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Letter From the Editor

Dear *CPER* Readers,

Just in time for the November election, Robert Bezemek's article lays out when and where a public entity may limit speech on its premises. Some community colleges have been taking too narrow a view of the traditional public forum, he contends. Unions and their opponents battling over tax initiatives and Proposition 32, which would eliminate payroll deductions for political contributions and restrict their political donations, may want to read carefully.

Also in this issue, the Labor and Employment Relations Association of Northern California shares with *CPER* readers a discussion on factfinding for local government entities that may interest anyone engaged in bargaining today's difficult issues. PERB finished implementing regulations under AB 646, but as the Recent Developments section shows, the legislature made more changes to PERB's jurisdiction and the laws it enforces. As a result, PERB is making changes to its regulations and wants your input.

A recurring theme on our pages is pension reform. Courts continue to answer questions about amending pension rights for current employees, and the legislature's pension reform bill, AB 340, may give them additional opportunities to develop the law.

Be sure to read "Legislative Roundup" in the Public Schools section, which explains state lawmakers' attempts to change school evaluations and track its success with education reforms. Of course, those reforms eventually spawn litigation, which you can also read about this month.

Say goodbye to the Fair Employment and Housing Commission, which will no longer be issuing precedential decisions in discrimination cases.

Like our readers, CPER is waiting with bated breath the outcome of the November election. Will the public sector benefit from an infusion of revenues, or will mid-year cuts again be necessary? The results will be in and we'll cover it all in our December issue.

Katherine J. Thomson, Editor, *CPER*

CPER Journal Online

Zoned Out — The Peculiar Assault on Free Speech by California Community Colleges

By Robert J. Bezemek and David Conway

In September 2010, with an election looming for members of a California community college's board of trustees, a few faculty members assembled outside the college's administration building during a public meeting of the board. They set up a folding table and intended to distribute leaflets urging support for challengers to incumbent board members. Campus police ordered them to leave, directing them to one of the free speech "areas" that the administration had designated. That area encompassed a small portion of the college's 71-acre campus, which includes several open areas and walkways, and more than 30 buildings. The three speech areas were one plaza, one patio, and part of a campus walkway near the college library. None of these areas adjoined the administration building.

In justifying its action, the college relied on its recently issued "election guidelines" that referred to "free speech areas on the…campuses…." The union asserted these restrictions were unconstitutional because the entire open space of the campus is a "public forum," where free speech is protected. The college relented, and faculty were able to leaflet outside a candidate forum held soon afterward in the same location. But, many other California community college districts have gone much further in their efforts to limit employee, union, or student speech on their campuses.

American colleges have long been identified with protest and demonstrations. In fact, a decade before the Revolutionary War, in 1765, colonists and Harvard college students protested the British Stamp Act at Harvard Yard.[1] Yet until the free speech battles that swept the nation in the 1960s, most American colleges were particularly hostile to freedom of speech on their campuses. It is worthwhile recalling that until the UC Berkeley Free Speech Movement of 1964, the history of the University of California overflowed with speech restrictions. Through the 1960s, the

university forbid political speakers and meetings on campus, prohibited the distribution of political writings, banned organizations whose views it disapproved, disciplined students or fired faculty who had “leftist” views, and behaved as though state and federal constitutional rights stopped at the college perimeter.[2] Such actions, of course, are and were unconstitutional.

Once again, there is a trend toward college administrations placing unconstitutional restrictions on speech. During the last few years, numerous California community colleges have adopted policies and regulations designed to severely curtail freedom of expression, if not altogether prohibit it except in limited “free speech zones.” More than half of California community college districts have now declared their entire campuses to be “non public forums,” with speech and advocacy confined to restrictive “free speech zones” or “areas.”[3] In a sense, these policies have replaced the “marketplace of ideas” with a “speech boutique” or, perhaps, a gazebo, shunted to the side, and that is only sometimes available (often if reserved well in advance).[4]

The problem with a free speech zone is, of course, that it restricts expression to those inside the zone, and prevents speech from reaching those outside. In the case of several colleges, these “zones” are not just an infinitesimally small percentage of the campus’ total open space, but they are remote from where people tend to walk or congregate. In this way, the college effectively prevents freedom of speech on nearly the entire campus. In implementing these “zones,” most of the policies assert that they are intended to “protect” or “enhance” free speech. For this they should get an “A” in Orwellian doublespeak.

In addition to restricting the physical space where speech may occur, most of these policies or implementing procedures erect other barriers to spontaneous protected expression. Many demand advance notice as to the speakers’ identity.[5] Several require advance submission of proposed remarks.[6] Some declare that individuals “shall be allowed to distribute petitions, circulars, leaflets, newspapers, and other printed matter” only “within the areas generally available to students and the community.”[7] Others forbid solicitation of political or ideological contributions.[8] And, some prohibit anonymous speakers or literature.[9]

The widespread adoption of these policies is no coincidence. Many districts have been stimulated to act by the Community College League of California, a non-profit organization consisting of the 72 local community college districts in California. The League offers “model” policies on freedom of speech that encourage districts to declare that “the colleges of the district are non-public forums.” The February 2010 version includes this Pinocchioan incentive: “Note: This policy is legally required.”[10]

One recent, glaring example of “free speech” policy run amok took place at Southwestern College, in San Diego County, where in 2009, the college declared its campus to be a “non-public forum” and decided it was thus empowered to ban from the campus and place on leave three professors who protested outside the College’s limited “free speech patio.” (The resulting storm of protest over this illegal action led to the reinstatement of all three faculty members and a revised policy on

free speech.[11])

Such restrictions are unconstitutional, however, as colleges are the quintessential "marketplace of ideas," where freedom of expression is to be fostered, not curtailed.[12] The U.S. Supreme Court emphasized that "the university is a traditional sphere of free expression…fundamental to the function of our society,"[13] and courts have repeatedly affirmed this same principle in deciding questions of speech in American colleges.[14] For instance, the Supreme Court declared:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation…Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.[15]

The court emphasized that because the First Amendment "needs breathing space to survive, the government may regulate in the area only with narrow specificity."[16] Thus, the court declared, the "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[17]

In this marketplace of ideas, the students, faculty, classified staff, and the public have the right to engage in a wide variety of protected speech, such as hand billing or leafleting, soliciting signatures or funds, distributing literature, proselytizing, protesting, satirizing, debating, urging support or opposition to candidates or policies, and expressing themselves artistically. Of course, they also enjoy the right to listen to the speech of others.[18]

Since the 1960s, several California court decisions have affirmed the rights of workers and others to distribute political literature on American's college campuses. In 1969, the California Supreme Court affirmed the right of unions in K-12 public schools to hold rallies and distribute literature on public school premises during duty-free time.[19] In 1975, another decision affirmed workers' rights to distribute leaflets on school premises,[20] the court agreeing that in order to restrict First Amendment speech rights, a district bears a "heavy burden" of establishing a compelling state interest. It also held that a district must prove that the conduct being curtailed was reasonably likely to result in actual impairment or disruption of public service.[21] The current leadership of California's community colleges seem largely unaware of these precedents.

While most recent appellate cases have focused on overbroad policies that unconstitutionally punish or muzzle students or faculty,[22] there have been cases addressing policies dealing with speech in more general terms. Thus, the Supreme Court acknowledged in *Widmar v. Vincent*, that "the campus of a public university, at least for its students, possesses many of the characteristics of a public

forum."[23] But until the recent "Occupy" demonstrations, American colleges have been relatively devoid of mass protest.[24]

As this article explains, these new policies and procedures that restrict the location of speech to specific "free speech zones" or "areas" and restrict or "chill" the exercise of free speech in other ways, are undoubtedly unconstitutional. In case after case, California courts, and those of other jurisdictions, have struck down these limitations. Surprisingly, the widespread adoption of these restrictive policies has failed to receive much public notice, and these new hurdles now lie in wait for unsuspecting speakers.

Speech Zone Policies and Procedures

The typical policy that establishes "speech zones" usually states, "The District is a non-public forum, except for those areas that are generally available for use by students or the community, which are limited public forums."[25] As an example, in Los Angeles County, the El Camino College policy incongruously declares:

El Camino College welcomes and supports the open and free exchange of ideas and philosophies in a civil and respectful manner consistent with constitutional principles rooted in the First Amendment. In order to maintain a reflective and productive academic and social environment, the Superintendent/President shall enact administrative procedures to regulate the time, place and manner of the exercise of free expression in the limited public forums. While El Camino College is a non-public forum, Free Speech Areas have been designated as limited forums. The administrative procedures shall allow the right of students and non-students to exercise free expression….The distribution of printed materials or petitions in those parts of the College designated as Free Speech Areas, … shall be permitted on campus … Prohibited speech on campus includes … the violation of District policies and procedures….[26]

In Santa Clara County, Gavilan College's AP 5550, entitled, "Speech: Time, Place, and Manner," declares the college is a non-public forum, except for a "designated Free Speech Area, as follows: Gazebo, located North of Cafeteria." It adds that "the Free Speech Area is a limited public forum, and that the District reserves the right to revoke that designation and apply a non-public designation at its discretion."

Most of these policies and procedures offer as their "legal authority" Education Code sections 66301 and 76120, discussed below. These policies are implemented through written "administrative procedures," which contain the additional specific limitations that are unconstitutional. To understand the implications of these policies, one must recognize the analytical methodology that has come to dominate court review.

Forum Analysis

Federal forum analysis: The legal distinctions among public forums, non-public forums, and limited and designated public forums. The "public forum doctrine" is a means through which courts analyze restrictions on freedom of speech in public places.[27] Federal "forum analysis," which is barely 30 years old, divides public property into public forums, non-public forums, and limited and designated public forums.[28] In federal constitutional analysis, the scope of free expression, and the allowed level of governmental regulation, turns on which forum is involved.

Federal forum analysis treats public streets, sidewalks, squares and parks, public grounds, and other rights-of-way to be "quintessential" *public forums*.[29] In a *public forum*, federal law holds that the government may only limit free speech and impose content-based exclusions on a showing that its regulation is narrowly drawn to achieve a compelling governmental interest.[30] Limitations are subject to "strict" judicial scrutiny. A "traditional" public forum is a place that is devoted to debate or association by long tradition or historical practice.[31] As the Supreme Court explained three-quarters of a century ago:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[32]

As with any "time, place, or manner" restrictions, the government bears the burden of justifying a location restriction.[33] And whenever a restriction covers a public forum, the government bears this same burden.[34]

A *designated public forum* is one that the government has opened to expressive activity.[35] In a designated public forum, the government may enforce a content-neutral time, place, and manner restriction only if the restriction is necessary to serve a significant government interest and is narrowly drawn to achieve that interest, and for such restrictions "is bound by the same standards as apply in traditional public forum."[36]

In a *non-public forum*, the least free speech rights exist. Non-public forums, which most California community colleges aspire to be, are, in the eyes of the courts, "no forum at all" for First Amendment purposes.[37] A non-public forum is one in which the *content* of the speech, and the *speaker*, can be restricted by the government. The government may entirely exclude, at its discretion, speakers on the basis of subject matter, so long as distinctions are viewpoint neutral and reasonably drawn in

light of the purpose served.[38] Hence, at Southwestern College, in 2009, the college declared it was a non-public forum and decided it was thus empowered to arrest and ban from the campus three professors who wanted to protest outside the limited "free speech zones." (The resulting storm of protest over this seemingly led to a "reassessment" of this illegal action.)[39]

Finally, a *limited public forum* is a non-public forum that the government elects to open for certain groups or for certain topics.[40] A district may convert part or all of a non-public forum to create such a limited public forum, since it may always increase speech rights beyond what is constitutionally required. Thus, in a "limited public forum," the government is able to restrict the topics of allowed speech and the speakers, but only in a place that would otherwise be a non-public forum, where there is no historic or intrinsic right to free public speech. In no circumstances is the government free to limit the status of its already-existing *public* forums, and any attempt to do so for a historical public forum is startling and utterly unwarranted.[41]

When a federal constitutional analysis is involved, the type of forum is critical to determining what standards apply to analyze any restrictions on speech.

The public forum under California law. California law holds that the test of whether property constitutes a public forum is whether the use of the area as a public forum interferes with its primary use.[42] This test is broader than that applied by federal courts. In the case of *Pruneyard Shopping Center v. Robins*, the California Supreme Court explicitly recognized that the state Constitution "grants broader rights to free expression than does the First Amendment" to the federal Constitution.[43] The court underscored that it had first recognized a private shopping mall as a public forum in 1946!

The primary uses of a shopping mall's open spaces are fairly evident to most consumers — such malls have replaced our town squares. A college's open spaces are even more apparent. Nearly every college campus includes pathways, sidewalks, hallways, plazas, quadrangles, courtyards, lawns, patios and fountains, public streets, student unions, and open areas where students and others have always congregated and exercised their freedom of expression. Indeed, a public college is *supposed to be a bastion of freedom of expression*, the quintessential public forum for protest, debate, and other political or artistic expression.

The exercise of these expressive and associative rights on a college campus rarely interferes with the primary educational use of the premises, and spirited debate, dissent, and protest actually enhance this purpose by exposing the college population to the free exchange of ideas in the search for truth. The generous open spaces and other areas of a college campus were never intended for mere pedestrian traffic, but offer the opportunity for adults in a college setting to associate and engage each other in debate and protest.

Because a public forum historically exists within California's colleges and universities, freedom of expression and association are fully protected from arbitrary limitation or exclusion by the trustees of that public property. Simply put, colleges cannot eliminate the constitutionally protected, historic public forum aspects of its

campuses *by purporting to recharacterize them as non-public forums*.

Such an action squarely conflicts with California law and federal law, which recognizes that a college campus bears all the attributes of a public forum.[44] Unlike VA hospitals, fishing piers, or military bases, which are either limited or non-public forums, the *default standard for a California community college is that the campus is historically and by tradition a public forum*.[45]

As mentioned above, California's more expansive approach to public forums is not limited to traditional forums such as streets, sidewalks, and parks, or to sites dedicated for communicative activities.[46] And the California Constitution grants more expansive speech rights than federal courts have interpreted in the First Amendment.[47]

The "Conversion" of a Public Forum to a Non-Public Forum Is Not Allowed

Under a federal constitutional analysis, traditional public forums are defined by the objective characteristics of a property, and hence simply asserting that those public forums are now "non-public forums" or "limited public forums" is ineffective to deprive a traditional or historic public forum of its status, when the objective characteristics remain unchanged.[48]

A designated public forum is created by intentionally opening a nontraditional public forum for public discourse.[49] The law dictates that "determining the government's intent is an inherently *factual inquiry*."[50] Thus, it is necessary to determine whether a forum is public or not by examining "the forum's past uses, the government's consistent policy and practice, and the forum's compatibility with expressive activity."[51] A policy statement, by itself, is not determinative.

Despite calling newly created speech zones "limited public forums," or "free speech areas," districts are actually *closing* public forums and purporting to convert and "designate" a small fraction of campus space into "limited public forums," whose availability for speech it may "revoke" at any time by fiat.

Rather than preserving its public forums, as the law requires, these new policies propose to do away with them. Yet a traditional public forum must be preserved for assembly and communication.

These principles were illustrated in a recent case, where Salt Lake City and the Mormon Church ran squarely into the Constitution by attempting to convert a formerly public forum street into a non-public forum mall. The city had sold a public street, historically available for speech, to the Mormon Church. Under the terms of the sale, the street and the mall plaza continued in existence, and the city maintained a public easement. But the Church owned the property, and a term of sale was the easement should not be interpreted to "create or constitute a public forum, limited or otherwise." The terms provided that the easement was not intended to allow picketing, distribution of literature, soliciting, demonstrating, or a

host of other expressive activities. The Church then posted signs forbidding such activities, and groups now foreclosed from use of the forum, such as the First Unitarian Church, filed suit.

The federal court held that the contractual declaration of an easement could not insulate the property from being considered a public forum:

> The easement's history, as well as the other contemporary characteristics of the easement discussed above, support the conclusion that the easement is a public forum. The objective nature and purpose of the easement and its similarity to other public sidewalks indicate it is essentially indistinguishable from other traditional public fora. We reach this conclusion *in spite of the City's express intent not to create a public forum*, because *the City's declaration is at odds with the objective characteristics of the property* and the City's express purpose of providing a pedestrian throughway. Accordingly, we hold that the easement is a public forum.[52] [Emphasis added.]

A primary thesis of the city and the Mormon Church was that, because the mall was no longer governmental property, the forum could be closed. The court rejected this, recognizing that either governmental ownership or governmental regulation was sufficient to find a public forum.[53] As the court stressed, government ownership is not required for a public forum to exist.[54]

The ultimate argument of the city and Mormon Church, that the city's intention to not create a public forum controlled the outcome, was rejected. The court explained, "The government cannot simply declare the First Amendment status of property regardless of its nature and public use."[55] It continued:

> If the objective, physical characteristics of the property at issue, and the actual public access and uses that have been permitted by the government indicate that the expressive activity would be appropriate and compatible with those uses, the property is a public forum. The most important considerations in this analysis are whether the property shares physical similarities with the more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property. (*International Society for Krishna Consciousness v. Lee*) (1992) 505 U.S. 672, at 698-699, J. Kennedy concurring in judgment).

While not every part of a college campus is, at all times, a public forum, California law recognizes that areas normally reserved for education or administration may also serve, at least temporarily, as designated or limited public forums. Thus, California's Civic Center Act[56] allows public use of classrooms, meeting areas, auditoriums, and other common areas of school and college districts for political meetings and events.[57]

Court Decisions Generally Treat College Campus Areas as Traditional or Designated Public Forums

In recent years, in nearly every instance in which a college has attempted to transform its public forums into non-public or limited public forums, the action was either enjoined, declared unconstitutional, or withdrawn when the school was confronted with demands or litigation.

In California, there have been but a handful of published cases, but they are instructive. In 1999, the South Orange Community College District adopted a policy identifying three "preferred areas" for speech and instituting a "reservation system" for gatherings of 20 or more. The policy forbid distribution of written material without obtaining prior approval.[58] The "preferred" speaking areas excluded the "popular" and "strategically located" areas where students typically gathered. Students went to court, challenging the regulations. The court found that the college had opened up its premises to public speech, and that the policy appeared to prohibit "the distribution of flyers advocating the need to safeguard individuals' rights of speech and seeking donations in support of [the students'] pending lawsuit."[59] It also concluded that partitioning the campus into speech areas was likely unconstitutional, resulting from overbroad regulations, and enjoined the unconstitutional provisions.

Following the decision, the South Orange CCD revised its policies, and landed back in court.[60] This time, the offending policies specified that use of "any portion" of the college's grounds had to be reserved, the decision being solely within the college president's discretion. The court found this to be an unconstitutional prior restraint because approval was dependent on the complete, unfettered discretion of the president. The district argued that its policies were valid "time, place and manner rules," but the court disagreed, finding that most of the policy restricted speech based on its content. In particular, one section allowed the college to examine the content of posted material and remove writings that it felt were obscene, libelous, or slanderous.[61] Holding that the state lacked a "compelling interest in enforcing state civil laws," the court struck down this aspect of the policy as being overbroad.

In 2009, a dispute arose at City College of San Francisco, which had in place policies requiring "off-campus" individuals and organizations to apply to speak or distribute literature "at least five (5) working days in advance…of the requested activity." The regulations restricted speech to "designated areas," in this case a plaza on campus, and required all literature for distribution to be provided to the college in advance, along with a form requesting use of the free speech areas. The case arose after the college police force placed a visitor under arrest, handcuffed him, took him to the campus police department, confiscated his literature, and detained him for more than an hour. He was then transferred to the county jail and held for three hours. The next day, the charges were dropped. The student sued.[62] The court never reached the question of whether this restriction was permitted, because it found on other grounds that the regulations were unconstitutional. The district did not dispute, and the court agreed, that the college's Ocean Campus was a public forum.

The court considered the provisions governing prior review and approval of materials, noting that the facts were comparable to those in *Lovell v. Griffin*,[63] where the Supreme Court found such rules to strike "at the very foundation" of the First Amendment.[64] After recognizing that CCSF's regulations "might properly be challenged as a prior restraint, a content-based regulation, or an exercise of unfettered discretion," it issued an injunction.[65]

Other Court Decisions

Several court cases have reviewed speech restrictions in American colleges, and most have found the restrictions unconstitutional. Notably, it is beyond dispute that "college campuses traditionally and historically serve as places specifically designated for the free exchange of ideas."[66] In considering government-imposed burdens on speech, the law holds that rights of free speech are nowhere stronger than in public forums.[67] As with any "time, place, or manner" restrictions, the government bears the burden of justifying a location restriction.[68] When these policies include advance approval, they are especially suspect.[69] Similarly, attempts to apply such limitations on solitary speakers or small groups have fared badly.[70]

Recently, in *University of Cincinnati Chapter of Young Americans for Liberty v. Williams*,[71] a court struck down a five-day prior notice and permit scheme that restricted all demonstrations, picketing, and rallies to a "free speech area" constituting less than .1% of the campus grounds. The situation bears some similarity to the actions of many California community colleges, for the university declared its intent to regulate all expressive activity on campus, and that its entire campus was a limited public forum, in an effort to "avoid strict scrutiny." The university's reasoning was that since its regulation did not depend on the content of speech, it could curtail most speech.

The court explained that in order to apply a federal forum analysis, it looked at the traditional use of the space, the objective use of the space and its purposes, the college's intent and policy regarding the property, and its physical characteristics and location. The court reviewed the history of use of the college's premises, finding that open campus areas had, from an objective standpoint, been made available to students as a designated public forum. Because the property had "traditionally been open for speech and debate," the areas in question were a designated public forum as to the college's students. The court distinguished cases dealing with outsiders, and then focused on the nature of the restrictions, finding that allowing the college to restrict the speech of students to limited topics was "anathema to the nature of a university," the "marketplace of ideas." The court emphasized that a desire for order or to avoid possible future disruption of educational activities was insufficient because "undifferentiated fear or apprehension of a disturbance is not enough to overcome the right of freedom of expression on a college campus."[72] Finally, the court rejected the action of declaring the entire campus to be a limited public forum, concluding that various open areas of the college were designated public forums,

and also holding that the lack of standards by which to judge various speech activities made the policy unconstitutionally vague.

In *Roberts v. Haragan (Texas Tech University)*,[73] the court struck down Texas Tech's "designated forum area" policy as unconstitutional. While the court agreed that the entire campus was not a public forum, it found that the campus included areas which were characteristic public forums, including sidewalks, park-like areas, streets and other common areas. The court wrote that these areas "comprise the irreducible public forums on the campus."[74] It rejected the proposition that the university's ownership of the campus property allowed it carte blanche power to limit the public forum:

> The mere fact that the University owns all the land within its boundaries does nothing to change the equation. First Amendment protections and the requisite forum analysis apply to all government-owned property; and nowhere is it more vital, nor should it be pursued with more vigilance, than on a public university campus where government ownership is all-pervasive. *The University's interest in an orderly administration of its campus and facilities in order to implement its educational mission does not trump the interest of its students, for whom the University is a community, in having adequate opportunities and venues available for free expression.* Indeed, those who govern and administer the University, above all, should most clearly recognize the peculiar importance of the University as a "marketplace of ideas" and should insist that their policies and regulations make adequate provision to that end.[75] [Emphasis added]

In *Justice for All v. Faulkner*,[76] the court rejected the university's assertion that its open areas were a limited public forum. The court examined the content of the rules, finding that they "guaranteed students the right to 'assemble and engage in free speech' subject to 'reasonable nondiscriminatory regulations as to time, place and manner of such activities.'" Based on these terms, the court held that the outdoor areas of the university campus "generally accessible to students such as plazas and sidewalks" were "designated public forums for student speech." Having reached this conclusion, the court ruled that the policy was not "narrowly tailored" because it burdens more speech than necessary to accomplish the university's supposed goal of preserving outdoor areas of the campus for leafleting by students. The court concluded that simply asking leafleters if they were students was much less intrusive than requiring every leafleter to identify him or herself.

Besides these cases, numerous other decisions also conclude that college campuses contain public or designated public forums.[77] In general, courts agree that college spaces routinely include public areas that amount to designated public forums.

The New Speech Policies and Procedures Are Unlawful

While the small number of speech zone cases may not provide a definitive answer on the constitutionality of specific community college district policies, they nonetheless offer considerable guidance that confirms the unconstitutionality of the new policies and procedures.

First, as is evident from the discussion above, it is generally the case that open areas of community college campuses are traditional public forums. Second, at most colleges both predecessor policies and actual experience confirm the public forum status of open areas. Third, the justifications offered by districts for cabining free speech into "limited public forum zones" are inadequate under a strict scrutiny analysis. The unbelievable justification that the changes are necessary to make speech "effective" are hardly persuasive. The new policies actually severely restrict speech, while offering less protection for speech than under previous policies. Furthermore, California law has afforded the widest protection to the public forum areas of colleges and other locations. And, the two cited Education Code sections do not warrant limiting speech to special, less protective zones.

Section 66301′s intent is clear: (1) colleges cannot make or enforce any rules subjecting students to sanction for speech conduct which, if engaged in outside the college, is protected by the California or U.S. Constitution; (2) a student can sue and recover attorney's fees for violations; and (3) prior restraints on speech are not authorized; and (4) employees shall not be adversely affected (dismissed, suspended, disciplined, reassigned, transferred, etc.) for protecting students from the loss of their speech rights. Nothing in section 66301 authorizes college actions to reduce the speech rights of faculty, staff, or visitors, yet the new policies are aimed directly at employees and college visitors, not just students. Moreover, the legislature's accompanying declaration of intent includes the broad admonition of the U.S. Supreme Court in the *Tinker* case, that students "and teachers do not shed their constitutional rights to freedom of speech…at the schoolhouse gate…."[78]

Section 76120 is similarly focused solely on students and, like 66301, is intended to protect, not cabin, speech. It declares that colleges may enact "reasonable" time, place, and manner rules, which shall "not prohibit" students' rights to distribute printed material, wear buttons, and engage in speech except where the speech "incites students so as to create a clear and present danger of…unlawful acts…or the substantial disruption of the orderly operation of the community college…." As is evident, the wholesale restrictions created by these new rules are inconsistent with this statute as well.

The lesson of the precedent setting *Los Angeles Teachers Union* case is that, "when the effective exercise of First Amendment rights relating to speech is impaired by governmental regulation, a court must weigh the extent of the impairment against both the importance of the governmental interest and the substantiality of the threat that the forbidden speech or related activity poses to that interest."[79] And, "the more substantial the infringement of First Amendment rights is, the more compelling the governmental interest and the more ominous the threat to that interest must be."

Applying these principles, it is apparent that the impairment of a rule zoning speech

into confined areas is substantial, while there is no substantial threat posed by the newly zoned speech. The threat to speech from these zones is “ominous,” and the governmental interest in restricting the speech is virtually non-existent. There is no “clear and present danger” from continuing free speech outside the “zones.”[80] The undifferentiated “fear” of college officials from continuing to permit speech throughout a campus’ traditional and designated public forums is not enough to authorize speech zones. As the California Supreme Court has underscored, “Tolerance of the unrest intrinsic to the expression of controversial ideas is constitutionally required.”[81] What motivated this tidal wave of “zoning” restrictions on speech was not any particular problem, merely an effort at cabining speech for the sake of “orderliness.” Of course, the world has experienced far too often the chilling excesses of the politics of order.[82]

Therefore, there is no doubt that the new rules — which at the encouragement of the Community College League have swept through the state — are unlawful. As with San Francisco and other districts that have been forced to withdraw them, those rules await lawsuits or other action to restore the status quo.

Individual Trustee or Administrator Liability for Adopting Policies and Procedures and Speech Zones

If the case law were not enough, the probability that an administrator will be liable for violating free speech rights should dissuade officials from the wholesale adoption of overbroad policies restricting free speech. Federal civil rights laws, in particular the 1871 Civil Rights Act,[83] provide that officials who deprive individuals of their federal statutory or constitutional rights, and who act “under color of state law,” may be sued individually for damages for violating constitutional rights. It is, by now, clearly established that efforts to paint an entire college as a non-public forum or limited public forum, or to ignore the existence of traditional or designated public forums, violate “clearly established’ law.[84] It is settled that adopting or enforcing policies which violate the First Amendment subjects officials to lawsuits for damages and attorney’s fees.[85] Given this, it is difficult to imagine what various college officials and school boards could have been thinking when they attempted to recharacterize their properties as non-public forums, and erect barriers to free expression.

College Districts, as Public, State-Supported Educational Institutions, Have a Mandatory Obligation to Protect Freedom of Speech.

College districts have an obligation to protect freedom of speech. The purpose of the Federal Bill of Rights was to protect First Amendment freedoms from limitation by local officials. As was explained in *West Virginia State Board of Education v. Barnette*,[86] the Founding Fathers determined to protect such freedoms from the “vicissitudes of political controversy, to place them beyond the reach of majorities and officials.”

In *Hague v. CIO*, the court held that the government has an affirmative duty to preserve public forums, and that the government did not enjoy the same discretion as a private property owner in regulating speech on public property.[87] Instead, the court imposed on the government the requirement that it accord the widest possible latitude to speech within "public forums," which are places where the government must guarantee not just the right, but the meaningful opportunity, for citizens to express themselves. Under this doctrine, the government serves as the guarantor of individuals' free speech rights.

By adopting policies that illegally restrict free expression, scores of California colleges have disregarded their obligation to assure that freedom of speech for employees, students, and the public is protected on college campuses.

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[1] The 1765 protest by Harvard students and Boston residents protested a law that taxed the colonists to pay for the lodging of British troops to keep the colonists in line, and to pay for British troops at war.

[2] *An extensive description of UC's war against free speech appears in At Berkeley in the Sixties, Jo Freeman, Indiana University Press, 2004, pp. 12-28.*

[3] These include the following community college districts: Alan Hancock, Antelope, Barstow, Butte-Glenn, Cerritos, Chaffey, Citrus, Coast, Desert, El Camino, Feather River, Gavilan, Glendale, Grossmont, Imperial Valley, Los Angeles, Mendocino Lake, Merced, Mt. San Antonio, Mt. San Jacinto, North Orange, Ohlone, Palomar, Rancho Santiago, Rio Hondo, Riverside, Santa Clarita, San Bernardino, San Joaquin Delta, San Mateo, Santa Monica, Sequoia, Shasta-Tehama-Trinity, Sierra, Siskiyou Joint, Solano, South Orange County, Southwestern, State Center, Taft, Ventura, Victor Valley, West Hills, West Kern, West Valley-Mission, Yosemite, and Yuba.

[4] See *Rodriguez v. Maricopa County Community College Dist*. (9th Cir. 2010) 605 F.3d 703.

[5] At North Orange, a speaker must identify him- or herself and the group one is making a reservation for. The same is true of Rio Hondo and Mt. San Jacinto.

[6] For example, the Allan Hancock administrative procedure on speech, dated June

15, 2009, required all persons to present a "brief written statement" of the general content of the statements they will be making. It also provides that the "free speech area" must be "reserved" "two weeks in advance of the planned speech activity."

[7] See Citrus College's Administrative Procedure (AP) 5550, pp. 1-2. Also, see, e.g., Citrus' AP 5550, which states,"No persons…shall solicit donations of money… except where…she is using the areas generally available to students and the community on behalf of and collecting funds for an organization that is registered…."

[8] Districts that restrict solicitation of contributions to registered non-profit or approved associated students organizations or clubs include Barstow, Citrus, Feather River, North Orange, Glendale, Los Angeles, Mt. San Antonio, Santa Clarita, San Joaquin, Sierra, State Center, and West Hills. Barstow states, for instance, "No persons using the Free Speech Area shall solicit donations of money, through direct requests for funds, sales of tickets or otherwise, except where he…is using the Free Speech Area on behalf of and collecting funds of an organization that is registered with the Secretary of State as a nonprofit corporation or is an approved Associated Students Organization or clubs." (See AP 5550 revised 5-12-05.)

[9] Districts that prohibit anonymous speech include Riverside, Santa Clarita, San Joaquin, and Mt. San Jacinto. Districts that forbid anonymous posting or bulletin board information include Los Angeles, Mt. San Antonio, Rio Hondo, State Center, West Hills, Cerritos, and Barstow.

[10] February 2010 "model policy," entitled "BP 3900 Speech: Time, Place, and Manner," references as its source Education Code sections 78120 and 66301, and includes this line: "The college(s) of the District is/are non-public forums, except for those areas that are designated public forums available for the exercise of expression by students, employees or the public." However, policies and procedures adopted generally have been even more restrictive of speech, as discussed above.

[11] *http://thefire.org/case/806.html.*

[12] This market analogy was first used by Justice Holmes in his dissent in *Abrams v. United States* (1919) 250 U.S. 616, 630, referring to the "best test of truth" being the "competition of the market." This analogy is credited with inspiring Justice Brennan's specific reference to the rights of listeners: "I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General of the U.S.* (1965) 381 U.S. 301, 308, Brennan concurring.

[13] *Keyshian v. Board of Regents of the State of New York* (1967) 385 U.S. 589, 605-606.

[14] The phrase was first applied in *Keyshian, supra,* 385 U.S. at 603, which held unconstitutional laws requiring college professors and other school employees to

sign loyalty oaths, on penalty of losing their jobs. The laws in question also declared that the "utterance of any treasonable or seditious word" was grounds for dismissal. The court ruled, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues (rather) than through any kind of authoritative selection."

[15] *Keyshian, supra,* 385 U.S. at 603, citing *Sweezy v. State of N.H. by Wyman* (1957) 354 U.S. 234, 250.

[16] *Id.*

[17] *Id*.

[18] *Lamont v. Postmaster General* (1965) 381 U.S. 301; *Kleindienst v. Mandel* (1972) 408 U.S. 753, 762-763 [upholding the First Amendment right to "receive information and ideas...."]*; Searle v. Regents of the University of California* (1972) 23 Cal.App.3d 448, 453.

[19] *Los Angeles Teachers Union v. Los Angeles City Board of Education* (1969) 71 Cal.2d 551.

[20] *California School Employees Assn. v. Foothill-De Anza Community College Dist.* (1975) 52 Cal.App.3d 150.

[21] In numerous cases, California courts have protected school or college employees from discharge or disciplinary action because of their protected free speech. *Adcock v. Board of Education* (1973) 10 Cal.3d 60 [teacher openly critical of school policies at a public forum was ordered reinstated because his dismissal resulted from his exercise of his rights of free speech.]; *Finot v. Pasadena City Board of Education* (1967) 250 Cal.App.2d 189 [dismissal for wearing a beard unlawful, appearance protected by freedom of speech]; *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575; *Ofsevit v. Trustees of Cal. State University* (1978) 21 Cal.3d 763 [college teacher discharged in violation of First Amendment rights entitled to reinstatement and for several years, though he had only a one-year contract]; *Bauer v. Sampson* (9th Cir. 2001) 261 F.3d 775 [faculty member at community college unlawfully penalized for criticizing college president in literature he distributed on campus, protected by freedom of expression]; *Bright v. Los Angeles Unified School Dist.* (1976) 18 Cal.3d 450 [declaring unconstitutional efforts of local school officials to prevent distribution of student newspapers by, *inter alia*, requiring prior approval of their content].

[22] See, e.g., *Silva v. University of New Hampshire* (D. N.H. 1994) 888 F.Supp. 293 [dismissal of faculty member for discussion protected by First Amendment]; *U.M.W. Post, Inc. v. Board of Regents of University of Wisconsin System* (E.D. Wis. 1991) 774 F.Supp. 1163 [rule restricting speech by students was overboad].

[23] (1981) 454 U.S. 263, 274.

[24] While demonstrations against wars in Iraq and elsewhere have occurred, they generally have not led to serious confrontations over free speech activities.

[25] See Butte-Glenn Community College District, Board Policy 3900.

[26] See El Camino College Board Policy 5550, "Speech: Time, Place and Manner," adopted 12-9-02.

[27] This construct originated with the decision in *Perry Education Assn. v. Perry Local Educators Assn*. (1983) 460 U.S. 37, 45-46.

[28] *Hopper v. City of Pasco* (9th Cir. 2001) 241 F.3d 1067, 1074.

[29] *Frisby v. Schultz* (1988) 487 U.S. 474, 481.

[30] See *United States v. Stevens* (3d Cir. 2008) 533 F.3d 218, 232. A "content-based" regulation, that is one which regulates the content of a message, is presumed unconstitutional in a public forum. *Id*.

[31] *Perry Education Assn. v. Perry Local Educators Assn.*, *supra,* at 45. The court explained, "In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks…. In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."

[32] *Hague v. CIO* (1939) 307 U.S. 496, 515-516. "Time immemorial" would certainly include Socrates speeches at the grounds and walkways of the Lyceum (Aristotle's school) in ancient Greece, circa 339 B.C. (Socrates' speech also upset certain political powers, resulting in his trial and the subsequent squelching of his speech by hemlock.) See Plato's *Apology,* 21 d-e, 23a, 23e.

[33] *United States v. Playboy Entertainment Group* (2000) 529 U.S. 803, 816-817; *City of Renton v. Playtime Theatres, Inc*. (1986) 475 U.S. 41, 50-52.

[34] *Perry, supra*, 460 U.S. at 45.

[35] *Perry, supra*, 460 U.S. at 46; *Arkansas Educational Television Comm. v. Forbes* (1998) 523 U.S. 666, 677.

[36] *Perry*, *supra*., 460 U.S. at 46.

[37] See, *Arkansas Educational Television Comm. v. Forbes* (1998) 523 U.S. 666, 678.

[38] *Cornelius v. NAACP Legal Defense and Education Fund* (1985) 473 U.S. 788, 799-800.

[39] See, e.g., http://chronicle.com/article/Professors-Suspended-After-a/48942 and http://thefire.org/article/11237.html.

[40] The case law reveals some confusion between "limited" as opposed to "designated" public forums. In several cases, the court has somewhat clarified its analysis. See, e.g., *Rosenberger v. Rector & Visitors of the University of Virginia* (1995) 515 U.S. 819, 829. The standard applied by the Supreme Court to limited public forums is "identical to that which the court has applied to non-public forums." *Justice for All v. Faulkner* (2005) 410 F.3d 760, 766. The court explained in *Good News Club v. Milford Cent. School* (2011) 533 U.S. 98, that "[w]hen the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech, and may be justified in reserving its forum for certain groups or for the discussion of certain topics, but the restriction must not discriminate against speech on the basis of viewpoint, [citation] and must be reasonable in light of the purpose served by the forum, [citation]." *Id*. at 106.

[41] *DiLoretto v. Downey Unified School Dist.* (9th Cir. 1999) 196 F.3d 958, 964, cert den. (2000) 529 U.S. 1067.

[42] *In re Hoffman* (1967) 67 Cal.2d 845, 851. In *Hoffman*, the issue was the right of protesters opposed to the Vietnam War to distribute literature to departing troops at Union Station in Los Angeles. The city attempted to restrict distribution on grounds that while "streets, sidewalks, and parks" have from "time immemorial" been held "in trust" for freedom of expression, a railway station was different, and that speech activities could be regulated as "unauthorized uses." *Id*. at 849. The court concluded that this distribution did not interfere in the use of the station as a transportation terminal. *Id.* at 851.

[43] (1979) 23 Cal.3d 899, 910.

[44] See *Barr v. Lafon* (6th Cir. 2008) 528 F.3d 554, 576, contrasting a public school — a limited public forum for K-12 age children — with a forum for adults.

[45] *Preminger v. Secretary of Veterans Affairs* (9th Cir. 2008) 517 F.2d 1299, 1313, holding that the VA Hospital is a non-public forum; and *Greer v. Spock* (1976) 424 U.S. 828, holding that a military base is a non-public forum; *New England Regional Council v. Kinton* (1st Cir. 2002) 284 F.3d 9, holding a fishing pier to be a non-public forum.

[46] See, *Pruneyard Shopping Center*, *supra.*

[47]

In states that do not have California's constitutionally based, special protection of free expression, some federal courts have concluded that universities or colleges were designated public forums. See, e.g., Bowman v. White (8th Cir. 2006) 444 F.2d 967, 977-978, holding that the University of Arkansas was an "unlimited designated public forum," despite having many characteristics of a traditional public forum. Id.

at 979. However, the court definitively rejected the university's assertion that it was a non-public forum. Id.

[48] *Perry*, *supra,* 460 U.S. 37, 45.

[49] *Perry*, *supra*, 460 U.S. at 45-46.

[50] *Air Line Pilots Assn. v. Department of Aviation* (7th Cir. 1995) 45 F.3d 1144, 1152; *Stewart v. District of Columbia* (CA DC 1988) 863 F.2d 1013, 1018.

[51] *Id*. at 1017.

[52] *First Unitarian Church of Salt Lake City v. Salt Lake City* (10th Cir. 2002) 308 F.3d 1114, 1131.

[53] 308 F.3d at 1122, relying on, *inter alia*, *United States v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129 [applying forum analysis to privately owned mailboxes controlled by the government]; *Marsh v. Alabama* (1946) 326 U.S. 501, 505 [title to property in a "company town" is not determinative to public speech rights on property]; *Venetian Casino v. Local Joint Executive Board* (2001) 257 F.3d 937, 945, n. 6 [sidewalks need not be government owned to constitute public forums].

[54] *Cornelius v. NAACP Legal Defense Fund*, *supra*, 473 U.S. at 800-801.

[55] *First Unitarian Church, supra.*, 308 F.3d at 1125, emphasis added."

[56] Education Code sections 58130 et seq.

[57] The act was originally adopted in 1913. Besides that act, the Educational Employment Relations Act (EERA) assures labor organizations the same right in section 3541.5. See also, *Desert Community College Dist.* (2007) PERB Dec. No. 1921, 21 PERC 137 [union entitled to hold meeting on campus in classroom to determine endorsements for school board election].

[58] *Burbridge v. Sampson* (C.D. Cal. 1999) 74 F. Supp. 2d 940.

[59] *Id*. at 952.

[60] *Khademi v. South Orange County Community College Dist.* (C.D. Cal. 2002) 194 F. Supp. 2d 1001.

[61] California Education Code section 76120 allows colleges to prohibit student speech that is libelous or slanderous, or obscene.

[62] *Jews for Jesus, Inc., v. City College of San Francisco* (N.D. Cal. 2009) 2009 WL 86703.

[63] (1948) 303 U.S. 444.

[64] 303 U.S. at 451.

[65] Court documents indicate the district and an individual defendant, an officer presumably involved in the arrest, agreed to pay the plaintiffs $60,000 in attorney's fees to settle the dispute, according to the judgment issued April 15, 2009.

[66] *Healy v. James* (1972) 408 U.S. 169, 180.

[67] See *Perry, supra*, 460 U.S. at 45.

[68] *United States v. Playboy Entertainment Group*, *supra*, 529 U.S. at 816-817; *City of Renton v. Playtime Theatres, Inc*., *supra*, 475 U.S. at 50-52. To survive constitutional review, a "time, place, or manner" restriction must be "content-neutral," must "be narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.

[69] To the extent any of the new policies insist on permits or applications as a condition of speech, such requirements are a "prior restraint" on speech and there is a "heavy presumption" that they are unconstitutional. *Forsyth County v. Nationalist Movement* (1992) 505 U.S. 123, 130. As the Supreme Court has cautioned, "It is offensive not only to the values protected by the First Amendment, but to the very notion of a free society that in the context of everyday public discourse a citizen must first inform the government of her desire to speak…and then obtain a permit to do so." *Wachtower Bible & Trace Society of New York, Inc., v. Village of Stratton* (2002) 536 U.S. 150, 165-166.

[70] The Supreme Court has "consistently struck down permitting systems that apply to individual speakers as opposed to large groups…." *Berger v. City of Seattle* (2009) 569 F.3d 1029, 1038, citing *Wachtower Bible, supra*, 536 U.S. at 166-167.

[71] (S.D. Ohio) 2012 W.L. 2160969.

[72] Quoting from *Healy v. James*, *supra*, 408 U.S. at 191.

[73] (N.D. Texas 2004) 346 F. Supp. 2d 853.

[74] *Id*. at 861.

[75] *Id*. at 862-863.

[76] (5th Cir. 2005) 410 F.3d 760, 769.

[77] These include *Riermers v. State ex rel University of North Dakota* (N.D. 2009) 767 N.W. 2d 832; *Bowman v. White* (8th Cir. 2006) 444 F.3d 967, 977-978; *Pro-Life Cougars v. University of Houston* (S.D. Texas 2003) 259 F.Supp.2d 575, 582; and *Hays City Guardian v. Supple* (5th Cir. 1992) 969 F.2d 111, 116.

[78] *Tinker v. Des Moines School District* (1969) 393 U.S. 503, 506-507.

[79] *Supra,* 71 Cal. 2d at 556.

[80] *Id.* at 558.

[81] Author Bezemek personally attended a meeting in Alameda County's Peralta District, two years ago, where it was obvious that graphic photos of abortions had motivated some in the college community to favor restrictive new speech rules, even though the unpopular anti-abortion protesters were well within their constitutional rights to protest as they had.

[82] See, e.g., *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terror*, Geoffrey R. Stone, W.W. Norton & Co., Inc., 2004.

[83] 42 U.S.C. section 1983.

[84] *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.

[85] See 42 U.S.C. section 1988.

[86] (1942) 319 U.S. 624, 638.

[87] *Supra,* 307 U.S. at 514-516.

CPER Journal Online

Factfinding Under the Meyers-Milias-Brown Act: Arbitrators' Perspectives

Panel: Arbitrators Catherine Harris, John LaRocco, and Katherine Thomson***[1]***

*At a luncheon gathering of the Labor and Employment Relations Association of Northern California (LERANC),**[2]** on March 27, 2012, in Sacramento, the arbitrators discussed recent amendments to the Meyers-Milias-Brown Act that require parties to use factfinding to resolve bargaining impasses if requested by the employee organization. While some local governments and labor organizations have experience with binding interest arbitration, few have been involved in a non-binding factfinding process like that mandated by AB 646.*

What follows is the panelists' dialog about factfinding within the context of the MMBA amendments. The discussion was predicated on questions that the arbitrators had prepared to illustrate issues raised by the new legislation.

Harris: None of us has any experience under the law that we're going to be discussing today because it was just signed by Governor Brown on October 9, 2011, and did not become effective until January 1 of this year. As most of you know, it establishes a new mandatory impasse resolution procedure that is administered by the Public Employment Relations Board. What's interesting about this law is that it specifically provides that the process is initiated only when the employee organization files a request for factfinding. The public employer has no right under the law to initiate the factfinding. The process is put into motion when the employee organization files its request with PERB, accompanied by a statement that the parties have been unable to reach a settlement.

As a practical matter, this means that several months will be added to the process because the public employer will not be able to implement its last, best, and final offer until three things happen. First, the parties' positions have been presented to a factfinding panel. Second, the panel's findings and recommendations have been made public. And third, a public hearing has been held on the impasse.

You can find the law and the regulations at the PERB website. But what you won't find on that site, and what we hope to bring you, is perspective on how the factfinding process actually works.

Of course, the first thing any advocate must do is determine what deadlines apply in a given situation. Here, the request for factfinding must be initiated within 30 days, if the dispute was not submitted to mediation, and otherwise within 45 days. The factfinding panel makes findings of fact and recommends terms of settlement within 30 days after appointment of the panel. So, my question to Katherine is:

Harris: **Are the timelines set forth in the new law realistic, and what do parties need to keep in mind when they enter into discussions about extending those deadlines?**

Thomson: First, those are really quick deadlines. This is not a simple grievance arbitration. We're talking about a very different animal. I have seen parties go through the entire process in a matter of 30 days, but only when one side has a strategic reason to do that. For example, I have seen it most often in April or May when teachers want to reserve the ability to walk out if they don't get a deal. They want everything done before the school year is over. The California Teachers Association has departments that know how to get ready for these document-intensive cases. But I would say that for most parties these timelines are not realistic, and they're certainly not what you would prefer to do.

First of all, you have to worry about the availability of a factfinder who has the experience you want. You can't expect many of us to be able to drop everything, start our hearing within 10 days, and finish a final decision within 30 days of our appointment.

You also have to think about your own witnesses, their availability, whether they have the time to put together the kinds of documents necessary to show, for example, comparability. You're going to have to show what other people, either within your organization or in similar positions outside of your organization, have bargained and what they're paid. You may have talked about these things in your negotiations, but you haven't necessarily put them into a form that is easily presentable to an arbitrator who hasn't yet had time to immerse herself or himself in your dispute. Those things take a lot of time, and it's a good reason to try to reach an agreement to extend the timelines.

Another reason is so you can have a pre-hearing conference with the chair factfinder to put together a plan in the most efficient way. You may be talking about 10 issues, and that can take a long time if you're not organized. So, the more time you spend in preparation and planning, the better.

Also, the chair normally sends the draft decision back and forth between the party arbitrators, either for dissents or to make sure that the arguments are well presented and the facts are explained clearly. All this takes time. So, yes, it can be done, but it's time consuming and overwhelming if you try to do it within those timelines.

Harris: **I don't think I've ever had an interest arbitration or factfinding under any law, ordinance, or charter where the parties did not stipulate to extend the time limits because they turned out to be so unrealistic, and I don't see anything different in this law. Is that your experience, John?**

LaRocco: Timelines are routinely and regularly extended, ad nauseum. I had one interest arbitration that went over two years. Nonetheless, the time deadlines are a fertile ground for disputes under this new law. I think some employers will be under

pressure to promptly move the factfinding process along, and extending the timelines may create controversy. If an employer wants to quickly implement its last, best offer, the employer will want to jump through the factfinding hoop as fast as possible. It will be for the factfinder to make decisions about extending the time if there is a dispute.

Audience: **Do you read the statute such that you can grant a request for continuance even if the employer objects to it? Or would you only do it if both sides agree?**

LaRocco: I think the factfinder has the discretion on the appropriate motion with good justification to extend the timelines.

Harris: I think it's in your power as the presiding officer in almost any kind of proceeding to decide on good cause shown that there could be something substantive enough to require a continuance.

Harris: **Moving along, we all know that preparation's important, but preparing for an interest arbitration or a factfinding is very different than a rights arbitration. John, from your perspective as the neutral, what is the best way for an advocate to prepare for a factfinding? In other words, what can an advocate do in advance of the hearing to make things go smoothly?**

LaRocco: Preparation often propels the outcome. Well-prepared parties help the factfinder make a final recommendation. One of the decisions a party must make is whether or not to use expert witnesses. They are common in interest arbitration. In factfinding, sometimes experts are necessary and sometimes they are unnecessary. The ability to pay is a huge issue and, by the way, that is the wrong language in my view; it is actually inability to pay. Since inability to pay is likely to be a complex issue, you might need an expert in governmental accounting to examine the employer's budget. If comparability of wages and benefits is an issue, you may need an economist that can define total compensation, break down the elements of compensation, and help you pick the jurisdictions to compare to your jurisdiction.

And back to the first question about the timelines, if both parties have expert witnesses, have them do some pre-trial preparation. Have them prepare reports ahead of time and exchange their reports so that there might be some stipulations that will streamline the factfinding process. I look at factfinding a little differently than some neutrals. I do not see it as negotiation anymore. I see it as the evaluation of evidence. It may be a step in negotiations, but it is now a trial or a hearing. The factfinder's recommendation is based on the evidence presented at that hearing. So, it is very important to prepare the evidence on the major issues.

Besides, comparability and inability to pay, recruitment and retention is an issue that comes up frequently. Prepare according to the issues.

Harris: I think this is really critical. I think most arbitrators really like telephonic pre-hearing conferences in these types of complex cases. During that initial case management conference or however you want to term it, I encourage the parties to

exchange as much information in advance of the hearing as possible because that helps to move the case along and to identify the disputed points. There's just no substitute for exchanging documents, and even graphs, charts, or diagrams, because if there are errors in those documents, wouldn't you prefer to have the other side point it out in advance of the hearing so that it can be corrected? So that valuable hearing time is not spent on having those corrections made when the clock is ticking?

I'm a great believer in using the pre-hearing time effectively to plan how the hearing time can be used more productively.

Thomson: Having the documents in binders, well marked in advance, and having the binders exchanged prior to the hearing is helpful. It really comes down to 7 or 10 binders by the time you have one for each of the factfinders and for at least a couple people on each side. Having them laid out in a way that they will naturally go along with the witness flow of testimony is helpful. You have to remember that you've been involved in this dispute for six months, a year. The neutral factfinder is walking in and has to absorb it as fast as possible. Think about what to tell somebody who knows nothing about the dispute. How do I simply present this very complicated issue? Particularly the financial information needs to be presented in a way that the neutral chair can pick it up quickly. We're all smart, it's not that. It's just a matter of trying not to spend extra time educating the chair when information could be presented very clearly.

Harris: **There have been quite a few references to the neutral chair and the party or wing arbitrators, and so I thought we'd discuss what may be different philosophies when it comes to off-the-record discussions with party arbitrators. Is a party arbitrator simply a super advocate or is a party arbitrator a member of the tribunal, so to speak? What is the party arbitrator's role? Are they really necessary? How do they fit in? Katherine, what is your view on this?**

Thomson: Unlike John, I do consider factfinding a step in negotiations, but using a different process. It is a tribunal; however, the parties, are still trying to reach agreement. You're now bringing in a third party for some evaluation. But it's not like rights or interest arbitration where you're going to get a final and binding decision at the end. What you're getting is another perspective, an advisory, non-binding perspective on your dispute.

Do I have off-the-record discussions with party arbitrators? In many factfindings, as opposed to interest arbitrations, there are no reporters taking down every word so the record may be the arbitrator's notes. From that perspective, these aren't off-the-record discussions. I always engage in discussions with party arbitrators, but together, because I can get a lot of information that way. So, I will have an executive session with the factfinding panel. The communication that's possible is very helpful because, many times, the party factfinders know a lot about the case. Sometimes they're the chief negotiators for one side or the other. And they can clue in the chair as to what issues will hang up reaching a resolution, what things are most important to the parties, and what things they need to hear the chair evaluate. So I definitely

talk to them in each other's presence, and I don't feel that I have to talk in front of the advocates.

Harris: **Sometimes parties agree to let the case go in front of a single arbitrator, but, John, when you do have a three-person panel, do you expect the party arbitrators to keep confidential what transpired between you and them during an executive session, or do you expect that the party arbitrators will reveal the discussions to their respective associates on one side or the other?**

LaRocco: I try to treat members of the panel as arbitrators even though they are partisan. I allow them to ask questions of witnesses during the hearing just like the arbitrator. And I have the "kick rule." If they want an executive session, they kick me in the shin under the table and we immediately go into executive session. The executive sessions are confidential. I want candid discussions about all problems, including a ruling on admissibility of evidence.

I have another rule…that the panel members do not divulge what goes on in our executive sessions unless all members consent to disclose that information. It works. I have had cases where the particular members tell me information that they would not ordinarily offer without that confidentiality rule.

I also sometimes will ask them for help when I don't understand particular evidence. Tell me where the advocate is going. The advocate may have brought in a witness that is talking about matters which do not appear to be relevant. So, I will call an executive session and ask the partisan member of the panel, what is going on? We may discuss if an offer of proof is appropriate. Sometimes, I invite the advocates into the executive session. I try to treat my partisan members with a great deal of respect. I want them to be full participants in the process.

Harris: I think the main reason that parties are willing to have a panel as opposed to a single arbitrator is because in a factfinding or interest arbitration context, as opposed to a rights arbitration, there is much more potential for the factfinder to become confused about a technical or financial issue. Probably the true function of a party arbitrator is to make sure that the neutral arbitrator does not make a mistake in interpreting the public accounting aspect of the case, especially the financial documents So, you need to think about that when you select your party arbitrator. It has to be someone who's articulate and who is going to be extremely familiar with every iota of evidence that's coming before the panel, someone who understands that one of their key roles is to make sure that the neutral gets it right.

Thomson: I don't make a categorical rule that whatever is said in executive session doesn't go outside of executive session because I have found many times that the questions of the chair have informed the parties where the chair may be heading. And that can be valuable information to the parties when they're considering, "What is this report going to look like when it comes out? Do we really want to be on the losing side on this issue? Do we want a report that says the most reasonable way to look at this is the other side's way of looking at it?" The party factfinders can go back to their constituents and say, "The chair is looking at this differently than we do." It

can be an impetus toward coming around on that issue, maybe heading toward an agreement. So, there are times that I say, “We need this conversation to be confidential,” but I don’t do that for all executive sessions.

Harris: **Let’s just take a quick look at the hearing itself. John, how formal is a factfinding hearing? Do rules of evidence apply? Give us a thumbnail of what a factfinding hearing chaired by you is going to look like.**

LaRocco: Presiding over the hearing is a matter of the arbitrator’s style. I conduct a fairly formal hearing. I want an orderly and efficient hearing. The employee organization goes first most of the time, presenting their case. There may be exceptions to that rule. Certainly, the parties can stipulate to an exception on an issue-by-issue basis. I conduct it like a rights arbitration hearing. Ordinarily, there’s not a burden of proof in a hearing. It is more akin to a burden of going forward. But if one party makes a specific allegation — for example, the union asserts that those funds in a particular account are available for wages — then, the union must prove that those funds are legally available.

Harris: **Under the new amendments, parties need not go to mediation prior to factfinding. My question for Katherine is: Under what circumstances would you be willing to put on your mediator hat during the course of a factfinding?**

Thomson: Whenever the parties want me to. A chair’s looking at this and saying, “Are we going to have a strike here?” None of us really wants that. Remember, the difference between interest arbitration and factfinding is that factfinding is not binding. The better thing to do is to have an agreement come out of factfinding whether there’s a report or not. In the initial executive session, I ask how likely it is that we could mediate, or when would the parties want mediation to happen? Sometimes they’re ready to go to mediation. Other times, they have a constituent control issue. The union may know that it is going to have to agree to something like increased contributions to health benefits. But it’s having trouble convincing the membership, and so it needs the evaluative report. It doesn’t want mediation because it needs somebody to actually come out in public and say, “No, this is just not a reasonable way to go.” I had a situation where all of management in the top-ranking positions were new and very scared to step outside of the safe zone in order to reach a deal. And therefore, they needed something from a third party that they could point to. And so in those situations you’re not going to mediate.

But in other situations, the parties just need something to push them again a little bit. Sometimes they don’t know until later in the process when they have seen the full presentation of the other side. They start to see where they might reach agreement and then they will ask to mediate. Where the parties really want to go into mediation, I tend to get all the evidence in the record on the major issues so that I can understand where the parties are, and what the presentations are, and know where I might be headed on the issues. That’s helpful in the mediation. And then if it doesn’t work out for some reason, I can write my report.

LaRocco: With regard to the factfinder acting as mediator, keep in mind that the mediator is different from the factfinder. The mediator wants to get a settlement and,

to put it quite bluntly, the mediator does not care about the contents of that settlement. A factfinder cares about the result. The factfinder makes an evidence evaluation, which is quite different from being a mediator. Also, I am not sure if mediation during factfinding works that well because there is no hammer. When I am an interest arbitrator, I have a huge hammer. As the mediator and factfinder I do not even have a wrench.

Harris: You have the power of the pen.

Usually the chair can learn from the party arbitrators during the course of the proceeding whether or not the parties really want to go all the way to a factfinding report or whether there's still some hope that an agreement can be reached. John, if despite everybody's best efforts, the dispute has to go to a report, what should a good factfinding report contain?

LaRocco: First, a factfinding report should find facts. It must set forth persuasive justifications for the proposals that the factfinder recommends for inclusion in the collective bargaining agreement. It is the job of the factfinder to sell the recommendation: to sell it to the parties and to sell it to the public. Thus, the factfinder has to be very good at persuasive writing. After writing a draft of the report, I meet with the panel. I will tell them that I am open to changes in language but not to changes in the bottom line. If I have made a big mistake, tell me now.

Harris: I generally have a deliberation session, or executive session, with the panel members before I write anything up. One thing I try to get out of this discussion is what I can put in the report that is going to be persuasive. I am trying to figure out the most impactful way to explain my interpretation of the evidence presented.

Thomson: I would say that my deliberations with the factfinding panel inform me where there might still be room for reaching some kind of agreement. The recommendations are all based on evidence. And so if there's a position the evidence just cannot support, I'm not going to make that recommendation. On the other hand, there are times where there is a little range of reasonableness, and to the extent that I feel that the parties are in that range, my recommendation will try to hit something that I think they can both move to. Those deliberations can be very important so the report can be something that both sides can work with, whether or not the party factfinders want to write a dissent. They may dissent, but at the same time they may not think it's totally unreasonable. They may take it back to their parties and within that 10-day period after the report comes out, they may concede to something a little closer to what the factfinder is recommending .

Harris: We have tried to fly through the law so we could leave time for questions. I do want to make a few comments regarding what you can do to best protect your interests during this process.

One of the most valuable things you can do is to try and simplify and economize with stipulations. You want to be prepared in the manner that John was talking about. You want to exercise good faith in formulating your impasse items. You want to have a lot of communication, not only between the two parties, but inside your

own camp so that the right hand knows what the left hand is doing. And you want to eliminate personal conflicts from these hearings because personal conflicts will have a negative impact on the hearing and interfere with the process. And finally, you want to look at factfinding not as an inevitable step in the process when parties fail to reach agreement, but as a worst possible scenario to be avoided.

Audience: **I have a question about whether you can predict when a factfinding is going to be useful. Is it solely in circumstances where there's declining revenues or a lack of adequate revenues, or do you see factfinding more broadly used as a dispute resolution tool regardless of what the state of the economy is?**

Thomson: I would say it's broadly helpful. What you're doing is getting an opinion. You've tried your best to reach an agreement, and you may have gone to a mediator where the process is fully confidential. Fact-finding is a process where the hearing is confidential, but at the end of that is going to be a very public report. And you're going to be spinning whatever is in that report in your favor. That report is helpful in any situation, whether the union's going to have to make concessions or whether they're trying to get a 4 percent raise when everybody else got 2. There's going to be a disinterested party weighing in. It's not a hammer, but there's some power to it or it wouldn't be successful.

Audience: **You don't see a conflict with the mediator also serving as the factfinder?**

Harris: There is a conflict, and the idea is that if you are acting as the mediator, the chances are very good that you are going to hear information that you would not have heard in a formal hearing. And that information may be something that, if the case were not to settle, you then have to put out of your mind and write your report based only on the record or the evidence. Now, most of us are very good at compartmentalizing because we do it all the time and we're very record oriented. We know what's in the record and what isn't, but we're also human….I don't know if there's any scientific way to demonstrate that once the cat's out of the bag, somebody would not be influenced. That's probably unknowable and why I am not going to step into the mediation role unless both parties agree in writing that the chair is to act as a mediator. I'm also reluctant to act as a mediator if, in so doing, I'm going to delay the process. In other words, I don't want to step out of the factfinder role, act as mediator, and then the whole deal falls through and they have to get a new factfinder. That doesn't make sense. So, unless the parties are willing to go with a written stipulation (that mediation will be tried for a certain amount of time and, if it fails, we return to the interest arbitration or factfinding track), I am not comfortable with acting as the mediator.

There are some public bargaining laws, for example, the Hawaii law, which specifically provides that the neutral chair is expected to act as the mediator. That is why you have to read the law wherever you go because it varies depending on the state or county where the case arises. The first thing you have to do when you get a case is to determine what the rules are that apply to the situation. If the parties are willing to go with a written stipulation, then fine, we will try mediation for a certain

amount of time but, if it fails, then we are back on the interest arbitration or factfinding track.

LaRocco: Your question underscores the importance of selecting a factfinder. You must choose somebody that you trust because if they step out of the factfinder role, you have to be able trust them to handle the dual roles.

Thomson: I would say I'm reluctant to do mediations in a binding process. But because factfinding is not binding, I'm much less reluctant to try to work both roles even though if mediation fails, I might end up writing a report. It's because factfinding is non-binding that it really is a different process to me.

Audience: **Is the selection of the arbitrator different than our strikeout process, where we get 15 names and each party gets to strike until we end up with somebody?**

Thomson: Under Meyers-Milias-Brown Act, you put in your request with PERB and then PERB puts together a list of seven. Then if you don't select someone from the list, they appoint someone.

Harris: And the parties can decide they want to just go with a neutral arbitrator and not a panel.

Harris: Any other questions?

Audience: **You mentioned factors like comparability and inability to pay. I'd be interested to know what other kinds of factors or evidence you would find to be probative and how you balance or weigh the different factors.**

LaRocco: These are the factors enumerated in the law: state and federal laws that are applicable to the employer; local rules, regulations and ordinances; stipulation of the parties; the interest and welfare of the public and financial ability of the public agency; wages, hours, and conditions of employment; the consumer price index; and the overall compensation presently received by the employees, and then the catchall.

Harris: And any other facts not confined to those specified in paragraphs 1 through 7 —which are normally or traditionally taken into consideration in making the findings and recommendation.

Audience: **So, how about the anything else?**

LaRocco: Recruitment and retention is always a critical issue. If the employer is having trouble recruiting or retaining individuals, something is wrong with the employment conditions or the wage rate. If they have no trouble recruiting and retaining people, then maybe the current working conditions are most appropriate. Within comparability, there are two decisions. First, which agencies, which other governmental entities, are you going to compare with your jurisdiction? This often entails an analysis of demographics. Next, what are you comparing? Are you comparing aggregate compensation? Are you comparing basic wages? What are

the compensation elements that you're comparing?

Audience: **Do you use a different thought process if you're making a recommendation as a factfinder versus making a final and binding interest arbitration decision?**

Harris: The thought process is different. The highest objective, one way or the other, is to put an end to the dispute. When you walk away from something, you like to think that whatever you do is not going to be the beginning of some other extended dispute. And in order to do that in a factfinding role, you can't be thinking that you're just writing something that's going to somehow be miraculously accepted. You're trying to stimulate, in many cases, a negotiated resolution. I think it's very different when you're the interest arbitrator because a lot of times you have to pick between two offers.

In Hawaii, you actually have the authority to come up with something that's different than either party proposes, which is a peculiar wrinkle in their public bargaining law. But in most cases, you're picking between two things, neither of which is perfect. And in fact, sometimes it's a struggle. Sometimes you have issue-by-issue in a total package, and sometimes the package is wonderful except for one thing that is just absolutely terrible which prevents you from selecting that particular proposal even though everything else about it is acceptable in your mind and justified by the proof. So, yes, I think they are very different.

LaRocco: The factfinder can massage the proposals since, unlike a high-low interest arbitrator, the factfinder is not bound to select one proposal or the other. But, I think that the factfinder still should have the perspective that he or she is supposed to do what is right for the collective bargaining agreement. The factfinder is supposed to decide what are the appropriate contents of the agreement just like the interest arbitrator. The factfinder should be saying this is what the economic evidence shows and supports, plus this is what the law shows is the appropriate content for this particular collective bargaining agreement.

Harris: And you're right, John. I didn't mean to imply that you're not bound to issue a report that is substantiated by the evidence that was presented at the hearing.

That's all the time we have. Thank you all very much.

Prior to AB 646, factfinding for school and community college districts and universities was funded by the Public Employment Relations Board, which simply lacked sufficient resources to compensate the neutral factfinders. These amendments require the parties governed by the MMBA to pay those fees and expenses.

While the three panelists did not discuss the issue of access to factfinding at the meeting, the requirement that the local governmental entity and the labor organization must pay could be problematic for small jurisdictions. Certainly, both

parties will have to budget for this cost and, perhaps, additional costs for expert witnesses. On one hand, in the case of small jurisdictions, this could effectively preclude access to factfinding. On the other hand, if the factfinding is successful, the parties may save resources that might otherwise be expended if the bargaining dispute continues to fester for months.

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CPER Journal Online

Pension Agreements Found Not to Be Valid Contracts

The court's decision in *San Diego City Firefighters, Loc. 145 v. Board of Administration of the San Diego City Employees Retirement System* is a lesson in the pitfalls of creating an enforceable agreement to amend a local pension plan. The Court of Appeal held that new pension provisions in a memorandum of understanding between Local 145 and the City of San Diego were not valid contracts, particularly once the Internal Revenue Service determined they were not compliant with requirements for qualified retirement plans. Local 145 also lost on its non-contract based theories of liability.

The 2002 Agreements

In 2002, the parties agreed to two new pension provisions. The "incumbent president" amendment allowed the union president's pension benefit to be based on both his salary from the city and his compensation from the union. The city council passed a resolution that the incumbent presidents of each of the three unions representing its employees would be entitled to the benefit. The city and Local 145's president, Ronald Saathoff, signed a written agreement to the same effect, and Saathoff made contributions to SDCERS until he retired in 2008.

The parties' 2002 MOU contained a new provision that allowed firefighters to convert "annual leave cash equivalent to retirement service credit on a pre-tax basis." The city council adopted an ordinance that added the "annual leave conversion program" to the San Diego Municipal Code. The ordinance stated that the new provision would take effect upon approval of the membership of the SDCERS, as required by the city charter, which mandated a majority vote of the members for any amendment to the retirement system. A majority of those voting approved the amendment, and SDCERS implemented it when individual firefighters submitted forms indicating their desire to use annual leave as payment for additional retirement service credit.

In 2007, the IRS issued a notice that the two amendments did not meet requirements for a qualified retirement plan, which allows contributions to be deducted from gross income and other tax advantages. It prescribed as corrective action that the two offending provisions be repealed, which the city did by ordinance. Annual leave credits were restored to city employees, and cash for the leave was paid to retirees who had elected to convert annual leave to service credit.

The union, Saathoff, and individual firefighters sued the city and SDCERS to enforce the agreements under a variety of legal theories. The city moved to dismiss the complaint and petition for writ of mandate. The trial court dismissed all of the claims without allowing the plaintiffs to amend their pleadings, and the plaintiffs appealed.

Saathoff Contract Not Valid

Most of Saathoff's claims were based on his individual contract and the city's resolution implementing the agreement with Local 145. The court pointed out that the existence of a valid contract was necessary for the viability of his claims for breach of contract, unconstitutional impairment of contract, and violation of public policy.

The court easily found that the city had no contractual obligation to Saathoff. The city charter required that the city council establish a retirement system by ordinance, the court observed, but the incumbent president benefit had been approved only by resolution. Prior cases have held that an ordinance is akin to a statute, whereas a resolution is usually a mere declaration of purpose or expression of opinion that is temporary in nature, the court explained. The city charter reflected that distinction between ordinances and resolutions when it specified strict procedural prerequisites for passage of an ordinance, but not for resolutions.

In addition, the charter required that any amendment to the retirement system be approved by a majority vote of SDCERS members, which never happened. Any enactments that violate the city charter are void, the court reminded the parties. Therefore, the resolution approving the incumbent president provision was void and could not be the basis for a contractual obligation.

Saathoff's individual agreement met the same fate. Since the resolution was void, the city council had no authority to enter into the contract. In addition, said the court, enforcement of the contract would violate the city charter.

Local 145 argued that the Meyers-Milias-Brown Act required enforcement of the provision because it was agreed to by the city and the union. But the court rejected this assertion because the act provides that an agreement becomes binding when the parties "jointly prepare a written memorandum of such understanding, which shall not be binding," and the council votes to accept it. Since Saathoff and the union had not identified a written MOU containing the provision, the MMBA did not apply, the court ruled. It advised that, even if there had been a written agreement, it would have been unenforceable because it conflicted with the charter requirements for amending the SDCERS.

Savings Clause Invoked

The annual leave conversion provision of the parties' agreement was contained in a written MOU adopted by ordinance and approved by the voting members of SDCERS. Yet the court found that it, too, was not a valid contract. It was doomed by the conflict with the Internal Revenue Code.

The MOU containing the leave conversion benefit had a savings clause, by which an MOU provision held to be "in conflict" with a federal or other law would be "suspended and superseded" by the law, but the remainder of the MOU would remain valid. The court agreed with the city that the IRS finding that the annual leave conversion program violated Internal Revenue Code Sec. 401(a) made the savings clause applicable, and the program was suspended and superseded by the law. The court turned aside the plaintiffs' argument that the city could have enacted a

version of the program that would not have contravened the law. The IRS notice required the city to repeal the entire annual leave conversion program, it observed. It therefore held that the MOU did not provide a basis for any claims dependent on the existence of a valid contract.

Alternatively, the firefighters contended that the ordinance enacting the changes to the retirement system created a contract. The court, however, viewed the MOU and the ordinance as all one contract because they related to a single transaction — the agreement on the annual leave conversion program. Therefore, the court ruled, the savings clause applied to the ordinance, as well as to the MOU. It remarked that it would not make sense to enforce the savings clause in the MOU but not apply the savings clause to the ordinance, when that ordinance implemented the MOU and the parties clearly contemplated at the time of contracting that any provision that contravened the law would be superseded.

Other Claims Fail

The plaintiffs also made claims of promissory estoppel and negligence against the city. Saathoff contended that the city's promise should be enforced even though there was no valid contract because he relied on the promise. Prior cases have held, however, that when contracts are void because they do not comply with charter provisions that are intended to protect the public, promissory estoppel cannot be used to impose liability on the public entity. The appellate court upheld the trial court's determination that the charter provisions requiring adoption of retirement system amendments by ordinance and vote of the system's members were matters of public policy and could not be circumvented by a promissory estoppel claim.

The promissory estoppel theory relating to the annual leave conversion program also failed. Based on its reading of the savings clause, the court found that the city did not promise to implement the program even if the IRS determined it was non-compliant. In addition, the court found the promissory estoppel doctrine did not apply because there actually was a bargain reached and items of value exchanged in the MOU, whereas the promissory estoppel doctrine applies when a defendant merely induces a plaintiff to act in reliance on a promise without obtaining anything of value in return.

Saathoff also argued that a deputy city attorney had negligently advised that a council resolution was sufficient to enact the incumbent president program. But the court found that Government Code section 818.8, which grants immunity to public entities for liability for misrepresentations by their employees, defeated the claim for negligence of the deputy city attorney. Section 818.2 insulated the city from liability for the failure of its managerial employees to present the incumbent president agreement for adoption by ordinance. Arguments by the plaintiffs that the city and its employees had negligently represented that the annual leave conversion program was legally sound and negligently failed to adopt an IRC-compliant version of it were dismissed for the same reasons.

The plaintiffs' claims against SDCERS fared no better. The retirement board did not have a duty to provide benefits because there were no valid contracts, the court

said. The forms that firefighters used to elect to convert the annual leave to service credit were not valid contracts because the SDCERS did not itself have authority to create a right to receive benefits. Its only power was to administer the benefits set by the city. As the board does not pass laws, the court found it was not liable for unconstitutional impairment of contract, even though it signed the IRS compliance statement. Since the annual leave conversion program was repealed in 2007, SDCERS had no duty to provide benefits, so the court had no basis for issuing a writ of mandate.

The court also rejected the claim of one firefighter that the retirement board had breached its fiduciary duty toward him when it induced him to convert his annual leave by not explaining the IRS compliance problem. The court agreed with SDCERS that it had no duty to research whether the program complied with the tax laws and no obligation to tell the city to provide the payment for the service credit in a way that would comply with the requirements for qualified retirement plans.

One appellate justice dissented from the rulings dismissing the contract-based claims relating to the annual leave conversion program. The dissenter was not persuaded that the savings clause applied to suspend the ordinance, particularly since using the savings clause to terminate provisions of the retirement system conflicted with the method for amendment required by the charter.

The majority of the appellate court upheld the trial court's judgment dismissing the complaint and petition for writ of mandate. (*San Diego City Firefighters, Loc. 145 v. Board of Administration of the San Diego City Employees Retirement System* [2012] 206 Cal.App.4th 594, 2012 Cal.App. LEXIS 629.)

CPER Journal Online

Retroactive Ordinance Did Not Impair Vested Pension Rights Where MOU Already Eliminated Them

City employees hired between the time a collective bargaining agreement was signed and the time the city enacted a corresponding ordinance did not gain vested rights to retirement benefits eliminated in the agreement, the Court of Appeal held in *City of San Diego v. Haas*. The court also held the San Diego City Employees Retirement System's statements to the contrary did not create contractual rights.

Four Benefits Eliminated

In 2005, the City of San Diego entered into memoranda of understanding with the unions representing its employees. The agreement provided new employees hired after July 1, 2005, would not be eligible for four benefits, including retiree medical benefits and the right to purchase up to five years of service credit. It implemented the same provisions in a last, best, and final offer after it reached impasse with the police officers association. Several of the MOUs prescribed target dates for the city to take procedural steps to implement the changes. The MOUs were ratified by the represented units. On June 27, 2005, the city council adopted a resolution approving the MOUs and the implementation of the LBFO, but did not pass an ordinance enacting the benefit changes.

Employees Haas and Vernon were hired after July 2005. Vernon was represented by a union, but Haas was unrepresented. The city had a practice of giving unrepresented employees the same benefits as those represented by the Municipal Employees Association. When he was offered his position, Haas was given a benefits schedule that did not include the four benefits which had been eliminated for new hires. This was the only document Haas received from the city explaining his retirement benefits.

The SDCERS, however, told new employees that it would treat them as eligible for the four benefits because the city attorney "had not filed the paperwork" necessary to make the modifications.

In January 2007, the city council passed an ordinance enacting the benefit changes for "members hired or assuming office on or after July 1, 2005." The ordinance stated that it would take effect 30 days after its passage. The city attorney's official report to the council stated that the ordinance reflected the agreed benefits modifications. Although the city charter provides, "No ordinance…that affects the benefits of any employee under the retirement system shall be adopted without the approval of a majority vote" of city employees, no vote was taken.

SDCERS informed the city that it would use an effective date of February 16, 2007, for the benefit changes, and it would continue to advise employees hired before that date that they were eligible for the four benefits. In October 2006, when Vernon was

hired, a SDCERS representative told him that an MOU in 2005 that eliminated the four benefits, but that they were still available because the city had not completed the proper paperwork. Within days, Vernon purchased service credits. Haas purchased service credits in June 2007. SDCERS approved both purchases after February 16, 2007. When the city demanded that Haas rescind his purchase, he refused.

The city sued SDCERS and two classes of employees hired between July 1, 2005, and February 16, 2007, non-represented employees and represented employees, naming Haas and Vernon as class representatives. The city, Vernon, and Haas each moved for summary judgment before trial. The lower court ruled that the employees did not have vested contractual rights to the four benefits. The employees appealed.

Ordinance Is Retroactive

The appellate court observed that the clear language of the MOUs made Vernon, Haas, and the class members ineligible for the four benefits. It stressed that vesting of benefits is a matter of the parties' intent, citing *Retired Employees Assn. of Orange County v. County of Orange* (2011) 52 Cal.4th 1171, 2011 Cal. LEXIS 12109, 204 CPER online. Because the parties agreed to exclude the four benefits from the contract for new hires, they could not be vested for new employees, said the court.

The employees claimed that the ordinance was not retroactive in its effect because the law presumes that an enactment is prospective in effect, and the ordinance stated that it "shall take effect and be in force" 30 days after passage. Neither argument persuaded the court because the express language of the ordinance showed the city council's intent that employees hired on or after July 1, 2005, would not be eligible for the four benefits. The court found that the effective date language merely identified when the ordinance came into being. Prior cases have held the MMBA allows such retroactive compensation, noted the court. And, the budgetary process in the charter practically makes retroactive compensation adjustments necessary, it found, since the charter requires the budget to be adopted in July and raises generally are effective July 1.

The court also dismissed Vernon's argument that the MOUs did not become binding until the 2007 ordinance was enacted. Vernon contended that the provisions setting target dates for the city to take procedural steps were conditions that had to be met before the contract was valid. Under contract law, the court reminded the employees, contract provisions are not interpreted as conditions precedent unless there is clear language to that effect. Here, the implementation clauses contained no conditional language.

Conflicting Representations Ineffective

Relying on *Retired Employees*, the employees asserted that the San Diego Municipal Code before the 2007 amendment gave them implied rights to the four benefits. But the court noted that the Supreme Court in *Retired Employees*

reiterated established law that implied contract terms cannot change the meaning of conflicting express terms. “Because the MOUs expressly made employees hired on or after July 1, 2005, ineligible for the Four Benefits that existed at that time in the SDMC, they cannot be implied from the SDMC in the MOUs,” the court reasoned.

The court also turned aside the employees’ claims that they were entitled to rely on SDCERS’ representations. “Only the City Council has the power to grant employee benefits,” said the court.

Ordinance Valid

Haas asserted that the charter did not allow retroactive ordinances. Although the charter states when ordinances become effective, it does not expressly prohibit retroactive enactments, the court observed. In addition, the court pointed out, the charter states that no other charter provision may be interpreted to limit the council’s authority to enter into labor negotiations and agreements.

The court rejected the employees’ contention that the retroactive application of the ordinance was unconstitutional as an impairment of contract since the ordinance only implemented the contract changes that were made before the employees were employed. Since the ordinance merely restricted the benefits to those the employees expected to receive when they were hired, there can be no impairment of vested rights, the court explained.

The court also dismissed Haas’ due process claims. Procedural due process is not applicable to legislative enactments, it reminded him. And, a retroactive enactment does not violate substantive due process unless it deprives a person of a vested right or impairs a contractual obligation. As neither occurred here, there was no due process violation.

The employees contended that the ordinance was invalid because there was no vote of retirement system members as the charter mandates. In a prior case, however, the charter was interpreted to require a vote only if the amendment affects either the substantive benefits or the vested rights of a member entitled to receive the benefits, the court said, relying on *Grimm v. San Diego* (1979) 94 Cal.App.3d 33, 1979 Cal.App. LEXIS 1833. Because the employees here were ineligible for the four benefits and did not have vested rights to them, they were not SDCERS members as defined by the charter, and no vote was necessary, the court concluded. Although the city has contended a vote is necessary in other cases, including *San Diego City Firefighters, Loc. 145 v. Board of Administration of the San Diego City Employees Retirement System,* above, the court did not find the city estopped from making its argument here, since the city’s positions were not mutually exclusive. In *Firefighters*, the city argued that a benefit promised to a union president and ratified by resolution was not effective, in part because it was not approved by SDCERS members. Here, a binding MOU made the employees ineligible before they were hired.

The court dismissed two other challenges to the trial court’s ruling. Haas was not prejudiced by the ordinance’s retroactive application, the court explained, because

the city demanded he rescind his service credit purchase within two months, long before he retired. The court also turned aside an appeal that the class should not have been certified. The judgment for the city was affirmed. (*City of San Diego v. Haas* [2012] 207 Cal.App.4th 472, 2012 Cal.App. LEXIS 763.)

CPER Journal Online

AG Allows POA to Sue to Overturn Ballot Measure

In November 2010, voters of the City of Bakersfield passed Measure D, which established a new, less lucrative pension benefit formula and a new employee contribution rate for employees hired after January 1, 2011. The measure also specified that the changed benefits could be amended or repealed only by a vote of the electorate.

The memorandum of understanding between the Bakersfield Police Officers Association and the city had expired in 2007. It provided for a pension calculation using the 3-percent-at-50 formula. The city's contributions depended on an individual officer's hiring date and length of service.

During bargaining for a successor agreement, the parties unsuccessfully negotiated pension proposals. In May 2010, nearly three years after the agreement expired, the city informed BPOA that it was considering placing a pension measure on the ballot. The proposed measure would make employees responsible for paying the entire employee contribution, and change the pension formula to entitle an officer who retired at age 50 to only 2 percent of the officer's highest three-year average salary. The parties agreed to discuss the proposed measure, but the union representative was unavailable to meet on June 2, the city's suggested date. The city and union met on June 16, but the city council had already voted on June 9 to place the measure on the November ballot. The council provided, however, that it could be amended before June 30 and withdrawn until August 11.

BPOA charged that the city violated the Meyers-Milias-Brown Act because it did not meet and confer with the union before placing the measure on the ballot. The city contended that it had engaged in exhaustive negotiations with BPOA, and that the union impeded reaching agreement prior to the city council vote when it failed to meet on June 2.

The union also claimed it did not know of the deadlines allowing amendment or repeal of the measure, but the city pointed out that BPOA should have been aware of the deadlines, since a representative was at the council meeting. After the parties met on June 16 and July 28, BPOA asked if the measure could be amended, but was informed that the date to amend had passed. When the union and the city could not agree to any additional bargaining dates before August 11, the union asked that the measure be withdrawn, but the city refused.

Suit In Quo Warranto

The union challenged the city's action under Code of Civil Procedure section 803, which allows a party to sue a person who unlawfully usurps or exercises the power of any public office. As police officer unions are exempt from the jurisdiction of the Public Employment Relations Board, allegations that a city has breached the duty to

bargain are not first filed with PERB.

A party must obtain permission from the attorney general to file a quo warranto action under section 803. The attorney general decides whether the matter presents a substantial issue of fact or law that warrants judicial determination and whether the determination would serve the public interest.

In this case, the AG observed that an action in quo warranto may be used to challenge an initiative measure on procedural grounds. It pointed to the use of the quo warranto procedure in *Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 1984 Cal. LEXIS 205, CPER SRS 28, where the AG granted employee organizations' applications for leave to sue in quo warranto to challenge a no-strike measure because the city had not met and conferred before placing the measure on the ballot.

Because wages, and the related subject pensions, are within the scope of bargaining under the MMBA, the city had an obligation to bargain before placing Measure D on the ballot, concluded the AG. In addition, the provision that requires a vote of the electorate to amend or repeal the ordinances enacting the measure effectively removed the subject from future bargaining, she observed.

The dispute centers on whether the parties complied with their duty to bargain in good faith. As this is a factual question the AG will not adjudicate, and as the validity of Measure D affected the public interest, the AG granted leave to BPOA to sue so the issue could be resolved in court. The AG stressed that it was not deciding the city had satisfied its obligation to meet and confer. (Opinion by AG Kamala Harris, Ops.Cal.Atty.Gen. No. 11-702 [6-1-12] 2012 DJDAR 7787.)

CPER Journal Online

Bankruptcy and Benefits

A bankruptcy court refused to protect the health benefits of retirees of the City of Stockton. In August, the court ruled that it had no power to interfere with the property or revenues of the city. The court acknowledged the unfortunate plight of retirees who were dependent on city-sponsored benefits, but explained that bankruptcy provisions of the U.S. Constitution trump the clause that normally bars impairment of contracts.

Retiree Benefits Cut

On June 28, the City of Stockton filed for bankruptcy under Chapter 9 of the Bankruptcy Code. Two weeks later, the Association of Retired Employees of the City of Stockton and eight retirees filed a class action requesting an order preventing the city from phasing out its payments of retiree health benefit contributions over the next two years, as the city has planned.

Under section 904 of the Bankruptcy Code, the court cannot interfere with a city's political or governmental powers, property, or revenue without the municipality's consent. Not surprisingly, the city did not consent.

Effect on the Contract Clause

For purposes of the hearing, the court assumed that the retirees have vested rights to the health benefit payments. The retirees based their request for injunctive relief on a clause in the U.S. Constitution that states, "No State shall…pass any…Law impairing the Obligation of Contracts."

The bankruptcy court concluded that the retirees' premise was flawed because the U.S. Constitution allows Congress to pass bankruptcy laws and does not bar *Congress* from passing laws that impair contracts. In 1819, the United States Supreme Court validated Congress' ability to impair contracts by enacting bankruptcy laws. Since the federal constitution trumps the state constitution, California's contracts clause also does not protect vested rights in bankruptcy, the court explained.

Court Powers Restricted

The Bankruptcy Code respects state sovereignty as required by the Tenth Amendment, however, the court instructed. Chapter 9 allows courts to preside over municipal bankruptcies if a state authorizes its cities to file for bankruptcy. Although the state cannot shield a particular kind of debt from the power of the bankruptcy court, section 904 limits the court's authority to force a municipality to take particular actions relating to its property or revenues. Unlike under other chapters of the code, the court cannot restrict the use, sale, or lease of a city's property, and no trustee is

appointed to oversee the city's affairs. Only the city can propose a plan of adjusting its debts, the court observed.

The court dismissed the retirees' contention that preservation of the status quo in the case would not interfere with city property or revenues because the vested health benefit rights are fixed. An injunction would interfere with the city's choice whether to suspend payments to control its treasury, it reasoned.

The retirees pointed out that a temporary restraining order was the issue in the Orange County bankruptcy case in 1995. The court distinguished that order from the retirees' requested injunction because Orange County was ordered only to meet and confer with unions and change the status of permanently laid-off employees to temporarily laid-off employees. There was no monetary consequence of the order.

In addition, the court explained, the Orange County order was authorized by a section of the code that allows the court greater power with respect to executory contracts, in which both parties have not fully performed their obligations under the contract. Collective bargaining agreements are executory contracts under the code. Here, however, the retirees have fully performed their side of the bargain by working, the court observed, and therefore, the court has no power to force the city to make payments.

The retirees also requested relief under a section of the code that governs the procedures for modifying retiree insurance under Chapter 11, but the court pointed out that section does not apply to municipal bankruptcies.

The court noted the retirees may file proofs of their claim that will be evaluated during the claims adjustment process. They may also object to the city's plan of adjustment, when filed, which will be subject to statutory standards. But "[t]he real remedy for the plaintiffs," the court said, "lies in participating in the process of formulating a plan of adjustment" through bona fide negotiations. (*City of Stockton v. Associated Employees of the City of Stockton* [8-6-12] U.S. Bankruptcy Ct., E.Dist.Cal. 232118-C-9.)

The court appointed a judge as mediator to facilitate agreements between the city and its creditors.

Hurdles to Bankruptcy

While they may wish to modify their retiree health obligations, municipalities cannot easily do so. As explained by the state Legislative Analyst's Office in its publication, "Local Government Bankruptcy in California: Questions and Answers," a municipality must be insolvent, have no feasible alternatives to bankruptcy, and show that it intends to develop a plan of adjustment before a court will find it eligible for bankruptcy. It must attempt to negotiate modifications with its creditors and employees, cut its costs, and raise revenues, if legally possible.

The municipality's plan of adjustment must be approved by at least one class of creditors as well as the court, which will look at questions such as the legality of the

plan, whether it will be effective in enabling the municipality to meet its obligations, and whether the plan disproportionally benefits some groups. A city may reject a collective bargaining agreement if it shows that the agreement would burden its ability to become fiscally stable, the employees would otherwise be treated more favorably than other groups, and that good faith negotiations with the union resulted in no resolution. As an illustration, read about the City of Vallejo's expensive trip through the bankruptcy process, which is explained in detail by authors Charles Sakai and Genevieve Ng in "We're Bankrupt….Now What?" (*CPER No. 199*, pp. 7-14.)

CPER Journal Online

PERB to Oversee New Law

In late June, the legislature hurriedly drafted and approved SB 1036, a law regulating labor relations of in-home support service providers. The new law covers individuals who provide care in the homes of elderly and disabled persons in eight selected pilot counties. The caregivers must be authorized to provide such services under the California Welfare and Institutions Code. California Department of Human Resources attorney Will Yamada, who helped draft the bill, explained that it is modeled in some respects on the Meyers-Milias- Brown Act, and in others on the acts governing court employer-employee relations. A clean-up bill, AB 1471, was passed at the end of August and is awaiting the governor's signature.

SB 1036 establishes a California In-Home Supportive Service Authority, or Statewide Authority, a joint powers authority that is deemed the service providers' employer for the purposes of collective bargaining. Recipients of care retain the right to hire, fire, and supervise the provider.

PERB will establish regulations for representation matters. The authority must grant exclusive recognition to employee organizations in compliance with the regulations. Bargaining units must be contained within a single county, as they are now.

To avoid a proliferation of bargaining tables, the act provides for coalition bargaining for all representatives affiliated with the same national union. It also requires coalition bargaining of all small unions. Only independent unions that represent more than 100,000 employees will negotiate alone with the Statewide Authority. Currently all workers are represented by AFSCME, SEIU, or the California United Homecare Workers, according to Yamada. The authority may contract with CalHR to engage in bargaining with the unions.

The scope of bargaining in the new law excludes hiring procedures such as conducting criminal background checks on providers, enrolling them and providing them with orientation, and establishing a provider registry. It also excludes overpayment recovery collection procedures, quality assurance activities, and other functions required pursuant to statute or regulation. However, the bill requires the Statewide Authority to "consider fully" union feedback on policy and other matters outside the scope of bargaining.

Any memorandum of understanding reached in collective bargaining is subject to approval of the legislature. Bargaining impasses must go to mediation. If mandatory mediation fails to produce an agreement, the dispute enters a factfinding process nearly identical to the one recently enacted by AB 646. The major difference is that there need be no public hearing on the factfinding report before the authority may implement its last, best, and final offer.

Agency shop procedures mirror those of the MMBA. Unfair practices are nearly

identical. PERB generally has the same power to hear unfair practice charges as under the Educational Employment Relations Act.

The act is effective immediately, but the transition process likely will continue until early 2014. Next spring, recipients of home care will begin being transferred by county to managed care, a process that will take a year. It is likely that the authority will not be established until early 2013. In the meantime, counties must continue to meet their collective bargaining obligations.

The Statewide Authority will become the successor employer and assume the obligations of collective bargaining agreements that cover the applicable county employees, If a county reaches an agreement on a non-economic contract provision before the county's implementation date, there is a 180-day period for the state to object for a bona fide business-related reason to the new term. The non-economic terms are subject to review and objection by the state Department of Social Services until the Statewide Authority is established, and thereafter by the authority. The state must notify the employee organization of its objection within 180 days and meet and confer if requested by the union. If agreement is reached, the new terms do not become operative until the county implementation date. If not, the provision to which the state objects becomes inoperable on the county implementation date. The clean-up bill will affect the share of costs the county must pay for any newly negotiated economic terms.

In light of the lengthy transition process, PERB has not yet drafted regulations authorized under the act. Les Chisholm, PERB division chief, told *CPER* that regulations likely will be proposed early in 2013.

CPER Journal Online

Courts Should Refuse to Compel Arbitration of CBA Provisions That Conflict With the Education Code

In *United Teachers of Los Angeles v. Los Angeles Unified School Dist.,* the California Supreme Court has held that courts must deny petitions to arbitrate provisions in a collective bargaining agreement that conflict with the Education Code. Because it could not determine whether the provisions cited in UTLA's grievances were in conflict with the code, the court remanded the case to the trial court to make that determination.

Charter School Conversion Dispute

The district approved the conversion of one of its existing schools into a charter school. UTLA filed a grievance claiming that the district failed to comply with the provisions of the collective bargaining agreement pertaining to charter school conversion. Specifically, it claimed that the district failed to do the following: present the complete charter to the employees; give the affected employees and the community a reasonable opportunity to review and discuss the plan; give the union a copy of the proposed charter; and clearly and fully disclose the employment conditions within the charter school.

The parties were unable to resolve the grievance informally, and the district refused to arbitrate the dispute. UTLA filed a petition to compel arbitration. The trial court denied the petition, finding that the collective bargaining provisions at issue conflicted with the Education Code. The Court of Appeal reversed, reasoning that, in adjudicating a petition to compel arbitration, a court is limited to determining whether there is a valid arbitration agreement that has not been waived. Finding that to be the case here, it granted the petition. The district appealed.

CBA Provisions in Conflict With the Education Code Are Unenforceable

The Supreme Court recognized that, in order to determine its role in ruling on a petition to compel arbitration to enforce a collective bargaining agreement between a school district and its employees, it must resolve the tension between two competing principles: that collective bargaining provisions in conflict with the Education Code are unenforceable, and that, in general, courts do not examine the merits of the case when deciding whether to enforce an arbitration agreement.

Government Code section 3540 states, in part, that the Educational Employment Relations Act "shall not supersede other provisions of the Education Code." In *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 1983 Cal. LEXIS 186, 57 CPER 39, the court concluded that the intent of this section was to preclude contractual agreements that would replace, set aside, or annul any of the Education Code's statutory provisions. In that case, the court held that a contract provision that would "replace or set aside" a section of the Education

Code was nonnegotiable. But, where collective bargaining on a subject regulated by the code would only strengthen that section, bargaining was permitted.

The court also pointed to its decision in *Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 1996 Cal. LEXIS 1904, 118 CPER 48, where it applied the *San Mateo* reasoning to arbitration. In that case, it vacated an arbitration award reinstating a probationary teacher who had not been reelected because contract provisions that the district had violated were unenforceable, as they were in conflict with a section of the Education Code. And, the court cited two decisions in which courts of appeal denied petitions to compel arbitration because the provisions sought to be arbitrated would directly conflict with sections of the Education Code: *United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 1984 Cal.App. LEXIS 2828, 60 CPER 70, and *Fontana Teachers Assn. v. Fontana Unified School Dist.* (1988) 201 Cal.App.3d 1517, 1988 Cal. App. LEXIS 362, 79 CPER 43.

"The conclusion that courts should refuse to compel arbitration of collective bargaining provisions in conflict with the Education Code is consistent with the statutory scheme governing arbitration under the EERA," the court said. Under EERA, "authorization to arbitrate is predicated on the existence of a collective bargaining agreement 'covering matters within the scope of representation,'" it explained, and it continued, "[A]s we held in *San Mateo,* the scope of representation does not include matters that would annul, set aside, or replace portions of the Education Code."

No Conflict With the Arbitration Act

The court recognized that Code of Civil Procedure section 1281.2 of the California Arbitration Act generally mandates a court to compel arbitration where a valid arbitration agreement exists. However, this mandate is qualified by EERA's section 3540, which places certain subjects governed by the Education Code beyond the scope of an arbitration agreement between a school district and a union.

It found the case of *California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 2006 Cal.App. LEXIS 1284, 180 CPER 28, on which the Court of Appeal relied, distinguishable. In that case, the contract provision that the union demanded to arbitrate had to do with allowing supervisors to observe rank-and-file negotiations and vice versa. The district, which had discontinued the practice, claimed that a section of the Government Code precluded participation of supervisors in bargaining unit negotiations. It argued that the union's petition should be denied because courts have the exclusive power to interpret and apply state statutes. The court in that case granted the petition, holding that CCP section 1281.2 "expressly forbids the court from reaching the merits of the parties' dispute," and that an order to arbitrate an existing controversy may not be refused on the ground that the petitioner's contentions lack merit.

The court here noted that *California Correctional Peace Officers* was decided under the Dills Act, not EERA, and so did not involve EERA's limitations on the scope of bargaining. Further, even if the Dills Act were construed to preclude arbitration of a

provision in direct conflict with it, no clear conflict was present in that case, instructed the court.

Holding in Accord With Prior Decisions

The court maintained that the principle that disputes over collective bargaining provisions that conflict with the Education Code are not arbitrable is consistent, not only with its prior decisions, but also with those of the United States Supreme Court, citing *Steelworkers v. Warrior & Gulf Co.* (1960) 363 U.S. 574, 1960 U.S. LEXIS 1921. In that case, the high court reversed the Court of Appeals' dismissal of the union's petition to arbitrate the contracting out of work previously done by laid off employees. It recognized, however, that a grievance based solely on contracting out would not be arbitrable where a specific collective bargaining agreement excludes contracting out from the grievance procedure or a written collateral agreement makes clear that contracting out was not a matter for arbitration. It held that the grievance was arbitrable because there was no express provision excluding it from arbitration.

In this case, said the California Supreme Court, the legislature expressly withdrew certain matters in the Education Code from collective bargaining "because labor relations in this area significantly intersect with educational goals affecting society as a whole," and decided "that those matters should be exclusively management prerogatives, subject only to the constraints of statute." A matter expressly excluded from the CBA, whether by the parties as in *Warrior & Gulf Co.* or by the legislature, is not arbitrable, it concluded.

In so holding, the court reaffirmed "the principle set forth in *San Mateo* and its progeny that collective bargaining provisions pursuant to the EERA that annul, set aside, or replace provisions of the Education Code, cannot be enforced." It acknowledged that non-enforcement may take many forms, depending on where in the process the challenge to arbitrability occurs. A court should deny a petition to arbitrate a collective bargaining provision that directly conflicts with the Education Code, the court instructed. However, it also admonished that doubts about arbitrability of a grievance should be resolved in favor of arbitration as the court did in *California Correctional Peace Officers*.

Court Unable to Determine Whether Grievance Conflicts With Education Code

The court reviewed the Charter Schools Act of 1992 in its attempt to decide whether the union's grievance was arbitrable, and it arrived at three conclusions. First, the grounds for denying a charter school petition are limited to those listed in Education Code section 47601(b). Second, section 47607(c) sets out the exclusive grounds for revocation of an existing charter. And third, "section 47611.5(e), read in conjunction with the non-supersession clause of Government Code section 3540, makes clear that while union representation and collective bargaining do have a place in charter schools, the approval or denial of a charter petition may not be controlled by a collective bargaining agreement."

UTLA, in its grievance, contended that the district violated sections 2.0 and 3.0 of the CBA in the course of reviewing and approving the charter conversion. These sections provided that the district must adhere to certain procedures in the conversion process, including urging the charter petitioner to present the complete charter to employees before soliciting signatures, discussing alternatives to conversion with the district and the union, and fully disclosing specific terms and conditions of employment. The district argued that both sections conflict with the Education Code because one of the remedies the union requested on its grievance form was to rescind the approval of the charter.

The court agreed with the district that rescission of charter approval because of non-compliance with the CBA would conflict with the Education Code and could not be granted. It also agreed that any collective bargaining provision that delays the timelines set out in Education Code section 47605 for approval of charter petitions may not be enforced.

“These conclusions, however, do not necessarily render all of UTLA’s grievances inarbitrable,” said the court. Some of the other remedies requested by the union may not delay or control the outcome of the charter petition process. Further, some parts of the specified sections requiring the district to take certain steps to encourage the provision of information to employees and to UTLA may not be precluded by statute or cause delay, it explained.

The court declined to decide which parts of the sections, if any, violate the Education Code, because it was unclear which parts UTLA sought to enforce in its grievance, since the grievance did not precisely correspond to any provision in either section.

“Rather than guess which collective bargaining provision UTLA is actually invoking, we remand the case to the trial court with instructions to direct UTLA to identify such provisions in an amended petition to compel arbitration and to explain why those provisions do not set aside, annul, or replace provisions of the Education Code,” the court said. “UTLA should identify *with specificity* such collective bargaining provisions,” it emphasized. “For reasons of judicial economy and judicial restraint, and to minimize incentives toward overbroad and poorly drafted grievances, courts should apply Education Code preemption analysis only to the specific collective bargaining provisions that are actually at issue in a given case. Where, as here, it is unclear which collective bargaining provisions are at issue, the court should request clarification,” it instructed. (*United Teachers of Los Angeles v. Los Angeles Unified School Dist.* [2012] 54 Cal.4th 504, 2012 Cal. LEXIS 6164.)

CPER Journal Online

LAUSD Layoff Case Resurrected

The Los Angeles Unified School District thought it had put the case of *Reed v. LAUSD* to rest when it agreed to bypass seniority-based layoffs at 45 schools in a settlement with the student plaintiffs. However, the Second District Court of Appeal, ruling on an appeal brought by United Teachers of Los Angeles, has voided the settlement and sent the case back to the lower court for trial on the merits.

The class action suit was filed against the district on behalf of students at three of the district's lowest performing schools. UTLA was joined as an indispensible party and named as a defendant. The students claimed that massive layoffs devastated the three schools and other poor performing schools because the newest teachers are assigned to them; since state law and the collective bargaining agreement require layoffs by seniority, these teachers were the first to go. In the 2009 reduction in force, the three schools lost up to two-thirds of their teachers, who were replaced by rotating substitutes and by instructors who did not have the proper credentials. The district proposed an additional RIF for 2010 to include both probationary and permanent teachers. (See story at *CPER* Issue No. 199, pp. 36-37.)

Superior Court Judge William Highberger granted the students' request for a preliminary injunction preventing further layoffs, finding that the 2009 layoffs at the three schools violated the students' constitutional right to an equal education. The students and the district subsequently negotiated a consent decree that protected the three schools and up to 45 additional schools from future teacher layoffs, and specified that no school in the district was to be disproportionately affected by a reduction in force. Judge Highberger approved the agreement over UTLA's objection, after conducting a fairness hearing and finding that the consent decree was fair, reasonable, and adequate.

UTLA appealed, arguing that the lower court had not decided the merits of the students' claims, that the settlement could potentially negate the seniority rights of its members, and that it had not had sufficient opportunity to present its arguments before the settlement was approved.

Due process mandates a decision on the merits. Two of the three members of the Court of Appeal panel agreed that the district was entitled to a decision on the merits of the students' claims. The majority pointed to the United States Supreme Court's decision in *Flight Attendants v. Zipes* (1989) 491 U.S. 754, 1989 U.S. LEXIS 3131, in which the court instructed that the rights of a party who intervenes or is joined in a lawsuit, such as UTLA in this case, are entitled to the same respect as the rights of the person or persons who brought the lawsuit. This and other Supreme Court cases led the majority to conclude that "neither a consent decree nor a trial court's approval of a consent decree can abrogate a third party's rights." "The only permissible inference from these holdings is that a third party is entitled to a decision on the merits," it continued.

The dissent argued that the union had received sufficient due process because it was permitted to state its objections to the reasonableness of the consent decree and introduce relevant evidence, citing *Firefighters v. Cleveland* (1986) 478 U.S. 501, 1986 U.S. LEXIS 133. The majority countered with a quote from *Cleveland*: "[A]pproval of a consent decree between some of the parties…cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree."

The majority cited a number of cases from other circuits in support of its conclusion. The Ninth Circuit "is in accord," it said, citing *U.S. v. City of Los Angeles* (9th Cir. 2002) 288 F.3d 391, 2002 U.S. App. LEXIS 7348, 154 CPER 51. In that case, the court stated, "Except as part of the court-ordered relief after a judicial determination of liability, an employer cannot unilaterally change a collective bargaining agreement as a means of settling a dispute over whether the employer has engaged in constitutional violations."

The majority was not persuaded by the settling parties' argument that other cases have interpreted the Due Process Clause as requiring much less than a decision on the merits when a consent decree has been found to be fair. Those cases are distinguishable from this case, said the majority, because the consent decrees in those cases did not involve altering rights granted by the constitution, contract, or statute.

The parties agreed that a fairness hearing is not a decision on the merits, and the court found that the trial court's ruling on the consent decree in this case did not decide the merits, but only that the consent decree was "presumptively fair."

In holding that the trial court must determine the merits of the students' claims, the majority set out the statutory framework, noting that section 44955(c) of the Education Code requires that, when a RIF occurs, permanent teachers must be terminated in "the inverse of the order in which they were employed." The collective bargaining agreement in this case provides the same for probationary teachers. Education Code section 44955(d) allows the seniority rights for permanent teachers to be altered by a district only if there is a proper legal basis. "UTLA's members are prejudiced by the consent decree because it would alter the system for RIFs by requiring the District to skip certain less senior teachers and layoff [sic] more senior teachers," said the court. "Because the trial court never decided the merits of the Students' claims, it erred when it approved the consent decree and entered judgment against UTLA. The matter must be remanded."

The court also held that, because UTLA did not sign the consent decree, judgment could not be entered against the union under Code of Civil Procedure section 604.6. (*Reed v. Los Angeles Unified School Dist.* [2012] 208 Cal.App.4th 322, 2012 Cal.App. LEXIS 868.)

Parties' reactions. The attorneys for the students expressed disappointment in a

statement issued after the decision. “The facts are clear that when students at struggling schools lose their teachers to layoffs, they also lose their chance at a quality education,” they said. The settlement will remain in effect pending the trial on the merits. However, the students’ attorneys will appeal directly to the California Supreme Court in an attempt to reinstate the settlement and avoid a trial. “Our Supreme Court has a long history of respecting the constitutional rights of schoolchildren, and we’re hopeful they will hear this case,” they said.

In a statement posted on its website in reaction to the decision, UTLA said, “By changing the way layoffs are handled in LAUSD, the Reed settlement violated the rights of UTLA members and hurt student learning by destabilizing schools across LAUSD. UTLA is gratified that the court affirmed that the rights of teachers and health and human services professionals cannot be so easily swept aside and that due process must be respected.” Further, “the Reed settlement has proven to be a failed experiment at most of the campuses involved because it does nothing to address the underlying issues at high-turnover schools.” UTLA charged that the settlement severely harmed hundreds of additional schools, triggering widespread displacements and layoffs at non-Reed schools, because the RIFs that were not allowed at the schools covered by the settlement had to be implemented at other schools. The union also made clear that, in its opinion, the settlement was not the way to stabilize struggling inner-city schools because it only addressed a single factor that affects teacher turnover — layoffs — and not other “more imperative” ones, such as ineffective administrators, unsafe conditions, and lack of support for struggling students. And,“Ultimately, the lasting solution for school stability is for all schools to be fully funded and fully staffed, eliminating year after year of painful layoffs that hurt student learning and decimate school communities.”

CPER Journal Online

Commission on Professional Competence Must Issue a Decision After Hearing

The Third Circuit Court of Appeal held in *Boliou v. Stockton Unified School Dist.* that the Commission on Professional Competence erred when it failed to issue a determination in accordance with Education Code requirements after the school board rescinded charges against a teacher on the eve of the hearing. The commission should have ruled that the teacher should not have been dismissed and should have awarded him attorney's fees and costs incurred during 18 months of litigation, rather than granting the district's motion to dismiss the charges.

Factual Background

David Boliou was a tenured high school math teacher. One of his students alleged he had covered her mouth with duct tape as punishment for talking in class. The school district filed an accusation against Boliou recommending he be dismissed. Boliou demanded a hearing before the commission, and the district requested the hearing be set. At the initial hearing, motions to exclude evidence were heard and one of the three charges was dismissed. Subsequently, the district served Boliou with an amended notice of hearing with a new hearing date.

Prior to the second hearing, the governing board voted to rescind the remaining charges and sent a letter to the administrative law judge requesting that the case be removed from calendar and not proceed to hearing. Boliou objected. He wanted the commission to issue a decision stating, "He shall not be dismissed." The ALJ construed the board's letter as a motion to dismiss the action. At the hearing on the motion, Boliou argued that, because the board essentially stood up and rested and, therefore, did not make out a prima facie case against him, the commission should have issued a decision in his favor which would entitle him to attorney's fees and costs. The district argued that the commission could not make any findings of fact because no facts had been presented.

The commission ordered the remaining charges dismissed with prejudice. It specified that its dismissal order did not constitute a decision, reasoning that it was not authorized to issue a decision where the governing board had rescinded the charges and requested dismissal prior to the start of the trial. Therefore, said the commission, Boliou was not entitled to attorney's fees and costs.

Boliou filed a petition for writ of administrative mandate to compel the commission to vacate its order of dismissal and sought a writ of mandate to compel the district to pay his fees and costs. The trial court issued the writs. It directed the commission to modify the dismissal order to state that its dismissal with prejudice constituted its determination that Boliou should not be dismissed and to direct the district pay his attorney's fees and costs. The district appealed.

Commission Required to Issue a Decision with a Disposition

The appellate court began its analysis by a review of the Education Code procedures for dismissing a permanent employee. After the district issues an accusation, the employee has the right to request a hearing. If he or she exercises that right, the district then has the option "either (a) to rescind its action, or (b) schedule a hearing on the matter." (Sec. 44943.) After the hearing, "the commission shall prepare a written decision containing findings of fact, determinations of issues, and a disposition that shall be, solely, one of the following: (A) That the employee should be dismissed. (B) That the employee should be suspended for a specific period of time without pay. (C) That the employee should not be dismissed or suspended." (Sec. 44944(c) (1).) "If the commission determines that the employee should not be dismissed or suspended, the governing board shall pay the expenses of the hearing…and reasonable attorney's fees incurred by the employee." (Sec. 44944 (e) (2).)

The court concluded that under this statutory scheme, once Boliou requested the hearing and the district opted to schedule it, there was "no mechanism by which the board could unilaterally prevent that hearing from going forward by thereafter rescinding the charges against Boliou." In these circumstances, the commission was required to hold a hearing and act on the charges, said the court.

As to the hearing itself, "there is nothing in the statutory scheme that requires an evidentiary hearing *on the merits* of the charges in the accusation," concluded the court. At most, it must be an "adjudicative proceeding," meaning "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision," it said, citing Government Code section 11405.20.

The court reasoned that not requiring an evidentiary hearing on the merits made sense because taking evidence would not be necessary in certain situations, such as this one, where the district does not choose to proceed. "Regardless of whether the hearing proceeds with or without taking evidence on the merits of the charges, the statutory scheme makes clear what the commission is required to do," it said, pointing to the language of section 44944(c)(1). It must "prepare a written decision containing findings of fact, determinations of issues, and a disposition" that the employee should be dismissed, that the employee should be suspended, or that the employee should not be dismissed or suspended.

"Here, the facts, issues, and disposition were clear" said the court. "The facts were the governing board had sought dismissal of the charges. The issue was whether Boliou should be dismissed. And the disposition was Boliou should not be dismissed, given that the governing board had sought to dismiss the charges."

The court affirmed the judgment of the trial court. (*Boliou v. Stockton Unified School Dist.* [2012] 207 Cal.App.4th 170, 2012 Cal.App. LEXIS 739 , 2012 DJDAR 8743.)

CPER Journal Online

Teacher Evaluation Bill Shelved

Assembly Member Felipe Fuentes (D-Sylmar) worked valiantly to fashion legislation that would have replaced the Stull Act, the law that governs teacher evaluations, with a new law that would have established a statewide uniform teacher evaluation system and would have made all aspects of teacher evaluations subject to collective bargaining. Fuentes had made a number of amendments to AB 5, entitled the "California Best Practices Teacher Evaluation Proposal," in an attempt to garner sufficient support for passage. However, he withdrew it on August 30, one day before the end of the legislative session. In a statement posted on his website, Fuentes said, "After working on this bill in a transparent and collaborative manner for more than two years, I could not in good conscious [sic] allow the proposed amendments to be voted on without a full public hearing. There would not be sufficient time for myself or the stakeholders I've been working with, to review the amendments that were being proposed. I believe this issue is too important to be decided at the last minute in the dark of night."

The proposed legislation was controversial. Strongly supported by the California Teachers Association and the California Federation of Teachers, who argued that teachers should participate in creating a system that would help them become better practitioners, it was vigorously opposed by superintendents and school boards throughout the state, who feared protracted bargaining over every detail of the evaluation process. Other opponents included the state PTA, United Way of Greater Los Angeles, the state Chamber of Commerce, the Bay Area Council, and Students First.

The death of the bill leaves the Stull Act in full force and effect, as well as the ruling earlier this year by Los Angeles Superior Court Judge James Chalfant that the Los Angeles Unified School District had violated the act by failing to consider students' progress towards district and state standards as a factor in teacher assessments. Judge Chalfant has given the district and the teachers union, United Teachers of Los Angeles, until December to come up with a plan that complies with his ruling in *Doe v. Deasy*.

The failure of the bill to move forward might also mean that the state has lost an opportunity to smooth its relationship with the federal government. Supporters of AB 5 had hoped that the legislation, if passed, would assist the state in qualifying for a waiver from the federal No Child Left Behind Act. The federal Department of Education has required that states have in place a statewide system for teacher evaluations as one of the criteria that needs to be met to receive a waiver. A waiver would avoid penalties against low-performing districts and ease restrictions on $350 million of Title 1 money for low-income districts.

Fuentes is termed out of the Assembly. Although unable to sponsor similar legislation next year, he has pledged to continue the fight, "because I believe that

creating a rigorous teacher evaluation system is too important and ultimately our children's futures are too important."

CPER Journal Online

Legislative Roundup

Assembly Bill 340: Pension Reform

The big pension bill passed by the legislature and signed by Governor Brown, known as the California Public Employees' Pension Reform Act of 2013, contains provisions that will impact both current and future certificated and classified school employees.

For California State Teachers' Retirement System members hired on or after January 1, 2013, benefits will include a formula based on 2 percent of final compensation per year of service at age 62, rather than on the current formula based on 2 percent at age 60. It changes the maximum age factor from 2.4 percent at 63 to 2.4 percent at 65. It lowers the age factor for early retirement at 55 from 1.4 percent to 1.16 percent. There will be a limit of 120 percent of Social Security wages on compensation that is considered creditable for the defined benefit program, or $132,120 based on the current maximum Social Security wage base of $110,100. A chart summarizing the ways in which the act affects CalSTRS members can be found at http://www.scribd.com/doc/105155285/CalSTRS-AB-340-Fact-Sheet.

For CalPERS members hired on or after January 1, 2013, there will be a new defined benefit formula of 2 percent at age 62, with an early retirement age of 52, and a maximum benefit factor of 2.5 percent at age 67, instead of the current benefit formula of 2 percent at age 55. The cap on the amount of pay that will count towards a pension for those participating in Social Security will be the Social Security wage base, currently $110,100. Final compensation will be based on the employee's highest annual compensation earnable averaged over a consecutive 36-month period, rather than on the current final 12-month period. New members will be required to pay half of the normal cost of defined benefit pension payouts, or the cost to fund the benefit for current service after calculating the predicted return on investments. If that level is not reached through collective bargaining by 2018, districts can increase employees' contributions up to 8 percent of pay.

Current CalSTRS and CalPERS members will no longer be allowed to purchase additional service credit known as "airtime." Both current and new CalSTRS members convicted of a felony committed in the course of performing official duties or against or involving a child with whom he or she has contact as part of his or her official duties will forfeit all retirement benefits earned or accrued after the date of the commission of the felony.

Current and new CalPERS employees who retire from service will be limited from working more than 960 hours or 120 days a year for any public employer in the same public retirement system from which the retiree receives benefits. Retirees must "sit out" for 180 days prior to returning to work, with some exceptions.

For a more in depth discussion of the legislation, see "Legislature Caps Pension Benefits, Increases Employee Contributions, Raises Retirement Ages," in the General section of this edition of *CPER.*

Assembly Bill 178: Teachers' Retirement Benefits

This legislation, introduced by Assembly Member Jeff Gorell (R-Camarillo), extends the operation of exemptions from the limit on post-retirement compensation that a retired teacher may earn without a reduction in retirement benefits to June 30, 2013. It additionally exempts from the earnings limitation an employee of a third party who does not participate in a state public pension system if the activities performed are for a limited term and are not those normally performed by employees of a public employer. It also changes the formula for the compensation limit allowed under the Teachers' Retirement Law for certain service activities. The bill eliminates the one-year waiting period for CalSTRS retirees who terminate their retirement allowance and are reinstated before they can again retire. The bill was chaptered on July 17, 2012, and took effect immediately.

Assembly Bill 885: Expanding the Pupil Data System

Authored by Senator Joe Simitian (D-Palo Alto), this legislation, if signed by Governor Brown, would expand the existing K-12 data system, the California Longitudinal Pupil Achievement Data System or CalPADS, to include preschool and college pupil information. In support of the bill, Senator Simitian said that it would allow "for tracking student achievement from preschool through university and into the workforce." He added that it would also fill the need "to provide educational data necessary to comply with federal funding and reporting requirements, and to evaluate which programs improve student performance and which ones don't in order to spend our limited education dollars wisely."

Senate Bill 1291: Unemployment Benefits for Teachers in Training Programs

Cosponsored by Senator Noreen Evans (D-Santa Rosa) and the California Teachers Association, SB 1291 will allow laid-off permanent and probationary teachers to continue to receive unemployment benefits while enrolled in training programs for additional certifications in mathematics, science, or special education endorsed by the Commission on Teacher Credentialing. While enrolled in one of the specified programs, the unemployed teacher will be relieved from the requirement to seek employment in order to receive benefits. The law will take effect January 1, 2014.

Senate Bill 1458: Standardized Tests and the API

Introduced by Senate President Pro Tem Darrell Steinberg (D-Sacramento), this bill, if signed, would change the way that schools are graded by de-emphasizing standardized tests in the evaluation process. It provides that standardized test results must make up no more than 60 percent of a high school's Academic Performance Index score, commencing in 2016. The bill authorizes the superintendent of public instruction, with approval from the state board of education,

to factor into the API the rates at which students move up grades before high school and “valid, reliable, and stable” measurements for assessing student readiness for college or career. It calls for a separate system of review by panels of evaluators who would observe teachers, interview students, and examine student work, if the money to fund the program becomes available.

Assembly Bill 1765: Master Teacher Bill Vetoed

Governor Brown vetoed legislation that would have required the Commission on Teacher Credentialing to convene an advisory panel to evaluate a program that would provide leadership roles within the teaching profession and to make recommendations next year for implementation. Sponsored by Assembly Member Julia Brownley (D-Santa Monica), the bill sought to keep experienced teachers in the classroom by giving them opportunities for career advancement. Governor Brown, in his veto message, said that now is not the time to give the commission additional responsibilities because it is “facing a huge backlog of cases,” and that “nothing precludes local educators from doing this work.”

CPER Journal Online

Bargaining Roundup

Los Angeles Unified School District

United Teachers Los Angeles and LAUSD entered into a one-year contract that could result in teachers losing as much as 10 pay days and shorten the school year to 175 days from 180, in exchange for saving 4,149 jobs. The number of elementary school arts teachers, nurses, and librarians will remain at current levels, as will class sizes.

The first three furlough days are scheduled to occur before Thanksgiving. The next four would occur on holidays, if necessary, and the final three would occur on the last three days of the school year. If Governor Brown's funding initiative, Proposition 30, passes in November, the agreement provides that funds would be unlocked immediately to eliminate or reduce furlough days. It also stipulates that, if it turns out at the end of the fiscal year that funding levels were sufficient to avoid furlough days that were in fact imposed, the district is obligated to reimburse employees for lost pay. If Prop. 30 fails, the union and the district will return immediately to the bargaining table to address the financial impact. The full text of the district's "2012-13 Jobs & Services Restoration Agreement" is online.

Approximately two-thirds of union members cast ballots. They voted in favor of the contract by a margin of 58 percent to 42 percent. In contrast, 86 percent voted in favor of a similar contract last year.

Even with the concessions, more than 1,300 UTLA members may still lose their jobs due to declining enrollment, reduced government funding, and program cuts.

Natomas Unified School District

After months of deadlocked negotiations that included the filing of an unfair practice charge and a factfinding hearing, the Natomas Teachers Association and the district have entered into a two-year agreement that they hope will increase enrollment and the number of teachers employed. It includes plans to expand kindergarten from half-day to full-day, add international baccalaureate programs, and increase the number of students at the alternative high school from 140 to 300. The contract also stipulates that the elementary school physical education specialists laid off last year will be recalled, and makes the pay of speech and language pathologists more competitive in order to reduce the number of outside consultants.

Teachers will have six unpaid furlough days for the 2012-13 school year, which may be increased by 11 days if neither of the two tax initiatives on the ballot passes in November.

San Diego Unified School District

The San Diego Teachers Association, representing 7,000 teachers, agreed to forgo pay raises and to a third year of up to five unpaid furlough days to save 1,481 jobs in a vote held mid-June. The district had issued more than 1,530 final layoff notices that were to go into effect on June 30. The recall of most of the laid-off teachers means that K through third-grade maximum class sizes will remain at 24 students, rather than increasing to 31. The agreement extends the current contract, set to expire in 2013, through June 2014, deferring a 7 percent pay increase that was to go into effect in three stages over this school year. It also includes a one-time $25,000 bonus to the first 300 teachers, age 55 or older with at least 25 years of service, to retire this year and next. It provides for a healthcare trust fund to guarantee health benefits for laid-off teachers in future years.

If either of the tax initiatives passes in November or if district revenue increases, the district must implement the deferred raises immediately, and the top step of each salary schedule will increase by 1 percent. An increase in district revenues would result in a decrease in furlough days under a predetermined formula.

If both tax initiatives fail and district revenues decline, the agreement provides that the district could impose up to 14 furlough days. The full text of the agreement can be found online.

Over 3,000 union members voted in favor of ratifying the tentative agreement, while approximately 1,470 voted against.

In August, the district also reached a tentative agreement with the Administrators Association San Diego certificated bargaining unit, which includes principals and vice principals. The agreement is similar to that reached with SDTA in that it delays a 7 percent raise scheduled to go into effect in three stages starting July 1. It saves the jobs of five administrators and stops a plan that would have had some vice principals working four days a week instead of five. It also includes 13 retirement incentives a year for the next two years. The agreement provides for a set number of furlough days for fiscal years 2012-13 and 2013-14, with additional furlough days to be added if there are mid-year cuts. There will be a 1 percent increase in the top salary step if either tax initiative passes in November.

A representative of the union told *CPER* that unit members voted in favor of ratifying the agreement by a large margin. The school board will consider it at its meeting this month.

San Francisco Unified School District

Members of United Educators of San Francisco approved a tentative contract with the San Francisco Unified School District by a vote of 1,146 to 310. The agreement

provides for 1.5 furlough days over each of the next two years. If one of the statewide revenue measures does not pass in November, the contract provides for up to 16.5 furlough days over the same period.

Upland Unified School District

The Upland Unified School District board of trustees and the Upland chapter of the California School Employees Association have entered into an agreement that will reduce classified employees' salaries by 7.78 percent. The cut is equivalent to a reduction of 15 work days in the 2012-13 school year and is expected to save the district $848,528. Union members voted 93 to 27 in favor of the agreement.

The district and administrators had previously agreed to a 7.78 percent pay reduction for the superintendent, assistant superintendents, and management-level employees. Negotiations between the district and the Upland Teachers Association are continuing.

Vista Unified School District

Members of the Vista Teachers Association voted overwhelmingly, 781 to 75, to ratify a tentative agreement with the district for the next two school years. The MOU modifies the current contract in several respects. It calls for two unpaid instructional furlough days in 2012-13 and four in 2013-14. It also allows the district to increase class sizes for the next two years above those provided for in the current contract. The agreement requires that any unrestricted ending fund balance dollars from 2011-12 would go to reduce the 2012-13 furlough days. Because there were funds available, all the furlough days have now been restored. It also provides for restoration of furlough days if the funded base revenue limit for 2012-13 is higher than the amount estimated in the budget. If funds generated exceed those necessary to restore all furlough days, each increment of $1.3 million will be used to give unit members a one-time payment of 1 percent of salary. If the amount generated is at least $500,000, they will receive a pro-rated payment. However, should the state impose mid-year cuts, up to 11 additional furlough days may be required in 2012-13 and 2013-14. The text of the MOU can be found online.

CPER Journal Online

Unpaid Leave, Contracting Out Are Subjects of Sideletters

Unions representing state employees hated furloughs, but they did not like Governor Brown's proposed four-day workweek either. Instead, the organizations representing all but two of the state bargaining units have agreed to a personal leave program substantially similar to furloughs. The governor imposed furloughs on the two holdout unions, using authority granted by the legislature in the budget act. (See story in this issue.)

When the Department of Human Resources (formerly Department of Personnel Administration, now "CalHR") suggested a 38-hour, four-day workweek, all the unions had agreements effective through June 2013. Although they were not obligated to reopen the contracts, most unions negotiated compensation reductions in return for other provisions advantageous to employees.

The common element of all the sideletter agreements is a personal leave program (PLP) that reduces pay 4.62 percent from July 2012 through June 2013, in exchange for a day off each month. The program will have no effect on benefits and pension accruals. Most of the pacts require employees to use the leave day each month, but agreements with peace officer and firefighter unions, like the California Association of Highway Patrolmen, merely "encourage" officers to take the day off in the month the personal leave day accrues. Agreements with the California Association of Professional Scientists and AFSCME allow unit members to accrue and take up to three PLP days a month, but not more than a total of 12 during the year.

Most of the unions gained benefits in other areas. The Service Employees International Union, Local 1000, pact requires the administration to eliminate student assistants and retired annuitants who do not perform "mission critical" work. In addition, CalHR agreed to establish a Budget Solutions Task Force, which will review personal services contracts to determine whether contractor hours can be trimmed, leaving more work for SEIU-represented employees. AFSCME, Union of American Physicians and Dentists, and California Attorneys, Administrative Law Judges and Hearing Officers in State Employment negotiated similar provisions establishing contracting-out committees. CAPS also gained language relating to telework and a classification committee. AFSCME established a benefits advisory committee.

CAHP and CDF Firefighters negotiated extensions of their contracts, which would have expired next July. Both sideletters provide, "This contract extension does not change the parties' legal rights with respect to any statutory or constitutional changes affecting pensions that may be enacted after the date the parties agree to the extension." CalHR spokesperson Lynelle Jolley told *CPER* that the extension will not affect the effective date of pension legislation signed by former Governor

Schwarzenegger in 2010, which rolled back pension formulas to 1999 levels. That legislation, SBX6 22, provided, in part, that new employees would be subject to less lucrative formulas unless the new law was “in conflict with a memorandum of understanding that is current and in effect on January 15, 2011,” in which case, the memorandum of understanding is controlling “while it remains in effect.” CAHP will not be foregoing raises by extending its contract, since wages are determined by comparison to the total compensation of officers in five large local agencies, including the Los Angeles and San Francisco police departments.

CPER Journal Online

PECG Wins Furlough Lawsuit, but Furloughs Imposed Again

The last of the lawsuits stemming from former Governor Schwarzenegger's furlough orders is inching to an end. In a victory for the Professional Engineers in California Government and the California Association of Professional Scientists, a superior court judge found that state engineers and scientists were furloughed more days than authorized, and that those in certain jobs should not have been furloughed at all. But, Governor Brown has appealed the ruling. And state budget pressures and an inability to reach agreement on compensation reductions have led Governor Brown to impose another round of furloughs on workers represented by PECG and the International Union of Operating Engineers, even though both units have unexpired, closed labor contracts.

Winning the Fine Points

The unions' lawsuit was based in part on laws relating to employees paid with special funds, and in part on legislative language that the union asserted required reduction in compensation "proportional" to the pay reductions of management employees.

The state did not dispute that nine engineers employed by the Prison Industry Authority and the Housing Finance Authority are entitled to back pay for up to 70 furlough days. The legislation in the budget act authorizing furloughs applied only to employees paid from an "item of appropriation," and neither authority received funding from the annual act. Workers in other bargaining units employed in these agencies already received back pay after settlements with their unions. (See story in *CPER online No. 205*.)

The unions had a harder time convincing the court that 225 employees involved in hazardous substances management and remediation work at military bases should have been exempted from furloughs. While sections of the Water Code and Health and Safety Code forbid the state controller and Department of Finance from imposing "personal services limitations" on those positions, the state contended the legislature had not ceded its authority over terms and conditions of employment when it enacted those provisions.

In response, the unions used the "single subject rule" to persuade the court that the furloughs were invalid. That rule prevents the legislature from using the budget act to change the substance of an existing law. Here, the court found the budget act effectively eliminated the provisions forbidding personal services limitations on hazardous substances workers. Affecting employee compensation through appropriations generally does not conflict with existing law, which makes executive branch agreements with unions subject to legislative appropriations, said the court.

Here, however, existing law barred the reduction of the employees' pay, the court found, and therefore was invalid because it violated the single subject rule.

The unions' last claim — that engineers' and scientists' pay had been reduced more than the pay of non-represented employees — affected all 12,000 employees in the two bargaining units. Because both CAPS and PECG had not agreed to new contracts, they were subject to the imposition of further furloughs in July 2010. The budget language directed that each item of appropriation be reduced "to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for non-represented employees…." The furloughs of engineers and scientists did not end until April 2011, but Schwarzenegger had ended furloughs for supervisory and management employees months earlier, instead implementing a one-day-a-month personal leave program and pension contribution increases amounting to an 8.5 percent pay reduction. After the first furlough day in March 2011, the salaries of engineers and scientists had been reduced more than that of non-represented employees in 2010-11. The court found that their pay had been reduced .7 percent more, and that the last two days of furlough were not authorized by the legislature.

Unless the state wins an appeal, engineers and scientists will receive two days back pay. Several may receive much more. The state will owe those employed in the Prison Industry Authority and other specified positions throughout 2009, 2010, and 2011, back pay for 70 furlough days.

New Furloughs Imposed

Just as litigation over the last round of furloughs is declining, Governor Brown has imposed new furloughs on engineers and IUOE-represented employees in unit 13. While unions representing employees in other units agreed to a new personal leave program in sideletters, PECG and IUOE refused to reopen their contracts. (See story in this issue.) The new one-day-a-month furloughs have the same effect as the personal leave programs that the other unions negotiated.

The legislature authorized furloughs for employees if the governor was unable to negotiate compensation reductions. The interesting difference this time is that the union contracts had not expired. It raises the question of whether the unions may sue under the state and federal constitutions because their contracts were impaired by the legislature. As a practical matter, a union rhetorically asked in its online newsletter, the *PECG Informer*: if the legislature can violate contracts, "what good does it do to agree to reductions now in exchange for increases in the future?"

PECG spokesperson Ryan Endean told *CPER* that the union is not in negotiations over pay cuts, but it would consider discussions with the state employer about cost-saving measures. The union is pushing strongly for reduction in outsourcing to private contractors, which it claims is being done without competitive bidding and at an additional cost of approximately $100,000 for each engineer.

CPER Journal Online

New CFA Contract Has Reopener Next Month

There are no furloughs and no employee benefit contribution increases in the new agreement between the California State University and the California Faculty Association, which represents 24,000 professors, lecturers, librarians, and counselors. However, with CSU's budget contingent on the fate of Proposition 30 in November, the parties agreed to allow negotiations on 2012-13 salaries and benefits if either party requests to reopen the contract this October or November. The university gained some small economic concessions and control over assignments, but the union beat back attempts to cut faculty pay and won some contract improvements in parental leave and other provisions.

Economic Items

The parties began negotiations for a new contract in 2010, and reached impasse last fall. Mediation was unsuccessful. After CFA members voted overwhelmingly in favor of a strike in April, the parties returned to the table in an attempt to avoid factfinding. (See story in 206 *CPER* online.)

On July 31, CFA and the university reached a tentative agreement, which was ratified by union members at the end of August. There are no general salary increases or service step increases in 2010-11 or 2011-12, and no benefit changes, except for extension of the eligibility of dependent children to age 26. Either party may reopen the contract to bargain salaries and benefits for 2012-13 and 2013-14.

The parties did agree that campus presidents have discretion to implement an aborted equity increase program to reduce salary inversion, where new professors have been hired at salaries higher than professors with several years of experience. The parties previously had agreed on a three-year process to eliminate salary inequities, but had to cancel it in 2008 after one year. (See story at *CPER Issue No. 200*, pp. 58-60.)

The rules on compensation for teaching summer classes were loosened. When fewer than 20 students sign up for a class, the professor can choose to teach the class if he or she agrees to accept lower pay. Pay can be reduced 5 percent for each student less than 20 to a minimum of 65 percent of salary.

The university also won an agreement for higher reimbursement rates from CFA for salaries of faculty on union leave. The prior contract had required pay at an untenured professor pay rate, whereas the new contract calls for reimbursement at the lower of either the union member's actual rate or full professor pay. The university will no longer pay the salaries of the union president and political action chair.

CSU Flexibility

The university now has more control over hiring of temporary faculty to teach courses. In recent years, lecturers have gained more security of employment through provisions that require CSU to offer them available classes if they previously have taught at a campus. Having a three-year appointment — obtained after six consecutive years of satisfactory employment on the same campus — led to greater rights to teach classes not taught by tenure-track professors. In the new contract, CSU was successful in changing the order of hiring lecturers to eliminate the obligation to hire a lecturer with a three-year appointment if the university determines that a lecturer with a one-year appointment is more qualified to teach the class. CSU also inserted more evaluation requirements into the provisions relating to reappointments of temporary faculty.

In addition, the university was able to limit the authority of arbitrators who hear cases. While there were some limits in the prior contract on the arbitrator's ability to award reappointment, tenure, or a promotion to a grievant, the limits were strengthened to bar such an award except in extreme cases where the decision was not based on reasoned judgment and it is clear that the decision would have gone in the grievant's favor it if had been.

CFA gained improvements in paid parental leave terms. Instead of taking 30 days paid full-time leave, professors may opt to reduce their workloads by 40 percent on the semester system or 60 percent on quarter-system campuses to care for a newborn. Leave may be shared between spouses if both are on the faculty, and parents may use 15 days of sick leave to extend parental leave. Tenure-track faculty may also take up to a year of unpaid parental leave, a benefit that has been available only to tenured faculty.

Other items in the new agreement include:

- Addition of gender identity, genetic information, and medical condition as prohibited bases of discrimination
- A limitation of 135 days on paid leave during an appeal of discipline
- A deadline for CFA to identify individuals in a class action grievance
- Limitations on grievance timeline extensions
- A requirement that an arbitrator resolve issues of arbitrability before hearing the merits of the case
- Expansion in the number of classes subject to student evaluations
- A joint-workload committee
- Clarification of counselor workload
- A right to deferral of sabbatical if the application is denied for lack of funding or a reason other than merit
- Availability of the Faculty Early Retirement Program to counselors.
- A reemployment list for temporary faculty with three-year appointments who are not reappointed due to a lack of work.

The contract will be in effect through June 2014.

Trigger Cuts

The faculty contract may be reopened in the next month. CSU stands to lose $250 million in state funding if Proposition 30 does not pass. This cut would be in addition to reductions of $1 billion since 2007-08, and would represent a total reduction in CSU's budget of nearly 40 percent. In July, the CSU board of trustees began planning for the potential cut. Because salaries and benefits comprise nearly 85 percent of university costs, the options the board of trustees is considering both include compensation reductions. One proposal is to increase student fees $150 and decrease average employee pay and benefits by 2.5 percent beginning January 1, 2013. Another alternative is to reduce enrollment and cut average compensation 5.25 percent. CSU estimates that the second option would result in about 750 layoffs. The board will make its decision at its September meeting. Of course, compensation cuts for represented employees will be subject to bargaining.

At the same time, the board approved salaries for three incoming campus presidents that are 10 percent higher than their predecessors' pay, with the extra pay being provided from non-state funds raised by campus foundations. After the board vote, CSU Employees Union President Pat Gantt issued a statement criticizing the decision. "It is insulting to employees, students, and the public to keep hiking presidential pay, no matter where the funds come from, at a time of ever more draconian cuts to services and hikes in tuition."

CPER Journal Online

Legislature Amends Definition of Employee in HEERA

Over the objections of the University of California, the legislature passed a bill that would grant graduate student researchers collective bargaining rights. If signed by the governor, Senate Bill 259 (Hancock-D, Berkeley) would change the definition of "employee" in the Higher Education Employer-Employee Relations Act.

Currently, the definition of "employee" or "higher education employee" permits the Public Employment Relations Board to treat as employees those student employees "whose employment is contingent on their status as students" only if the services they provide are "unrelated to their educational objectives, or that those educational objectives are subordinate to the services they perform."

SB 259 would delete this restriction and provide that the definition of employee includes "student employees whose employment is contingent on their status as students."

The United Auto Workers union — which represents teaching assistants, readers, tutors, and post-doctoral students at UC and the California State University — sponsored the legislation. It explained that only graduate student researchers have no bargaining rights, since they were excluded from coverage in *Regents of UC v. Student Association of Graduate Employees, UAW* (1998) PERB Dec. No. 1301-H, 134 CPER 73. UC's 14,000 graduate student researchers often are employed as teaching assistants either before or while working as GSRs. Because they move in and out of the represented unit, they lose child care subsidies, family leave, workload protections, job security rights, and many other contractual rights from one term to the next.

According to the legislative analysis, UC opposes the bill because it would change the relationship between faculty and GSRs from mentor-mentee to employer-employee. It quoted UC: "'Research is not work in the traditional employment sense, in that it does not represent an exchange of wages for services. Academic research is also unique in that individual discoveries do not follow a set timeline.'" UC fears loss of faculty due to restrictive relationships with GSRs and loss of graduate student interest because "new work restrictions…would increase the time it takes to earn a graduate degree at UC," it explained in a letter to the Assembly Higher Education Committee.

CPER Journal Online

San Francisco Court Workers' Strike Beats Back Imposition of LBFO

Court clerks did not show up for work on July 16, causing the clerk's office and many courtrooms to close. The strike was called after the court imposed a 5 percent pay cut effective July 1. While the one-day strike did not shut down the courts entirely, it did bring the San Francisco County Superior Court back to the table with SEIU Local 1021, which represents the clerks.

Budget Cuts

The judiciary statewide has suffered over $1 billion in funding cuts over the last four years. The San Francisco court has seen its budget slashed by $21.2 million since 2008-09. Last year, it laid off 67 employees. Facing further cuts this year, the court demanded a 5 percent salary reduction from all its employees in an attempt to avoid further layoffs. Employee organizations representing management staff, court reporters, and court professionals such as lawyers and counselors agreed in March to a 5 percent salary reduction that could be adjusted if budget allocations were better than anticipated. Their contracts reduce the time laid-off employees can remain on a recall list from five years to three. In exchange, the court agreed to pay health premium increases up to 9 percent each year of the three-year contract, to additional floating holidays, and to other non-economic items.

SEIU Local 1021 members voted down the proposal, however. After four weeks of negotiations, the parties reached impasse. The union asserted it could not accept cuts when it had not received all the financial information it had requested, a claim the court disputes. Mediation in April was unsuccessful. In May, 95 percent of SEIU members voted to authorize a strike. In late June, it became apparent that there would be a $544 million funding reduction to the judiciary branch, and the legislature might require local courts to spend down reserves, rather than forfeit them to the state's Administrative Office of the Courts, which makes funding distributions to local courts. As the July 1 deadline to impose the pay cut approached, SEIU argued that the ability to use reserves made salary reductions unnecessary. Unswayed, the court imposed the terms of its last, best, and final offer.

Strike Moves Court

The court kept enough courtrooms open to perform essential functions and handle time-sensitive criminal, unlawful detainer, civil harassment, and juvenile delinquency cases. Potential jurors were sent home though, and many cases were delayed. Several members of the San Francisco board of supervisors attended a union rally several days after the strike.

A week later, the court agreed to withdraw the pay cut and return to the table if the union promised not to strike and to reduce its public communications. The union

demanded that the court use its own negotiators, rather than a representative from the state AOC. In late July, the AOC recommended that the San Francisco court spend approximately $5 million of its $13 million reserve in the coming year. The number, though not final, is sufficient for the parties to restart negotiations. In addition to bargaining with SEIU Local 1021, the court has reopened its contracts with Local 21 and the Management Employees Association to discuss adjustments to the 5 percent salary cut that became effective July 1.

CPER Journal Online

Big Change in FEHA Enforcement

Senate Bill 1038, signed into law by Governor Brown in June, eliminates the Fair Employment and Housing Commission, effective January 1, 2013. The commission is one of the two main agencies charged with enforcement of California's Fair Employment and Housing Act.

The FEHA established both the Department of Fair Employment and Housing and the FEHC, two administrative agencies that worked hand-in-hand to enforce the act's prohibitions against employment and housing discrimination. The DFEH was given the power to receive, investigate, and conciliate complaints of discrimination, whereas the FEHC promulgated regulations interpreting the act, conducted administrative hearings, published decisions and publications, and conducted mediations at the request of the DFEH.

The new legislation creates the Fair Employment and Housing Council within the DFEH. The council will now be responsible for the promulgation of FEHA regulations and will hold informational hearings on FEHA-related topics. It will be made up of seven members to be appointed by the governor and confirmed by the Senate. The director of the DFEH will serve as a non-voting member. It will be staffed and funded by the DFEH.

While the bill ends administrative adjudication of FEHA claims, it provides that the DFEH may file cases directly in state and federal courts. Prior to initiating litigation, the department must require the parties to participate in mandatory dispute resolution in its internal dispute resolution division, free of charge. The bill authorizes courts to award the DFEH reasonable attorneys' fees and costs, including expert witness fees, in cases in which it prevails.

It is estimated that the legislation will save taxpayers $391,000 in fiscal year 2012-13, and $784,000 in every fiscal year thereafter.

CPER Journal Online

Statistical Evidence That Does Not Account for Defendant's Reason for Discharge Still OK for Prima Facie Case

In *Schechner v. KPIX-TV*, the Ninth Circuit Court of Appeals clarified that a plaintiff may use statistical evidence to support a prima facie case of disparate-treatment age discrimination under the Fair Employment and Housing Act, even if that evidence does not take into account the defendant's proffered nondiscriminatory reason for the discharge.

In 2008, CBS headquarters instructed senior management at local stations to reduce their annual budgets by 10 percent. KPIX-TV President and General Manager Ronald Longinotti and Vice President Dan Rosenheim were responsible for implementing the cuts at KPIX-TV, a San Francisco affiliate. They decided to lay off two television news reporters, William Schechner and John Lobertini, along with three other members of the "on-air" news team, Tony Russomanno, Manny Ramos, and Rick Quan. At the time of the layoffs, Schechner was age 66, Lobertini was 46, Russomanno was 57, Ramos was 56, and Quan was 51.

Schechner and Lobertini filed a lawsuit against the station and CBS for age and gender discrimination in violation of the FEHA.

Statistical Evidence

At trial, Longinotti and Rosenheim testified that, when considering who to lay off, they decided to keep all the news anchors because they were the "face" of the station. They decided to lay off general assignment reporters based on the expiration date of the reporters' contracts but not those reporters focusing on a specific beat, known as "specialty reporters," because they were being promoted as integral to the station's brand.

As part of their prima facie case, Schechner and Lobertini's expert introduced statistical evidence from which he concluded that "those individuals laid off, as a group, are older than the group of those not laid off, and the disparity between the two groups is statistically significant." The expert included news anchors in his analysis, assuming that they had an equal chance of being laid off as all other employees, and did not consider contract expiration dates.

The trial court granted the station's motion for summary judgment, finding that Schechner and Lobertini failed to make out a prima facie case of age discrimination because where a plaintiff's statistical analysis fails to preemptively account for the defendant's legitimate non-discriminatory reason for discharge, the statistical results cannot show the stark pattern of discrimination required by the Ninth Circuit in statistical evidence cases.

Court of Appeals' 'Clarification'

Although the Ninth Circuit affirmed the trial court's dismissal of the case, it disagreed with its analysis. "We clarify that a plaintiff's statistical evidence need not necessarily account for an employer's proffered non-discriminatory reason for the adverse employment action to make a prima facie case of discrimination," under the burden-shifting framework of *McDonnell Douglas v. Green* (1973) 411 U.S. 792, 1973 U.S. LEXIS 154. That framework provides that once the plaintiff has established a prima facie case, the burden of production shifts to the employer to rebut this prima facie case by "articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection." Then the burden shifts back to the employee to show that the employer's justification is merely a pretext for behavior actually motivated by discrimination.

In an age discrimination case, the plaintiff can make a prima facie case of disparate treatment by showing that he or she was at least 40 years old, performed the job satisfactorily, was discharged, and was either replaced by a substantially younger employee with the same or lesser qualifications or terminated under circumstances that give rise to an inference of discrimination, instructed the court. "A plaintiff laid off during a reduction in force will generally have to rely on evidence giving rise to an inference of discrimination — often statistical evidence — because the plaintiff is unlikely to have been replaced," it said. In this case, the plaintiffs easily satisfied the first three elements of their prima facie case, leaving the sufficiency of the statistical evidence as the only issue to be determined.

The court reviewed its recent cases where the strength of the statistical evidence was in question and noted that those cases were resolved at the third step of the *McDonnell Douglas* framework, not the first. In none of those cases did the court require that the plaintiff address the defendant's non-discriminatory explanation for its layoffs as part of its prima facie case. See *Diaz v. Eagle Produce Ltd. P'ship* (9th Cir. 2008) 521 F.3d 1201, 2008 U.S. App. LEXIS 7261, and *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 2000 U.S.App. LEXIS 29508. The court also reiterated its statement in *Wallis v. J.R. Simplot Co.* (9th Cir. 1994) 26 F.3d 885, 1994 U.S. App. LEXIS 12249, that the degree of proof necessary to establish a prima facie case of discrimination on summary judgment "is minimal and does not even rise to the level of a preponderance of the evidence."

The court concluded that "a plaintiff who submits statistical evidence that shows a stark pattern of age discrimination establishes a prima facie [case] at step one of the *McDonnell Douglas* framework. We hold that statistical evidence does not necessarily fail to establish a prima facie case because it does not address the employer's proffered non-discriminatory reasons for the discharge," the court said. "We do not hold that *any* statistical evidence of disparate treatment, regardless of its strength, will be sufficient to establish a prima facie case," it cautioned.

Here, the court concluded that the statistical evidence submitted by Schechner and Lobertini did show stark age disparities between the employees who were retained and those who were laid off, sufficient to establish their prima facie case.

Next Steps

However, the court concluded that KPIX was able to meet its burden to articulate a non-discriminatory reason for its layoffs. It claimed that they were based on the contract expiration dates.

In an attempt to show that this reason was mere pretext for discrimination, Schechner and Lobertini argued that the station did not actually follow the process described by Longinotti and Rosenheim in instituting the layoffs. They claimed that two of the general assignment reporters who were retained had earlier contract expiration dates, that anchors were not in fact exempt from layoff, and that two of the laid-off reporters were "specialty reporters."

The court was not impressed by these contentions. It found no evidence that the two general assignment reporters had earlier contract expiration dates. One of the two anchors who was laid off left voluntarily. While the termination of the other anchor presented "a closer question," the evidence supported the station's contention that he was terminated for very specific reasons having to do with the role of sports in its broadcasts.

'Same-Actor Inference' at Play

The court did conclude that there was a factual dispute raised as to whether Lobertini and Russomanno were specialty reporters. But, it said, the facts did not support a finding of pretext because KPIX was entitled to the "same-actor inference."

"'Where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive,' " the court explained, quoting from *Bradley v. Harcourt, Brace & Co.* (9th Cir. 1996) 104 F.3d 267, 1996 U.S.App. LEXIS 33867. Here, Longinotti and Rosenheim signed both Schechner and Lobertini to new contracts not long before they laid them off, after Schechner was well into his sixties. They had signed a two-year contract with Lobertini when he was 46 years old.

The court affirmed the lower court's grant of summary judgment. (*Schechner v. KPIX-TV* [2012] 686 F.3d 1018, 2012 U.S. App. LEXIS 10766.)

CPER Journal Online

Section 1983 May Not Be Used to Remedy Violations of Title I ADA Rights

In *Okwu v. McKim*, the Ninth Circuit Court of Appeals held that a state employee may not sue state officers under 42 USC section 1983 for violations of Title I of the Americans with Disabilities Act. The court concluded that, by drafting a comprehensive remedial scheme for Title I violations, Congress manifested its intent to preclude the availability of section 1983 remedies. That intent was not changed by a subsequent Supreme Court decision holding that the Eleventh Amendment gives state employers immunity from suit under Title I, said the court.

Retired Employee Denied Reinstatement

Josephine Okwu, a Caltrans employee, has severe psychological disorders. Caltrans wanted to fire Okwu, and Okwu claimed that she had been improperly denied promotion and harassed. A settlement of the dispute provided that Okwu could apply for and receive disability retirement benefits from the California Public Employees Retirement System and could seek reinstatement to active employment.

Okwu's application for reinstatement was denied. At a hearing on the matter, an administrative law judge determined that Okwu remained substantially incapacitated and could not perform the duties of her position. The CalPERS Board of Administration adopted the ALJ's decision. Okwu's attempt to overturn the decision in state court failed.

Okwu then filed an action in federal court under section 1983 against those individuals alleged to have made the decision not to reinstate her, claiming that her rights under Title I of the ADA and under the Equal Protection Clause had been violated. The district court dismissed her complaint, and Okwu appealed.

No Recourse Under Section 1983 for ADA Violations

The Court of Appeals upheld the lower court's dismissal, relying heavily on its decision in *Vinson v. Thomas* (9th Cir. 2002) 288 F.3d 1145, 2002 U.S.App. LEXIS 8586. In that case the court said that an alleged violation of federal law may not be prosecuted under section 1983 where "Congress has foreclosed citizen enforcement in the enactment itself, either explicitly, or implicitly by imbuing it with its own comprehensive remedial scheme." The *Vinson* court held that the remedial scheme of Title II of the ADA was sufficiently specific and comprehensive to foreclose section 1983 actions, "and that allowing the plaintiff to use the more general §1983 remedial scheme instead would be contrary to Congress's intent," explained the court.

The court also relied on *Ahlmeyer v. Nevada System of Higher Education* (9th Cir.

2009) 555 F.3d 1051, 2009 U.S.App. LEXIS 3024, in which it held that the remedial scheme in the Age Discrimination in Employment Act foreclosed section 1983 actions based on violations of that act. In that case, in addition to finding that the remedial scheme indicated Congress's intent to preclude section 1983 suits, it also reasoned that allowing suit to be brought under section 1983 for ADEA violations would enable plaintiffs to make "an end run around the ADEA scheme's specific, complex procedural protections."

Okwu argued that her situation was distinguishable from *Vinson* because state employees are barred from seeking damages against their employers for violations of Title I of the ADA. (*Board of Trustees of the Univ. of Alabama v. Garrett* (2001) 531 U.S. 356, 2001 U.S. LEXIS 1700, 147 CPER 50.) Okwu contended that, because she had no recourse under the ADA itself, she should be allowed to proceed under section 1983 instead.

The court disagreed. "We have already decided…that a state's immunity from suit does not mean that a plaintiff may use §1983 as a substitute for an otherwise-comprehensive remedial scheme," said the court, pointing again to *Ahlmeyer*. In that case, the Supreme Court had invalidated that part of the ADEA which permitted plaintiffs to sue states, leaving the plaintiff unable to proceed under the ADEA. Therefore, she attempted to proceed under section 1983. The *Ahlmeyer* court determined that it must analyze the comprehensiveness of the statute as originally written, not as subsequently altered by the courts. It found that the ADEA's remedial provisions evidenced Congress's intent to make them comprehensive enough to preclude ADEA-based section 1983 suits. The fact that courts subsequently "defanged" part of the remedial scheme was irrelevant. Consequently, the court held that the plaintiff could not sue under section 1983.

"The same reasoning applies here," said the court in this case. "By drafting a comprehensive remedial scheme for employer's violations of ADA Title I, Congress manifested an intent to preclude §1983 remedies," it instructed. "The Supreme Court's subsequent decision that this scheme did not validly abrogate the states' Eleventh Amendment immunity…did nothing to change that intent. We are not free to interpret §1983 in a way that provides a substitute remedy that Congress never provided," it said.

Failure to State an Equal Protection Claim

The Court of Appeals agreed with the lower court that Okwu failed to state a section 1983 claim for deprivation of her constitutional right to equal protection because she failed to allege that the defendants treated any similarly-situated employee differently. The court dismissed her argument that she was a "class of one," noting that "that theory is not available in the public employment context," citing *Engquist v. Oregon Dept. of Agriculture* (2008) 553 U.S. 591, 2008 U.S. LEXIS 4705.

Further, alleging disparate treatment alone would not be enough, the court cautioned, because the Supreme Court held in *Garrett* that courts must affirm state disability-based employment decisions when they are supported by a rationale basis. And here, said the court, the state's decision not to reinstate Okwu was

rationally based on its decision that Okwu could not perform her prior duties because of her psychological disorders.

The court affirmed the lower court's decision to dismiss Okwu's complaint with prejudice. (*Okwu v. McKim* [2012] 682 Fed.3d 481, 2012 U.S. App. LEXIS 11874.)

CPER Journal Online

Surviving Spouse Pension Benefit Not Discriminatory

The City of San Diego's surviving spouse benefit does not violate Title VII's prohibition of sex discrimination, said the Ninth Circuit Court of Appeals in *Wood v. City of San Diego.* The court upheld the lower court's dismissal of the disparate treatment and disparate impact claims alleging that the benefit paid to married retirees is larger than that paid to single retirees, which discriminates against female retirees because male retirees are more likely to be married.

Janet Wood retired after 32 years as a city employee. She was single at the time of her retirement.

City employees are required to contribute a percentage of their salaries to their pensions and to fund survivor benefits. If a city employee is married at the time of retirement and chooses the surviving spouse benefit, she would receive her full monthly benefit until she dies, at which time the spouse receives a monthly benefit equal to one-half of the employee's monthly pension benefit. If a city employee is single at the time of retirement and chooses the surviving spouse benefit, the city either refunds the contributions she has paid into the survivor benefit, plus interest, or treats them as voluntary additional contributions to provide a larger monthly pension benefit.

Wood filed a class action lawsuit claiming that because the city pays a larger amount of money to the married retirees who select the surviving spouse benefits than it does to the single retirees, and male retirees are more likely to be married, the benefit has an unlawful disparate impact on female retirees. She later amended her complaint to include a claim of disparate treatment.

The district court dismissed Wood's Title VII disparate treatment and disparate impact claims. Wood appealed.

Failure to Show Intent to Support Disparate Treatment Claim

Prior to 1978, San Diego's retirement plan required male employees to make larger contributions to the surviving spouse benefit than female employees. The rationale underlying the unequal contributions was that because women live longer, male employees were more likely to still be married at retirement and were more likely to die before their spouses. The contribution amounts were equalized after the United States Supreme Court's decision in *City of Los Angeles, Department of Water & Power v. Manhart* (1978) 435 U.S. 702, 1978 U.S. LEXIS 23, which struck down a pension plan that required women to contribute more than their male counterparts as violative of Title VII's bar against sex discrimination.

Wood argued that the city violated Title VII when it equalized the contribution requirements without changing other parts of the program, knowing that male

retirees on average would receive more in surviving spouse benefits than would female retirees.

The appellate court found that Wood failed to allege any facts to show that the city had a discriminatory intent or motive when it equalized the contributions. While Wood did allege that the city was aware that male employees would disproportionately benefit from the change, mere knowledge was insufficient to prove intent to discriminate, said the court, relying on *Hazen Paper v. Biggins* (1993) 507 U.S. 604, 1993 U.S. LEXIS 2978, 100 CPER 49, and other cases. "'It is insufficient for a plaintiff alleging discrimination under the disparate treatment theory to show the employer was merely aware of the adverse consequences the policy would have on a protected group,'" the court said, quoting from *American Federation of State, County and Municipal Employees v. Washington* (9th Cir. 1985) 770 F.2d 1401, 1985 U.S. App. LEXIS 22712, 63X CPER 9.

Wood argued that in *Manhart* and in *Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris* (1983) 463 U.S. 1973, 1983 U.S. LEXIS 8, 58 CPER 53, the Supreme Court found disparate treatment even though there was no allegation of motivation to discriminate against female employees on the basis of sex. The court was not persuaded, noting that the plans at issue in those cases were discriminatory on their face. "Where, as here, a plaintiff is challenging a facially neutral policy, there must be a specific allegation of discriminatory intent," said the court, citing *American Federation*.

The court upheld the district court's dismissal of the disparate treatment claim. It also concluded that the lower court had not abused its discretion when it refused to allow Wood leave to amend her complaint, because Wood could not show any facts to show discriminatory intent on the part of the city.

Disparate Impact Claim Failed as a Matter of Law

The basis for the district court's dismissal of the disparate impact claim was lack of standing. The lower court pointed out that the value of a pension is tied to the length of the retiree's life and a number of other factors, making it unpredictable and not capable of calculation. It concluded that Wood could not show she had suffered a concrete injury.

The Court of Appeal determined that it need not reach the issue of standing to affirm the district court's decision, because the Supreme Court's opinion in *Manhart* foreclosed Wood's claim. "In that case, the Supreme Court expressly recognized that facially neutral pension plans will inevitably have a disparate impact on some protected groups and concluded that such claims are not actionable under Title VII," said the appellate court. "Thus, even if the district court had considered Wood's disparate impact claim on the merits, it should have dismissed the claim."

In *Manhart*, the Supreme Court expressly addressed the situation presented by Woods, said the court. There, the high court recognized that in facially neutral pension plans, women as a class will be subsidized by the class of male employees because of increased longevity. It also recognized that this subsidy would be

partially offset by survivor benefits because the wives of male retirees would be more likely to receive those benefits. The Supreme Court explained that in insurance, “the better risks always subsidize the poorer risks,” and specifically noted that “unmarried workers subsidize the pensions of married workers.” “Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair.” Regarding disparate impact, the court said, “Even a completely neutral practice will invariably have *some* disproportionate impact on one group or another….[T[his Court has never held, that discrimination must always be inferred from such consequences.”

Thus, said the Court of Appeal, Wood’s disparate impact claim cannot stand in the face of the Supreme Court’s decision in *Manhart*. It affirmed the district court’s judgment of dismissal. (*Wood v. City of San Diego* [9th Cir. 2012] 678 F.3d 1075, 2012 U.S. App. LEXIS 9418.)

CPER Journal Online

Supreme Court Finds Union's Special Assessment Violated Non-Members' First Amendment Rights

In a broadly-worded opinion in *Knox v. Service Employees International Union, Loc. 1000*, the United States Supreme Court held unconstitutional SEIU Local 1000's extra fee assessment to fight two ballot measures because the union did not provide non-members with advance notice and an opportunity to object to paying the special agency fees. In addition to deciding the narrower question presented by the facts, a fractured court questioned the validity of the opt-out procedure it sanctioned in *Chicago Teachers Union v. Hudson* (1986) 475 U.S. 292, 1986 U.S. LEXIS 27, 68X CPER 1. Justice Samuel Alito's majority opinion provides plenty of advice to those who would challenge agency or "fair share" fees. Justices Breyer and Kagan dissented.

Mid-Year Fee Increase

In 2005, SEIU Local 1000 decided to assess a special temporary dues increase to fight two initiative measures on the November ballot. One was Proposition 75, which would have required unions to ask their members for permission to spend dues on political campaigns. The other was Proposition 76, which would have limited state spending and empowered the governor to reduce appropriations for state employee compensation.

As stipulated by the Dills Act, the union has a fair share agreement that allows it to collect fees from non-members, as well as dues from members, to defray representation and collective bargaining costs that are incurred for the benefit of members and non-members alike. The Supreme Court ruled in *Hudson* that fee payers' First Amendment rights are violated when the union spends fees on political candidates or other non-representational expenses without giving the fee payers notice and an opportunity to object to paying agency fees.

In June 2005, Local 1000 issued its annual *Hudson* notice to agency fee payers that announced the fee amount for the following year, which came to 99.1 percent of member dues. It also notified them of the likely breakdown of the union's expenditures for the coming year. Based on a review of the previous year's spending, the union advised that 56.35 percent of the fee was chargeable to fee payers for the costs of bargaining and representation of all employees in the unit. The remainder was for political or other nonchargeable expenses. Fee payers had 30 days to object to collection of the full agency fee, in which case only 56.35 percent of the monthly dues amount would be deducted from the objector's paycheck. The notice also stated that the agency fee was subject to increase at any time without notice.

In July, the union proposed an "Emergency Temporary Assessment to Build a

Political Fight-Back Fund" for a broad range of political expenses. The proposal asserted that the fund would not be used for routine union expenses like rent and salaries. In August, union delegates voted to impose a temporary dues increase of one-fourth of 1 percent of salary to create the fund.

In a letter to members and fee payers, the union explained that the temporary assessment would be used to fight Props. 75 and 76, to defeat an expected attack on pensions in June 2006, and to elect officeholders in November 2006 who would support public employees and services. When one fee payer called to object to the extra amount, a union manager told him that he could not do anything to prevent the fee collection or its use for political purposes. However, the union did deduct only 56.35 percent of the temporary increase from the paychecks of those who had objected in June to the regular agency fee.

A class action was filed on behalf of 28,000 non-union employees who either had not previously objected or had objected and been billed for only part of the increase. They argued that there should have been a separate notice and opportunity to object to the special assessment, and that objectors should not have been billed at all because the assessment was to be used for non-chargeable political purposes.

The federal trial court agreed with the fee payers, and ordered the union to send out a new notice and pay back those who had objected. On appeal, the Ninth Circuit Court of Appeals ruled in favor of the union, finding that the procedure reasonably accommodated the interests of the union, the fee payers, and the public sector employer. The fee payers took the case to the Supreme Court. Before the court heard the matter, however, the union offered a full refund to all class members.

Controversy Not Moot

Having offered a full refund, the union argued that the case was moot. The Supreme Court noted, however, that SEIU was continuing to defend its action, and expressed doubt that it would refrain from using the same tactic in the future. In addition, there was still a question about whether SEIU's refund notice was adequate. The fee payers claimed it was confusing and intended to limit the number of class members who could claim a refund, as the union refused to accept refund requests by fax or email and required an original signature and Social Security number. The court advised, with no citation to precedent, that the union was "not entitled to dictate unilaterally the manner in which it advertises the availability of the refund." Therefore, the court found that the case was not moot.

Agency Shop an 'Anomalous' Impingement on Rights

The court began its analysis by explaining that the First Amendment forbids the government both from prohibiting speech that it disfavors and from "compelling the endorsement of ideas that it approves." Compelled funding of the speech of others has also been found unconstitutional, the court pointed out, and compared agency fees to a law it had found invalid because mushroom growers would be required to pay assessments to fund generic mushroom advertisements. The court asserted it was not revisiting whether its prior cases had adequately considered the First

Amendment rights of non-union members, but it emphasized that its acceptance of unions' "free-rider" justification for charging fees for representation expenses is an anomaly, permitted because it promotes labor peace.

Requiring non-members to opt out of paying fees — rather than opting in — is "a remarkable boon for unions," the court said, since courts do not usually assume that individuals will acquiesce in the loss of rights. It questioned whether an opt-in procedure fits the likely preference of most non-union members to avoid paying the full union dues amount. The court implicitly invited a reexamination of the opt-out *Hudson* procedure, commenting that it "appears to have come about more as a historical accident than through the careful application of First Amendment principles."

While the Ninth Circuit court had applied a balancing test it derived from its reading of *Hudson*, the Supreme Court rejected the assertion that *Hudson* had called for a balancing of rights. The union has no countervailing constitutional right to fees, the court emphasized, citing *Davenport v. Washington Education Assn.* (2007) 551 U.S. 177, 2007 U.S. LEXIS 7722, 185 CPER 21. And, the court observed, *Hudson* required a fee collection procedure to be "carefully tailored to minimize the infringement" on First Amendment rights and invoked a line of cases that require a compelling interest before burdening constitutional rights.

Non-Objectors Entitled to Opt-in Notice

The court opined that prior decisions upholding the opt-out procedure "approach, if they do not cross, the limit of what the First Amendment can tolerate." Not surprisingly, the court denounced SEIU's collection of the special assessment from non-members as "indefensible."

The court found no justification for SEIU's failure to issue a new *Hudson* notice for the assessment, since it sent a letter to employees it represented explaining the increase to dues and fees. Non-members then could have decided whether they wanted to pay for the ballot fight. The court reasoned that, when a union collects fees for a special, unexpected purpose, a nonmember's choice whether to object may change. Particularly in this case, where one of the ballot initiatives would have made it easier for non-members to avoid paying for political expenses, the court found the lack of an opportunity to object detrimental to non-members' rights.

The court was not persuaded by the union's argument that the non-objectors could recover the fees by opting out during the objection process the following year. Even though the chargeable percentage would likely decrease if the special assessment were entirely used on nonchargeable expenses, the court found the non-members would not be fully compensated. In addition, as *Hudson* made clear, the union is not permitted to borrow non-members' money even if they intend to pay it back. The court ruled that the union should have sent out a notice allowing non-members to opt *in* to pay the special fees.

Prior Objectors' Rights Also Infringed

SEIU deducted only 56.23 percent of the fee from non-members who had objected to paying nonchargeable expenses during the annual notice process. But the court found any deduction without consent impermissible under the facts of this case. Since the union had announced that the entire fee was to be used for electoral purposes rather than ordinary union expenses, the court found no basis for treating the special fee as though it would be used partially for chargeable expenses.

The *Hudson* procedure allows unions to base the current year's chargeable fee on the percentage of the last year's chargeable expenses because it is assumed that the breakdown of chargeable and non-chargeable expenditures is somewhat constant from year to year, the court noted. But that justification disappears when the union raises new fees for a special purpose, the court reasoned.

Nor did the court find acceptable a procedure where the union would attempt to predict the chargeable percentage. The court emphasized that the *Hudson* procedure already places a heavy burden on objectors to make a legal challenge to the union's annual determination of what expenses are properly chargeable to non-members. "[T]he burden would become insupportable if unions could impose a new assessment at any time, with a new chargeability determination to be challenged," it continued.

The court's skepticism about the union's ability to make a proper allocation between chargeable and nonchargeable expenses was illustrated in this case. SEIU argued that all funds spent on influencing the electorate about the ballot measures were chargeable because Prop. 76 would have allowed the governor to abrogate collective bargaining agreements in some circumstances, undermining the union's ability to represent employees.

The court found that accepting the union's idea of what expenses were germane to its representation responsibilities would effectively swallow the rule limiting the use of agency fees to support union political activities. As public employee compensation accounts for a large percentage of state budgets, the union could claim that campaigns for or against many ballot measures and candidates were chargeable, forcing non-members "to subsidize political and ideological activities to which they object," the court said.

As a result, the court was not swayed by the union's claim that objectors actually paid less than the union spent for chargeable expenses in 2005, which the union calculated as 66 percent of its expenditures. And, it found that any risk that the union's prediction will be inaccurate should be borne by the union, since it has no constitutional rights at stake. Otherwise, the constitutional rights of non-members would be infringed to benefit the union.

The court concluded, "[W]hen a public-sector union imposes a special assessment or dues increase, the union must provide a fresh *Hudson* notice and may not exact any funds from non-members without their affirmative consent." It reversed the Ninth Circuit's judgment and remanded the case to the trial court.

Justices Sotomayor and Ginsburg concurred in the result, but disagreed with the

majority because it addressed issues the parties did not argue, rather than exercising judicial restraint. They asserted the majority should not have questioned the validity of precedent that allows an opt-out system, since the fee payers did not contend that the First Amendment requires an opt-in system. “To cast serious doubt on longstanding precedent is a step we historically take only with the greatest caution and reticence,” they scolded. The fact that it was done here without the benefit of the parties’ argument on the issues was “both unfair and unwise,” they cautioned.

Justice Breyer dissented and was joined by Justice Kagan. They found that, as a matter of fact, the objectors, who paid only 56 percent of dues, were not harmed because the union’s chargeable expenditures in 2005, were in fact 66 percent of its expenses. This fact shows the wisdom of the retrospective system approved by *Hudson*, they asserted. Breyer also pointed out that California law allows a union to classify some lobbying as chargeable if it is designed to “foster policy goals and collective negotiations and contract administration.” The dissenters reasoned that the administrative difficulties of predicting chargeable expenses for a new notice and the non-objector’s option to object the following year make it unnecessary to send a new notice. Both the concurring and dissenting opinion observed that the majority’s opt-out procedure would apply to all special assessments, even those for indisputably representational purposes. (*Knox v. Service Employees International Union, Loc. 1000* [6-21-12] 10-1121, __U.S. __, 132 S.Ct. 2277, 2012 U.S. LEXIS 4663, 2012 DJDAR 8391.)

CPER Journal Online

Bargaining to Impasse Over Nonnegotiable Wage Recoupment Proposal Violated EERA

The Public Employment Relations Board has found that a school district's proposal seeking to deduct erroneous wage payments from paychecks is inconsistent with state law and is a non-mandatory subject of bargaining. By insisting to impasse on the proposal, the Berkeley Unified School District violated its duty to negotiate in good faith, interfered with employees in the exercise of their rights, and denied the Berkeley Council of Classified Employees the right to represent employees. The provision, which had been in the prior bargaining agreement, expired when the agreement expired, the board ruled.

Expired Agreement

When the parties' collective bargaining agreement expired on June 30, 2007, they engaged in negotiations over a successor agreement. Impasse was declared by PERB in June 2008, and the parties continued to negotiate with the assistance of a mediator. The one item remaining was a provision in the parties' expired contract permitting the district to recoup erroneous overpayments in salary by withholding an employee's wages "over the same period of time the error occurred" unless other arrangements were made. The district demanded to include this provision in the successor agreement; the union refused to renew the recoupment provision. BCCE contended that the language improperly waived statutory rights of employees and was a non-mandatory subject of bargaining.

An administrative law judge concluded that the district's proposal was inconsistent with state wage garnishment laws and constitutional due process. Therefore, it was a non-mandatory subject of bargaining, and the district violated the Educational Employment Relations Act by insisting to impasse on it. Upon review, the board agreed.

In its exceptions to the proposed decision, the district challenged the ALJ's reliance on *California State Employees Assn. v. State of California* (1988) 198 Cal.App.3d 374, 1988 Cal.App. LEXIS 60. In that case, the court ruled that a recently enacted state statute protecting employees' wages from recoupment took precedence over an older statute permitting the state to recoup overpayments by offsetting past overpayments against current employee wages. The board here rejected the district's argument that, because its proposed recoupment procedure was a contractual bargaining proposal related to wages, it was distinguishable from the statutory recoupment procedure at issue in *CSEA*. "Both procedures transgress state policy protecting employee wages from prejudgment attachment," the board said. The district's proposal permits it, "without employee consent and without a court order or other due process, to withhold alleged past overpayments from wages currently due and owing to the employee."

PERB also rejected the district's contention that the decision in *Social Services Union v. Board of Supervisors* (1990) 222 Cal.App.3d 279, 1990 Cal.App. LEXIS 754, 86 CPER 21, was persuasive authority contradicting the *CSEA* court's ruling. *Social Services* involved a wage deduction reimbursing Tulare County for premium increases in employee health insurance coverage, which the union eventually agreed would be paid by employees, but which was paid by the county employer during bargaining. The court in *Social Services* expressly distinguished the *CSEA* ruling by citing Labor Code section 224, which permits wage deductions for increased insurance premiums.

In addition, PERB noted the *Social Services* court's reasoning, that the obligation to pay increased costs of health premiums for dependent coverage and the method of payment by payroll deduction came into existence because of collective bargaining, would be undermined if the deductions were not permitted. Here, in contrast, said PERB, the debt does not result from collective bargaining; it comes into existence as a result of the district's determination that it has overpaid an employee wages.

The board also rejected the district's assertion that the recoupment proposal was a mandatory subject of bargaining. The board found that the state's policy against prejudgment attachment of employee wages establishes immutable provisions outside the scope of bargaining.

PERB turned aside the district's effort to liken its recoupment proposal to *voluntary* payroll deductions, which are mandatory subjects of bargaining. The board also declined to view the recoupment proposal as similar to the methodology for implementing a wage adjustment, which PERB found negotiable in *Laguna Salada Union School Dist.* (1995) No. 1103, 112 CPER 80. "This case is not about the methodology used by an employer for adjusting a negotiated decrease in wages," the board said. The board concluded that "the District's proposed recoupment procedure for wages allegedly overpaid to individual employees exceeds the ambit of negotiable exceptions to California's policy protecting employee wages from prejudgment attachment, and that the District's proposal is therefore a non-mandatory bargaining subject to which the parties had no right to agree in the first place as it was at variance from mandatory external law and thus nonnegotiable."

The district also argued that the proposed recoupment procedure survived expiration of its prior agreement and, once satisfying its bargaining obligation, it was free to implement its proposal. By exhausting its statutory duty to bargain, the board instructed, "an employer neither sheds its external law limitations, nor acquires greater authority over employee terms and conditions of employment." As a non-mandatory subject of bargaining, PERB said, the recoupment provision of the prior contract was not part of the status quo on mandatory subjects. The recoupment provision did not survive expiration of the contract "since only mandatory subjects are governed by EERA [sic] duty to make no change while negotiating or participating in impasse resolution procedures," the board clarified.

The district's insistence to impasse on the recoupment provision was a refusal to meet and confer in good faith. In addition, it violated section 3543.5(b), by denying

the union its statutory right to represent bargaining unit employees, and section 3543.5(a), by interfering with employees' rights to select an exclusive representative to negotiate with the employer on their behalf.

In her dissent, Member Dowdin Cavillo found the union never clearly communicated its opposition to negotiate over the recoupment proposal, an issue not raised by the district on appeal. And, relying on the decision in *Social Services*, she found that public policy would not be promoted by limiting the district's recourse to filing individual lawsuits against employees to collect wage overpayments. (*Berkeley Council of Classified Employees v. Berkeley Unified School Dist.*, No. 2268 [5-29-12] By Member Huguenin, with Chair Martinez; Member Dowdin Calvillo dissenting.)

CPER Journal Online

PERB Seeking Advice on Regulation Overhaul

On June 28, the Public Employment Relations Board held a public meeting to gather comments on two sets of possible regulations. A review of potential amendments relating to the State Mediation and Conciliation Service, which was recently transferred under PERB's purview, was followed by a discussion of possible changes to a wide range of PERB's current regulations.

After the meeting, PERB staff posted another discussion draft and requested feedback by August 31, 2012. Formal proposed regulations will be presented to the board at its October meeting.

The new draft includes regulations relating to filing and service of documents by way of electronic mail. PERB staff is considering deleting current regulations that allow online filing of unfair practice charges only.

Several changes would merely state in writing the board's current practices or policies. Amendments to factfinding regulations would recognize the practice of permitting higher education sector parties to choose their own chair and pay for the chair's services. Changes to section 32147 would spell out how PERB decides whether to expedite hearings or other procedures.

Potential amendments to the sections regulating representation processes under the Meyers-Milias-Brown Act include new sections regarding filing of petitions for recognition of an exclusive representative and responses to petitions. The new provisions would make no substantive changes to current procedures, and would be similar to those already in effect for employees of schools, community colleges, and universities.

Although PERB staff discussed possible changes to regulations on deferral to arbitration and partial dismissals, those are not included in the second draft. Clarifying amendments to the section on warning letters in unfair practice cases remain.

Potential changes to sections relating to the finality of board decisions incorporate requirements of SB 609 (Negrete McLeod, D-Montclair), which provides that an administrative law judge's decision regarding recognition or certification of an employee organization becomes final 180 days after the ALJ decision is appealed to the board if the board does not issue a ruling that supersedes it. Extensions of time for filing documents in such cases would be barred.

PERB is also proposing that it exercise discretion whether to make nonprecedential some of its decisions reviewing unfair practice charge dismissals. The draft regulation lists criteria the board would use to decide whether a decision should be considered precedential.

Finally, several of the possible regulations result from the State Mediation and Conciliation Service's move to PERB. Most of the current regulations would be inapplicable to SMCS except for regulations on disqualification of PERB staff from participation in cases in which there is a potential conflict of interest. In addition, PERB is considering eliminating regulations that provide for maintaining a list of arbitrators, since most parties use SMCS' list rather than the list provided by PERB. The list of factfinders would not be affected by this change. PERB indicated that sometime in the near future, it will consider more substantive changes to its regulations relating to SMCS.

At the time of *CPER* publication, the new draft regulations can be found online.

CPER Journal Online

Legislature Caps Pension Benefits, Increases Employee Contributions, Raises Retirement Ages

Under a bill passed on the last day of the legislative session, employees hired on or after January 1, 2013, will earn skimpier pensions than the ones public employees today anticipate. The bill, AB 340 (Furutani-D, Long Beach) does not apply to the University of California or charter cities and counties that have established their own pension plans separate from state law. State employees, whose pension rights were already changed by legislation in late 2010, will not be affected as much as most local government employees. Several new prohibitions in AB 340 effectively limit the ability of unions and employers to bargain enhancements to benefits, and several provisions require bargaining to result eventually in higher employee contributions.

Benefit Formulas Change

The new law changes the earliest retirement age, the factors that can be used in pension formulas, and the age at which the maximum factor can be earned for new employees. Whereas current employees generally can retire at 50, the minimum retirement age for new employees will be 52, except for public safety employees.

Recent state employee hires are entitled to retire at age 60 with a pension of 2 percent of their years of service and highest salary; safety employees can retire at 55 with at least a 2 percent factor, and California Highway Patrol officers and state firefighters can earn a 3 percent factor by working until age 55. By contrast, 60 percent of local government retirement plans entitle safety employees to retire at age 50 with a 3 percent formula.

AB 340 will prohibit 3 percent formulas for new employees and raise the age at which an employee becomes entitled to a 2 percent factor. Miscellaneous employees will not earn a 2 percent formula until age 62, but three options will be available to safety employees — 2 percent at 57, 2.5 percent at 57, or 2.7 percent at 57. The formula applicable to the new employees will be the one closest to, but lower than, the one provided before January 2013. Those employers who become subject to 2.5 percent or 2.7 percent formulas may bargain a lower benefit formula with an employee organization, but cannot impose it in a last, best, and final offer after conclusion of impasse procedures.

Caps and Restrictions on Pensionable Compensation

The bill will cap the amount of a new employee's salary that can be used to calculate retirement benefits at $110,100 for employees who are entitled to Social Security benefits, and at $132,120 for those not entitled to Social Security. Those amounts will be adjusted based on the Consumer Price Index. Employers cannot avoid the maximum pensionable compensation by offering a supplemental defined

benefit plan, but could provide a defined contribution plan for compensation exceeding the cap. Due to the lower benefit formulas, few new employees will be affected by the cap.

The law also limits the types of pay that can be used for the benefit calculation. Only regular recurring pay will be used, not severance pay, ad hoc payments, leave cash-outs, overtime pay, expense reimbursements, or salaries that appear to be used to "spike" an employee's pension.

Another anti-spiking provision applies to employers of employees who move from one agency at a lower salary to another one at a much higher salary. It would require an agency that hires an employee at an excessive compensation to bear the excess costs of that employee's benefits. The California Public Employees Retirement System is tasked with determining how to evaluate and assess the excess costs.

Employee Contributions Increased

All new employees will be required to contribute at least 50 percent of the normal cost of their pensions, the amount that is necessary to fund the employee's benefit due to service in the current year, but not any unfunded liability. As the normal cost may change from year to year, an employee's contribution may not remain constant.

In the past, employers have agreed through collective bargaining to pay some or all of their employees' contributions, but that practice will be barred. Instead, the employer and employee organization could agree that employees will be required to pay part of the employer's contribution, as long as all the employees in a class of retirees, such as firefighters or miscellaneous employees, and related non-represented employees pay the same contribution. The higher contribution may not be imposed after impasse. The law deletes the provision in former law that required employers to offset higher employee contributions with increased member benefits.

State employee contributions are already 8 to 10 percent of pay and will rise another point or two in the next two years, depending on the employee's bargaining unit. Many local plans, however, still call for employers to pay employee contributions. The requirement that new employees pay half the normal cost of their pensions will be delayed for those employers who are party to a collective bargaining agreement in effect on January 1, 2013, in order to avoid impairment of contracts. Renewals, amendments, and extensions of the contract, however, must comply with new employee contribution rules.

The new law also sets the contribution rate for current employees at 50 percent of normal cost, but the provision will not go into effect until 2018. Local and school miscellaneous members of agencies that contract with CalPERS will be required to pay no more than 8 percent of pay; local police and fire, 12 percent; and other local safety members, no more than 11 percent of pay toward their pensions. There are similar limits on employee contributions for current employees covered by the County Employees Retirement Law of 1937.

The changes must be accomplished through collective bargaining, including any

required mediation and factfinding. If not negotiated by 2018, the employee contribution rates prescribed for local and school employers may be imposed.

Three-Year Final Compensation

All employees hired on or after January 1, 2013, will have their pension benefits calculated on the average of the highest consecutive 36 months of wages, even if their employer's plan for current employees uses only the highest 12 consecutive months as final compensation. State employees hired after January 15, 2011, already are subject to the longer final compensation period, but classified school employees and employees in more than 62 percent of local plans are not. The law also forbids an employer from agreeing to a final compensation figure based on less than 36 months for current employees if it currently uses a 36-month period.

Other Limits on Pension Benefits

Employee organizations and employers may continue to bargain benefits, but must be aware of further constraints. Any increased benefits for either current or future employees, for example moving to a 2.5 percent at 57 from a 2 percent at 57 plan, cannot operate retroactively to increase the benefits based on past service.

Employers cannot offer highly paid new employees a replacement benefit plan for the amount those employees earn in excess of the amount federal tax law permits qualified tax plans to use when computing benefits. That figure is presently $250,000.

Employers will be required to contribute the normal cost of the plan every year, even if there is a surplus. Unless there is a conflict with federal requirements for qualified tax plans, there will be no pension contribution holidays.

The law also limits post-retirement employment for a public agency and changes industrial disability retirement benefits for employees who become disabled before the minimum retirement age.

Vested Rights Concerns

Most of the law's provisions apply only to new employees, who have no vested pension rights in the prior benefit formulas or other aspects of retirement benefits. CalPERS has warned, however, that a ban on purchases of service credit, which applies to both new and current employees, may be challenged in the court by current employees, as it was a right they had which now has been eliminated.

Another area CalPERS believes may be subject to lawsuits is a provision that requires a convicted felon to forfeit all rights to benefits earned or accrued after the date the employee committed the felony. It applies to employees who are convicted of felonies for acts taken in the performance of their duties as public employees or taken to obtain salary or benefits, and in particular felonies involving children the employee has contact with as part of official duties. Since current law requires forfeiture only by elected officials who commit felonies, current employees could

argue that the provision cannot constitutionally be applied to them.

CalPERS' "Preliminary Analysis of the Conference Committee Report (AB 340), prepared on August 30, 2012, before the bill was passed, can be found online.

CPER Journal Online

Refusal to Sign for Receipt of Disciplinary Memo Disqualifies Employee From Unemployment Benefits

An employee's refusal to sign a memorandum of discipline was misconduct, not a simple mistake or good faith error in judgment, the Court of Appeal ruled in *Paratransit v. Unemployment Insurance Appeals Board*. The court overturned the board's contrary conclusion, despite the fact that the language of the disciplinary memo differed from the prescribed notice in the collective bargaining agreement. On September 26, the California Supreme Court granted a petition for review of the case.

Passenger Complaint

Craig Medeiros was a driver for Paratransit, which provided transportation services for the elderly and disabled. In February 2008, a passenger made a complaint about Medeiros to Paratransit. The human resources manager investigated the complaint, determined that the incident had occurred, and prepared a disciplinary memo informing Medeiros that he would be suspended for two days. Medeiros had been disciplined twice before, once regarding another incident, and once because he had not disclosed a prior conviction on his application for employment.

In May 2008, the human resources manager called Medeiros into the office and told him he was being disciplined for the February incident. She also mentioned his employment application. Medeiros denied the incident and asked for a union representative. He was told that he was not entitled to representation because the discipline already had been determined.

The disciplinary memo stated below the signature line, "Employee Signature as to Receipt." The union contract provided, "All disciplinary notices must be signed by a Vehicle Operator when presented to him or her provided that the notice states that by signing, the Vehicle Operator is only acknowledging receipt of said notice and is not admitting to any fault or the truth of any statement in the notice."

Medeiros refused to sign the memo, even though he had signed disciplinary memos in the past to avoid being fired. The human resources manager warned that he must sign it or he would be terminated for insubordination. She explained that he was not admitting to anything other than receipt of the document. He left the meeting without signing the memo and was terminated.

Medeiros' application for unemployment insurance benefits was denied, and he asked for a hearing. He explained that he had been tired because the meeting had been at the end of his shift. His union representative had advised him not to sign anything that could lead to discipline without the union representative being present because a signed document could be used as an admission of guilt. He suspected that the employer's representation about the significance of his signature was a lie.

He was concerned about the reference to his employment application. He thought the meeting would be rescheduled for him to have an opportunity to talk with his union representative, but he did not request another meeting.

The ALJ concluded he had deliberately disobeyed a lawful directive, and that his refusal to sign was misconduct that disqualified him from receiving benefits. Medeiros appealed the ALJ's decision. The Unemployment Insurance Appeals Board reversed, finding that the refusal was a mistake or error in judgment because of the incomplete notice, the union's advice, and the denial of union representation.

The employer asked the court to review the board decision. The trial court overturned the decision, agreeing with the conclusion of the ALJ. It did not believe the union representative actually told Medeiros not to sign anything without union representation. Either way, the court said, Medeiros could not have in good faith relied on the incorrect advice. The trial court held the union contract did not require that the exact language of the agreement be used on the disciplinary memo, and found the language and the human resources manager's explanation sufficiently clear to conclude that Medeiros' refusal to sign was deliberate disobedience rather than a good faith judgment error. The employer asked for judicial review of the administrative decision.

Insubordination Found

Under Labor Code section 1256, an individual is disqualified from receiving unemployment benefits if discharged for misconduct. State regulations establish that an employee engages in misconduct when he owes a duty to the employer under the employment contract, but breaches the duty in a "willful or wanton disregard of that duty," and the breach "disregards the employer's interests and injures or tends to injure the employer's interests." State law and regulations provide that an employee must comply with all directions of the employer, with certain exceptions, and that a refusal, without justification, to comply with "lawful and reasonable orders of the employer" is insubordination.

Medeiros contended that the employer's demand was unreasonable or unlawful as a matter of law because the language in the disciplinary memorandum did not track the collective bargaining agreement. The employer countered that the language did not need to be exact, and that the recitation that the employee was signing for receipt only was the same as saying that the employee was not admitting to fault or the truth of the allegations.

The court, however, found the issue a "red herring" because Medeiros never stated at the time that he was not signing the memo because the language was inadequate. Instead, the court found, Medeiros would not have signed it even if it tracked the language of the union contract because he would have followed his union's advice not to sign anything without a representative. The court pointed out there was no evidence that supported Medeiros' suspicion that the human resources manager was lying when she assured him that he would not be admitting anything by signing. It concluded Medeiros was insubordinate.

No Excuse

The court acknowledged that a claimant might commit no more than a good faith error in judgment if he failed to recognize the employer's directive was reasonable and lawful or he reasonably believed he was not required to comply. But, it found the evidence supported the trial court's conclusion that Medeiros' mistake was not reasonable.

Medeiros argued that it was reasonable for him to be mistaken about whether he was required to sign the disciplinary memorandum, emphasizing that there was a difference in opinion between the appeals board and the court about whether the directive to sign was lawful and reasonable. But the court pointed out the appeals board found Medeiros had made a "simple mistake" or exercised poor judgment and had not reached the conclusion that the directive was unlawful or unreasonable.

Medieros claimed that the trial court failed to consider evidence of his confusion when it ruled that the directive to sign was not unreasonable. The appellate court assumed the lower court performed its duty, as there was no indication to the contrary.

The court also found sufficient evidence to support the trial court's conclusion that Medeiros' refusal was not a good faith error. Medeiros' assertion that he refused to sign because he was confronted with serious allegations without a union representative was not supported by the evidence, the court pointed out, as Medeiros had never asked for a representative during the investigation of the allegations. The court saw no error in the trial court's conclusion that Medeiros' fatigue during the meeting and concern about the reference to his employment application were insufficient to prove good faith. As for the claim that being threatened with termination added to Medeiros' confusion, the court reasoned that no employee would ever have to obey an employer's order if it ruled that a termination threat for refusing to sign a memo excused noncompliance.

The court also did not disturb the trial court's finding that the union either did not give Medeiros the blanket instruction not to sign anything or that Medeiros could not reasonably have relied on such advice. "Were it otherwise," the court said, "a union could insulate members from adverse employment action simply by giving them bad advice that they need not comply with an employer's orders."

Medeiros argued that his actions in requesting a union representative satisfied the requirements of prior board precedent, which holds that an employee should seek other avenues of redress rather than disobey an order. But the court agreed with the trial court that Medeiros was not entitled to a union representative at the meeting, which was called only to inform him of discipline. Not only did the human resources manager explain that he was not entitled to representation at the meeting, but a card the union had given Medeiros that explained his *Weingarten* rights supported this conclusion. Under these circumstances, Medeiros could not have had a reasonable belief that he was entitled to union representation, and refusal to sign without the assistance of a representative was disobedience.

The court dismissed Medeiros' claim that he reasonably believed the meeting was investigatory when his employment application was mentioned and he was threatened with termination. It agreed with the trial court's conclusion that Medeiros could not have reasonably believed that he would be further disciplined for the old transgression. As for the termination threat, it said, the employer was "just reminding Claimant of what he should already know, i.e., that insubordination can result in discipline."

The court affirmed the trial court's ruling. The dissenting justice disagreed that Medeiros' refusal to sign was misconduct as defined by the Labor Code, since it did not show a "willful…disregard of the employer's interests." The signature provision of the union contract was designed to protect the employee, not the employer, the dissent reasoned. Medeiros has petitioned for review in the California Supreme Court. (*Paratransit, Inc. v. Unemployment Insurance Appeals Board* [2012] 206 Cal.App.4th 1319, 2012 Cal.App. LEXIS 695.)

CPER Journal Online

Court Reluctantly Finds Officer Speech About Beatings Unprotected

An officer who was placed on administrative leave after reporting that other officers were physically abusing inmates lost his First Amendment lawsuit because a three-judge panel felt constrained to follow precedent it believes was wrongly decided. In *Dahlia v. Rodriguez,* the Ninth Circuit Court of Appeals repeatedly criticized a prior case which held that a police officer who reports wrongdoing does not speak as a private citizen, even if he gives the information to a different law enforcement agency.

Beatings Reported

Angelo Dahlia was a detective in the City of Burbank Police Department. While he was on call in 2007, an armed robbery occurred. During the investigation, he witnessed other officers beating suspects and threatening them with guns. When he reported his observations to his superiors, he was told to "stop his sniveling." He alleged that he heard the police chief express his displeasure that not all the suspects were in custody and instruct officers to "beat another one."

A few months later, the internal affairs division began an investigation into alleged physical abuse. Dahlia was approached numerous times by his sergeant and lieutenant, and told to not to say anything. He was interviewed three times by internal affairs investigators. And each time, Dahlia claimed, his superiors asked him what he told IA, and he replied that he had said nothing. Throughout the investigation, Dahlia perceived that he was being monitored, as his supervisors repeatedly walked past his office. He alleged that he was threatened with investigation of past incidents, and he reported one such threat to his union, which relayed it to the city manager.

A month later, the Los Angeles Sheriff's Department interviewed Dahlia. He disclosed what he had seen and heard. Four days later, the police chief placed him on administrative leave with pay pending discipline.

Dahlia filed suit under 42 USC Sec. 1983, alleging retaliation in violation of his First Amendment rights. Relying on *Huppert v. City of Pittsburg* (9th Cir. 2009) 574 F.3d 696, 2009 U.S. App. LEXIS 15970, the federal district court found that his speech was not protected because a police officer's duties include disclosing incriminating facts. It also ruled that being placed on administrative leave with pay was not an adverse action. It dismissed his section 1983 claim and declined to exercise jurisdiction over related state law claims. Dahlia appealed.

Huppert *binding*. The appellate court set out the principle established in *Garcetti v. Ceballos* (2006) 547 U.S. 410, 2006 U.S. LEXIS 4341, 179 CPER 21. "[W]hen public

employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." In *Huppert*, a divided three-judge panel of the Ninth Circuit applied this principle to a case involving a police officer who had been ordered to participate in several investigations of police corruption, but told not to memorialize his findings. The officer not only notified his superiors and city officials; he also told the Federal Bureau of Investigation about the alleged corruption.

Relying on a California Court of Appeal case from 1939, the *Huppert* court found that, as a matter of California law, police officers have a duty to disclose information about acts of corruption. Therefore, the court found that Huppert's report to the FBI, even though not done at the direction of his superiors, was pursuant to his official duties and was not protected by the First Amendment.

The *Dahlia* court explained that the 1939 case relied on in *Huppert* was decided long before *Garcetti* and was not a First Amendment case, but a case where the officers were being investigated for their own corruption. But, finding *Huppert* "entirely unsupported by the sole California case it purports to rely on" was insufficient to allow the *Dahlia* court to depart from *Huppert*'s binding precedent.

The court further explained that the *Huppert* court did not follow the Supreme Court's instructions in *Garcetti* that a factual inquiry must be made into the job responsibilities of public employees, and that reliance on a formal job description would not be sufficient to determine whether an employee was acting in the course of his official duties when engaging in speech claimed to be protected by the First Amendment. In *Huppert*, the court did not conduct a factual inquiry, but invoked a broad job description for police officers, the *Dahlia* court criticized. The court noted that other Ninth Circuit cases not involving police officers have examined the factual basis for claims that public employees were speaking as part of their official duties. "Were we and the district court not bound by *Huppert*, the district court would have been free to consider the scope of Dahlia's professional duties — and whether he was acting in his capacity as a private citizen — as a question of fact," it emphasized.

Nevertheless, the court explained that there was no legal difference between Huppert's independent cooperation with the FBI and Dahlia's report to the sheriff's department. It expressed its frustration that under *Huppert*, "the act of whistleblowing is itself a professional duty of police officers, thus stripping such speech of the First Amendment's protection," a result the court called "dangerous."

The court also addressed the trial court's decision that a paid administrative leave is not an adverse action sufficient to cause liability under the First Amendment. No prior cases have found paid administrative leave an adverse action, but Dahlia claimed that his placement on leave prevented him from taking a promotional examination, affected his on-call and holiday pay, and hindered his ability to gain additional experience. The court advised that the allegations, if proven, might be sufficient to establish an adverse action, but it declined to decide the issue because there were insufficient facts in the record.

The court reluctantly affirmed the district court's dismissal of the case. (*Dahlia v. Rodriguez* [9th Cir. 8-7-12] 10-55978, __ F.3d __, 2012 U.S. App. LEXIS 16377, 2012 DJDAR 10898.)

CPER Journal Online

PERB's Injunctive Relief Request Does Not Excuse City's Attempt to Avoid PERB's Administrative Process

The Public Employment Relations Board's decision to seek an injunction against a pension ballot measure did not allow the City of San Diego to skip PERB's hearing on an unfair practice charge, ruled the Court of Appeal in *San Diego Municipal Employees Assn. v. Superior Court*. The court also held that nothing bars the city from presenting to PERB its statutory and constitutional defenses to the unfair practice charge. The court overturned a trial court order staying an administrative law judge hearing on the charges. The city has filed a petition for review in the Supreme Court.

Bargaining Required?

In 2011, several citizens of the City of San Diego qualified a ballot initiative that would 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 San Diego Municipal Employees Association asked PERB to file for an injunction against placing the measure on the June ballot, as the city did not first negotiate with employee organizations. The association contended that 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 countered that the ballot measure was a citizen's initiative, not placed on the ballot by the city council. However, the union characterized the initiative as a "sham device," since the mayor wrote it and used city property to promote it.

At SDMEA's request, PERB asked the superior court to bar the measure's placement on the ballot. The board contended that there was reasonable cause to believe an unfair practice had been committed, and that it was necessary to preserve the status quo because its determination whether the city was required to negotiate before placing the measure on the ballot would be rendered meaningless if the initiative were enacted. The court denied the complaint for injunctive relief on the grounds that a pre-election injunction was not appropriate and the measure, if passed, could be challenged by a quo warranto proceeding, a legal process during which an improper exercise of governmental power individual's right to hold an office or governmental privilege is challenged. (See, "AG Allows POA to Sue to Overturn Ballot Measure," in the Local Government section.

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 was biased because it had already

made its decision against the city, and that PERB and SDMEA had waived PERB's jurisdiction by going to court for an injunction. The city also argued that the court had power to stay the hearing because PERB's ruling on the unfair practice charge was likely to conflict with the court's ruling. The trial court 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.

PERB's Initial Exclusive Jurisdiction

The Court of Appeal had no trouble holding that PERB had initial exclusive jurisdiction over the unfair practice charge, pointing to the language of the MMBA in Government Code section 3509. The city agreed that PERB would normally have jurisdiction over this case, but asserted that PERB does not have jurisdiction to rule on its defense that the mayor and other city officials had First Amendment rights to put the measure on the ballot as citizens. The court dismissed the contention, stating, "The mere fact that constitutional rights may be implicated or have some bearing on this dispute is not in and of itself sufficient to divest PERB of its exclusive *initial* jurisdiction to consider MEA's allegations that the City's conduct violated the MMBA." The court pointed out that the city could ask the appellate court to overturn an adverse decision.

Exhaustion of Administrative Remedies

The appellate court rejected the city's argument that it should be excused from participating in PERB procedures before going to court. The city maintained that it would be futile to present its case to PERB because the board had already decided against it when it sought an injunction and asked the trial court to order the city to meet and confer. The court, however, pointed out that the MMBA gives PERB the power to seek injunctive relief if it believes an injunction is necessary to retain the status quo while a case is pending. That action "does not automatically compromise PERB's neutrality," said the court. The city's theory would automatically divest the board of its statutorily authorized power any time the board sought injunctive relief, it observed.

The city argued that PERB lacked authority to rule on the parties' dispute, relying on *Coachella Valley Mosquito and Vector Control Dist. v. Public Employee Relations Board* (2005) 35 Cal.4th 1072, 2005 Cal. LEXIS 5953, 173 CPER 18. In that case, the district argued that it should be excused from burdensome administrative proceedings in a case relating to events occurring over three years because the board had taken jurisdiction over the case even though it lacked jurisdiction over claims that were more than six months old. There, the court agreed because the statute of limitations question was a purely legal issue not requiring PERB's expertise, and its answer would in fact divest PERB of jurisdiction over the case.

The court in *SDMEA*, however, found *Coachella Valley* did not apply because the city's arguments, even if successful, would not deprive the board of jurisdiction over the unfair practice charge. In addition, this case presented both factual disputes about whether the measure was city-sponsored and legal issues under the MMBA, on which PERB's expertise would be beneficial to the court if called on to review the

ruling. In addition, the city had not presented this argument to the trial court and had not explained why it would be more burdensome or time-consuming to endure the administrative process than to engage in lengthy litigation. For the same reason, the court rejected the city's argument that PERB's process was inadequate because it was too slow and the initiative needed to be implemented quickly.

The appellate court dismissed the remainder of the city's claims. The argument that the city was constitutionally required to place the measure on the ballot once it qualified could be presented to PERB, the court held. There was no justification for the court to exercise its power to control all the proceedings relating to the dispute. PERB had gone to court, not for a ruling on the merits, it noted, but for an injunction to retain the status quo "in aid of the administrative proceedings" on a claim over which it had jurisdiction. It continued, "City's argument that PERB forfeits its initial exclusive jurisdiction under the MMBA if it exercises a power contemplated by the MMBA to preserve the status quo while it fulfills its statutory function to resolve MMBA claims is not supported in logic or case law, and appears inconsistent with the statutory scheme." (*San Diego Municipal Employees Assn. v. Superior Court* [2012] 206 Cal.App.4th 1447, 2012 Cal. LEXIS 715.)

CPER Journal Online

Continued Absenteeism Justifies Termination Despite Medical Documentation

An employee's failure to improve his attendance provided just cause for termination, even though there was a valid medical reason for each of his absences, arbitrator Ruth Glick decided in a case involving the Sacramento Municipal Utility District. The absences occurred after the district imposed progressive discipline, including a decisionmaking leave after which the employee accepted the district's conditions for continued employment, which included coming to work when scheduled.

Pattern of Absenteeism

The grievant was hired in 2005 as a customer service representative. In March 2010, he received an oral reminder for numerous unscheduled absences. His supervisors met with him again in June 2010, after he incurred another 18 days of unscheduled absences. They explained that being absent without obtaining advance permission impeded their ability to schedule enough employees to handle customer telephone calls.

During the summer of 2010, the grievant missed 31 out of 45 workdays. In a meeting with his supervisors, he explained he had a substance abuse problem and would soon be incarcerated for driving under the influence. He was notified of his proposed termination, but the *Skelly* officer reduced the termination to a decisionmaking leave after his predisciplinary hearing. Decisionmaking leave is an advanced level of discipline that requires the employee to take a leave to consider whether to accept specified conditions for his continued employment.

The decision letter from the *Skelly* officer, dated September 22, 2010, informed the grievant of the conditions of his continued employment. Among those conditions were requirements to make a sustained improvement in his attendance, obtain approval at least 24 hours in advance for all leave, and provide medical verification for each absence. On October 22, the grievant signed a memorandum entitled, "Decision Making Leave – Employee's Decision," which repeated the conditions of the *Skelly* letter and reminded him that the DML was the final level of discipline before termination.

After completing an inpatient rehabilitation program and serving jail time for two DUI convictions, the grievant was released to return to work under a home detention program for three months. As part of the program, SMUD was required to send weekly reports to the sheriff's office concerning the grievant's attendance. Between October 22 and January 22, the grievant's attendance was nearly perfect.

Two weeks after the home detention program ended, however, the grievant reported to work ill and was sent home for a week because he had the flu. When he tried to return, the employer's medical clinic determined he was still contagious and sent

him home. After he returned, his supervisor advised him to inquire whether the absence was protected by the Family and Medical Leave Act. Later in February, he missed three days for a medical procedure for which he provided documentation.

In March 2011, the grievant worked overtime for several weeks to accrue compensatory time off because he did not have sufficient vacation leave credit to take a paid vacation he had scheduled. Two days after returning from vacation, he took leave without advance approval because he had lost his voice. He took two more days off on short notice because his stomach was bothering him. He provided medical documentation after each absence.

On April 15, the grievant asked to go home because a migraine headache was beginning and he did not want to ruin his birthday weekend. Although he was reminded of the DML conditions, he left and was charged with four hours of short-notice leave. A few days later, he missed more work due to a migraine. The grievant had become ineligible for FMLA leave because he had not worked the minimum 1,250 hours in the preceding year. After the April absences, SMUD terminated him for excessive absenteeism and for violating the conditions of the DML.

Documentation Not Enough

The union argued that SMUD did not have just cause for the termination because the grievant provided medical documentation for each absence. Arbitrator Glick rejected the contention that medical documentation by itself was sufficient because the DML letter required compliance with all conditions, including making an immediate and sustained improvement in attendance. She was unconvinced that the grievant misunderstood the DML requirements, since he had had a month to study them. In addition, she observed that there was no medical documentation for four hours of leave on April 15, which in itself would violate the DML conditions.

Although arbitrator Glick recognized that the grievant had an unfortunate health history, she reasoned that his prior health challenges and recent commitment to improved attendance should have made him careful to avoid unexpected health emergencies. Yet he had failed to get a flu shot and neglected to keep medication for migraines on hand. When he reported he needed to leave early “to avoid ruining his birthday weekend,” it is “easy to understand why the employer lost patience,” she said.

Glick turned aside the union’s contention that the supervisors should have provided more coaching. He was coached after every absence, she found, so more coaching would not have made a difference.

The union argued that the grievant had shown his commitment when he worked overtime. His purpose was to accrue compensatory time off for a vacation, Glick observed. And, she pointed out that he had no health problems when he was on the home detention program. She concluded that the grievant violated the DML conditions because he did not make a sustained improvement in his attendance, “particularly after demonstrating that when motivated he had the ability to do so.”

Arbitrator Glick rejected the union's contention that the employer should not have considered the grievant's past attendance record because the DML resolved that prior issue. Because the collective bargaining agreement provided for attendance issues to be resolved on a case-by-case basis using SMUD's positive discipline program, she found it consistent for the employer to consider the grievant's entire employment history when making its decision to terminate. His history substantiated that he had a recurring problem with absenteeism, and it was helpful to understanding the challenges facing the employee, the choices he made, and the employer's attempts to change his conduct, she explained. As his history showed an inability or unwillingness to work as scheduled, Glick found termination for violation of the DML conditions reasonable.

She also upheld the termination under the standard of just cause, which she described as premised on "a fair day's work for a fair day's pay." Glick reviewed the evidence under each of the seven just cause tests. The grievant had been forewarned multiple times of the seriousness of his absenteeism. She found that the investigations conducted during the meetings about his attendance were fair, attended by his union representative, and conducted with the intent to help the grievant overcome his health issues. There was substantial evidence of the grievant's absenteeism and no evidence that other employees with similar records were treated differently. She found the penalty of termination was reasonable because the grievant continued to have unreliable attendance despite progressive discipline. (*Organization of SMUD Employees and Sacramento Municipal Utility Dist.* [3-6-12] 11 pp. Representatives: Dennis B. Cook, for the employer; Timothy K. Talbot [Talbot Law Group] for the union. Arbitrator: Ruth V. Glick.)

CPER Journal Online

Resources

Internet Guides at Institute for Research on Labor and Employment Library

The Internet puts universes of information at our fingertips, and Google makes it easy to find everything whenever you want it, right? Perhaps, but sometimes it can save a lot of time to take advantage of the searching, indexing, and classifying that other people have already done, and which is freely available. Research libraries provide one of the best sources of annotated directories, lists of online resources, and other time-saving search tools. For example, the IRLE Library produces Internet Guides, the Berkeley Labor Guides series, and a Labor Research Portal on the IRLE Library website. Topics include corporate research, business directories, financial data, legal resources, and more. IRLE is not the only producer of such guides; indeed, all full service libraries produce similar products, and some are quite excellent. Harvard Business School's Baker Library publishes an outstanding series on business information, as does the New York Public Library. Both series are freely available to any researcher, although they may link to licensed databases that their university acquires. This itself can be helpful, because many public libraries also subscribe to the same resources, and if you carry a library card for that system, chances are that you will have some sort of access.

The IRLE Library's Labor Research Portal lists just three Internet guide series, but there are many more. Effective research relies on finding reliable guides to electronic resources, and some will appeal to you more than others, so a search for guides can be time well-spent. Moreover, compiling and maintaining a list of the finest guides has become a "best practice" for most serious researchers.

Mediation Guide

Mediation continues to be a successful method for resolving labor disputes for public sector employees in California.

The **Pocket Guide to Public Sector Mediation in California** discusses the various aspects of the mediation process as it applies to public agencies and employees throughout the state. Because the process differs among public employees depending on the governing statute, this guide outlines those differences and explains how the process typically works.

Useful for both the beginning practitioner and the seasoned professional, the guide covers the types of mediation and how they operate under the different statutes, levels of involvement, and the importance of confidentiality.

Included are the relevant statutory language of each act, relevant cases, selected

references, and a glossary of terms.

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.

- Contract interpretation
- Out-of-class pay

City of Sacramento and Stationary Engineers, Loc. 39 (5-9-12; 8 pp.) *Representatives*: Michael Fry, deputy city attorney, for the employer; Gary Provencher (Weinberg Roger & Rosenfeld) for the union. *Arbitrator*: James G. Merrill (CSMCS Case No. ARB-11-0315).

Issue: Did the employer violate the contract when it required supervisors to monitor the sick call-in line without providing out-of-class pay?

Union's position: (1) The duty to monitor the sick-call-in line had been assigned to integrated waste general supervisors (IWGS) until 2005. Then, as IWGS positions became vacant or were eliminated, the duty was assigned to superintendents. In January 2011, the duty was transferred from superintendents to solid waste supervisors (SWS), a lower classification than IWGS, on a volunteer basis. SWSs were paid a 5 percent out-of-class premium for hours spent monitoring. In July 2011, when the assignment became mandatory and assigned by seniority (no longer voluntary), the out-of-class premium was eliminated, which violated the out-of-class pay clause in the contract.

(2) When monitoring the call-in line, SWSs perform the duties of the higher classification of the IWGS because they are required to direct the work of multiple crews and other SWSs when scheduling replacements and filling vacancies. Those duties fall under the IWGS job description, which includes planning, organizing, and directing work of subordinates. The SWS job description does not contain those duties, so the assignment is beyond the scope of SWS responsibility.

(3) The contract provides that employees assigned to perform work in a higher

classification are to be paid the 5 percent premium.

***Employer's position*:** (1) Monitoring includes calling the call-in line, obtaining information about absences, and distributing it among the other nine SWSs. That duty does not entail or require the assigned SWS to direct the other supervisors how to fill the vacancies, or to direct, plan, or organize their routes.

(2) IWGS and SWS duty descriptions overlap. Monitoring the call-in line and distributing the information does not require the SWS to direct, plan, or organize other supervisors' routes, a duty of the IWGS, which is a position requiring supervision of lower-level supervisors. Rather, gathering and distributing call-in information is within the scope of the SWS's job duties and is not at a higher level requiring the 5 percent premium.

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

Arbitrator's reasons: (1) Premium pay would be warranted if the SWS monitoring the call-in line was responsible for filling the vacancies on the other supervisors' routes or directing the other supervisors how to organize their routes.

(2) No evidence shows that the assigned SWS directs, coordinates, or otherwise assists other supervisors to cover vacancies. Rather, the SWS merely collects and disseminates information to other supervisors, and is responsible only for covering vacancies on his own route.

(3) Although the monitoring duty is not stated in the SWS job description, it falls under "related duties as assigned." Because the tasks are not supervisory, but rather are administrative tasks that could be performed by a non-supervisory employee, they do not justify premium pay.

(Binding Grievance Arbitration)

- Contract interpretation
- Job selection
- Seniority
- Education Code
- Remedy — Mitigation

Riverbank Unified School Dist. and California School Employees Assn., Riverbank Chap. 31 (5-8-12; 15 pp.) *Representatives*: Thomas Gauthier (Lozano Smith) for the employer; Kyle Harvey (California School Employees Assn.) for the union. *Arbitrator*: Katherine Thomson (CSMCS Case No. ARB-11-0050).

Issue: Did the employer violate the contract regarding the summer job assignment of the grievant?

***Union's position*:** (1) The district violated the contract when it did not assign the grievant to the summer kindergarten readiness program, a position she had held for

10 previous summers, and instead selected seven other paraeducators without regard to the grievant's seniority.

(2) The contract language is clear and unambiguous when it states that the district must offer summer work to employees in the classification when work they customarily perform during the regular school year is available in the summer, and further states that assignment of such work, "shall be made on the basis of qualifications. If qualifications are equal, assignment shall be on the basis of seniority."

(3) District past practice has been to assign regular employees to summer positions based on seniority within their job classification. The employer implemented a new selection process when it based selection on the candidates' comparative qualifications, rather than on seniority, since all of the candidates were paraeducators necessarily "qualified" for the summer program.

(4) The MOU on "effects of layoff," while committing the district to a good faith effort to provide affected employees with work opportunities, does not grant them the right to temporary or substitute assignments and does not justify assignment of such an employee to the summer program unless there were open positions after internal candidates were assigned.

***Employer's position*:** (1) The district has the management right to use qualifications for selecting candidates for short-term summer assignments. The plain language of the contract states that only if qualifications are equal are assignments to be based on seniority.

(2) The contract language follows Ed. Code Sec. 45102, which bases assignments on qualifications, except that the parties added the caveat that seniority would be used if qualifications are equal.

(3) The union's argument of a past practice of basing assignments on seniority contradicts the plain contract language. The evidence did not show a districtwide, established practice of using seniority to make summer assignments.

(4) Even if seniority were determinative, the grievant's seniority was in the after-school program classification, not the paraeducator classification of the summer kinder-readiness program. No witness testified to a clear understanding of "seniority." Therefore, the union did not meet its burden of proving that the grievant was more senior than any successful candidate.

(5) The district retains the discretion to determine if qualifications are equal. It made a legitimate decision to prefer candidates with transcripts on file showing relevant college coursework. The grievant did not provide evidence on her application or in her personnel file of such coursework.

(6) If a remedy is granted, the grievant is not entitled to back pay because she failed to mitigate her damages. She refused assignment to a different position that was for a longer period and more lucrative than the kinder-readiness job. She did not explain

at the time that her refusal was because of other commitments during the period of that other position. Also, she failed to invoke the job-sharing provision in the contract that may have allowed her to accept the longer-term position.

***Arbitrator's holding*:** The grievance is sustained.

Arbitrator's reasons: (1) Both parties claim the contract language regarding selection of employees for summer positions is clear and unambiguous, but both interpret it differently. The arbitrator can find at least two reasonable but contradictory meanings to the contract provision.

(2) No bargaining history is in evidence, but similar statutory language and past practice may help discern the intent of the language. The similarity between the contract and Ed. Code section 45102(d) confirms the parties' intent to incorporate statutory provisions when drafting contract language. Therefore, the contract calls for selection based on qualifications, and seniority does not apply unless qualifications are equal.

(3) The union argues that all paraeducators were "qualified" for the summer kinder-readiness jobs because of the similarity to their regular positions, so that seniority must govern selection. However, the contract does not say seniority rules among candidates "minimally qualified," but implies that a comparison of qualifications is to be made, with seniority governing selection only when qualifications are equal.

(4) Evidence of the use of seniority for summer assignments in other departments is not sufficiently clear to show the parties mutually understood for a long period that summer assignments were to be based on seniority.

(5) The district has the managerial right to define qualifications, and education and experience are reasonable criteria for evaluating qualifications. At least one successful candidate was clearly less qualified than the grievant, since her five years of experience in no way compared to the grievant's much greater experience in both kinder and elementary education.

(6) That less-qualified employee was not entitled to selection under the parties' layoff MOU, since that agreement did not give laid-off employees priority or preference rights over district employees when filling positions, but only entitled them to "consideration" for open positions. Therefore, the district violated the contract when it selected the less-qualified, laid-off employee for the paraeducator position instead of assigning the grievant, who was a current district employee.

(7) The district did not meet its burden of proving that the grievant could have mitigated damages by accepting the different position she was offered, and then sharing that job with someone else for the period she had other commitments, since it presented no evidence that other employees were interested in job-sharing.

(Binding Grievance Arbitration)

- Contract interpretation
- Bargaining unit work
- Management right to assign work
- Past practice
- Overtime
- Prior award

East Bay Municipal Utility Dist. and AFSCME Loc. 2019 (4-17-12; 9 pp.) *Representatives*: Lourdes Matthew, EBMUD Office of the General Counsel, for the employer; Andrew H. Baker (Beeson Tayer & Bodine) for the union. *Arbitrator*: Patrick Halter (CSMCS Case No. ARB-10-0545).

Issue: Did the employer violate the contract when it assigned water treatment operators, represented by IUOE Local 39, instead of water system inspectors, represented by AFSCME Local 2019, to perform water sampling for the presence of a contaminant at selected reservoirs?

***Union's position*:** (1) Water sampling is traditionally performed by inspectors in Local 2019's unit, establishing a past practice sufficient to bestow inspectors with exclusive jurisdiction to perform this work. Inspectors test for this same contaminant on a quarterly basis.

(2) The inspectors' job description states they investigate water quality by sampling for lab analysis, which involves technical advice on sampling plans, collecting routine and emergency samples in the field, performing other field tests and interpreting results. They operate boats to obtain samples, maintain equipment and instruments, monitor water quality in reservoirs, and maintain inventories of lab supplies used in the field. Two-thirds of their time is dedicated to core duties in the field.

(3) Operators' primary duty is to operate the treatment plant; they test for this contaminant within the plant. Their job description states they serve in a lead capacity at water treatment facilities, and collect samples using plant equipment, but it does not state they perform field duties. Sampling is not operators' primary duty.

(4) Collecting samples for this contaminant is more complex than the district claims, and requires the expertise and judgment of an inspector.

(5) The district must be ordered to cease and desist from violating the contract. It assigned work to operators to avoid paying inspectors for overtime, violating the contract's overtime clause. Inspectors must be made whole for the overtime pay they lost when the employer violated the contract by assigning this sampling work to operators.

***Employer's position*:** (1) Assigning this sampling work to operators did not violate the inspectors' MOU. Sampling is not reserved exclusively for inspectors. Consistent with reserved management rights and civil services rules, flexibility inures to the district when assigning work.

(2) No past practice shows sampling exclusivity for inspectors. At most, the union was unaware that employees other than inspectors collect samples for this contaminant. No agreement or mutual understanding supports the union's claim.

(3) In the complex structure of the district, inspectors and operators are aligned, and rigid jurisdictional lines are not feasible. Inspectors' job description states they must possess knowledge of "water treatment and distribution principles," while operators' description requires knowledge of "operation and maintenance of water distribution systems." Assigning sampling to operators is a management right that is consistent with industry practice and state regulation, which reflect the interdependence between the two classifications

(4) Although operators' primary duties are within the treatment plant, their description does not imply or state their duties are confined to the plant; operators collect water samples outside the plant at clear wells. The sampling is not complex, but is comparable to turning on a faucet. Operators are trained and certified to collect samples. The sampling at issue occurred at tanks outside the area where inspectors take quarterly samples.

(5) The sampling project was a good faith, one-time research effort. The district did not abolish any inspector jobs or violate the MOU's recognition of AFSCME as inspectors' representative. They suffered no economic loss.

(6) Inspectors were not available for this sampling because they were performing regular duties. This sampling occurred when inspectors were turning away overtime offerings and had exceeded the overtime budget. The overtime claim was not raised until the arbitration hearing, months beyond the 12-day deadline to file a grievance alleging violation of the overtime clause. The overtime claim is untimely and must be denied.

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

Arbitrator's reasons: (1) The dispute reflects the clash between the union's interest in protecting the integrity of its bargaining unit and management's right to operate efficiently.

(2) Civil service rules state that the MOU controls if there is a conflict. The union claims the contract grants inspectors the exclusive right to do the sampling, whereas the employer notes that job descriptions are "descriptive and explanatory and not restrictive" so they do not grant exclusivity over sampling to inspectors. However, there is no conflict because the MOU does not have a clause explicitly granting sampling exclusivity to inspectors.

(3) Inspectors do routinely collect samples for this contaminant from the distribution system, but operators also collect samples from clear wells in the system and not only in the plant. This practice is consistent with the operators' job description, which includes sampling, although de minimus compared to operators' primary duties. The practice does not violate the MOU which does not grant exclusivity to inspectors.

(4) The parties dispute the complexity of the sampling duty, but there is no showing that the instruments or tools involved were solely within the skill and qualifications of inspectors.

(5) The broad past practice of inspectors doing sampling, as asserted by the union, is not established by the evidence. While there is a past practice of inspectors regularly sampling as part of their primary duties, there is insufficient evidence that the practice encompasses this one-time sampling effort undertaken for the sole purpose of isolating the source of the contaminant.

(6) The union cites a prior arbitration award under the same MOU, in which the arbitrator found that the contract was violated when bargaining unit work was assigned outside the unit. That award is distinguishable because the issue there was a supervisor being assigned bargaining unit work, and that arbitrator refrained from addressing the present issue, which is whether exclusivity attaches to bargaining unit work.

(7) The arbitrator may not modify a district decision without finding that it violated an express contract provision or rules governing personnel practices, or otherwise acted in an arbitrary, capricious, or discriminatory manner. Since the past practice regarding sampling is not all-encompassing as the union claims, the district did not breach it. There is no violation of the contract's recognition or pay clauses.

(8) Since no violation occurred, the matter of overtime pay as a remedy is not addressed.

(Binding Grievance Arbitration)

- Discipline
- Sexual-orientation harassment
- Personal use of office computer
- Physical confrontation

Los Angeles County Department of Mental Health and Individual Appellant (9-16-11; 13 pp.) *Representatives*: Rodney Collins (County Civil Service Advocate) for the employer; Lisa Tarin Pompa (SEIU Local 921) for the appellant. *Hearing Officer*: Philip Tamoush.

Issue: Are the allegations in the notice of suspension true? If yes, was the 20 calendar-day unpaid suspension appropriate?

***Employer's position*:** (1) The appellant subjected a coworker to discrimination based on sexual orientation when he sent an email to an openly gay coworker that criticized same-sex marriage, which the coworker found offensive.

(2) The appellant violated published rules regarding the use of county computers for personal business when he sent the political and offensive email.

(3) The evidence supports another coworker's charge that the appellant physically pushed her with his body when the coworker objected to his taking food from a pot-luck without having contributed to the event.

(4) The suspension is justified based on these two egregious incidents as well as on his continuing history of counseling regarding his attitude and poor personal relations, including mandatory training which he has failed to complete. Also, discipline is warranted by his failure to conform to instructions, including the rule prohibiting using computers for personal messages, especially messages that tend to harass in violation of county non-discrimination policy.

***Appellant's position*:** (1) Admittedly, some minor discipline is justified for sending the offensive memo to the coworker and for personal use of the computer, even though other employees continue to disregard this rule.

(2) No discipline is justified for the pushing incident, since the coworker had grabbed the appellant's arm to stop him from taking food and was miffed that he ignored her objections, even though he had contributed money toward the event. The department was biased in accepting the coworker's version of the event.

(3) The two incidents came two years apart and had no relationship to each other.

***Arbitrator's holding*:** The grievance is granted in part.

Arbitrator's reasons: (1) When an employee's attitude, behavior, and character have an impact on his job, as it appears with regard to his supervisors and his ignoring their instruction, it becomes a proper consideration for progressive discipline.

(2) The "halo effect" of his negative behavior caused the department to believe the coworker rather than the appellant with regard to the pushing incident, but the facts support the appellant's version. The event should not be construed against the appellant, despite past counseling, and no discipline should be imposed.

(3) If the two incidents are considered separately, then 10 days of the 20-day suspension are attributable to the computer/harassment charge. However, other employees have sent similar joking and potentially offensive emails without discipline. Coworkers forwarded the memo in question to the appellant, who then forwarded it to the complainant, but there was no investigation into other employees' role. The appellant should have had the sense not to forward the message, but rather should have reported it. His failure to do so justifies a five-day suspension as a serious warning in progressive discipline for violation of the computer and non-discrimination rules.

(4) In addition, the appellant must take the training in interpersonal relations, as ordered in a recent performance evaluation, but which he has ignored.

(Recommended findings and conclusions, Civil Service Appeal Proceeding)

- Discharge
- Personal use of confidential law enforcement database
- Progressive discipline

San Joaquin County and Individual Grievant (5-23-11; 11 pp.) *Representatives*: Quendrith L. Macedo, deputy county counsel, for the employer; Justin E. Buffington (Rains Lucia Stern) for the grievant. *Arbitrator*: Paul D. Staudohar.

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

***Employer's position*:** (1) The employer had just cause to terminate the grievant, a legal technician assigned to the D.A. but working in the sheriffs department, for wrongfully accessing controlled confidential data on the law enforcement inter-agency database, CLETS.

(2) The grievant acknowledged that it was wrong to access CLETS information to assist a friend with family issues.

(2) The grievant had notice that CLETS data is confidential when she passed a CLETS access exam that covered confidentiality of the system. Each time she accessed CLETS, a warning in bold type appeared on the computer screen stating that unauthorized access or misuse could result in adverse action or criminal prosecution.

(3) County rules state that county property is to be used only for county business, require employees to protect property entrusted to them and to use it only in the manner intended, and require employees to maintain confidentiality of information obtained on the job.

(3) The grievant's improper access on several occasions was potentially a crime, under the penal code, and could result in the county being denied access to CLETS.

(4) Misuse of her authority to access confidential information is a serious breach of trust, in a position requiring a high level of trust, and requires her discharge.

***Grievant's position*:** (1) The grievant did not receive the initial training or periodic testing that is required for her to have CLETS access.

(2) The grievant freely admitted to using CLETS improperly and accepted full responsibility, but had no idea that seemingly minor transgressions would have severe consequences. Now aware, she would never again misuse the system.

(3) The grievant has 13 years of service with an unblemished record, and her supervisors testified to her stellar work ethic and abilities.

(4) Termination is too severe a penalty, as it extinguishes her career in law enforcement, evidenced by her rejected application for a job in a police department.

(5) The grievant should be reinstated, with full back pay and benefits, with interest.

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

Arbitrator's reasons: (1) There is no doubt the grievant had notice that improper and personal use of CLETS data could lead to discipline; she admitted knowing what she did was wrong, expressing remorse.

(2) Although the information she sought may have been justifiable for the grievant's personal reasons, there were other means for her to find information to assist her friend with child custody concerns.

(3) Her improper use had serious consequences, as it could result in the county losing access to CLETS.

(4) The grievant's contention that deputy sheriffs convicted of DUIs have not been discharged is not analogous, since their misconduct occurred off duty and did not impact the trust factor of the job.

(5) Discipline for serious misconduct is justified but discharge is too severe, given her work record, testimony of her supervisors and her acceptance of responsibility for the misconduct; she is to be reinstated but without back pay.

(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

None this issue.

EERA CASES

Unfair Practice Rulings

Zero-tolerance policy was unilateral change in progressive discipline provision: Fairfield-Suisun USD.

(*Mutual Organization of Supervisors v. Fairfield-Suisun Unified School Dist.*, No. 2262, 5-8-12. By Member Huguenin, with Chair Martinez; Member Dowdin Calvillo concurring.)

Holding: The district unilaterally changed the progressive discipline provision of the parties' contract when it enforced a "zero tolerance" regulation and terminated an employee for failure to submit to a random drug and alcohol test. The union did not waive its right to negotiate because it did not receive notice of the policy.

Case summary: The charge alleged that the district changed its discipline policy as set forth in the parties' contract when it terminated a transportation operation supervisor without following the steps of progressive discipline and instead relied on a "zero tolerance" policy. A PERB hearing officer found the employee's termination

for failure to submit to a random drug test was consistent with the contract provisions and dismissed the complaint. The board reversed.

The board found that the district terminated the supervisor for failing to follow instructions, rather than for safety reasons. It rejected the district's contention that it made no unilateral change because the zero tolerance provision of the drug testing policy fell within the "safety" exception to the contract's progressive discipline language. The exception permits the district to depart from progressive discipline when the unit member's conduct endangers the safety of students, employees, or district property. The board likewise found the contract's emergency exception did not permit abandonment of progressive discipline.

PERB also found that because external federal law does not mandate the drug testing regime adopted by the district, the policy is negotiable because it relates to employee discipline.

The district failed to provide the employee organization notice of its implementation of the zero tolerance policy back in 1996. The union steward and chief negotiator did not learn of the zero tolerance regulation until the district initiated discharge proceedings against the employee. The policy, adopted unilaterally by the district, had a generalized effect and continuing impact on unit employees, the board concluded. PERB also found the charge was timely filed and that the union did not waive its right to negotiate over the policy.

In its order directing restoration of the status quo, the board directed the terminated employee be reinstated and reimbursed for all loss of salary and benefits.

Member Dowdin Calvillo filed a concurring opinion. She noted that the district had not relied on the safety exception to the contract's progressive discipline provision. Accordingly, she did not join in the majority's determination that the conduct for which the employee was disciplined fell outside the scope of the exceptions to the contractual progressive discipline policy.

No basis for appeal of dismissal: Oxnard Union High S.D.

(*Collins v. Oxnard Union High School Dist.*, No. 2265, 5-25-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charge failed to state a prima facie case of retaliation or interference. On appeal, the charging party merely reiterated the allegations asserted in the unfair practice charge and did not reference any portion of the dismissal said to form the basis for her appeal.

Case summary: Among other allegations, the charging party alleged that the district violated EERA by reducing the hours of her teaching assignment, which she grieved. She alleged retaliation and interference with her rights after she grieved when the principal implied that a student complaint had been lodged against her. A

regional attorney dismissed the charge. She found that the charging party lacked standing to assert violations of the Education Code or the act that governs the bargaining process between the district and the exclusive representative. She also lacked standing to assert that a breach of the collective bargaining agreement between the district and the exclusive representative amounted to an unlawful unilateral change; such bargaining rights rest with the employee organization, the regional attorney said.

The R.A. also dismissed the charge alleging retaliation. The R.A. noted that the only instance of protected conduct alleged in the charge was the grievance that was filed *after* the charging party's hours were reduced. The report concerning student complaints occurred after the grievance; it was not objectively adverse to her employment, the R.A. reasoned. The R.A. also found insufficient allegations supporting the interference charge.

On appeal, the board affirmed the dismissal. It found the appeal merely reiterated the facts alleged in the unfair practice charge. Nor did the appeal refer to any particular portion of the dismissal or state the specific issues of procedure, fact, law, or rationale to which the appeal was taken. The board found no merit to the charging party's assertion that the general counsel dismissed the charge because of her workload, a time lag, or at the behest of the union.

Bargaining to impasse over nonnegotiable recoupment proposal was violation of EERA: Berkeley USD.

(*Berkeley Council of Classified Employees v. Berkeley Unified School Dist.*, No. 2268, 5-29-12. By Member Huguenin, with Chair Martinez; Member Dowdin Calvillo dissenting.)

Holding: The district's proposal seeking to recoup erroneous wage payments by paycheck deduction is inconsistent with state laws and is a non-mandatory subject of bargaining. Insisting to impasse violated its duty to negotiate in good faith. (See story in General section.)

Request to withdraw appeal of partial dismissal of charge granted: Los Angeles USD.

(*Chukwu v. Los Angeles Unified School Dist.*, No. 2269, 5-31-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The board granted the charging party's request to withdraw his appeal of the partial dismissal of his unfair practice charge.

Case summary: The charging party alleged that the district issued a performance evaluation report in retaliation for engaging in collective activity. A board agent dismissed this portion of the charge, and the charging party appealed.

Thereafter, the charging party notified the board that he wished to withdraw his appeal. Finding the withdrawal of the appeal to be in the best interests of the parties and consistent with the purposes of EERA, the board granted the request.

Appeal taken to exhaust administrative remedies was rejected for failing to take issue with basis for underlying dismissal: Centinela Valley Union High School Dist.

(*Centinela Valley Union High School Dist. v. Centinela Valley Secondary Teachers Assn.*, No. 2270, 6-7-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The board denied the district's appeal of a board agent's dismissal of its unfair practice charge because the district failed to identify the issues to which the appeal was taken.

Case summary: Since 2001, the district and the association were parties to a collective bargaining agreement that provided for the association president to be released from 40 percent of his or her assignment to perform various union-related duties. This practice existed until January 2011, when the district gave the association an invoice requesting reimbursement of $323,479.49 for all compensation paid to association presidents from 2001 through 2010.

When the association failed to pay, the district discontinued the practice of providing 40 percent leave time to the association president. The district then filed an action against the association in superior court requesting enforcement of its right to reimbursement under Education Code Sec. 44987. The district filed this action to prevent a violation of EERA Sec. 3543.5(d), which makes it unlawful for a public school employer to contribute financial support to an employee organization.

The association filed a demurrer to the district's superior court complaint, asserting that PERB had initial exclusive jurisdiction over the dispute because the district alleged an arguable violation of Sec. 3543.6(a) on the grounds that the association caused the district to violate Sec. 3543.5(d).

The superior court sustained the association's demurrer and stayed the proceedings pending exhaustion of administrative remedies before PERB.

In response to the court's ruling, the district filed a charge with PERB alleging that the association violated the Education Code by failing to reimburse the district for compensation provided to association officials for union leave time. The general counsel dismissed the charge on the grounds that PERB does not have jurisdiction to enforce rights under the Education Code and the charge failed to allege a prima facie violation of EERA.

The district appealed the dismissal in order to exhaust its administrative remedies, but stated that it did not dispute the decision to dismiss the charge. In response, the

association asserted that the appeal failed to satisfy the requirements of PERB Reg. 32635 by stating the specific issues to which the appeal is taken.

The board agreed that the appeal filed by the district did not identify issues of procedure, fact, law, or rationale to which the appeal was taken, or state the grounds for appeal. Therefore, it denied the appeal because the district had not objected to any findings set forth in the dismissal, providing the board no basis on which to review the merits of the dismissal.

Board explains application of statute of limitations in public notice cases: Standard School Dist.

(*Garchow et al. v. Standard School Dist.*, No. 2273, 6-22-12. By Member Dowdin Calvillo, with Chair Martinez; Member Huguenin concurring.)

Holding: The six-month statute of limitations in public notice cases begins to run when the charging party is put on notice of the district's intent to sunshine its proposals or when the proposals are sunshined in a manner inconsistent with statutory requirements.

Case summary: The charging parties alleged that the district violated EERA by failing to comply with the public notice requirements concerning negotiations with the Standard Teachers Association. The charges related to the notice of the sunshine meetings, the availability and intent of the proposals, and the failure to adopt the district proposal. A board agent found the charge was untimely and failed to state a prima facie case. On appeal, the board affirmed the dismissal.

The purpose of the statute's public notice provisions is to ensure that the public is informed of the issues being negotiated by the public school employer and to have an opportunity to express their views. This is accomplished by sunshining the initial proposals of both the exclusive representative and the public school employer at a public meeting.

Initially, public notice complaints were subject to a 30-day statute of limitations period. Under regulations promulgated in 2006, however, alleged public notice violations are treated as unfair practice charges and a six-month statute of limitations period applies. On the basis that the parties should have known of the violations in November at the latest, the board rejected their contention that the statute began to run when they discovered the notice violations. In public notice circumstances, the board instructed, the statute begins to run either upon publication of a public notice of a meeting at which bargaining proposals will be sunshined or at the public meeting itself. If the charge alleges that the notice was defective, the statute of limitations begins to run upon publication of the notice. If the charge alleges that the notice was proper, but the proposals sunshined at the meeting failed to comply with EERA, the limitations period begins to run on the date of the meeting where the proposals were presented to the public.

In this case, the statute of limitations began to run in September 2010, when the district provided public notice of its intent to sunshine its initial proposals, by publishing its agenda for the trustees meeting, and at the latest in November, when it published the agenda extending an opportunity to the public to comment. Using the dates of these events, the board calculated the July 2010 charge was untimely.

The district's conduct that occurred within the limitations period, an alleged attempt to bargain non-sunshined proposals, was not a continuing violation because it did not state an unfair practice independent of the prior alleged violation, the board said, and did not allege the same public notice violation.

The board declined to apply the doctrine of equitable tolling to this case based on the charging party's assertions that the district misrepresented and/or concealed material facts relevant to its initial proposals. The board also refused to alter its rule that the charging party bears the burden of proving that the charge was timely filed.

Member Huguenin filed a concurring opinion observing that the board's ruling leaves untouched PERB's unfair practice limitations policy affecting unfair practices in general.

Dismissal of untimely charge upheld: San Bernardino City USD.

(*Trotter v. San Bernardino City Unified School Dist.*, No. 2278, 7-11-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party filed an untimely charge and did not allege sufficient facts demonstrating that the district violated the act.

Case summary: The charging party alleged that the district violated EERA and discriminated against her on the basis of race by failing to reclassify and pay her according to the correct placement on the certificated salary schedule based on her prior teaching experience at another school. The district first notified her of its decision in 2004, but she did not file a charge until 2010, instead asking the district multiple times to reconsider the decision.The general counsel dismissed the charge as untimely and beyond PERB's jurisdiction.

On appeal, the board affirmed the dismissal. It declined to entertain new allegations or supporting documents presented for the first time on appeal.

Duty of Fair Representation Rulings

Failure to file grievance not DFR breach: Los Angeles County Education Assn.

(*Sanders v. Los Angeles County Education Assn.*, No. 2264, 5-21-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The association's decision not to file a grievance on the charging party's behalf did not breach its duty of fair representation.

Case summary: The charging party alleged that the association breached its duty of fair representation by failing to file a grievance on her behalf challenging her reassignment by the Los Angeles County Office of Education. The general counsel dismissed the charge and the board affirmed the dismissal.

The board noted that the association assigned three representatives, including an attorney, to assist the charging party in resolving her dispute with the Office of Education. Association representatives communicated with the employer on her behalf. They also informed her that the employer's decision to remove her from working at two worksites likely did not constitute a basis for filing a grievance.

The charging party failed to allege facts showing that the decision not to file a grievance was arbitrary, discriminatory, or in bad faith. Nor did she allege that the association's determination was without a rational basis or devoid of honest judgment.

PERB also observed that the association's decision not to file a grievance did not foreclose the charging party from pursuing a remedy herself.

No basis for appeal of dismissal of DFR charge: Oxnard Federation of Teachers.

(*Collins v. Oxnard Federation of Teachers*, No. 2266, 5-25-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charge failed to allege sufficient facts in support of the claim that the federation breached its duty of fair representation by refusing to pursue a grievance to arbitration or interfering with her rights by threatening her.

Case summary: In a separate unfair practice charge, the charging party alleged that the district violated EERA by reducing the hours of her teaching assignment. That charge was dismissed by the regional attorney and, on appeal, affirmed by the board in *Collins v. Oxnard Union High School Dist.* (2012) No. 2265, above.

The federation grieved the issue on the charging party's behalf but, thereafter, declined to pursue the grievance to arbitration. It explained that the outcome of arbitration was uncertain and might result in layoffs of other unit members. The regional attorney dismissed this charge. She found the federation's conduct was not arbitrary, discriminatory, or in bad faith.

On appeal, the board affirmed the dismissal. It found the appeal merely reiterated the facts alleged in the unfair practice charge. Nor did the appeal reference any particular portion of the dismissal or state the specific issues of procedure, fact, law, or rationale to which the appeal was taken. The board found no merit to the charging

party's assertion that the general counsel dismissed the charge because of her workload, a time lag, or at the behest of the union.

A federation representative warned the charging party that she might suffer repercussions from the employer if she chose to pursue the matter with a private attorney. The charging party viewed this warning as a threat. The regional attorney dismissed the interference charge because the federation had no control over the employer.

Because party's relationship with district not impacted, charge does not allege DFR breach: Fillmore Unified Teachers Assn.

(*Hood v. Fillmore Unified Teachers Assn.*, No. 2274, 6-22-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party's allegations that the collective bargaining agreement forged by the association and the school district unfavorably impacted his relationship with his employer were not sufficient to show a breach of the association's duty of fair representation.

Case summary: The charging party alleged that the association violated EERA by denying him an equal right to participate in a contract ratification vote. A board agent found that most of the allegations were untimely and that the charge failed to state a prima facie case of interference with protected employee rights because the voting procedure did not affect the charging party's relationship to the employer or constitute a violation of the duty of fair representation.

On appeal, the charging party challenged the B.A.'s determination that the association's actions failed to have a substantial impact on his relationship with the employer, the Fillmore Unified School District. The charging party asserted that changes to the collective bargaining agreement with respect to transfer and seniority rights severely altered teachers' relationship to the district. The board affirmed the B.A.'s conclusion that the duty of fair representation does not bar an exclusive representative from making an agreement that may have an unfavorable effect on some members of the bargaining unit or that benefits some members more favorably than others.

The board also declined to entertain new factual allegations and evidence not presented in the original or amended unfair practice charge. PERB found no reason why the documents and allegations could not have been included in the original or amended charge as they all predated issuance of the dismissal letter. Moreover, the board added, as these documents allegedly demonstrate that the association's actions had an unfavorable impact on his transfer and seniority rights, they would not alter the conclusion that the charge failed to state a prima facie violation of the duty of fair representation.

Dismissal of DFR charge upheld: SEIU Loc. 1021.

(*Harris v. SEIU, Loc.1021*, No. 2275, 6-26-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin).

Holding: The charging party failed to allege sufficient facts supporting his claim that the union failed to satisfy its duty of fair representation with respect to an FMLA request.

Case summary: The charging party alleged that the union failed to adequately represent him in his dispute with the Fremont Unified School District concerning his placement on a 39-month rehire list instead of granting him a leave of absence under the Family and Medical Leave Act. A board agent dismissed portions of the charge as untimely. The B.A. found that the remaining factual allegations failed to state a prima facie case because the union did not possess the sole means by which the charging party could obtain a medical leave.

On appeal, the board affirmed the B.A.'s dismissal. It also noted that the charging party failed to reference any particular portion of the dismissal with which he disagrees or otherwise state the matters of procedure, fact, law, or rational to which the appeal was taken.

HEERA CASES

None this issue.

MMBA CASES

Unfair Practice Rulings

No good cause to excuse late filing: Stanislaus Consolidated Fire Protection Dist.

(*Stanislaus Consolidated Firefighters, Loc. 3399 v. Stanislaus Consolidated Fire Protection Dist.*, No. Ad-392-M, 1-19-12. By Chair Martinez, with Members Huguenin and Dowdin Calvillo.)

Holding: Good cause to excuse the late filing was not demonstrated.

Case summary: Under PERB Reg. 32635(a), the firefighters association filed a timely appeal of the board agent's partial dismissal of its unfair practice charge. Under subsection (c), any party has 20 days following the date of service of the appeal to file a statement in opposition to the appeal. The district filed its response eight days late, with a statement that acknowledged the tardiness and explanations that "PERB regulations are directory as opposed to mandatory" and "a portion of the PERB decision warrants clarification." Accordingly, the board's appeals assistant

informed the district that its response to the appeal was untimely, but that it could appeal the timeliness issue. The district then filed an appeal reiterating the arguments in its initial response.

Pursuant to PERB Reg. 32136, the board may, at its discretion, excuse a late filing for good cause. Here, however, the board was unable to determine if the reasons were reasonable and credible because none were given. There was no information on which to evaluate whether the district made a conscientious effort to timely file.

In response to the district's assertion that, if excused, there would be no prejudice to the opposing party, the board explained that it cannot find good cause to exist based on lack of prejudice alone but must have evidence of good reason for the untimely filing as well.

As for the district's assertion that PERB regulations are "directory as opposed to mandatory," the board asserted that "expiration of a PERB timeline has not been construed as stripping PERB of jurisdiction to hear the underlying case," but it "does not negate the requirements contained in PERB's regulatory scheme." The board has discretion to accept a late filing only upon a determination of good cause.

In response to the district's claim that its response to the appeal was critically needed to clarify whether Section 20-2 of the MOU exists in the successor agreement, the board noted that presently the only issue before it was the timeliness of the response. The board found the district failed to explain why the appeal was untimely filed, and denied the appeal.

No retaliation or interference with right to representation by authority: HACLA

(*Moore v. Housing Authority of the City of Los Angeles*, No. 2166-M, 2-25-11. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

Holding: The charge was untimely and failed to state a prima facie case that HACLA interfered with his right to union representation or retaliated against him by refusing to allow him to return to his position following a medical leave.

Case summary: The charging party, Moore, was an eligibility interviewer with the housing authority. Around March 2005, he became ill due to stress and requested leave. Moore was instructed to complete a workers' compensation form prior to taking leave. HACLA's doctor determined he had a "non-industrial" injury and discharged him with instructions to get private treatment. He did so and was eventually cleared to return to work around early 2006. HACLA, however, insisted he see an in-house doctor before being allowed to return to work. Moore did not see a HACLA doctor and asserted that the authority refused to allow him to return, even though his personal doctor gave him clearance.

When Moore contacted the union for assistance, HACLA claimed that Moore was

not entitled to representation because he was a temporary employee. On November 2, 2009, Moore filed an unfair practice charge against the authority alleging retaliation and interference.

With regard to the charge of retaliation, PERB is prohibited from issuing a complaint with respect to any charge based on an alleged unfair practice occurring more than six months prior to the filing of the charge. The limitations period begins to run once the charging party knows, or should have known of the conduct underlying the charge. Moore did not file his charge until nearly three years after HACLA refused to let him return to work. Therefore, the retaliation charge is untimely and the allegation was dismissed.

Moore, a "casual" or temporary employee, also alleged that HACLA prevented him from receiving union representation when it asserted that he was not a permanent employee and therefore not a member of the bargaining unit represented by the union. The board determined that Moore's argument was that HACLA denied him access to representation because the authority does not include temporary employees in the bargaining unit. Because he alleged no facts demonstrating that he had requested union assistance in his endeavor to return to work or that HACLA knew of his request, this allegation was also dismissed.

Finally, Moore alleged that HACLA violated a variety of state and federal laws, over which the board found it lacked jurisdiction.

After reviewing the dismissal and the record in light of Moore's appeal and relevant law, the board affirmed the board agent's dismissal of the charge as untimely filed and without the facts to state a prima facie case. Moore's petition for judicial review was dismissed.

Joint powers agencies within PERB's MMBA jurisdiction: Central Contra Costa Transit Authority.

(*Amalgamated Transit Union, Loc. 1605 v. Central Contra Costa Transit Authority*, No. 2263-M, 5-8-12. By Chair Martinez, with Member Huguenin; Member Dowdin Calvillo dissenting.)

Holding: The transit authority, a joint powers agency, is subject to PERB's jurisdiction as a public agency under the MMBA.

Case summary: The union filed an unfair practice charge alleging that the transit authority violated the MMBA by issuing a written warning to the union president for conduct that occurred during a meeting with management to discuss a personnel matter involving another union member. The transit authority is a joint powers agency established by 10 cities and the County of Contra Costa. PERB's general counsel determined that, as a joint powers agency, the transit authority is not a public agency within the meaning of Government Code section 3501 and, therefore, the board lacks jurisdiction to entertain the union's charge.

The board disagreed, and found the transit authority is a public employer and remanded the charge to the general counsel to investigate the underlying charges.

PERB began by observing that the board's jurisdiction is not conferred by filing an unfair practice charge, by the parties' consent, agreement, stipulation or acquiescence, or by waiver or estoppel. PERB only has jurisdiction as conveyed by statute.

The board then reviewed prior decisions addressing the jurisdictional scope of EERA. It noted that in *North Orange County Regional Occupational Program* (1990) Dec. No. 857, the board's majority found that the regional center operated by a joint powers agency was not a public school employer under EERA. The legislature has since amended EERA to include joint powers agencies in PERB's EERA jurisdiction. The majority in this case found the language of the MMBA different from EERA and "broad enough" to encompass the transit authority. The board noted that the transit authority, although a provider of transportation services, is not a transit district with its own statutorily prescribed labor relations process, which would exempt it from coverage under the MMBA.

The board examined the language of section 3501(c), the purpose and intent of the statute, and the status of joint powers agencies under other state laws, including the act that created joint powers authorities. It found "no reason discerned from the MMBA for treating the Authority, a joint powers agency, differently for labor relations purposes than other local public entities." The board recognized that the constituent members of the transit authority are subject to the MMBA and cited the legislature's intention to provide local public employees and employers in California with a uniform framework for collective bargaining and dispute resolution.

The board also relied on the test formulated in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee* (1971) 402 U.S. 600, 1971 U.S. LEXIS 126, which focused on the exclusion from federal labor law of "any State or political subdivision thereof." Applying the test, the board found the transit authority exempt from federal labor law and a governmental subdivision under the MMBA.

Member Dowdin Calvillo dissented, noting the legislature's amendment of EERA, but not the MMBA, to include a joint powers agency. She also criticized the majority's reliance on other state statutes, operating with "an entirely different purpose than the MMBA."

Request for reconsideration denied: Stanislaus Consolidated Fire Protection Dist.

Stanislaus Consolidated Firefighters, Loc. 3399 v. Stanislaus Consolidated Fire Protection Dist., No. 2231a-M, 5-23-12. By Chair Martinez, with Members Huguenin and Dowdin Calvillo.

Holding: Defenses relating to arbitration of a dispute similar to the underlying charge are not grounds for reconsideration of the board's decision where they were not raised previously and there is no authority supporting collateral estoppel of

issues decided in arbitration.

Case summary: In its previous decision, No. 2231, the board reversed the partial dismissal of the charge, finding the charging party had alleged sufficient facts to state a prima facie case that the district had made a prohibited unilateral change and engaged in discrimination and interference when it repudiated a section of the parties' MOU regarding union access rights. The district requested reconsideration of the board's decision on several grounds.

The board denied the request for reconsideration. It found the district's claim that a final and binding arbitration award on the related dispute required dismissal of several paragraphs of the complaint was raised too late. The district knew about the arbitration award before the Office of the General Counsel took any action on the charge. The district waived its defense by failing to raise the issue of deferral to arbitration until the request for reconsideration, the board ruled. The board rejected the district's claim that a PERB hearing is barred by collateral estoppel, since the question before the arbitrator was not the same as the question before the board, and there is no authority that requires the board to give preclusive effect to arbitration decisions.

The board also turned aside the district's contention that its engagement in mediation of the underlying dispute showed it did not make a prohibited unilateral change. Because the mediation occurred after the repudiation, it was not relevant to the board's decision, the board pointed out. For similar reasons, the board's failure to mention in its decision the district's later offer to meet and confer over the provision it had already repudiated was not a prejudicial error, the board said, since the later action would not excuse the earlier violation.

The district's claim that the board committed a prejudicial error of fact was rejected, as Local 3399 disputed the facts claimed by the district, and the board assumes the charging party's facts are true when reviewing the dismissal of a charge.

No good cause to excuse late filing: Stanislaus Consolidated Fire Protection Dist.

(*Stanislaus Consolidated Firefighters, Loc. 3399 v. Stanislaus Consolidated Fire Protection Dist.*, No. Ad-394-M, 1-19-12. By Chair Martinez, with Members Huguenin and Dowdin Calvillo.)

Holding: The request for reconsideration was deemed untimely, and the board's order was made final.

Case summary: The appeal of the general counsel's partial dismissal in PERB Dec. No. Ad-392-M, above, resulted in two decisions: (1) *Stanislaus I*, which came about after the PERB appeals assistant's determination that the district's response to the appeal of the partial dismissal was untimely; and (2) *Stanislaus II*, PERB Dec. No. 2231-M, CPER 206 online, arising out of the Stanislaus Consolidated Firefighters,

Local 3399's appeal of the general counsel's partial dismissal of the unfair practice charge.

For *Stanislaus I*, a request for reconsideration was due on February 13, 2012. For *Stanislaus II*, a request for reconsideration was due on February 14. On February 13, the district timely filed for an extension to file a request for reconsideration of *Stanislaus II*. The request made no mention of *Stanislaus I*.

In an April 27 letter, the appeals assistant informed the parties that the district's request for reconsideration of *Stanislaus II* was timely filed but the request for reconsideration of *Stanislaus I* was not. On May 7, the district timely filed an administrative appeal of the denial for reconsideration of *Stanislaus I*.

The district argued that its request regarding *Stanislaus I* was only three days late and that Local 3399 had agreed to an extension. The local objected, contending that the district did not specifically refer to *Stanislaus I* when seeking an extension, and had the union known that the district was still attempting to add the late-filed response to the record, it would not have agreed so readily to the request. Local 3399 further contended that the continual delay in this case resulted in the denial of a determination of fundamental union access rights, that Local 3399 was prejudiced thereby, and that the board should deny the district's extension request.

The board found it "antithetical to the regulatory scheme to grant a request for extension of time to file a document when the time period for filing…has already expired." Furthermore, in response to a district assertion that PERB's communication failed to indicate that the district's letter was unacceptable, the board found the district's contention to be "an effort to shift responsibility for its own late filing mistake to PERB."

Pursuant to PERB Reg. 32136, the board may, at its discretion, excuse a late filing for good cause only, which it did not find because the district failed to offer any explanation as to why it could not have filed an extension request for *Stanislaus I* on or before February 10. And had the request been found timely, the board found no merit in the district's reiteration of its arguments. "A request for reconsideration…is not an opportunity to the Board to 'try again.'" Nor did the board accept the district's new explanation that the late filing was the result of an error in calendaring procedures.

In conclusion, the board found good cause did not exist to excuse the late filing of the district's amended request for extension. And, had it been considered timely, it would have been denied on the merits.

ALJ's proposed decision supported by credibility findings and application of law to those factual findings: County of Santa Clara.

(*Jones v. County of Santa Clara*, No. 2267-M, 5-25-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party's exceptions to the ALJ's proposed decision provided no basis for reversing the dismissal of the charge.

Case summary: The charging party alleged that the county violated the MMBA by (1) terminating his employment in retaliation for engaging in the protected activity of filing grievances related to his working conditions, (2) denying him his right to have a union representative present at a meeting which he reasonably believed would result in disciplinary action, and (3) by interfering with his rights by directing him to cease communicating with his coworkers with regard to issues and concerns that he had.

An administrative law judge dismissed the charge. He found there was no evidence linking the charging party's protected activity to the decision to release him from his probationary position. The ALJ found that the charging party did not demonstrate that the meeting with management was intended to result in formal discipline and that the charging party made no request for union representation at the meeting. The direction given the charging party about speaking to his coworkers regarding matters of concern was an instruction to follow the chain of command and made in an effort to first provide supervisory staff with an opportunity to respond to his concerns.

The charging party filed numerous exceptions to the ALJ's proposed decision, most of which related to the ALJ's findings of fact and credibility determinations, as well as to the ALJ's application of the law to those facts. The board found no basis to overturn the ALJ's credibility determinations, the factual findings, or his legal conclusions.

The charging party also sought to reopen the record to admit new evidence. In reviewing this request, the board applied the standard set forth in its Regulation 32410(a), which requires that the evidence was not previously available or could not have been discovered prior to the hearing with the exercise of reasonable diligence, was submitted within a reasonable time of its discovery, is relevant to the issues sought to be reconsidered, and impacts or alters the decision of the previously decided case.

Here, the board found that the new documents failed to meet this standard. The charging party failed to demonstrate why the documents could not have been discovered prior to the hearing before the ALJ, and failed to demonstrate the relevance of the evidence to the issues before the board or how the evidence impacts or alters the decision.

The board found no merit in the charging party's assertion that, in making credibility determinations, the ALJ failed to take into account his medical condition.

PERB also determined that a letter submitted to the general counsel during its investigation of the charge does not automatically render it part of the record in the evidentiary hearing before an ALJ. All evidence must be introduced properly and admitted during the hearing, the board explained.

The board found the charging party's claim that there was improper ex parte

communication between the county counsel and the ALJ to be without merit. Also rejected was the charging party's assertion that the ALJ refused to allow him to call county counsel as a witness.

City failed to participate in impasse procedures in good faith: City of Davis.

(*Davis City Employees Assn. v. City of Davis*, No. 2271-M, 6-8-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The city violated the MMBA when it unilaterally bypassed the impasse procedure established by local rules and took its last, best, and final offer to the city council for final resolution of the parties' bargaining impasse.

Case summary: The association alleged that the city violated the MMBA by implementing its last, best, and final offer without exhausting impasse resolution procedures set out in the city's local rules, and by modifying its furlough proposal. An administrative law judge found that, by cancelling the factfinding dates and implementing its final offer in the absence of an emergency, the city violated the act. The modification of the furlough plan was reasonably contemplated in the LBFO, and not a violation.

The city filed exceptions to the ALJ's proposed decision, arguing that the association was dilatory in failing to offer dates for the factfinding hearing. The board found that even if the association had engaged in some delay, it did not excuse the city from deviating from the procedure set out in the city's employer-employee relations resolution, unilaterally requesting the names of arbitrators from the State Mediation and Conciliation Service, contacting an arbitrator and obtaining available dates without notifying the association, cancelling the factfinding process altogether (after the parties had reached an agreement on the arbitrator and on two dates of hearing), and submitting the matter to the city council for final resolution. By doing so, the board held, the city failed to meet its obligation to participate in good faith in the impasse resolution procedures.

Prematurely dismissed charge remanded to general counsel for further processing: City of Carlsbad.

(*Carlsbad City Employees Assn. v. City of Carlsbad*, No. 2276-M, 6-27-12. By Member Huguenin, with Chair Martinez and Member Dowdin Calvillo.)

Holding: An unfair practice charge that was dismissed before the charging party filed a timely amendment to its charge was remanded to the general counsel for further processing.

Case summary: The association filed an unfair practice charge against the city. The general counsel dismissed the charge, and the association appealed. Thereafter, the general counsel asked that the case be remanded because the

charge had been prematurely dismissed prior to receipt of a timely filed amended charge.

The board found it appropriate to remand the case to the general counsel for further processing.

Two-year suspension from union membership was reasonable: SEIU Loc. 221.

(*Gutierrez v. SEIU Loc. 221*, No. 2277-M, 6-29-12. By Chair Martinez, with Member Huguenin; Member Dowdin Calvillo, concurring and dissenting.)

Holding: The union did not retaliate against the charging party for seeking to persuade his coworkers to drop their full union membership and become agency fee payers; the decision to suspend his union membership for two years was reasonable.

Case summary: The charging party alleged that the union violated the MMBA by retaliating against him and unreasonably suspending his union membership. Because he was dissatisfied with the service the union was providing, he urged 97 SEIU members to drop their full membership and become agency fee payers.

A member of the union's executive board filed internal charges against the charging party and a hearing was conducted pursuant to the union's bylaws. The hearing resulted in a finding that the charging party was a grossly disloyal union member. As discipline, the trial body imposed a two-year suspension of the charging party's union membership.

The union president, when informed by SEIU members that the charging party was performing union duties on county time, contacted the county's labor relations manager. The labor relations manager inquired into the charging party's absence, but concluded he had been on jury duty.

An administrative law judge found that the charging party engaged in protected activity when he encouraged his coworkers to become agency fee payers. However, he found that the executive board member's call to the labor relations manager was not an adverse action because it did not have an adverse impact on the charging party's employment. The ALJ also found that the two-year suspension of union membership imposed on the charging party was a reasonable response to his actions that attempted to thwart SEIU's fundamental objectives.

Responding to the charging party's exceptions to the ALJ's proposed decision, the board agreed that the union did not retaliate against him by taking any adverse action. The board also affirmed the ALJ's conclusion that the two-year membership suspension was reasonable. PERB precedent does not hold that an employee's union membership may be suspended only when he or she engages in a decertification effort. "By encouraging members to drop their membership, SEIU

was hurt financially and deprived of the support of its members at a critical time, the initiation of bargaining," the board said.

The board also rejected the charging party's assertion that his ability to file exceptions to the ALJ's proposed decision was hindered by the fact that he did not have a transcript of the hearing. The charging party never made a request for a transcript.

Member Dowdin Cavillo dissented from the majority's view that the two-year membership suspension of the charging party was reasonable. She found that his campaign to change the membership status of his coworkers did not threaten the existence of the union.

Request to reconsider issuance of complaint rejected: SEIU-United Healthcare Workers West.

(*National Union of Healthcare Workers v. SEIU-United Healthcare Workers West*, No. 2249a-M, 7-16-12. By Member Huguenin, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The board denied SEIU's request for reconsideration of its decision to issue a complaint based on claims that it interfered with the conduct of a decertification election.

Case summary: The National Union of Healthcare Workers filed a charge alleging that SEIU violated the MMBA when, during the course of a decertification election, its agents obtained unsupervised access to marked ballots and otherwise interfered with balloting of bargaining unit members, engaged in physical and verbal threats toward unit members, misrepresented information to unit members, and destroyed and/or removed bargaining unit members' personal property. The general counsel dismissed the charge and the union of healthcare workers appealed.

In Dec. No. 2249, PERB reversed the dismissal and directed the general counsel to issue a complaint. The board found that the appropriate standard for assessing conduct alleged to interfere with employees' rights to choose a representative or to constitute a serious irregularity in the conduct of an election is the totality of circumstances. The board also found that the name of the employee alleged to be acting as an agent of the employee organization is not an indispensable element of a prima facie case. Finally, PERB held that various statements made by SEIU agents would reasonably tend to interfere with or restrain voters and did not merely involve "electioneering puffery."

SEIU filed a request for reconsideration of the board's decision.

PERB permits reconsideration only under extraordinary circumstances where there is a showing that the decision contains prejudicial errors of fact or that the party has discovered new evidence not previously available.

Here, the board rejected SEIU's challenge to its ruling not to require as a condition to stating a prima facie case that the charging party include the name of any person alleged to be an agent of an employee organization. PERB found this claim not to be a prejudicial error of fact, but a dispute over the appropriate legal standard for stating a prima facie case.

In support of its underlying decision, the board had noted that "requiring the charging party to provide the names of the alleged perpetrators in order to avoid dismissal is too high a pleading burden given that charging party has alleged with sufficient factual detail both the conduct alleged to constitute an unfair practice and the identity of the alleged perpetrators as SEIU agents."

The board also rejected SEIU's request for reconsideration based on its contention that the decision to reverse the dismissal of the underlying charge ignored unrebutted facts set forth in a declaration. SEIU argued that this declaration undermined the claim that its agents unlawfully threatened voters with a loss of health benefits were the healthcare workers union to win the election. The board concluded, "a hearing would be the appropriate venue for resolving this factual issue."

Duty of Fair Representation Rulings

Charge is untimely and fails to assert facts showing DFR breach: AFSCME Council 36.

(*Moore v. American Federation of State, County and Municipal Employees, Council 36*, No. 2165-M, 2-25-11. By Member Wesley, with Chair Dowdin Calvillo and Member McKeag.)

Holding: The charging party's allegation that the association failed to represent him in his dispute with the employer was untimely filed. Even assuming the charge was timely, it failed to state a prima facie case of a breach of the duty of fair representation.

Case summary: In June 2004, the charging party, Moore, an eligibility interviewer with the housing authority, was instructed by the authority to temporarily disregard increases in earned income when evaluating the eligibility of applicants for HACLA assistance. Feeling this to be inappropriate, he reported his misgivings to the HACLA CEO and to the U.S. Department of Housing and Urban Development. Moore did not specify when, but he was transferred to the authority's asset management department, and by February 2005, requested to take a leave due to stress and job frustration. Moore was instructed to complete a workers' compensation form prior to taking leave.

Following HACLA's instructions, Moore met with doctors, who cleared him to work, However, HACLA did not agree to allow him to return, and Moore subsequently filed to receive unemployment benefits. In September 2005, HACLA appealed the

decision to award the benefits on the grounds that Moore was still considered an employee. Moore filed his DFR charge with PERB on November 2, 2009.

The charging party's burden includes alleging facts showing that the unfair practice charge was timely filed, that the alleged violation occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School Dist.* (2007) PERB Dec. No. 1929.) The limitations period begins to run once the charging party knows or should have known of the conduct underlying the charge. In DFR cases, the statute of limitations begins to run when the charging party knew or should have known that further assistance from the union was unlikely. In the present case, Moore filed his unfair practice charge on November 2, 2009, meaning that the statute of limitations extended back to May 1, 2009. But Moore did not allege any union conduct occurring after March 2009. Therefore the charge was dismissed as untimely filed.

PERB Reg. 32615(a)(5) requires that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Moore alleged that he met with union officials who "failed to fairly and equally represent and/or investigate [his] employment status." Yet, by his own admission, he declined to provide specific allegations of misconduct in either the original or amended charge.

Moore also alleged that the union refused to accept his dues payments, interfering with his right to be represented by an employee organization. But, he previously had been informed that he was not included in the bargaining unit that the union represents. As a result, the general counsel dismissed all allegations.

After reviewing the dismissal and the record in light of Moore's appeal and relevant law, the board affirmed the dismissal of the charge as untimely filed and without the facts to state a prima facie case. Moore's petition for judicial review was denied in June 2012.

ALJ's finding of unalleged DFR violation was not fully litigated: SEIU Loc. 1021.

(*Sahle v. SEIU Loc. 1021*, No. 2261-M, 5-8-12. By Member Huguenin, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The union did not fail to represent the charging party in his claim that an agreement had been reached with his employer to promote him to a higher classification. The unalleged violation concerning the union's failure to seek a reclassification on the charging party's behalf was not fully litigated before the ALJ.

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to provide him with documentation pertaining to an agreement to promote him to the position of anesthesia technician II upon completion of required training. The board found that, because no agreement to promote the charging party was forged at a meeting attended by an SEIU worksite

organizer, the union had no duty to provide the requested information.

The charging party also alleged that the union failed to respond to his inquiries regarding the promotional transfer. PERB found that the union was responsive to the charging party's inquiries. The board also found that the union attempted to provide him with documentation supporting what the charging party believed to be an agreement to promote him to the anesthesia technician position.

The board also reviewed an administrative law judge's decision to consider a violation that was not alleged in the complaint, that the union failed to initiate or grieve the denial of a reclassification study on the charging party's request pursuant to the MOU. The board found that SEIU did not have sufficient notice of the claim.

Neither the charge nor the complaint alleged that the charging party sought reclassification, that SEIU should have sought reclassification on his behalf, or should have grieved the employer's failure to reclassify him. PERB found the reclassification claim was not intimately related to the subject matter of the complaint, although it was part of the same course of conduct. Neither party litigated the reclassification grievance. Nor did the parties have an opportunity to examine or cross-examine witnesses regarding the MOU provision relating to reclassifications.

Representation Rulings

Board sent issue of joint employer status back to ALJ for expedited hearing and decision: County of Ventura.

(*Union of American Physicians & Dentists v. County of Ventura*, No. 2272-M, 6-14-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The issue of the county's joint employer status over physicians employed at its satellite clinics was remanded to the ALJ for issuance of an expedited proposed decision.

Case summary: The union filed an unfair practice charge alleging that during negotiations for an initial memorandum of understanding, the county refused to bargain over released time and refused to provide the union with a list of issues over which the county had authority to negotiate as a joint employer. An administrative law judge determined that when the union had been granted recognition under the county's local rules, the county accepted the obligation to bargain in good faith and provide released time as required by MMBA section 3503.3. The ALJ found that the county had failed to bargain with the union. The ALJ rejected the county's argument that it was not a joint employer.

The board viewed the issue on appeal to be whether it had jurisdiction, which turns on whether the physician employees were employed by the county as a joint employer with clinic operators. The county had been found to be a joint employer at the time the union first requested recognition in 2006, in *County of Ventura* (2009)

No. 2067-M, 198 CPER 89, which the county did not appeal. Instead, it certified the union as the exclusive representative, thereby creating the expectation that it was prepared to bargain over matters within the scope of representation over which it had control. However, in this case, the county refused to bargain, asserting that there had been a change in its employment relationship with the physician employees since the union first requested recognition in 2006, and that it was no longer a joint employer.

The board remanded to the administrative law judge the issue of whether the county remains a joint employer of the physician employees at the satellite clinics. PERB instructed that the joint employment control test turns on whether the county retains the right to control both what shall be done and how it shall be done. The essential characteristic, said the board, is the right to control and direct the activities of the persons rendering service, or the manner and method in which the work is to be performed. The board is not bound by the agency's intent or declarations made in contracts with third parties.

The board explained that, following remand, if the evidence does not demonstrate sufficient control over negotiable subjects, the county cannot be a joint employer and would be excused from bargaining. If there is sufficient control, the board continued, the county's refusal to bargain will be a per se violation of its duty to meet and confer in good faith. As a joint employer, the board noted, its bargaining obligation might be limited. However, a well-developed evidentiary record will aid the parties in determining the county's bargaining obligation.

The board directed that the case be remanded to the ALJ to conduct a further expedited formal hearing and issue a new expedited proposed decision.

TRIAL COURT ACT CASES

None this issue.

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PERB Activity Report

ALJ PROPOSED DECISIONS

Sacramento Regional Office — Final Decisions

International Association of Firefighters Union, Loc. 2734, AFL-CIO v. City of Chico, Case No. SA-CE-621-M. ALJ Cloughesy. (Issued 7-26-12; final 8-21-12, HO-U-1058-M.) A firefighter was convicted of driving under the influence of alcohol while off-duty. He communicated to the deputy chief that his commercial driver's license would be suspended for four months. The deputy chief offered the accommodation that the firefighter could keep his job if he agreed not to work overtime or participate in shift trades. When the firefighter resisted the offer, the deputy chief ordered the firefighter to submit to the two restrictions. Because the firefighter refused, the chief started processing a notice of non-disciplinary termination. The Department of Motor Vehicles later notified the city that the firefighter had his commercial license suspended for one year, not four months. Local 2734 advocated that the city had to negotiate such an overtime restriction.

The firefighter appealed the notice of non-disciplinary discharge to a city hearing officer who reinstated the firefighter, as it was not clear that a commercial license was a requirement for the job. The issue was whether the city unilaterally implemented a change in overtime policy, and whether the chief issued the notice of proposed non-disciplinary discharge because the firefighter sought assistance. It was found that the city did unilaterally change the overtime policy and the chief would have taken the adverse action but for the exercise of protected activity.

San Francisco Regional Office — Final Decisions

International Federation of Professional and Technical Employees, Loc. 21, AFL-CIO v. County of Contra Costa, Case No. SF-CE-762-M. ALJ Ginoza. (Issued 5-25-12; final 6-21-12, HO-U-1042-M.) The county sheriff required staff members to accept on-call duty for activation of its community warning system. Due to budget reductions and a staff of only two, the one-week, stand-by duty assignment occurred twice each month. To lower the frequency of that duty for two employees, the department merged an on-call duty rotation of four employees from another subdivision, which provided support for the county's natural disaster incident command center, thereby requiring the pool to handle both alert duty functions.

Both duty rotations included a salary differential. The union asserted that the community-warning duty was more difficult than the command-center duty. The proposed pool rotation also had the effect of lowering the frequency of the command center on-call duty, resulting in a less-frequent salary differential. After denying

negotiability, the county agreed to a meet-and-confer session. It rejected the union's proposals either to assign the community-alert function to other staff or increase wages to compensate for the extra duty and decreased frequency of the differential. Despite asserting that the wage proposal was appropriate for contemporaneous contract negotiations, the county proceeded to implement at the close of the meeting. Before the meeting, a manager approached an incident command center employee and obtained his consent to cover two days of one shift.

It was held that the county violated the statute by unilaterally implementing the new duty rotation before completion of good faith negotiations, but that it did not engage in direct dealing with the employee. The one-session negotiation failed to result in a bona fide impasse due to the lack of give-and-take and the fact that the county implemented before the union could take its compensation proposal to the contract bargaining table. No bypassing occurred because the manager did not directly negotiate an assignment amounting to implementation of a new policy or waiver of an existing policy.

Teamsters, Loc. 856 v. Town of Atherton, Case No. SF-CE-860-M. Hearing Officer Clement. (Issued 6-22-12; final 7-18-12, HO-U-1048-M.) The town announced its decision to subcontract bargaining unit work. The union requested information regarding the town's 2011-12 projected revenue, as well as information regarding the proposals that had been submitted, including the names of the proposers. The town provided some of the requested information, but withheld the identity of the proposers, arguing that the information was excluded from disclosure under the Public Records Act, citing the California Supreme Court's decision *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065. No violation was found as to the alleged failure to provide the projected revenue. The union failed to prove, by a preponderance of the evidence, that the town's response to its request for revenue projections was inadequate.

A violation was found as to the failure to provide the names of the subcontractors submitting proposals for bargaining unit work. Exemptions from disclosure under the California Public Records Act cannot be used to deny an information request that is otherwise required under the Meyers-Milias-Brown Act. The town failed to establish a "legitimate and substantial" interest in preserving the confidentiality of the information requested, as required under *Detroit Edison Co. v. National Labor Relations Board* (1979) 440 U.S. 301.

SEIU Loc. 1021 v. City of Oakland, Case No. SF-CE-815-M, ALJ Cloughesy. (Issued 6-29-12; final 7-27-12, HO-U-1051-M.) The city changed from issuing negotiable paychecks or direct deposit to paycards or direct deposit. The city refused to meet and confer over the decision. The change did not result in a "significant and adverse" effect on members' working conditions. (*City of Alhambra* (2010) PERB Dec. No. 2139-M.) The complaint was dismissed.

King City Joint Union High School Teachers Assn. v. South Monterey County Joint Union High School Dist., Case No. SF-CE-2907-E, ALJ Cloughesy. (Issued 7-11-12; final 8-7-12, HO-U-1054-E.) Counselors are part of the certificated bargaining unit and have performed counseling duties for at least 10 years. The district then

adopted job specifications for a new “coordinator” classification, which encompassed the duties of both the counselor and the assistant principal. The district then hired two coordinators for the next school year. Later that school year, the district laid off all of the counselors and two assistant principals. The ALJ found that the district violated EERA by transferring bargaining unit work out of the bargaining unit without meeting and conferring in good faith with the association, as the counseling duties ceased to be performed by bargaining unit employees.

California School Employees Assn. v. Foothill-De Anza Community College Dist., case No. SF-CE-2874-E. ALJ Ginoza. (Issued 7-25-12; final 8-21-12, HO-U-1056-E.) The district had employed three maintenance coordinators, who were lead workers with some responsibility for performing crafts work but no formal supervisory duties. After a failed attempt to process a unit modification to remove the coordinators from the unit based on supervisory status, the district announced it would hire a maintenance supervisor when the first maintenance coordinator separated from employment. When one coordinator retired, the district hired a supervisor while keeping the coordinator position vacant. The union alleged a unilateral change based on the “wholesale” transfer of coordinator duties to the supervisor position. The evidence established that the supervisor predominantly performed supervisory functions and performed no crafts work. No violation was found due to the lack of evidence of an actual transfer of duties. The one area of overlapping duties was the assignment of work, but this was not a duty that had been performed exclusively by bargaining unit employees, and thus the overlapping duties defense of *Eureka City School Dist.* (1985) PERB Dec. No. 481 applied.

SEIU Loc. 1021 v. Marin County Superior Court, Case No. SF-CE-21-C. ALJ Wesley (Issued 7-31-12; final 8-28-12, HO-U-1059-C.) The court notified the union of its decision to implement a court reporter pooling plan three business days before its implementation. The union demanded to bargain the impacts of the decision and asked the court to halt implementation until the parties could meet and confer. The court implemented the pooling plan as scheduled and before effects bargaining could begin. A violation was found. The court did not satisfy the criteria that allow for implementation of a nonnegotiable decision before concluding effects bargaining.

Los Angeles Regional Office — Final Decisions

Santa Ana Unified School Dist. and Santa Ana School Police Officers Assn. and California School Employees Assn. & its Chap. 41, Case No. LA-SV-169-E. Hearing Officer Wu. (Issued 5-10-12; final 6-15-12, HO-R-180-E.) The severance petition seeking to sever a unit consisting of school police officers from the existing wall-to-wall classified unit is granted. The officers share a community of interest separate and distinct from the remaining employees in the unit. They share many of the same factors as the security officers in previous decisions where PERB found the establishment of a separate unit was warranted. Moreover, there was evidence that several of the school police officers’ issues have been ignored by the exclusive representative, and some internal dissension existed between the officers and the rest of the unit.

CSEA & its Chap. 557 v. Santee School Dist., Case No. LA-CE-5541-E. ALJ Cloughesy. (Issued 5-11-12; final 6-15-12, HO-U-1041-E.) The principal of PRIDE Academy of the Santee School District changed the duties of the instructional media technician (IMT) by having her check out approximately 300 fiction books to a book cart that was to be taken to classrooms and rotated every two months instead of having a classroom of students come to the library to check in and out books for a half-hour period every week. CSEA claimed the pilot program removed work from the classified unit to the certificated unit without prior notice and the opportunity to negotiate the decision or its effects.

No violation was found. In this case, the placing of books on book carts primarily impacted who the IMT checked books out to and how long they were checked out. The IMT continued to maintain the library collection and maintain records on those books, even though she would only see the books every other month, instead of seeing a number of different books on a weekly basis. CSEA, however, claims that the IMT was eliminated from helping students find books within the students' appropriate reading level. However, the IMT was not precluded from helping students who came into the library other than those who had been coming into the library during the previous half-hour allotments. While the IMT's duties in regards to students may now be more isolated and sporadic, they were not eliminated. Therefore, it was not found that the district transferred bargaining unit work into another bargaining unit, and a bargaining obligation was not be triggered. The complaint was dismissed.

Great Lakes Federation of Teachers, Loc. 504, IFT-AFT, AFL-CIO v. San Diego Community College Dist., Case No. LA-CE-5518-E. ALJ Wesley (Issued 5-25-12; final 6-27-12, HO-U-1043-E.) The district obtained a contract to provide educational services to military personnel at the Great Lakes Naval Base after the prior employer's contract expired. After the district hired a majority of the predecessor's employees, the union demanded that the district recognize the union. The district requested the union demonstrate that it was the exclusive representative of the bargaining unit. No violation was found because the union did not establish that it was the exclusive representative of the predecessor's employees, and the unit was no longer appropriate.

Graham v. AFSCME Loc. 3299, Case No. LA-CO-506-H. ALJ Allen. (Issued 6-11-12; final 7-9-12, HO-U-1046-H.) No denial of fair representation was found where, contrary to the complaint, the union did appeal the grievance to arbitration but, upon review, decided not to proceed. The evidence showed a communication failure but not arbitrary, discriminatory, or bad faith conduct.

Commerce City Employees Assn. v. City of Commerce, Case No. LA-CE-609-M. ALJ Allen. (Issued 6-13-12; final 7-10-12, HO-U-1047-M.) No unilateral change was found where changes in lifeguard duties to include fitness room duties were reasonably comprehended within pre-existing duties.

Copple v. California School Employees Assn., Chap. 469, Case number LA-CO-1462-E. ALJ Cu. (Issued 6-25-12; final 7-24-12, HO-U-1049-E.) The charging party

failed to appear at a formal hearing after being notified verbally and in writing. No notice or explanation was given; nor was there a response to telephonic and written requests. The case was dismissed for failure to prosecute.

Riverside Sheriffs Assn. v. County of Riverside, Case No. LA-CE-594-M. ALJ Cu. (Issued 6-28-12; final 7-24-12, HO-U-1050-M.) The association alleged that the county (1) engaged in surface bargaining; (2) unlawfully imposed terms post-impasse; and (3) unilaterally changed employee schedules. First, no violation was found concerning surface bargaining. The county met 16 times over more than 12 months and demonstrated an interest reaching agreement where possible. Neither party was required to retreat from their mutually exclusive positions on economic issues. Second, a violation was found were the county unilaterally imposed a limitation or waiver of the union's statutory right to bargain or file grievances. And third, a violation was also found concerning the changed schedules. Schedules are within the scope of representation under the *City of Alhambra* test ([2010] PERB Dec. No. 2139-M). It was undisputed that the county changed schedules without notice to the union. The case was not moot because subsequent agreement did not clearly decide the legality of the county's prior conduct.

AFSCME Loc. 3299 v. Regents of the University of California, Case No. LA-CE-1095-H. Hearing Officer Racho. (Issued 6-29-12; final 7-27-12, HO-U-1053-H.) After layoffs had occurred in AFSCME's bargaining unit, amid rumors that the university was simultaneously contracting out unit work, the union requested information from U.C. regarding: (1) whether the employer had contracted out custodial work and any related requests for proposals; (2) the budget for the Facilities Management department; (3) a list of names and order of seniority of unit employees subject to layoff; (4) a current organizational chart of management; and (5) management employee compensation. The university repeatedly promised that it was working on the request, but failed to produce any information for two-and-a-half years. At that time, the university provided the management organizational chart and seniority list of employees in the unit that suffered layoffs. It was found that U.C.'s partial response to the information request was unreasonably dilatory and thus violated the duty to bargain in good faith. It was also found that U.C's failure to provide any response to the balance of the union's request violated an employer's duty to bargain in good faith. But the university is not now required to furnish the rest of the information sought; the union did not establish that information regarding non-unit employees was relevant to its representational duties, and U.C. demonstrated that some information requested did not exist. The university was ordered to cease and desist from violating the duty to bargain in good faith.

Inland Empire Utilities Dist. Supervisors Assn. v. Inland Empire Utilities Agency, Case No. LA-CE-719-M, ALJ Cloughesy. (Issued 6-29-2012; final 7-27-12, HO-U-1052-M) The agency previously assigned its chief operator to on-call duty on a daily basis for working at the desalter. The chief operator received one hour of on-call compensation pursuant to the MOU. The permit for operating the desalter was amended on January 13, 2011, and no longer required the chief operator to be responsible for monitoring the desalter for non-emergencies. The agency then ceased assigning the chief to on-call duty as of March 19, 2011. No violation was

found as the agency's decision fell within the four corners of the existing MOU.

Poway School Employees Assn. v. Poway Unified School Dist., Case No. LA-CE-5547-E. ALJ Cu. (Issued 7-13-12; final 8-8-12, HO-U-1055-E.) The association alleged that the district enacted an unlawful unilateral change by passing a resolution to reduce unit members' work year. The district contended that reductions were authorized under the expired CBA of the prior union. The terms of the prior CBA did not apply to the new union because it was not a party to the agreement. In addition, the management rights clause in the expired CBA was not part of the status quo that existed post-contract. It is found that terms and conditions of employment, such as wages, hours, and benefits, must remain at the status quo post-contract, but contract-based management rights clauses do not continue. Moreover, while modifications to working conditions that are consistent with an established pattern of change may be part of a "dynamic status quo," changes that are based on the district's discretion are not. Later rescission of the resolution does not negate a finding of unilateral change, but it does obviate the need for a rescission of the unlawful policy.

AFSCME Loc. 127 v. City of San Diego, Case No. LA-CE-673-M. ALJ Allen. (Issued 7-26-12; final 8-21-12, HO-U-1057-M.) No retaliation was found where the city proved that probationary failure would have occurred regardless of protected activity.

Sacramento Regional Office — Decisions Not Final

Stationary Engineers Loc. 39, International Union of Operating Engineers, AFL-CIO v. City of Sacramento, Case SA-CE-738-M. ALJ Bologna. (Issued 5-10-12; exceptions filed 5-29-12.) Local 39 represents the city's general supervisory bargaining unit, which included supervising dispatchers. The Sacramento Police Officers Association represents the city police department unit, which includes dispatchers I/II and III. The Local 39 contract with the city includes a layoff article and regression ladders for job class series through which employees may downgrade/bump. On April 28, 2011, the police chief sent an email to all police department staff announcing that to reduce the department's budget, the city would cut 167 positions, including all seven supervising dispatchers. Under the contract, supervising dispatchers would bump seven dispatcher IIIs, who would then bump seven dispatcher IIs. Local 39 representatives saw and discussed the email with supervising dispatchers in May. The city council approved the cuts in June. On June 23, Local 39 demanded to meet and confer with the city over the decision and impact of moving bargaining unit work out of its jurisdiction to SPOA. The parties met on June 29. No further meet and confer sessions or other meetings were held because Local 39 filed this charge that day.

No violation was found. The city's decision was a non-negotiable layoff of the supervising dispatchers rather than a bargainable transfer of work from the supervising dispatchers to the dispatcher IIIs. Although there are two separate job specifications, it is impossible to segregate the job duties for each class given the history of dispatcher IIIs promoting to supervising dispatcher and senior dispatcher

IIIs acting as shift supervisors in the absence of supervising dispatchers. Although the city did not provide formal written notice of its intent, Local 39 did not claim that it lacked actual notice of the layoff and reassignment of supervising dispatcher duties to dispatcher IIIs. Local 39 waited more than a month to demand to meet and confer with the city. The city promptly scheduled a meeting on one of the two days specified by the union and met within six days of the demand letter.

Under the totality of circumstances, the city did not breach its bargaining obligation to meet and confer over the effects of its layoff decision. Local 39's failure to request negotiations on the issue for over a month after learning of the layoff and reassignment of duties is waiver by inaction.

Stationary Engineers, Loc. 39, International Union of Operating Engineers, AFL-CIO v. City of Lincoln, Case No. SA-CE-756-M. ALJ Wesley (Issued 6-7-12; exceptions filed 6-27-12.) The union and city engaged in negotiations for a successor MOU. The union membership twice rejected a tentative agreement. Thereafter, the city declared impasse and imposed its last, bes,t and final offer. The bargaining teams reached a third tentative agreement, which the union membership ratified. During the city council meeting to consider the tentative agreement, several council members commented that it was a good effort but more work needed to be done. The council directed staff to continue to work with the union on an agreement that would be acceptable to both parties. No violation was found because the intent of the governing body can be conveyed in a manner other than a formal vote. Based on the council members' comments and direction to staff, the council clearly communicated that the tentative agreement was not acceptable.

SEIU Loc. 521 v. County of Fresno, Case SA-CE-673-M. ALJ Bologna. (Issued 6-22-12; exceptions filed 7-30-12.) Local 521 is the exclusive representative for county bargaining units 3, 4 and 36, and three other units. The 2004-2011 memoranda of understanding for the three units contain a full understanding clause and reopener language on five non-economic items. Salaries for the job classes in each unit are set forth, specifying the bottom step of the salary range and annual salary adjustments from 2004-10. The MOUs do not include any provisions on separations, layoffs, or furloughs, and do not mention local personnel rules.

In March 1993, the county board of supervisors added section 12060 to County Personnel Rule 12, implementing a mandatory furlough program (208 hours over up to 26 pay periods) for unrepresented and management employees. In August 1993, the mandatory furlough program was adopted for 15 of 25 county bargaining units (including two SEIU units); furloughs were reduced to 80 hours. Rule 12 was not applied to 10 units where the exclusive representative agreed to temporary office closures (TOC) or bargaining was ongoing. The 1993 Side Letter Agreements for units 3 (SEIU) and 36 required 40 hours of unpaid time off and closure of county offices on specified days. In 1997, SEIU and the county agreed to an MOU requiring unpaid time off in fiscal years 1997-98 through 2000-01 with 5 days of office closure in units 3, 4, and 36.

In March 2009, the county proposed to modify Rule 12 to include units 3, 4 and 36, and asked SEIU to negotiate. SEIU responded that the MOUs were closed and the

contract language prevented furloughs. The county replied that the MOU allowed it to act after bargaining, and it would recommend that the board of supervisors modify Rule 12 if the union did not request negotiations. SEIU agreed to meet and confer. In June 2009, the county and SEIU executed an MOU addendum on mandatory furlough/TOC for seven units; the county agreed not to impose Rule 12 mandatory furlough on the units during FY 2009-10. Rule 12 was not amended.

In January 2010, the county proposed to modify Rule 12 to include the three units and requested SEIU to meet and confer. SEIU requested budget information. In March, the county provided preliminary budget information and requested to negotiate. The parties briefly met on May 7 without resolution. In May, the county provided more budget information and the 2010-11 budget to SEIU and proposed 13 days for meeting before taking an agenda item to the board of supervisors in June. After the agenda item was presented on June 4, SEIU informed the county that it would not meet. On June 15, the board of supervisors approved the modification of Rule 12 to include the 3 units. The county then informed SEIU that 40 hours of mandatory furlough for the three units would be invoked in 2010-11. On June 23, SEIU sent a TOC proposal for the units to the county and the parties began to bargain. On July 26, SEIU and the county executed MOU Addenda/TOC for the three units; the MOUs contained the same language and 40 hours unpaid time off as the June 2009 Addendum except for language that the county agreed not to impose mandatory furlough under Rule 12.

No violation was found. There was no contract repudiation because the three MOUs did not contain provisions on furloughs or mention local rules. The contract language (full understanding, reopener, compensation) did not cover mandatory furloughs because SEIU negotiated and executed TOC addenda in lieu of furloughs in 1993, 1997, and 2009; those addenda superceded any MOU provisions then in existence. There was no unilateral change or breach of the meet and confer obligation over the decision and/or effects of amending Rule 12 to include the three units. SEIU declined to negotiate until after the amendment to Rule 12 was approved by the board of supervisors. The parties then bargained and executed the MOU Addenda/TOC. SEIU's failure to engage in negotiations until after the local rule was changed was tantamount to waiver by inaction.

San Francisco Regional Office — Decisions Not Final

Park v. Inlandboatmen's Union of the Pacific, Case No. SF-CO-191-M. ALJ Ginoza. (Issued 5-10-12; exceptions filed 6-4-12.) A casual deckhand enlisted the union to represent him following his placement on the hiring hall's non-dispatch list by order of the transit district as a result of allegations that he was insubordinate to his ferry boat captain and made a lewd gesture to a fellow deckhand. The union represented the deckhand in a first-step grievance meeting but was disappointed in the deckhand's unrepentant attitude because it conflicted with its strategy for obtaining reinstatement. The deckhand had a history of dissident activity in the union and in his own case took steps to independently represent himself during the grievance process. Following his independent demand for discovery and an insulting email to

the employer in response to non-production, the union informed the deckhand it would cease processing his grievance, explaining that his negative post-discharge conduct would make it unlikely the union would prevail in arbitration. The union was found not to have breached its duty of fair representation because the union processed the grievance in a non-arbitrary, non-perfunctory manner and had a rational basis for believing the grievance lacked merit. Evidence was lacking that it ceased representation because of the deckhand's history of dissident activity.

Los Angeles Regional Office — Decisions Not Final

City of Lompoc v. Lompoc Police Officers Assn., Case No. LA-CO-100-M; *Lompoc Police Officers Assn. v. City of Lompoc*, Cases Nos. LA-CE-555-M, LA-CE-564-M, LA-CE-585-M. ALJ Allen. (Issued 5-9-12; exceptions filed 5-30-12.) An unlawful unilateral change was found where the parties bargained to impasse on a 5 percent salary reduction for a full year, and the city unilaterally implemented a 10.679 percent salary reduction for what was then the remainder of the year. Allegations of retaliation, threats, and surface bargaining were dismissed. Per Government Code section 3511, the make-whole remedy was not extended to peace officers.

San Bernardino County Public Attorneys Assn. v. County of San Bernardino (Office of the Public Defender), Case No. LA-CE-431-M. ALJ Allen. (Issued 5-17-12; exceptions filed 6-25-12.) Unlawful interference was found where the public defender refused to allow the deputy district attorney to represent the deputy public defender in an investigatory interview that was separable from review of case files containing client communications and attorney work product. Retaliation and the failure to provide requested information were found.

International Association of Machinists & Aerospace Workers, Local Lodge 1930, District 947 v. City of Long Beach, Case No. LA-CE-537-M. ALJ Allen. (Issued 6-1-12; exceptions filed 6-26-12.) An unlawful unilateral change was found where the city imposed furloughs without bargaining to impasse. The city did not show it had no alternative to furloughs.

Santa Monica College Faculty Assn. v. Santa Monica Community College Dist., Case No. LA-CE-5489-E. ALJ Wesley. (Issued 6-27-12; exceptions filed 7-17-12.) The district notified some part-time faculty that they had not completed a retirement election form. The association requested a list of affected employees. The district provided the list two days later. Two months later, the association requested an updated list. The district refused claiming attorney-client and work-product privileges, and employee privacy rights. A violation was found because the information pertained to a mandatory subject of bargaining. The district waived the privileges by providing a preliminary list and failed to demonstrate infringement on privacy rights.

Estes v. Regents of the University of California (Irvine), Case No. LA-CE-1120-H. ALJ Cu. (Issued 7-31-12; exceptions filed 8-27-12.) The charging party alleged that the university suspended and terminated him in retaliation for participation in multiple

protected activities, including requests for meetings with his union, filing grievances, and trying to enforce contract rights. No violation was found. His notice of suspension included direct reference to an incident that U.C. admitted was protected activity. This is direct evidence of nexus sufficient to establish a prima facie case for retaliation. Nevertheless, the university successfully rebutted the prima facie case by demonstrating that it had concerns with the employee's conduct long before and long after his protected activities. Because those concerns persisted independent from his protected conduct, it was concluded that protected activity was not the true cause of his suspension or termination.

Report of the Office of the General Counsel

Injunctive Relief Cases

Three requests for injunctive relief were filed during the period May 1 through July 31, 2012. Two were denied and one was withdrawn.

Requests denied

Jones v. County of Santa Clara (IR Request No. 620, Case No. SF-CE-646-M.) On May 8, 2012, Jones filed a renewed request for injunctive relief, claiming that he was 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. The board denied the IR request on May 14, 2012.

Liu v. Trustees of the California State University (East Bay) (IR Request No. 621, Case SF-CE-995-H.) On May 30, 2012, Liu filed a request for injunctive relief alleging that injunctive relief — requiring the university to reverse its decision to deny him tenure as a professor at CSU East Bay — would be just and proper, pending completion of binding arbitration on several claims that the university retaliated against Liu in violation of the applicable CBA and HEERA for filing grievances relating to a disciplinary suspension, denial of tenure, and termination of his employment. The board denied the request on June 5, 2012.

Request withdrawn

Public Employees Union Loc. 1 v. City of Yuba City (IR Request No. 619, Case No. SA-CE-789-M.) On May 1, 2012, Local 1 filed a request for injunctive relief alleging that the city improperly rejected a decertification petition filed by PEU No. 1 based on a premature extension of its MOU with the incumbent union, which prevented the opening of any "window period" until sometime in 2013 at the earliest. The request was withdrawn on May 2, 2012, and the matter was resolved during a pre-complaint settlement conference.

Litigation Activity

Six new litigation cases were opened between May 1 and July 31, 2012.

Grace v. Public Employment Relations Board; Beaumont Teachers Assn./CTA & Beaumont Unified School Dist., Court of Appeal, Fourth Appellate District, Division Two, Case No. E056338, PERB Case Nos. LA-CO-1410-E and LA-CO-1411-E. On May 29, 2012, Grace filed a petition for writ of mandate in the Court of Appeal, alleging that the board erred in its Decision Nos. 2259 and 2260, by affirming a board agent's dismissal of Grace's charges, in which she alleged violations of the union's duty of fair representation for failing to represent her in connection with her non-reelection as a probationary employee. On July 3, 2012, PERB filed a motion to dismiss the petition on the grounds that it should have been filed in superior court pursuant to *International Assn. of Fire Fighters Loc. 188, AFL-CIO v. Public Employment Relations Board* (2011) 51 Cal.4th 259. The motion to dismiss was unopposed and remains pending.

City of San Diego v. Public Employment Relations Board; San Diego Municipal Employees Assn., Court of Appeal, Fourth Appellate District, Division One, Case No. D062090, PERB Case No. LA-CE-746-M. On June 7, 2012, the city filed a petition for writ of mandate and an application for stay of PERB's administrative proceedings, alleging that PERB has no jurisdiction of the underlying unfair practice charge because it involves a citizens' initiative seeking to amend the San Diego city charter to effect pension reform. On June 14, 2012, after hearing oral argument in a related case, No. D061724, the Court of Appeal summarily denied the petition.

Glendale City Employees Assn. v. Public Employment Relations Board; City of Glendale, Los Angeles Superior Court, Case No. BS137172; PERB Case No. LA-CE-672-M. On June 18, 2012, Glendale City Employees Association filed a petition for writ of mandate alleging that the board erred in its Decision No. 2251, by affirming a board agent's dismissal of the association's charge. In its charge, the association alleged per se violations of the city's duty to meet and confer in good faith and surface bargaining during negotiations for a successor MOU, which included proposals to change pension contributions.

City of San Diego v. Public Employment Relations Board; San Diego Municipal Employees Assn. et al., California Supreme Court, Case No. S203478, PERB Case No. LA-CE-746-M. On June 22, 2012, real parties in interest Boling, Zane, and Williams (the Boling Group) filed a petition for review of the decision of the Court of Appeal for the Fourth Appellate District, Division One, in its Case No. D062090, and requested an immediate stay of PERB's administrative proceedings as to the underlying unfair practice charge. The petition for review and stay application were denied by the California Supreme Court on July 11, 2012.

City of San Diego v. Public Employment Relations Board; San Diego Municipal Employees Assn. et al., California Supreme Court, Case No. S203952, PERB Case No. LA-CE-746-M. On July 12, 2012, the city filed a petition for review, seeking essentially the same relief sought by the Boling Group in California Supreme Court Case No. S203478. The petition for review and application for stay were denied by the Supreme Court on July 14, 2012.

San Diego Municipal Employees Assn. v. Superior Court of San Diego County; City of San Diego et al., California Supreme Court, Case No. S204306, PERB Case No. LA-CE-746-M. On July 27, 2012, the city filed a petition for review of the decision of the Court of Appeal for the Fourth Appellate District, Division One, in which the court granted a petition for writ of mandate filed by the association, seeking to vacate and reverse an order of the San Diego superior court staying PERB's administrative proceedings as to the underlying unfair practice charge. (*San Diego Municipal Employees Assn. v. Super. Ct. (City of San Diego)* (2012) 206 Cal.App.4th 1447.) The petition for review is pending.

Staff Changes

In July, Ronald Pearson was hired as a senior regional attorney in the Sacramento Regional Office. Pearson comes to PERB with over six years of experience as a labor relations counsel in the Department of Personnel Administration (now the California Department of Human Resources or "CalHR").