alleged failure of an arbitrator to provide adequate pre-hearing notice of the agency fee hearing. The board agent also found that the charge failed to allege facts demonstrating that PERB should not have deferred to the decision of the arbitrator as to the adequacy of the pre-hearing notice.

On appeal, the board adopted the decision of the board agent. It addressed the

charging party's claim that the board agent engaged in ex parte communications with the union and improperly granted the union multiple extensions of time in violation of PERB Reg. 32132(b).

Consistent with PERB Reg. 32620(a), the board said, a board agent freely may communicate with the parties to facilitate the gathering of information necessary to investigate the charge. The board's policy permits the use of unrestricted and open communication at the charge-processing stage. In stark contrast, rules governing formal hearings specifically prohibit oral and written ex parte communications.

The board explained that, when processing a charge, ex parte communications allow board agents to assist charging parties in formulating a charge and to respond to procedural questions. Ex parte communications are "fully contemplated by the regulatory scheme," PERB said.

The board found that UPTe failed to comply with PERB regulations requiring that requests for extensions of time be communicated in writing. While such violations should not be condoned, the board said, they should not be enforced to thwart the board agent's authority to determine if the facts alleged state a prima facie case and whether the charging party is capable of providing admissible evidence in support of its allegations.

There was no showing that the charging party was prejudiced by permitting UPTe's extension of time to file a position statement.

Request to withdraw charge following global settlement agreement granted: CUE.

(*Coalition of University Employees v. Regents of the University of California [Santa Barbara]*, [No. 2254-H](#), 4-25-12, 2 pp. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party's request to withdraw its unfair practice charge due to a settlement agreement reached by the parties was granted by the board.

Case summary: CUE filed a charge alleging that the university violated HEERA by retaliating against an employee for engaging in protected activity, unlawfully interfering with a CUE representative's conduct, and unilaterally changing a past practice. A board agent dismissed the charge for failure to state a prima facie case, and CUE appealed.

CUE then notified the board that it wished to withdraw the charge pursuant to a global settlement agreement executed by the parties. PERB found withdrawal of the request in the best interests of the parties and consistent with the purposes of HEERA, and granted the request.

Request to withdraw charge granted: CUE.

(*Coalition of University Employees v. Regents of the University of California [Irvine]*, No. 2255-H, 4-25-12, 2 pp. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party's request to withdraw its unfair practice charge was granted by the board.

Case summary: CUE filed a charge alleging that the university violated HEERA by unilaterally implementing a policy requiring bargaining unit employees at the U.C. Irvine medical center to either wear a surgical mask while at work or demonstrate that they received an inoculation for the H1N1 flu virus, and to wear insignia indicating whether they had been immunized. An administrative law judge found that the university did not commit an unfair practice. Both parties filed exceptions to the proposed decision.

CUE then notified the board that it wished to withdraw the charge pursuant to a global settlement agreement executed by the parties. PERB found withdrawal of the request in the best interests of the parties and consistent with the purposes of HEERA, and granted CUE's request.

Withdrawal of unfair practice charge granted: CUE.

(*Coalition of University Employees, Loc. 4, v. Regents of the University of California [Los Angeles]*, No. 2257-H, 4-25-12, 2 pp. By Chair Martinez, with Members Dowdin Calvillo and Member Huguenin.)

Holding: The board granted the charging party's request to withdraw its unfair practice charge.

Case summary: CUE alleged that the university violated HEERA by unilaterally changing job descriptions and performance standards of certain employees without affording the union notice and an opportunity to meet and confer over the decision and/or the effects of the changes on employees. An administrative law judge found that the university did not violate the act and dismissed the complaint.

CUE informed the board that it wished to withdraw the unfair practice charge as the parties had reached a settlement agreement. The board granted the union's request.

MMBA CASES

Unfair Practice Rulings

Good cause found to excuse late filing of amended charge: Fallbrook Public

Utility Dist.

(*Pecore v. Fallbrook Public Utility Dist.*, [No. 2229-M](#), 1-10-12, 5 pp. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: Although the board agent did not receive the charging party's amended charge until after the deadline, the charging party provided the board with proof of service, signed under penalty of perjury, that the charge had been mailed prior to the deadline and thereby demonstrated good cause to excuse the late filing.

Case summary: The charging party filed an unfair practice charge alleging that the district retaliated against him for engaging in protected activities. A board agent dismissed the charge, finding that the amended charge was not timely filed.

On appeal, the board vacated the dismissal. The board noted that, while the board agent failed to receive the amended charge in a timely manner, the charging party mailed it to the board agent prior to the deadline. The charging party provided the board with proof of service, signed under penalty of perjury, establishing that he deposited the amended charge in the mail prior to the deadline.

Moreover, PERB noted, the district had the opportunity to rebut the charging party's explanation and the presumption that the proof of service was valid, but did not file any objections to the charging party's petition to excuse the late filing.

PERB found good cause was provided to excuse the charging party's untimely filed amended unfair practice charge. It therefore vacated the dismissal and remanded the charge to the general counsel for further investigating and processing.

Board grants union's request to withdraw appeal of dismissal after parties reach agreement: Rio Linda/Elverta Community Water Dist.

(*Teamsters Local 15, IBT v. Rio Linda/Elverta Community Water Dist.*, [No. 2230-M](#), 1-19-12, 2 pp. By Member Dowdin Calvillo, with Members McKeag and Huguenin.)

Holding: The union's request to withdraw its appeal of a dismissal of its unfair practice charge and the underlying charge was granted by the board following a settlement agreement between the parties.

Case summary: The union filed an unfair practice charge alleging that the district violated the act when it implemented its last, best, and final offer following the parties' negotiations over a successor agreement. The union alleged that the district discriminated against the union for exercising protected rights, interfered with the rights of union members, and engaged in bad faith bargaining.

A board agent dismissed the charge, finding that it did not state a prima facie violation of the MMBA. The union appealed the dismissal.

The union then notified the board that it wished to withdraw its appeal of the

dismissal because the parties had negotiated an agreement under which the union pledged to withdraw the charge and the appeal. Based on a review of the record, the board granted the union's request to withdraw its appeal and the underlying charge, finding that to be in the best interest of the parties and consistent with the purposes of the MMBA.

Repudiation of access right and union time bank policy stated prima facie case: Stanislaus Consolidated Fire Protection Dist.

(*Stanislaus Consolidated Firefighters, Loc. 3399 v. Stanislaus Consolidated Fire Protection Dist.*, No. 2231-M, 1-20-12, 24 pp. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party alleged sufficient facts to demonstrate the district unilaterally repudiated a contract provision that provided employee access rights and abolished a policy permitting a union time bank for organization purposes, interfered with employee rights, and retaliated against the union for filing grievances.

Case summary: Stanislaus Consolidated Firefighters, Local 3399, filed an unfair practice charge alleging that the district unilaterally eliminated a provision of the parties' MOU that allowed firefighters to hold union meetings at a fire station during work hours and a policy that allowed employees to donate vacation hours to a union time bank. The district asserted that on-duty personnel no longer would be able to attend union meetings.

A board agent issued a complaint on the unilateral elimination of the union time bank. But he dismissed charges concerning the access provision, finding that while access rights are a matter within the scope of representation, the union failed to include factual allegations that the union had made specific requests to use district facilities and that those requests had been denied.

On appeal, the board affirmed that the contract provision at issue was a matter within the scope of representation, and rejected the district's contention that it was exercising its managerial right concerning employees' coverage of response areas.

The board also rejected the district's contention that the union waived its statutory bargaining rights by agreeing to a management rights clause. PERB rejected the board agent's conclusion that a tentative agreement signed by the parties during successor bargaining continued the terms of the expired MOU and that the parties did not adopt a successor agreement that expressly excluded the access provision. The board found that the district repudiated the provision of the expired MOU, as evidenced by the fact that the district's version of the tentative agreement did not include the provision and the union was no longer allowed to hold meetings at district fire stations as previously permitted by the contract.

The district also asserted that it provided the union with proper notice of its proposal to remove the access provision from the contract even though it argued it was not

required to meet and confer over its operational needs. “The District cannot have it both ways,” PERB said. “It cannot, on the one hand, profess to be in compliance with its bargaining obligations by offering to meet and confer and, on the other, assert that it has no bargaining obligations based on management prerogative.”

The board found that the union alleged sufficient facts to state a prima facie case that the district unilaterally changed a policy with continuing impact on members of the bargaining unit.

The board agent had also dismissed the union’s allegations that the district retaliated against it by eliminating the contract provision and abolishing the union time bank. The fire chief who announced the unilateral change was aware that three grievances recently had been filed and personally denied grievances that concerned the union time bank. Eliminating union access and the option of allowing employees to donate one hour a month of vacation leave to a time bank used for organizational activities are adverse actions, the board concluded.

PERB found evidence of unlawful intent, citing the chief’s admission that he repudiated the access language of the contract because of three union grievances concerning the time bank, and comments he made concerning the elimination of grievances related to the union time bank.

The board also found a prima facie case of interference with protected rights when the district eliminated the access provision of the parties’ contract and abolished an established policy implementing the union time bank. The overall effect of the district’s actions, whether intended or not, was to discourage employees from using the grievance procedure, the board concluded.

Non-employee union representatives have access rights under MMBA: County of Riverside.

(*SEIU Local 721 v. County of Riverside*, [No. 2233-M](#), 1-23-12, 17 pp. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: Non-employee union representatives have a presumptive right of access to public facilities, and the burden of proof to demonstrate the reasonableness of its restrictions falls on the employer.

Case summary: SEIU Local 721 alleged that at the regional medical center, the county prohibited SEIU access to the union’s designated bulletin boards and to non-work areas to confer with employees, and that the prohibitions were imposed unilaterally without allowing the union notice or an opportunity to meet and confer. The county alleged that the union violated the provisions of its employee relations resolution.

An administrative law judge found that both parties committed unfair practices. The county filed exceptions to the ALJ’s proposed decision.

The board first construed the MMBA as affording employee organization officers and representatives a presumptive right of access to non-work areas subject to reasonable regulation by the employer, an interpretation consistent with other public sector statutes administered by the board. The board relied on *Omnitrans* (2009) Dec. 2030-M, 197 CPER 79, which recognized the access rights of *employees* of the public agency.

In this case, the board found the MMBA grants a presumptive right of access to public facilities by union agents, subject to reasonable regulation on the employer's showing that the regulation is necessary to the efficient operation of the employer's business and/or the safety of its employees and others and that it is narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights. "We apply right of access without distinction both to employee and non-employee union representatives," the board announced.

When access rights are applied to public hospitals, it is permissible for the employer to limit solicitation and distribution activities by non-employee union representatives during non-working time in non-working areas. The employer bears the burden of proof that its restrictions are reasonable. But the employer may restrict access to immediate patient-care areas as necessary to prevent disruption of care or disturbance of patients. The employee organization bears the burden of proof that such restrictions are unreasonable.

Where a hospital uses its public passageways for both patient care and access to non-work areas, the hospital must permit non-employee representatives to traverse the passageways in order to access non-work areas; the employer bears the burden of proof that its passageway restrictions are reasonable. The availability of non-work venues, like cafeterias and classrooms, within or near the hospital may be considered in assessing the reasonableness of the employer's limitations on non-employee access to more traditional non-work venues, like break rooms and locker rooms; the employer bears the burden of proof that these alternative venues are a reasonable substitute for more traditional venues.

The board upheld the ALJ's determination that the county improperly prevented non-employee union agents from traversing some work areas and patient-care areas in order to post and update SEIU materials on union-designated bulletin boards. The board said that the employer may prohibit employees from conferring in passageways with non-employee union representatives and prohibit non-employee representatives from lingering or stationing themselves in passageways used for patient care if it would be disruptive to do so. If an employer permits the public access to such passageways, it may not deny access to non-employee union representatives.

The county's rule that permits union access to employees in work areas only if the union makes advance arrangements is reasonable, PERB said. But the county deemed the entire hospital a work area, including traditional non-work areas like break rooms, locker rooms, and grounds adjacent to hospital entrances. The employer may not characterize the entire hospital as a work area and eject non-employee union representatives from traditional non-work areas for failure to make

advance arrangements. This was an overbroad construction of its employee relations resolution.

The board found, as did the ALJ, that the county unilaterally changed its access policy in violation of the MMBA. It rejected the county's exceptions to the ALJ's decision that SEIU materials, inadvertently improperly posted on non-union bulletin boards and promptly removed, did not amount to an MMBA violation.

Claimed violations of personnel rules beyond PERB's jurisdiction: City of San Juan Capistrano.

(*San Juan Capistrano Management & Professional Employees Assn. v. City of San Juan Capistrano*, No. 2238-M, 2-24-12, 4 pp. + 8 pp. board agent dec. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: Violations of personnel rules, absent a showing of generalized effect or continuing impact on the bargaining unit, are processed as grievances and are outside the board's jurisdiction.

Case summary: The San Juan Capistrano Management and Professional Employees Association filed a charge alleging that the city committed a unilateral change by assigning temporary workers to perform the duties of vacant bargaining unit positions.

A board agent dismissed the charge, finding that the city personnel rules give the city the authority to fill vacant positions on a temporary basis under certain conditions and the union did not establish that the city acted beyond its authority conveyed by the rules.

The union also alleged that the city failed to guarantee it would not fill the positions with bargaining unit employees within 12 months, and that the city declined to explain why provisional appointments to vacant bargaining unit positions were necessary. Nothing in the personnel rules requires the union to do so, the board agent explained.

The board agent also rejected the union's contention that the city was considering reorganizing to avoid filling vacant positions with unit members. The charge failed to include sufficient information to determine that the city planned to change a policy within the scope of representation or whether the city intended to satisfy its duty to negotiate with the union.

On appeal, the board affirmed the board agent's dismissal of the charge, adding that it lacked jurisdiction to remedy the violations of personnel rules as alleged because there was no allegation that the rules were employee relations regulations adopted pursuant to the MMBA. The board construed the charge to contest an unlawful unilateral change in a policy set forth in the personnel rules. Each of the contentions raised by the union on appeal concerns application of, not a change in, the

personnel rules, the board explained. To the extent that the city's action is an isolated breach of the rules, violations are addressed as grievances. Absent any showing that the rule violations amounted to a change in policy having a generalized effect or continuing impact on the terms and conditions of employment, the charge was properly dismissed, the board concluded.

No unilateral change in retiree health benefits: County of Sonoma.

(*SEIU Loc. 1021 v. County of Sonoma*, No. 2242-M, 2-29-12, 21 pp. By Member Dowdin Calvillo, with Member McKeag; Member Huguenin dissenting.)

Holding: The union failed to demonstrate the existence of a contractual requirement or binding past practice linking retiree health benefit contributions to those of active bargaining unit employees. The evidence showed that retiree benefits were tied to those of unrepresented management employees and had been so linked for 20 years.

Case summary: SEIU Local 1021 alleged that the county unilaterally changed its policy concerning retiree health insurance benefits without giving the union notice and an opportunity to meet and confer. Specifically, the complaint alleged that on April 10, 2007, the county unilaterally changed the contribution amount from the same premium costs as it paid for current employees under the parties' MOU to a maximum of 85 percent of the lowest-cost medical plan offered for each level of health care coverage for retirees and their dependents.

An administrative law judge found the county had violated the MMBA and PERB Reg. 32603(c) by unilaterally implementing a policy placing a prospective cap on premium retiree contributions to future retirees. The county filed exceptions to the ALJ's proposed decision.

The board first found that the union's charge was untimely because the county had a practice for over 20 years of linking retiree health insurance benefits to those received by unrepresented administrative management employees. It found "implausible" that the union was unaware of the practice. The only change that occurred in 2007 was to unrepresented employees' contributions.

Relying on its ruling in *County of Sonoma* (2011) Dec. No. 2173-M, [CPER 202 online](#), which involved similar facts and legal arguments, the board found the language in the parties' MOU was ambiguous as to the manner and basis on which contributions to retiree health benefits are to be made. Because examination of extrinsic evidence did not clarify the ambiguous contract language, the board reviewed the record to determine if there existed an unwritten but established past practice.

The board found the evidence did not establish the county had an unequivocal, clearly enunciated and acted upon, and readily ascertainable past practice, accepted by both parties, of linking retiree health insurance benefits to the benefits

received by current bargaining unit employees. “While SEIU may have believed this to be the practice, it did not rebut the County’s evidence that, in fact, the actual contributions paid by the County on behalf of retirees since at least 1990 exactly mirrored those paid on behalf of unrepresented management, and were different from those paid on behalf of bargaining unit employees.” Linkage with administrative management was reflected in documents provided to retirees and discussed repeatedly at labor/management meetings, the board noted.

In his dissenting opinion, Member Huguenin found the county did not prove the union agreed to and incorporated into the MOU a practice permitting the county to reduce at will its contributions to retiree and future retiree health care benefits as long as the same reduced benefits were provided to unrepresented management employees.

He concluded the union filed a timely charge and demonstrated that in April 2007, the county reduced its retiree health care benefit contributions to a fixed percentage of the lowest cost plan, instead of continuing to pay a fixed percentage of that plan selected by the individual retiree. In so doing, it violated the MMBA.

Sufficient allegations of unfair practice within limitations period lacking: City of Santa Monica.

(*Gordon v. City of Santa Monica*, No. 2246-M, 4-6-12, 2 pp. + 38 pp. board agent dec. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The unfair practice charge and a series of amendments to the original charge failed to include sufficient factual allegations that occurred within the six-month statute of limitations period. An individual does not have standing to file charges on behalf of the union or other employees.

Case summary: The charging party filed an unfair practice charge on her last day as union director. After filing several amended charges, she moved to add herself as a party. The union later withdrew as a party. She alleged that the city engaged in various misconduct, including denial of raises and promotions, interference with union representation, retaliation, and intimidation. The board agent dismissed the charge, originally filed in 2007, and found that the specific factual allegations added to the fifth amended charge did not relate back to the original charge because they occurred long after 2007, and were filed for the first time in the fifth amended charge more than six months after they occurred.

On appeal, the board affirmed the board agent’s dismissal. The board emphasized that, as an individual employee, she did not have standing to maintain a charge alleging failure to comply with an information request.

Request to withdraw appeal of partial dismissal granted: County of Riverside.

(*Laborers International Union of North America, Loc. 777 v. County of Riverside*,

No. 2248-M, 4-6-12, 2 pp. By Member Huguenin, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The parties settled the dispute underlying the unfair practice charge, and the board granted the union's request to withdraw its appeal of a board agent's partial dismissal of the charge.

Case summary: LIUNA Local 777 filed an unfair practice charge alleging that the county violated the MMBA when it unilaterally changed the retirement benefits for future retirees and failed to provide the union with requested information. A board agent partially dismissed the charge, finding that it failed to state a prima facie case. The union appealed the partial dismissal.

Thereafter, the union notified the board that it wished to withdraw its appeal because the parties had settled the dispute underlying the unfair practice charge. The board granted the union's request to withdraw its appeal.

Alleged interference with employees' right to select representative demonstrated by totality of circumstances: National Union of Healthcare Workers.

(*National Union of Healthcare Workers v. SEIU-United Healthcare Workers West*, No. 2249-M, 4-18-12, 18 pp. By Member Huguenin, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The National Union of Healthcare Workers alleged sufficient factual allegations to support its charge that unnamed agents of SEIU interfered with employees' right to freely select a bargaining representative during a decertification election.

Case summary: The National Union of Healthcare Workers filed objections to a representation election, alleging that SEIU-United Healthcare Workers West violated the MMBA during a decertification election conducted by the State Mediation and Conciliation Service under the authority's local rules. The election was conducted in a unit of in-home support service providers operating within the Fresno County In-Home Supportive Services Public Authority. Specifically, NUHW alleged that SEIU instructed its agents to wear SEIU identification badges and garb; approached bargaining unit members at their homes and demanded that they vote "on the spot" in the presence of the SEIU agent; made physical and verbal threats toward unit members; misrepresented to voters they would lose their health insurance and suffer a reduction of wages or lose their jobs if they voted for NUHW; and destroyed pro-NUHW signs and literature belonging to unit members on private property. A board agent dismissed all of the allegations.

On appeal, the board noted that the Public Authority local rules did not provide for a party to file election objections, but did provide that unfair practice charges would be decided by PERB. Therefore, the board approached the charge as an allegation of

interference with bargaining unit employees' right to choose a representative and the right under local rules to participate in a representation election.

The board said that, when asked to set aside an election, the demonstration of unlawful conduct is a threshold question. Thereafter, the party seeking to have the election set aside must submit specific facts showing how the conduct interfered with the election. In assessing this allegation, the board considered the totality of the circumstances raised by the charge, rather than viewing them separately as the board agent had done, and the cumulative effect of the conduct that forms the basis for the relief requested.

With regard to the allegations about SEIU agents, the board found the names of those individuals is not necessary to state a prima facie case. In reaching this conclusion, the board instructed that, despite the oft-repeated language of *United Teachers-Los Angeles (Ragsdale)* (1992) No. 944, 95 CPER 52, a charging party need not in every situation include the "who, what, when, where, and how" of the respondent's alleged violation. While this formulation may be useful in explaining to a charging party how to plead a case, "it is not a hurdle over which every charging part must leap at the risk of dismissal."

In this instance, NUHW's inability to identify by name the individual SEIU agents involved in the alleged misconduct did not warrant the dismissal of the charge.

The board also concluded that the statement alleged to have been made by SEIU agents (that employees would lose health benefits and suffer wage reductions should they vote for NUHW) could reasonably tend to interfere with voters' rights to freely choose their representative. This was not "mere electioneering puffery," the board said.

Concerning the allegations that SEIU agents destroyed and removed unit members' personal property, the board agreed with the board agent that, standing alone, NUHW failed to show that the conduct had the natural and probable effect of discouraging voter participation or that a substantial number of voters were aware of the alleged conduct. However, the board said, these allegations when considered within the totality of circumstances support a prima facie case of interference with employees' right to freely choose their representative.

Based on the entire record, the board found it had jurisdiction over NUHW's allegations as an unfair practice, not as election objections, and ordered that a complaint issue on the charge.

Dismissal of retaliation charge affirmed: County of San Diego.

(*SEIU Local 221 v. County of San Diego*, No. 2258-H, 4-26-12, 4 pp. + 8 pp. board agent dec. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The union failed to adequately allege that the county retaliated against a

union steward by involuntarily transferring him because he engaged in protected activity known to relevant county officials.

Case summary: SEIU alleged that the county violated the MMBA by retaliating against a bargaining unit employee and union steward for engaging in protected activity. A board agent dismissed the charge finding that, while the employee engaged in protected activity, there was insufficient evidence that the relevant individuals in the county were aware of his protected acts. Additionally, the board agent found the allegations failed to demonstrate that the involuntary transfer of the employee was an adverse action because it did not result in any change in working conditions. The union failed to demonstrate a nexus between the protected activity and the county's decision to transfer him because the charge did not allege when the employee engaged in his union-related activities.

On appeal, the board affirmed the board agent's decision. It found the appeal failed to reference any portion of the board agent's determination or otherwise identify issues of procedure, fact, law, or rationale to which the appeal was taken. PERB also refused to consider new factual allegations presented for the first time on appeal. These allegations referred to facts that occurred before the charge was filed and before the board agent's dismissal of the charge.

Duty of Fair Representation Rulings

Alleged failure to notify employee of her right not to join union states prima facie case: Office and Professional Employees International Union, Loc. 29.

(*Fowles v. Office and Professional Employees International Union, Loc. 29*, [Nos. 2236-M](#), 2-7-12, 15 pp., and [2236a-M](#), 4-25, 12, 4 pp. By Member Dowdin Calvillo, with Chair Martinez and Members McKeag and Huguenin.)

Holding: The board ordered issuance of a complaint based on the charging party's allegation that the union failed to notify her of her right as an agency fee payer not to become a union member.

Case summary: The charging party alleged that the union failed to inform her of her right not to become a union member, failed to provide notice of her rights as an agency fee payer, and misrepresented that full union membership was required as a condition of employment.

A board agent dismissed the amended charge, finding it was untimely filed and did not relate back to the original charge. In addition, the alleged misrepresentation did not violate the MMBA or PERB regulations.

The original charge was timely filed, but an amended charge filed months later alleged more facts. Appealing the dismissal, the charging party asserted that her charge was timely filed because her amended charge clarified her original allegations by providing dates and factual circumstances under which the union

allegedly made misrepresentations about her obligation to join the union. The board found that the allegations in the amended charge were sufficiently related to the original charge for the “relation back” doctrine to apply.

Citing Sec. 3502 of the MMBA, the board observed the statute provides that public employees have the right to refuse to join or participate in the activities of employee organizations. The MMBA at Sec. 3502.5(a) authorizes public agencies and employee organizations to enter into agency shop agreements, under which employees may be required to join the union or pay a service fee to defray the costs of collective bargaining, contract administration, and grievance adjustments.

Relying on precedent under federal law, the board said that a union must provide newly hired nonmember employees with notice that they may elect to be or remain nonmembers, that nonmembers have the right to object to paying for union activities unrelated to the union’s duties as the bargaining representative and to obtain a reduction in those fees, and that notice must be calculated to apprise nonmembers of their rights.

In this case, PERB held, the charging party alleged that she did not receive notice of her right not to become a union member and that the notice she did receive was inadequate to apprise her of her rights. The board ordered, therefore, that a complaint be issued to determine whether the union complied with its legal obligations.

In No. 2236a-M, the board denied the union’s request for reconsideration on the ground that the request merely repeated its previous legal assertions.

Violation of duty of fair representation not supported by allegations in the charge: SEIU.

(*Smith v. SEIU United Long-Term Care Workers*, [No. 2247-M](#), 4-6-12, 2 pp. + 7 pp. board agent dec. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The unfair practice charge failed to allege that the union’s decision not to pursue a grievance on her behalf violated its duty of fair representation.

Case summary: The charging party filed an unfair practice charge alleging that the union breached its duty of fair representation by failing to pursue a grievance based on her belief that she was improperly paid. A board agent dismissed the charge, citing the union’s broad discretion in deciding whether or not to pursue a grievance. The board agent found that the charging party failed to allege facts demonstrating that the union’s decision was arbitrary, discriminatory, or in bad faith and dismissed the charge.

The board summarily affirmed the board agent’s dismissal.

No showing of bad faith bargaining during successor talks: City of Glendale.

(*Glendale City Employees Assn. v. City of Glendale*, [No. 2251-M](#), 4-18-12, 3 pp. + 21 board agent dec. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: A board agent dismissed the charge that the city failed to bargain in good faith with the association; the board adopted the board agent's decision and refused to consider a retaliation charge raised for the first time on appeal.

Case summary: The association alleged that the city refused to meet and confer in good faith during negotiations for a successor agreement and bargained to impasse a permissive subject of bargaining. A board agent examined the parties' bargaining conduct, including an instance of regressive bargaining, and dismissed that charge for failure to state a prima facie case. The board agent also dismissed the charge relating to the permissive subject of bargaining because the association did not object at the time.

PERB adopted the board agent's dismissal as the decision of the board itself. It declined to consider allegations on appeal that the city's bargaining conduct was retaliatory and involved strategies of intimidation and threats of reprisals intended to extract concessions from the association.

The board added that, even if it considered allegations that the association was treated differently than the police and fire and management units, the charge failed to alleged that differential treatment between two groups of employees was predicated on one group's participation in protected activity, as required by *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416.

Representation Rulings

Showing of support from 15 percent of 'donor' unit under local agency rule is unreasonable: County of Riverside.

(*Riverside Sheriffs' Association v. County of Riverside*, [No. 2239-M](#), 2-24-12, 7 pp. + 14 pp. ALJ dec. By Member Huguenin, with Members McKeag and Dowdin Calvillo.)

Holding: The county's rule requiring a showing of support from 15 percent of the donor unit in order to effectuate a unit modification is unreasonable, and the county's denial of the association's unit modification petitions on that basis is unlawful.

Case summary: The county's employee relations resolution has no severance provisions but permits an employee organization to seek a unit modification by filing a request with the human resources director and submitting proof that its represented members comprise 15 percent of the employees in the unit.

The Riverside Sheriffs' Association filed a unit modification petition seeking to move welfare fraud investigators from the existing inspection and technical unit represented by LIUNA Local 777, and the supervising welfare fraud investigators from the existing supervisory unit represented by SEIU Local 721, into the association's existing law enforcement unit. In support of its petition, the association submitted three employee authorization cards signed by the supervising welfare fraud investigators and 17 cards signed by the welfare fraud investigators. At the time, there were three supervising welfare fraud investigators and 25 welfare fraud investigators.

The inspection and technical unit represented by LIUNA had 1,405 members; the supervisory unit represented by SEIU had 1,327 members.

The county denied the association's petition because there was not a 15 percent showing of support from either of the two "donor" units, the inspection and technical unit represented by LIUNA and the supervisory union represented by SEIU.

The association filed a second unit modification petition seeking to move community service officers from the existing inspection and technical unit represented by LIUNA into the association's law enforcement unit. The association submitted proof of support from 116 of the 125 community service officers in the inspection and technical unit.

As it did with regard to the first unit modification submitted by the association, the county denied this petition because there was not a 15 percent showing of support from the donor unit, the inspection and technical unit represented by LIUNA.

An administrative law judge concluded that it would be "virtually impossible" for the petition to garner support from employees represented by another union, other than those it seeks to add. Under the county's interpretation of its rule, no severance-type petition could ever be processed unless the petitioner was seeking to move at least 15 percent of the donor unit to its own unit.

Accordingly, the ALJ found the county rule requiring a 15 percent showing of support from the donor unit was unreasonable, and the denial of the association's unit modification petitions on the basis of that rule was unlawful.

On appeal, the board agreed with the ALJ's conclusion that the county's local rule was unreasonable.

Allowing mixed unit of peace officers and non-peace officers did not violate MMBA: County of Calaveras.

(SEIU Local 1021 v. County of Calaveras; Calaveras County Public Safety Employees Assn., intervener, No. 2252-M, 4-18-12, 8 pp. + 24 pp. ALJ dec. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The local rule precluding a mixed bargaining unit comprised of peace

officers and non-peace officers is unreasonable, and its enforcement would be contrary to the provisions of the MMBA. (See the Local Government section for a summary of this case.)

TRIAL COURT ACT CASES

Duty of Fair Representation Rulings

Charge not filed in timely manner: California Media Workers Guild.

(*Zhang v. California Media Workers Guild/CWA/Loc. 39521*, [No. 2245-I](#), 4-6-12, 7 pp. + 9 pp. board agent dec. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party's allegation that the union failed to represent her had been the subject of a prior unfair practice charge which had been dismissed; this charge was untimely filed.

Case summary: The charging party, an interpreter, alleged that the union breached its duty of fair representation when it rejected her request for representation during a dispute with her employer, the Los Angeles County Superior Court. The charging party had failed to comply with language registration and certification requirements established by the Judicial Council of California; consequently, her name was removed from the list of certified court interpreters. A board agent dismissed the charge, finding it was untimely filed and failed to state a prima facie case.

The board noted that the charging party had sought union assistance between September 2007 and January 2010 and that the union consistently declined to represent her. The board reviewed its own files and took notice of a prior unfair practice charge filed in 2008, which was dismissed for failure to state a prima facie case. PERB concluded that the statute of limitations on the charging party's claims began to run in 2008. At that time, she knew or should have known that the union's assistance was unlikely. Her continued requests and the union's continued refusals for representation did not extend the statute of limitations.

The court's removal of the charging party's name from the list of interpreters was the final administrative action taken by the judicial council. The union's decision not to represent her did not turn on the timing of the court's final action. It turned on the underlying certification dispute, about which she knew the union would not offer representation. Even the last request for representation was more than six months before the charge was filed. Thus, her charge was untimely.

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Sacramento Regional Office — Final Decisions

Mraz v. Regents of the University of California (Davis), Case No. SA-CE-277-H. ALJ Robin Wesley. (Issued 03-01-2012; final 03-27-2012, HO-U-1034H.) When the university began to consider furloughs, Mraz organized union meetings and encouraged coworkers to oppose them. After the union refused to agree to furloughs, the university applied the “reduction in time” provision in the contract. The university imposed a 45 percent reduction on Mraz. After one year, all other employees’ hours were restored but the reduction was maintained for Mraz. No violation was found because the university established it would have imposed the reduction in time regardless of Mraz’s protected activity.

California School Employees Assn. & its Chapter 379 v. State Center Community College Dist., Case No. SA-CE-2543-E. ALJ Christine A. Bologna. (Issued 03-21-12; final 04-18-12, HO-U-1035E.) Since 2000, the district-CSEA contract has contained an hours-of-work clause providing for swing and graveyard shift differentials; it also has waived the management rights sections. In 2009, the district notified CSEA that 11 custodians at Fresno City College would be removed from shifts paying differentials to save money. When the district and CSEA met, the association wanted to negotiate the shift changes. The district responded that it had changed classified bargaining unit employee work hours and shifts for 15 years and believed it could continue to do so. CSEA did not request to negotiate the effects of the shift change decision.

CSEA sent a cease and desist letter to the district, asserting its right to bargain the decision and effects of work shift changes for all bargaining unit members. The district responded that the custodian shift changes did not require additional bargaining because the parties already had bargained and reached agreement, citing the contract. There was also a fixed and established past practice from 1991-2004 of changing work hours and shifts without negotiating.

No violation was found. The contract language was not a waiver of CSEA’s right to negotiate due to its broad wording. However, the union had constructive notice of the district’s historical practice of changing bargaining unit work shifts without negotiating. The CSEA chief job steward and negotiating team member for one contract was a custodian subject to numerous changes in work hours and shifts covered by the 2002-04 audit. The same CSEA labor relations representative and chief job steward participated in a 2004 meeting over the shift change for the bargaining unit telephone technician, which was not negotiated or grieved. The chapter president admitted that the custodians advised that the district had changed their work shifts in the past; he also admitted that no contract language prevented

the shift changes, and that implementation of the shift changes did not change the contract.

Oakland Regional Office —Final Decisions

Mendizabal v. City of Milpitas, Case No. SF-CE-679-M. ALJ Donn Ginoza. (Issued 02-21-12; final 03-20-12, HO-U-1032M.) The city was found to have interfered with the union president's right to represent members of the bargaining unit during layoffs when, after demanding the prompt production of lists of the affected employees and seniority lists, the city placed her on paid leave for purposes of conducting an investigation of allegations of harassment and possible workplace violence. Complaints against the president, including one by the human resources director, were lodged after the president escalated her demands for the lists and engaged in other representational activity. The leave removed the president from the workplace for the entire period of the layoff and had a chilling effect on the union's ability to represent employees. This harm outweighed the city's justification based on violation of the policy of no union activities on work time. The allegations of potential workplace violence were not substantiated. The findings of the investigation included discourteous treatment of coworkers and failure to obtain prior approval for union activities on work time, resulting in a letter of warning. The discipline was not justified because the president's contumacious behavior was provoked by the human resources director's refusal to deal with her.

Bias v. City & County of San Francisco, Case SF-CE-749-M. ALJ Christine A. Bologna. (Issued 02-28-12; final 03-27-12, HO-U-1033M.) The charging party is in City & County of San Francisco bargaining unit 1-S, comprised of approximately 115 painters and supervisors. The exclusive representative of unit 1-S is Auto, Marine & Specialty Painters, Local Union No. 1176. The city/county, Local 1176, and 13 other exclusive representatives signed a three-year memorandum of understanding from 7-1-06 through 6-30-09; in June 2009, the parties extended the MOU through 6-30-10. On 4-21-10, the charging party filed a decertification petition, accompanied by 59 signed employee petitions, with the city/county. On 4-27-10, the city/county responded that the petition should have been submitted between 4-2-08 and 5-2-08 under Section 16.212 of the City/County Employer-Employee Relations Ordinance (ERO); thus the request to decertify was untimely and could not be processed. In April 2010, ERO Sec. 16.212 required decertification petitions to be filed between 90 and 60 days before the expiration date of the existing MOU if the MOU did not exceed two years. If the MOU exceeded that time, the petition was to be filed within the 90 and 60 days before the expiration of the second year of the MOU.

No violation was found. The ERO was not unreasonable on its face or as applied to the decertification petition. The ERO complies with PERB precedent. The MMBA does not contain a contract bar. Public agencies may adopt reasonable rules, including contract bar provisions. The June 2009 extension of the MOU through 2010 met duration requirements but did not create a new window period because the window already had expired in 2008. For the same reason, the extension was not a premature extension. The city/county followed the ERO rather than violate its

local rules and the MMBA.

Mutual Organization of Supervisors v. Fairfield-Suisun Unified School Dist., Case No. SF-CE-2881-E, ALJ Shawn Cloughesy. (Issued 03-30-12; final 04-24-12, HO-U-1036.) Fairfield-Suisun Unified School District wanted to close the entire district for four days during school recess over Thanksgiving and December break in order to save costs on utilities. The collective bargaining agreement between the district and Mutual Organization of Supervisors allowed for the district to “reserve the right to schedule vacations at times least disruptive to work routine.” The district used the CBA section to order MOS supervisors to take their vacations during the days of the closure. MOS replied that the district needed to bargain the decision directive. The district denied and stated it would bargain only the effects of the decision.

Violations were found. The CBA section reserving the district the right to schedule vacation did not include ordering a person to take a vacation when it was not requested. The district changed the work year of the MOS supervisors without negotiating the decision.

Los Angeles Regional Office — Final Decisions

AFSCME Locs. 164, 585, 1890 & 2204 v. Community Redevelopment Agency of Los Angeles, Case No. LA-CE-567-M. ALJ Thomas J. Allen. (Issued 02-15-12; final 03-13-12, HO-U-1031M.) Allegations were dismissed as withdrawn, untimely, or unprovable. After two days of hearing, the motion to amend the complaint to allege different possible protected activity was denied due to possible prejudice.

San Diego Unified School Dist. v. Administrators Association of San Diego, Case Nos. LA-UM-838-E and LA-UM-839-E. ALJ Eric J. Cu. (Issued 03-14-12, final 04-10-12, HO-R-179E.) Petitions to add nine positions to two supervisory bargaining units were opposed on the grounds that the positions were either management or confidential. Management employees must play a significant role in both policy formulation and program administration. The district met its burden with respect to four positions because they required responsibility over specific district programs. That role included drafting policy and procedures, and presenting directly to the district’s board. The positions also displayed autonomy and the ability to deviate from policy. A fifth position was excluded as confidential due to its role in the district’s negotiating team and access to district negotiating information and strategy. The petitions were granted as to the remaining four positions.

Pasadena Management Assn. v. City of Pasadena, Case No. LA-CE-660-M. ALJ Eric J. Cu. (Issued 03-30-12, final 04-25-12, HO-U-1037E.) It was alleged that the city enacted an unlawful unilateral change by refusing to make Employee Option Benefit Funds (EOBF) contributions to members using maternity leave. No violation was found. The plain language of the parties’ contract obligated the city to make only health contributions, not EOBF contributions. Past practice indicates that no employee ever received EOBF contributions while on unpaid leave. The charge and complaint were dismissed.

Gordon v. City of Santa Monica, Case No. LA-CE-426-M. ALJ Eric J. Cu. (Issued 04-13-12, final 05-10-12, HO-U-1038M.) The charge alleged that the city interfered with the employee union representative's protected right to take contract-based leave. The employee alleged that she first was ordered to submit leave requests five days in advance and then, 25 minutes later, was directed to submit requests one, not five, days in advance. No violation was found. There was no evidence that the employee was subject to the five-day requirement. To the extent it was implemented, it was lawfully rescinded under PERB's retraction doctrine. There was insufficient evidence that a strict one-day notice policy applied either. The city considered all leave requests on a case-by-case basis and never denied a single one, regardless of when it was submitted. The city was also justified in getting the employee to adhere to existing policy, where she previously had not done so. There was no cause to examine the employee's previously unalleged violations. The unalleged claim was untimely and would prejudice the city if heard now.

SEIU Loc. 1000 v. State of California (Department of Corrections & Rehabilitation), Case No. LA-CE-672-S. ALJ Thomas J. Allen. (Issued 04-18-12; final 05-17-12, HO-U-1039S.) Interference was found where the administrator asked employees why they filed grievances on behalf of all affected employees, saying it hurt her feelings. No other interference was found. No retaliation was found in the cancellation of overtime where it was rescheduled, and no employee was shown to be adversely affected.

Sacramento Regional Office — Decisions Not Final

Stationary Engineers Loc. 39, International Union of Operating Engineers, AFL-CIO v. County of Yolo, Case No. SA-CE-704-M. ALJ Christine A. Bologna. (Issued 02-02-12; exceptions filed 02-17-12.) Local 39 exclusively represented the Yolo County general unit, 600-plus employees in over 250 job classes. The bargaining unit included 6 peace officer classes of 95 probation and detention officers in the county probation department. On July 2, 2010, the Yolo County Public Employees Association filed a decertification petition in the general unit. Also on July 2, the Yolo County Probation Association filed a petition for unit modification, recognition, and decertification, with proof of support of 84 employees, seeking to create a separate bargaining unit of the probation and detention officers; YCPA requested recognition as the exclusive representative for the new unit, stating that the employees no longer wished to be represented by Local 39 in the general unit. On July 13, County Employee Relations Officer Nunes sent both petitions to Local 39, advising that proof of support was met and an election would be scheduled in the YCPEA decertification petition. Nunes also advised that she would deny the YCPA petition for lack of proof of support and on unit proliferation grounds under the County Employer-Employee Organization Relations Resolution. On July 14, Nunes informed the YCPA president that the petition was denied. YCPA appealed the determination that the appropriate unit for the Probation Department peace officer classes was one of the three existing law enforcement units (65 deputy sheriffs, 12 investigators, and 104 correctional officers, sheriff's operations & service

technicians, and animal services officers & technicians).

Mediation by the California State Mediation and Conciliation Service did not resolve the dispute. On October 7, YCPA appealed the unit determination decision to the county board of supervisors. In mid-October, CSMCS conducted a decertification election, which was won by Local 39. On November 9, the board of supervisors heard the YCPA appeal; Local 39 spoke in support of the county's denial of the petition. The board consolidated the six probation and detention officer classes with the investigators; this action removed the peace officers from the general unit. In January 2011, after the investigators appealed the board's action, the board adopted Nunes' recommendation to approve the YCPA unit modification petition, placing the peace officer classes in a separate probation bargaining unit.

No violation was found. If all relevant provisions of the employer-employee organization relations resolution and MMBA are given effect, the mixed pre-existing general unit represented by Local 39 continued until it was changed under local rules. The evidence shows that the county followed its resolution rather than violate its local rules. MMBA Sec. 3508(a) grants peace officers the right to be separate if appropriate unit determination standards under local rules are met. Local 39 failed to meet its burden of proof that the county violated the MMBA and its resolution; for the same reasons, the unilateral change/failure to bargain in good faith allegation also failed.

Oakland Regional Office — Decisions Not Final

Santa Cruz Faculty Assn. v. Regents of the University of California (Santa Cruz), Case No. SF-CE-912-H, ALJ Shawn Cloughesy. (Issued 03-29-12, exceptions due 05-23-12) The Santa Cruz Faculty Association sought to negotiate workload mitigation as a result of the furlough/salary reduction plan adopted by the regents on July 16, 2009. Specifically, SCFA wanted to schedule its furlough days on instruction days or expand the definition of instruction days to include a "Reading/Recitation/Review Period." The president of the university has the authority to fix the calendar and the calendar is fixed at 146, unless he/she agrees otherwise. To allow furloughs on instruction days would be to decrease the calendar. The president's delegate would not agree to a reduction. Additionally, the definition of an instructional day must be approved by the academic senate. The university refused to meet and confer over the two areas that SCFA was interested in negotiating as those areas were outside the scope of representation. SCFA only has the right to meet and confer specified within their scope of representation. (Gov. Code Sec. 3579[e]) The areas are limited to "those matters which have customarily been determined on a division basis." The president's delegate had authority to fix the university's calendar that brought the number of instructional days outside the scope of representation. The academic senate's control over the definition of an instructional day brought that issue outside the scope of representation.

Operating Engineers Local 3 v. City of Santa Rosa, Case No. SF-CE-768-M, ALJ Shawn Cloughesy. (Issued 04-16-12, exceptions filed 05-13-2012) After the city

implemented a last, best, and final offer of a two-tiered retirement plan on May 25, 2010, the city requested that Operating Engineers Local 3 return to the bargaining table to negotiate further concessions. Local 3 refused, stating that Gov. Code 3505.4 allowed it to refuse to bargain over new terms for a year from implementation. The city proposed a 5 percent salary reduction. Local 3 refused to meet, and the city declared impasse. The parties eventually came to an agreement. Local 3 alleged the city breach its duty to bargain in good faith when it requested that Local 3 meet and confer regarding a successor contract two weeks after implementing its LBFO.

No violation was found. Local 3 contended that MMBA Sec. 3505.4 sets forth a one-year cooling off period for bargaining pending implementation of the city's LBFO. The legislative history of Sec. 3505.4 persuades otherwise. In adopting Assembly Bill 1852 in 2000, the legislature's purpose was to prohibit public employers from imposing a multi-year LBFO without allowing the exclusive representative to meet and confer on an annual basis, rather than mandating a cooling off period.

Valley of the Moon Teachers Assn. v. Sonoma Valley Unified School Dist., Case No. SF-CE-2787-E. ALJ Donn Ginoza. (Issued 04-30-12; exceptions due 05-25-12.) A second-year probationary elementary school teacher was non-reelected on the basis of a recommendation by the principal. The principal had changed the teacher's tentative grade assignment just prior to the start of the school year. During the first week, the principal amended the new assignment to a two-grade combination class. The teacher rallied other teachers to support her request for a reconsideration of these directives. The principal responded by telling the teacher not to meet with other teachers to discuss the assignment outside of her presence. The principal then issued the teacher a counseling memorandum citing her resistance to the assignment. The teacher invoked union representation to challenge the memorandum as improper discipline. Around the same time, other teachers became disenchanted with the principal and lodged complaints with the union, which were conveyed to the administration. Mirroring the list of complaints against her, the principal criticized the teacher with a list of her complaints in a two-hour meeting with the superintendent present. Later, after she was informed her tenure was in jeopardy, the principal revealed to two parent leaders that she suspected the probationary teacher to be the ringleader of a campaign against her.

Despite finding no criticism with the teacher's classroom performance, the principal recommended non-reelection. The district argued that the teacher's brash personality resulted in a lack of fit with the staff. The ALJ held that the non-reelection was discriminatory based on the teacher's protected activity. Timing, disparate treatment, and obstructionist conduct constituted evidence of unlawful intent. The business justification was not persuasive because the principal relied on the teacher's argumentative style, which arose directly from the teacher's protected protests, and concerns about the teacher's personality were peripheral and insubstantial.

Nelson v. Jurupa Unified School Dist., Case No. LA-CE-5517-E. ALJ Eric J. Cu. (Issued 03-16-12, exceptions filed 04-05-12.) The charging party alleged retaliation for the party's grievance activity. The charging party teacher was on the district's 39-month reemployment list. On August 3, 2010, the charging party filed several grievances. On September 15, 2010, the respondent stated the employee lacked standing to file grievances because her employment had terminated. The district later informed the charging party that she remained on the 39-month reemployment list. According to *Santa Ana Educators Assn. (Felicijan & Hetman)* (2009) PERB Dec. No. 2008, 195 CPER 86, certificated personnel on the 39-month reemployment list remain both employees and unit members under EERA. Although the charging party remained an employee, it was an adverse action for the district to state she had been terminated. Nexus was established due to timing and because the employer's inaccurate statements about the charging party's employment demonstrated a departure from its existing processes as well as an animosity toward the charging party's grievance activity. The remedy was a cease and desist order and rescission of the September 15, 2010, letter.

Report of the Office of the General Counsel

Injunctive Relief Cases

Three requests for injunctive relief were filed in the period of February 1, 2012, through April 30, 2012. One was granted and two were denied.

Requests granted

Deputy City Attorneys Association of San Diego v. City of San Diego (IR Request No. 617, Case No. LA-CE-752-M). On February 16, 2012, the Deputy City Attorneys Association of San Diego filed a request for injunctive relief asking that the city be enjoined from proceeding with a local ballot measure entitled, "Comprehensive Pension Reform." The request was based on a charge alleging that the mayor and two other city council members authored, funded, and acted in their official capacities to promote the measure using city resources and facilities, yet refused to bargain with the DCAA. The board granted the request on March 9, 2012, with Member Alice Dowdin Calvillo dissenting, and ordered that the administrative proceedings on the DCAA charge be expedited.

Requests denied

Calexico Unified School Dist. v. Associated Calexico Teachers (IR Request No. 616, Case No. LA-CO-1510-E). On February 8, 2012, Calexico USD filed a request for injunctive relief, alleging that ACT was violating EERA by picketing in front of a Lucky's Supermarket, where one of the trustees for the district works, and was

engaging in other conduct that threatened the trustee's employment as a receiving clerk at that store. The board denied the request on February 15, 2012, and the charge is being processed in normal rotation.

Jones v. County of Santa Clara (IR Request No. 618, Case No. SF-CE-646-M). On April 24, 2012, Jones filed a request for injunctive relief, claiming that he is suffering irreparable harm as a result of his discharge in 2009, allegedly in retaliation for filing grievances. The underlying unfair practice charge was dismissed by an ALJ in February 2011, and the matter is currently pending on appeal to the board. The board denied the request for injunctive relief on April 30, 2012.

Litigation Activity

Four new litigation cases were opened between February 1, 2012, and April 30, 2012.

PERB v. City of San Diego; San Diego Municipal Employees Assn., San Diego County Superior Court, Case No. 37-2012-00092205-CU-MC-CTL. This action is based on PERB Case No. LA-CE-746-M and IR Request No. 615, which were filed by the San Diego MEA in January 2012. On February 10, 2012, the board granted MEA's request for injunctive relief, and an administrative complaint issued the same day. On February 14, PERB filed a complaint for injunctive and writ relief in San Diego Superior Court, followed the next day by an ex parte application for a temporary restraining order and an order to show cause regarding the preliminary injunction. In its ex parte application, PERB sought to enjoin the city from proceeding with a ballot measure entitled, "Comprehensive Pension Reform," which was alleged by MEA to be a city-sponsored measure about which the city was required, but had refused, to meet and confer before placing it on the ballot for the June 5, 2012, election. At a hearing on February 21, 2012, the court denied the TRO/OSC, without prejudice to refile a motion for preliminary injunction after the election.

Boling et al. v. PERB et al.; City of San Diego, San Diego County Superior Court, Case No. 37-2012-00093347-CU-MC-CTL. On March 5, 2012, after the judge in the *PERB v. City of San Diego* case denied their request to immediately intervene, three citizen proponents of the "Comprehensive Pension Reform" ballot measure filed a separate complaint against the board and the individual board members, seeking injunctive, declaratory, and monetary relief. The city was also named as a defendant, for purposes of the request for declaratory relief only.

San Diego Municipal Employees Assn. v. Superior Court of CA, County of San Diego; City of San Diego et al., California Court of Appeal, Fourth Appellate District, Division One, Case No. D061724. On March 27, San Diego Superior Court Judge Luis Vargas — who was then newly assigned for all purposes to *PERB v. City of San Diego* and the related case of *Boling v. PERB* — granted the city's ex parte application for an indefinite stay of the PERB administrative proceedings as to PERB Case No. LA-CE-746-M. On April 11, MEA filed a petition for writ of mandate in the Court of Appeal, seeking immediate relief from the stay and a writ of mandate

directing Judge Vargas to vacate his stay order. On May 3, after considering informal responses submitted by PERB and the city, the Court of Appeal issued an order to show cause why the relief requested by MEA should not be granted.

Moore v. PERB; HACLA, AFSCME, Council 36, California Court of Appeal, Second Appellate District, Case No. B240272. In March 2011, Moore filed a petition for writ of mandate in Los Angeles Superior Court to challenge the dismissals of unfair practices charges he had filed against HACLA and AFSCME alleging, respectively, retaliatory discharge and breach of the duty of fair representation, which were upheld by the board in Decision Nos. 2165-M and 2166-M. Moore's petition was denied by the superior court after a hearing on the merits in November 2011, and judgment was entered in favor of AFSCME and HACLA in January 2012. Moore filed a notice of appeal in the Court of Appeal on March 29, 2012.

Staff Changes

In March 2012, Mary Weiss was hired as a senior regional attorney in the Los Angeles Regional Office.

In April 2012, James Coffey was hired as a regional attorney in the Sacramento Regional Office.