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CPER Journal Online

Letter From the Editor



Dear *CPER* Readers,

The graph is startling.... California public worker employment has plummeted over the past four years as falling revenues have forced public service cuts. But that's not all, conclude labor economist Sylvia Allegretto and public policy scholar Luke Reidenbach in this issue of *CPER*. Read how public sector belt tightening is squeezing private sector jobs as well.

With so much workforce disruption, what do you do when reservists return from the front looking for their old jobs back? Do they get the promotions that were available while they were gone? Do they get laid off? Author Christopher Miller explains the ups and downs of the “escalator principle” of the Uniformed Services Employment and Reemployment Rights Act.

This issue of the *Journal* also chronicles conflicts and victories in the education reform movement — pulling the parent trigger, using student test data in teacher evaluations, and bargaining over “Race to the Top” applications.

And, of course, retirement benefits are also prominent in this issue. Can CalPERS file a lawsuit against a city that has already petitioned for bankruptcy? What language gives employees a vested right in retiree health benefits? Will Los Angeles city employee unions acquiesce in a second pension tier for new employees? Will UC unions agree to pension changes? Some of these questions are decided, at least temporarily; some are pending.

As usual, the law is changing constantly. There are new provisions and regulations under FEHA. And the courts are still wrestling with standards of employer conduct in employment cases. Whenever a party wants to push — like outsourcing half the workforce or refusing to turn over officer records in a discipline hearing — new rules arise that you need to know.

So, enjoy catching up with your reading as you celebrate your holidays.

Katherine J. Thomson, Editor, *CPER*

CPER Journal Online

Shrunken Public Sector Stunts California's Recovery



Sylvia A. Allegretto and Luke Reidenbach

Since the onset of the Great Recession five years ago, we have been experiencing the fallout from the bursting of an \$8 trillion housing bubble, the collapse of the financial sector, and the loss of 8.7 million jobs in the United States. During the crisis, many economists and policy analysts called for aggressive federal fiscal policy — a massive Keynesian-style stimulus on the scale of a new New Deal. To stop the hemorrhaging of jobs and prevent further economic deterioration, Keynesian macroeconomics posits that the government should offset decreases in private consumption and investment with an increase in public spending.

The \$787 billion American Recovery and Reinvestment Act (ARRA), passed in 2009, was not large enough to pull us quickly or entirely from the grips of the worst recession since the Great Depression. Yet it did help. Estimates from a range of sources indicate that absent ARRA, the economy would have had far fewer jobs and weaker growth. The Congressional Budget Office estimated that ARRA created from 500,000 to 2.9 million jobs as of June 2011, while IHS Global and Macroeconomic Advisors estimated between 2.4 and 2.6 million more jobs.^[1]

In 2010, political and policy discourse shifted to the deficit and debt. Even President Obama took a hawkish stance in 2010 when he froze the pay of federal workers for two years, a policy move that played into the notion that the deficit was the central economic problem, not lack of aggregate demand due to the recession. ^[2] As the economy remained weak, many economists advised another round of fiscal stimulus, especially to struggling state governments, but the deficit hawks won the day.

Not only was Keynesianism pushed aside, but also austerity measures were implemented by choice at the federal level, and because of balanced budget

requirements, at the state level. As a result, from 2009 through 2011, the stimulus of ARRA *and* the anti-stimulus of austerity were conflicting policies. In California, it is clear which policy won out.

Since the state budget experienced the largest shortfalls on record, and without the option of deficit spending, the result was significant cuts to much needed programs. With no possibility of passing new legislation to increase state revenues, California enacted program cutbacks to many areas — health care, public safety, education, child care, elder care, and care for the disabled —which resulted in substantial layoffs of the public sector workforce, including significant numbers of teachers.[3]

Enough time has now passed to assess some outcomes of these austerity policies. Indeed, new research has documented the harmful effects that austerity has had on the U.S. economy. An Economic Policy Institute analysis estimated that without state and local austerity in the U.S., there would be 2.3 million more jobs today — with half of them in the private sector.[4]

This article looks at how measures of austerity have affected the economic recovery in California. It is not our intent to debate the merits of the state's reaction to the recession and the state's budget decisions, but to document and assess the outcomes of the policies on jobs and economic growth.

Highlights include:

- The housing bust in California was huge. Average home prices around the country declined by 24 percent from peak to trough, while the decline in California cities was 45 percent.
- State budget cuts have weakened the U.S. recovery as decreases in government outlays shaved off up to a percentage point in quarterly economic growth.
- Surprisingly, private sector job growth in California, at this point into recovery, is better than it was following the 2001 and 1990 recessions. However, the huge cuts in the non-federal government workforce have severely mitigated overall employment growth.
- It is estimated that without the state budget cuts, reductions to public sector employment, and the resultant ripple effects into the broader economy, California would have over half-a-million more jobs today — with half of them being in the private sector.
- In sum, this brief suggests that austerity pursuits at a time of high unemployment and negative or low growth only lead to a more weakened economy and a delay in economic recovery.

California's Nightmare

The precursor to the Great Recession was the bursting of the housing bubble. California's bubble was one of the biggest. As cited above, average home prices around the country declined by 24 percent, while the decline in California cities was 45 percent, according to Moody's Investor Services analysis of housing price data from the National Association of Realtors. The hardest hit cities, such as Stockton,

Riverside, and Modesto, experienced 60 percent declines, on average.^[5] State revenues declined as workers lost their jobs, consumer spending fell, business activity waned, and, in turn, tax receipts fell. As state revenue dropped, the demand for safety-net spending increased — which is expected during times of recession. California implemented deep cuts, which in turn added to already stressed local budgets. Estimated 2012-13 state spending is \$11.6 billion below the 2007-08 level, a sizable decline (-11.3 percent).

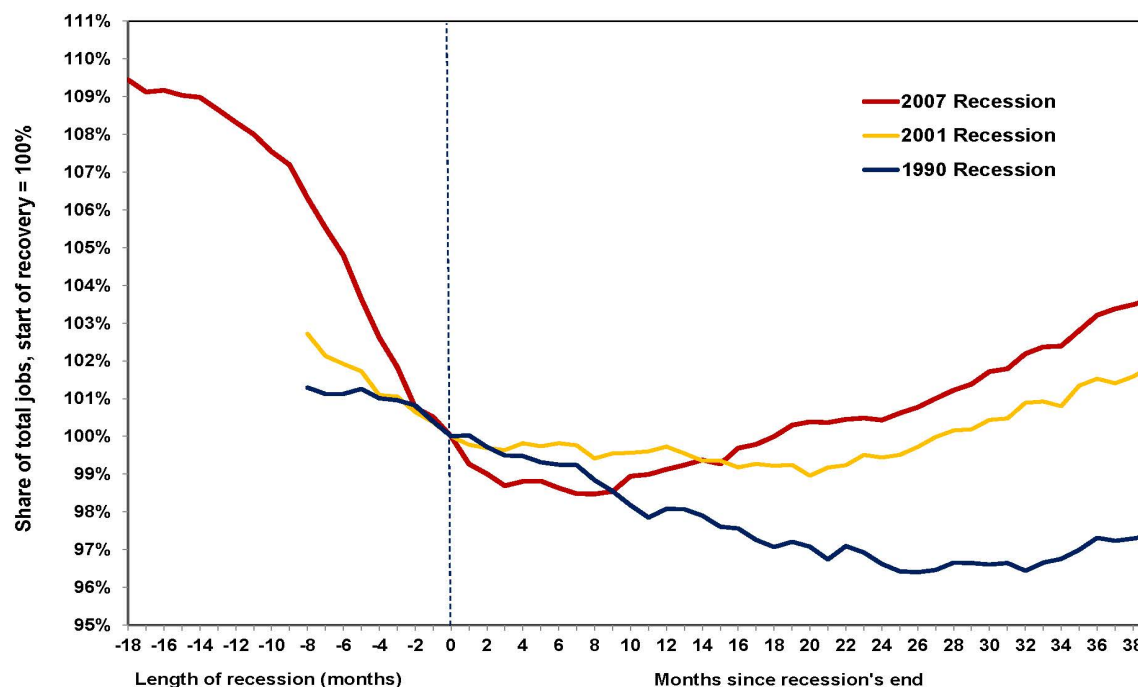
The true size of the budget cuts is actually understated because it does not take into account state spending trends expected prior to the Great Recession. In 2007, the Legislative Analyst's Office projected that 2012 General Fund spending would be \$135.6 billion, based on the economic and demographic trends at the time. Instead, this year's budget agreement put state spending at just \$91.3 billion, a difference of \$44.2 billion. This gap, which is more than what we currently spend on K-12 education, represents a massive decline relative to the underlying baseline trend.^[6]

It isn't just Sacramento's economy that is affected. Much of California's state budget flows to local communities and individuals. According to the California Budget Project, nearly three-quarters of state spending goes directly to local communities and individuals, meaning that these cuts have put tremendous strain across the entire state as local budgets were hit hard.^[7]

Jobs: The Story of Two Sectors

Officially the recession lasted 18 months (December 2007-June 2009). During that time, the U.S. lost 7.5 million jobs (a drop of 5.4 percent), and 1.1 million of those jobs lost were in California (representing a 7.3 percent decline of jobs in the state). Since the end of that period, California's jobs picture has become the story of two sectors: a slowly strengthening private sector and a perpetually weak public sector. As the labor market gradually recovered, job losses in the public sector mitigated gains in the private sector. Two figures contextualize the dynamics of the two sectors in California.

First, **Chart 1**, below, illustrates private sector employment growth for the Great Recession (red line) relative to the previous two recessions that occurred in 2001 (yellow line) and 1990 (blue line).^[8] The first thing to notice is the severe and lengthy decline of jobs in the private sector associated with the Great Recession — much more so than the previous two recessions. Though the recession officially ended in June 2009 (the onset of recovery is represented by the dotted line), California's private sector continued to shed jobs for an additional eight months — bottoming out at just over 1.3 million private sector jobs, an unprecedented 10.4 percent decline. In other words, one of every ten private sector jobs simply disappeared. Private sector job growth did not turn positive until nine months into recovery. Since then, private sector job growth has been outpacing that of the previous two recoveries at this stage.

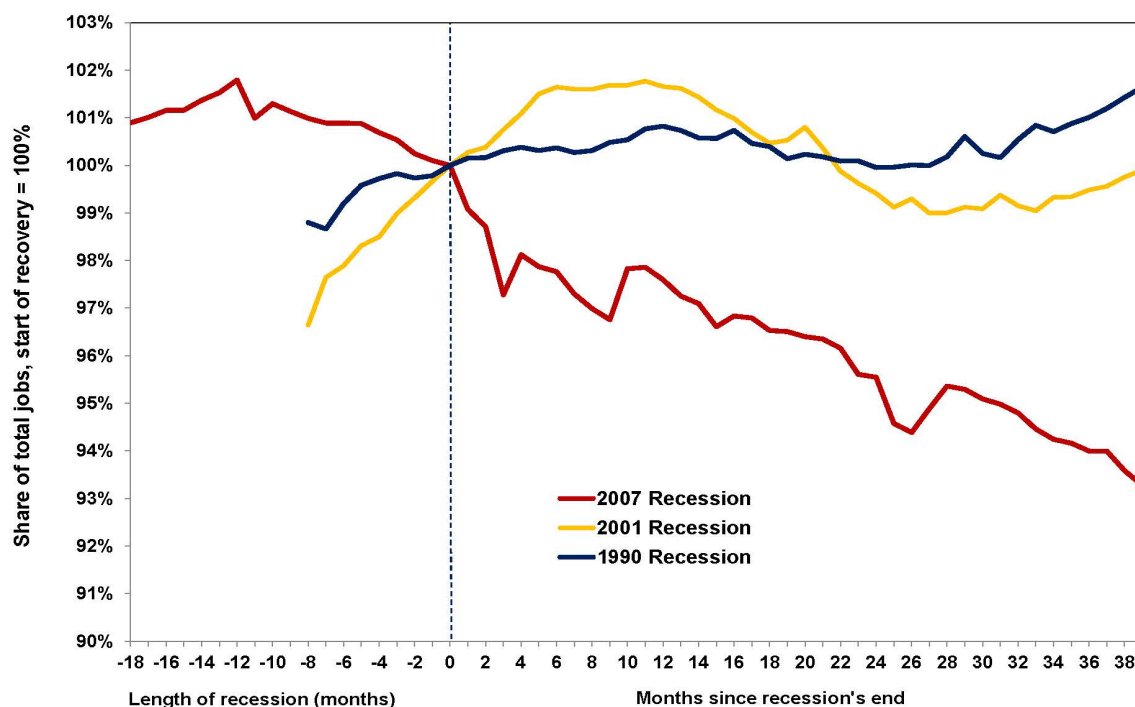
Chart 1 California's private-sector job growth over the last three recessions

Source: Authors' analysis of U.S. Bureau of Labor Statistics, CES data.

But with more than two years of consecutive month-to-month private sector growth, why is the labor market still so weak and unemployment so high? First, job losses in the 2007 recession were very deep and it will take longer to recoup them — this is clearly visible in Chart 1. Employment in California is still 842,000 jobs short of what it was prior to the recession. Second, population and the number of workers who need jobs both increased over the past five years. If population growth is factored in, California's labor market is unlikely to reach pre-recession strength until sometime between 2018 and 2023.^[9]

Moreover, job growth performance was stronger this time only compared to weak prior recoveries. The previous two recessions were hampered by 'jobless recoveries' (an expanding economy with continued job losses) in the U.S. and more severely in the Golden State. As shown in Chart 1, it was not until 32 and 20 months into recovery that private sector job growth resumed following the 1990 and 2001 recessions, respectively. Job growth in the previous two recessions was late coming and quite tepid.

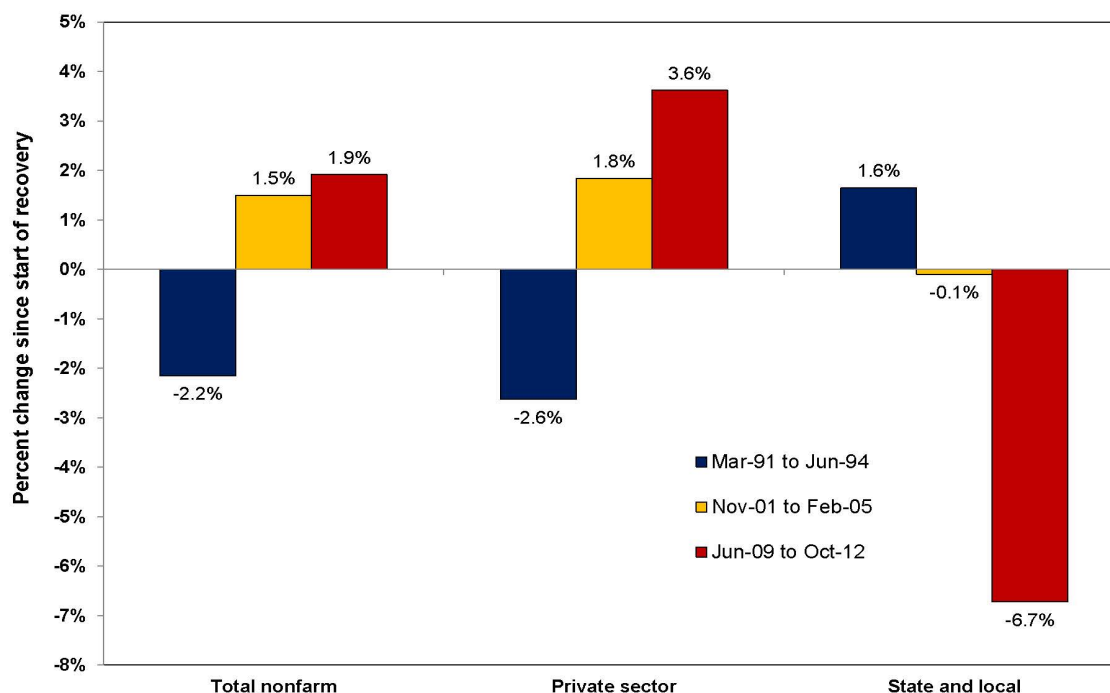
Another significant factor dampening employment growth has been the severe decline in government jobs at the state and local (S&L) level, including education, in California. **Chart 2**, below, illustrates the trajectory of public sector jobs for the last three downturns and recoveries in the state. Public sector jobs at the local level (which account for the lion's share of all government jobs^[10]) are currently down 359,000 in the U.S. compared to prior to the downturn. Remarkably, 45 percent of those losses have been California.

Chart 2 California's state and local government job growth for three recessions

Source: Authors' analysis of U.S. Bureau of Labor Statistics, CES data.

As Chart 2 shows, public sector job losses in the current recovery are significantly more severe than they were for the two previous periods of economic recovery. This sector is down 6.7 percent since the beginning of the recovery (right side of dotted line). But, if losses that occurred during the recession are added (left side of dotted line), the sector is down 7.5 percent. This was not the case in the two previous recoveries when public sector growth was increasing slightly this far into recovery.

Chart 3, below, sums California's employment growth by sector (total, private, and S&L) 39 months into the recovery. In total, employment is up 1.9 percent, which is not far from the 1.5 percent increase to this point following the 2001 recession, and much more than the -2.2 percent associated with the early-1990s recovery. Significant differences become evident when the private sector is compared to the public sector. Gains in the private sector (3.6 percent) are far outstripping the last two recoveries, but these gains are diminished by the unusually large decline (6.7 percent) in the S&L workforce. These are the steepest losses in public sector employment on record for California. California now has as many employed non-federal public employees as it did in the spring of 2001, even though the state's population grew by at least 8.5 percent.^[11]

Chart 3 Change in California's employment 39 months into recovery, by sector

Source: Authors' analysis of U.S. Bureau of Labor Statistics, CES data.

Job declines have hit many sectors of government, but especially education, as funds for education were slashed by \$18 billion over the last four years.^[12] According to the Bureau of Labor Statistics, 49.5 percent of S&L job losses from 2008 through 2011 occurred in education in California.^[13] A second source of data from the Census Bureau's Survey of Public Employment corroborates these losses.^[14] According to the latter survey, there were 70,787 (-7.9 percent) fewer people working in K-12 schools in 2011 than in 2006 in California, including 38,703 fewer teachers. The side box has other examples of how cuts affect public services and employment.

Side Box: The Impact on Core Government Services

This article focuses primarily on the immediate economic impact of California's austerity measures. However, it is worth noting that these cuts have put tremendous strain on California's core public services such as education, public safety, and access to the judicial system.

The bulk of the public sector's duties are related to either education or keeping the public safe. Data from the U.S. Census Bureau's annual survey of the state and local government workforce show that education-related jobs represent by far the largest share of California's public workforce, making up 56.7 percent of public workers in 2011.^[15] Of the 1.2 million employees working in education, a little over half (51.8 percent) were instructors. The next-largest group of public workers is

employed in public safety, which includes firefighters, police officers, and other emergency responders. This group represented an additional 10.7 percent of the California public sector workforce in 2011.

Spending cuts have taken a toll on the ability of governments to do their jobs well. For example, spending on California's court system has been significantly reduced. Contra Costa County Superior Court announced in October 2012 that it will close six courtrooms in the poorest parts of the county, citing the loss of millions in state funding.[16] In the spring of 2012, Los Angeles County announced the closure of over 50 courtrooms.[17] In the case of education, class sizes have continued to grow as cuts to K-12 schools persist. Half of California's largest school districts now have 30 or more students per teacher in a K-3 grade class, compared to 20 students per teacher in 2008-09.[18] Teacher layoffs in California resulted in a rank of 50th in the nation with respect to the number of students per teacher.[19]

Public safety has felt the impact as well. In 2011, Sacramento cut \$12.2 million from its police department's budget, and, in response, the department laid off police officers and eliminated entire divisions of the police force, including narcotics, financial crimes, and undercover gang squads.[20] Elsewhere, Oakland's police department cut staffing levels of sworn officers from 830 in 2009 to 640 in 2012.[21]

Budget cuts have consequences for how public services are rendered. It may take years to fully realize all the implications.

Was California's Public Sector Bloated?

Was the public sector workforce bloated, a "bubble" that needed to be popped? Writing in the *Wall Street Journal*, Stephen Moore states: "Today in America there are nearly twice as many people working for the government (22.5 million) than in all of manufacturing (11.5 million). This is an almost exact reversal of the situation in 1960, when there were 15 million workers in manufacturing and 8.7 million collecting a paycheck from the government." [22] Moore also argues that this trend is driving state fiscal crises, especially in states such as California.

Such statistics are deeply misleading, as the comparison is simply not relevant. First, manufacturing employment has been declining as a share of the workforce and in raw numbers for over three decades. This decline has nothing to do with the size of the public sector workforce. Second, population growth alone accounts for the increase in demand for public sector workers. Historical data show that, as a share of the labor force or of the population, state and local government employment has remained stable for well over 30 years. Simply put, the size of the public sector — which serves all of California's residents — has been remarkably stable, making up anywhere between 6.8 percent and 7.9 percent of the population for decades. That share dropped 0.5 percentage points from 7.5 percent to 7.0 percent in 2011, and has likely declined further throughout 2012.[23] There just isn't a public sector bubble.[24]

The effects of budget cuts and job losses go beyond laid-off workers or residents now lacking access to public services. Public cuts in outlays and employment to the degree experienced in California seep into the private sector and the larger economy in several ways.

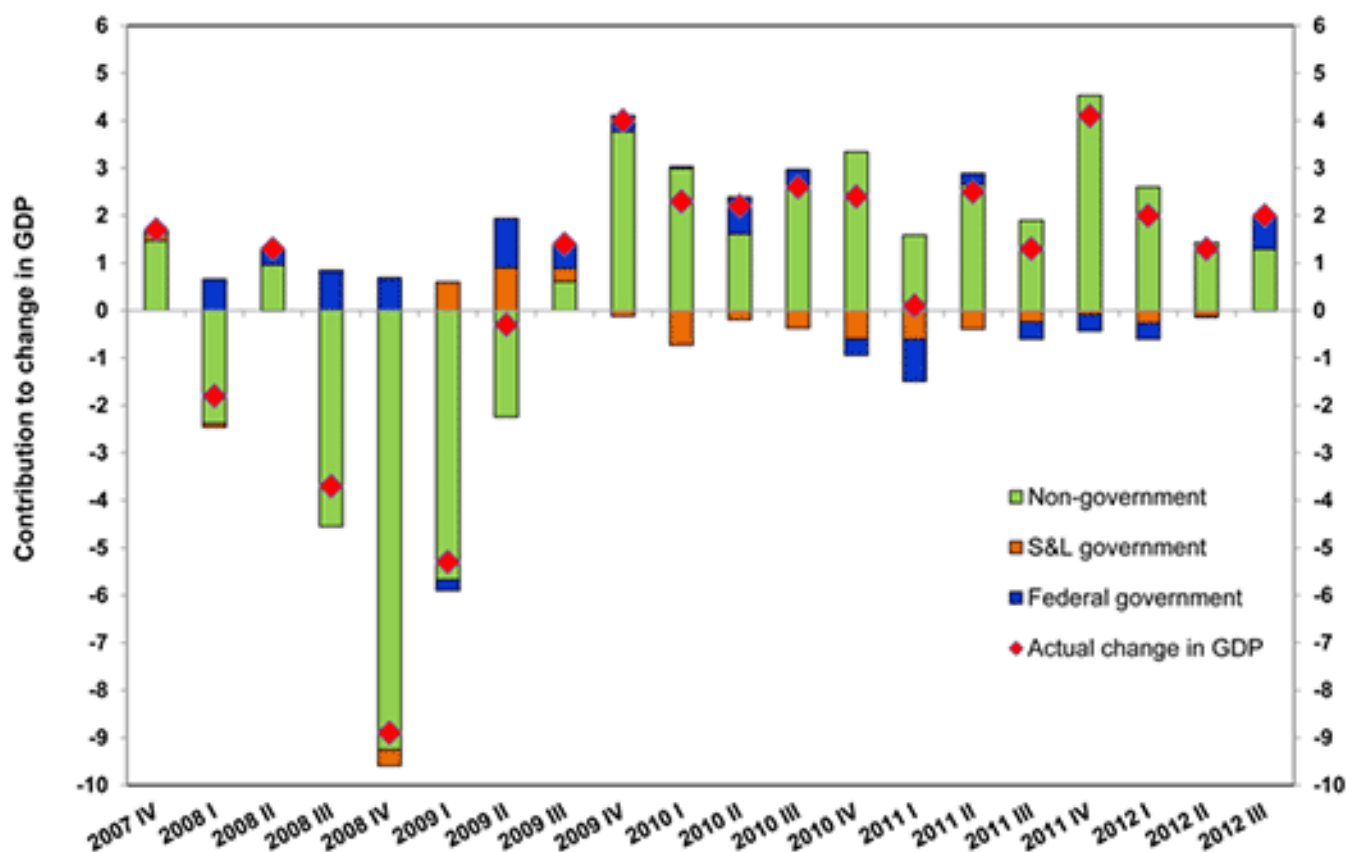
First, direct job losses do not take into account the growth of government employment that would have occurred without the downturn and cuts. Normally, as the population increases, the public workforce grows proportionally. However, during the period of steep public sector job losses, California's population continued to grow without a corresponding increase in the number of public workers. Since 2009, California's population has grown by around 1.6 percent, or 601,259.^[25] In June 2009, when the recession officially ended, there were 6.05 state and local workers for every 100 California residents. In the subsequent three years, that ratio has dropped to 5.55. If California had maintained the same ratio as it when the economic recovery *began*, it would have added 187,307 new S&L workers. This is a conservative estimate because when the economic recovery began in the summer of 2009, thousands of public sector jobs already had been lost. So, California public sector employment is down 338,200 jobs relative to the normal economic trend.

Second, economic impacts are often measured through “multipliers,” which are quantified estimates of how certain economic activities impact economic growth. This multiplier takes into account the effect of the decline in S&L spending on suppliers (mostly in the private sector) and the effect of the decline in spending by unemployed public sector workers who previously spent most of their income at private sector businesses. The Economic Policy Institute, working from multipliers developed by Moody's economist Mark Zandi, estimated that the multiplier for public sector jobs is 0.67.^[26] In other words, for every public sector job lost, about 0.67 jobs are lost in the private sector. Using this multiplier as a rough estimate, California has not only lost 338,200 public sector jobs relative to economic trend, but that impact has meant 226,594 fewer private sector jobs as well.^[27]

Impact on Economic Growth

National data confirm that state and local austerity has been a drag on total economic output, or gross domestic product (GDP). GDP measures the total market value of all goods and services produced in the economy. One component of GDP is public sector outlays, which includes how much the government spends on goods and services and the salaries of its workers. Government spending — and how it changes over time — can either add or subtract from total GDP.

Chart 4, below, shows the change in quarterly GDP since the onset of recession, broken down by S&L government (orange bar), federal government (blue bar), and non-governmental (green bar) contributions to that change. The red diamonds mark the percent change in total GDP.

Chart 4 Contributions to U.S. gross domestic product

Source: Authors' analysis of U.S. Bureau of Economic Analysis data.

The depth of the recession can be seen in the 2008 figures. The four consecutive quarters of negative growth were all mitigated somewhat by a net positive in public sector contributions — especially in quarter two of 2009. GDP trend turned positive in the third quarter of 2009, but cutbacks at the S&L level, as was often the case for federal contributions, mitigated growth. Throughout the recovery (which officially began 2009, third quarter), average quarterly GDP growth has been just 2.2 percent. Keep in mind that GDP growth below 4 percent is not enough to bring down unemployment and keep up with new entrants into the workforce. As depicted in Chart 4, at a time of tepid growth, decreases in government outlays directly shaved off up to 1.5 percentage points of quarterly GDP.

This drag on total GDP comes from the decrease in public expenditures, and state-level data show that California's state and local government sector shrank more than in the nation as a whole. Detailed data on state-level GDP is only available in annual averages through 2010, thus giving us a limited view into how the state's economy fared in recent years during continued government austerity. The data that are available confirm that California's state and local government sector contracted much more sharply than the nation as a whole. From 2008 to 2009, California's S&L outlays shrank by 4 percent compared to 0.37 percent for the nation. And in the following year, California's public spending contracted another 3.4 percent while nationally the sector declined by 0.68 percent. Without this decline, California's total GDP would have been 0.4 percent larger in 2009 and 0.3 percent larger in 2010.^[28]

Final Thoughts

This article documents the severity of the Great Recession, especially in California. In response to a housing crisis and the resulting deep recession, ARRA was passed, which helped mitigate the fall. But, soon afterwards the federal government pivoted towards austerity. As foreclosures, job losses, and unemployment mounted, the economy contracted and revenues tanked in the U.S overall, but more so in California. Steep budget cuts were implemented in efforts to balance the state budget, which in turn weakened an already faltering economy and added thousands of government workers to the already expanding ranks of the unemployed. By our estimates, assuming normal economic trends and the resulting ripple effect on the economy, California would have roughly half a million more jobs than it does now if budget cuts could have been avoided.

Federal officials got it backwards when they pursued austerity at a time of high unemployment, deep problems in the labor market, and severely reduced aggregate demand. Government spending should have expanded sufficiently to fill the void and provide sufficient funds to the states to assist a solid recovery. A sufficiently healthy economy must be in place before a discussion on debt can be reasonably debated. This paper supports the belief that budget cuts implemented during the most severe recession since the Great Depression led only to a deeper, more prolonged slump.

Looking forward, while it is impossible to quantify the long-term impact the cuts will have on economic growth and on the ability of the public sector to provide necessary services efficiently and/or effectively, it is clear that the short-term effects are negative. One of the best ways a state can set itself up for sustained economic growth is through investments it makes in its public institutions, especially education and infrastructure.[29] As Minneapolis Federal Reserve researchers Rob Grunewald and Arthur Rolnick wrote, “investment in human capital breeds economic success not only for those being educated, but also for the overall economy.”[30]

California must have a solid educational system from pre-school through graduate school, as students are the workers of the future. Further investments in the state’s infrastructure, such as roads, the electrical grid, water systems, and telecommunications that commerce depends on to provide goods and services, is also crucial. Hanging in the balance is whether California’s future will be Golden or not.

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Notes

[1] Council of Economic Advisers 2011.

[2] Baker and Calmes 2010.

[3] Legislative Analyst's Office 2012.

- [4] Bivens and Shierholz 2012.
- [5] Moody's Investor Services 2012.
- [6] Legislative Analyst's Office 2007; Legislative Analyst's Office 2012; California Budget Project 2012.
- [7] California Budget Project 2012.
- [8] Recessions are dated by the National Bureau of Economic Research's business cycle dating committee. See here for business cycle dates:
<http://www.nber.org/cycles/cyclesmain.html>.
- [9] Allegretto and Reidenbach 2012.
- [10] In December 2007, public sector employment in California as a share of all employment was: 1.6 percent federal, 3.2 percent state, and 11.7 percent local.
- [11] Population estimates are from the California Department of Finance's Demographic Research Unit. The estimated change in population between January 1, 2012, and January 1, 2002.
- [12] California Teachers Association 2012.
- [13] U.S. Bureau of Labor Statistics, Current Employment Survey.
- [14] U.S. Census Bureau, 2011 Annual Survey of Public Employment and Payroll.
- [15] U.S. Census Bureau, 2011 Annual Survey of Public Employment and Payroll.
- [16] Lee 2012.
- [17] Los Angeles Superior Court 2012.
- [18] EdSource 2012.
- [19] Kaplan, Jonathan 2011.
- [20] Goode 2012.
- [21] *San Francisco Chronicle* 2012.
- [22] Moore 2011.
- [23] Estimate from U.S. Census Bureau's Current Population Survey (CPS). Calculated as the ratio of all state and local government workers to the entire civilian population.
- [24] For more see: Allegretto, Jacobs, and Lucia 2011.
- [25] California Department of Finance, Demographic Research Unit.

[26] Bivens and Shierholz, 2012.

[27] There are other indirect effects when large numbers of government workers are relegated to the ranks of the unemployed, such as the jobs likely lost due to state spending cutbacks on transfer programs.

[28] U.S. Bureau of Economic Analysis, National Income and Product Account (NIPA) tables.

[29] Lynch 2004; Mofidi and Stone 1990; Abel and Deitz, 2009.

[30] Grunewald and Rolnick 2003.

CPER Journal Online

After the Homecoming: A User's Guide to the Uniformed Services Employment and Reemployment Rights Act



By Christopher W. Miller, Esq., Mastagni, Holstedt, Amick, Miller & Johnsen

In the last decade, the wars in Afghanistan and Iraq have called into uniform thousands of California public employees who would otherwise have been working in state and local government agencies. Over the next five years, reports the U.S. Department of Labor, some 300,000 active duty, Guard, and Reserve service members will leave the military to return to civilian life.^[1] Many of these veterans and reservists are coming home to public employers obligated under the Uniformed Services Employment and Reemployment Rights Act to reemploy them in a changing economy where positions may no longer exist and questions of seniority, status, pay, and benefits must be answered based on the rights of the returning soldier.

Reviewing the key provisions and court decisions under USERRA, and related provisions of the California Military and Veterans Code, this article gives an overview of the federal and state requirements for integrating returning military reservists into the civilian workforce.

USERRA became law in 1994, replacing the Veterans' Reemployment Rights Act and other federal statutes that had been passed to afford reemployment rights to "the Greatest Generation" returning from World War II. Codified at 38 USC 4301-4335, USERRA exists to "encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service";^[2] to minimize the disruption to reservists and their employers by providing for prompt reemployment;^[3] and to prohibit workplace discrimination on the basis of military service.^[4] The statute is to be broadly construed "in favor of its military beneficiaries";^[5] however, USERRA rights, like many other military benefits, are not available to persons separated from military

service with a dishonorable, bad conduct, or other-than-honorable discharge.[6] USERRA applies to federal, state, and local governments and agencies as well as private companies of any size.[7]

The centerpiece of USERRA — and the source of most of the litigation under the statute — is its three provisions establishing the rights and limitations on employment and reemployment of service members. Sections 4311-4313 prohibit discrimination and retaliation on the basis of military service, establish the preconditions and requirements for reemployment, and describe the “escalator principle” that governs how an otherwise-qualified reservist may be reemployed. For reservists, practitioners, and public agency staff, these are the sections of the statute most fraught with peril for the unwary.

Prohibition Against Discrimination and Reprisal

The first of these key provisions, Section 4311, prohibits discrimination and retaliation against any person who is, was, or has applied to be, a member of the uniformed services. That section provides, in part, that such persons

...shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.[8]

Under Section 4311(b), employers are prohibited from discriminating in employment or taking any adverse employment action against a person who has taken an action to enforce his or her USERRA rights, has participated in a USERRA investigation or proceeding, or has exercised any rights under the statute.

For both provisions, the statute defines prohibited employment actions broadly as any action where the person’s military status is a “motivating factor.”[9] Under USERRA, the employee has the burden to show, by a preponderance of evidence, that his or her military service was a “substantial or motivating factor” in the adverse employment action.[10] This is a “but-for” test; therefore, once the employee establishes discriminatory motive or intent, the burden shifts to the agency to prove it would have taken the action despite the employee’s protected status as a military reservist.[11]

USERRA Sets Minimum Requirements to Trigger Reemployment Rights

Subject to some exceptions and conditions, an employee returning from military service is entitled to USERRA-mandated reemployment rights and benefits, provided the employee:

- (1) gave advance written or verbal notice of the service obligation to the employer (unless “military necessity” or other circumstances make

it impossible or unreasonable to provide such notice);

(2) was absent for military service for less than five years total time, not including training periods;

(3) received an honorable discharge from the active duty service or obligation; and

(4) submits an application for reemployment or reports to the employer, depending on the length of the absence for military service.^[12]

These basic requirements can serve as a checklist for evaluating whether a returning reservist is initially eligible for reemployment. The requirements are simple, and usually simply met; however, in keeping with USERRA's purposes favoring military duty, the statute prohibits employers from delaying or attempting to defeat a reemployment obligation by, for example, demanding the employee provide additional documentation of service.^[13]

Court decisions under this section emphasize constructive compliance with the notification provisions but strict compliance with the application requirements. In *Vega-Colon v. Wyeth Pharmaceuticals*,^[14] for example, the court held an employee's mere announcement to his employer that he intended to return to active duty after remaining inactive for several years was sufficient to trigger protection under USERRA.^[15] Another district court has held an employee's notations on a fax cover sheet to his manager stating his mobilization date had changed were sufficient to trigger rights under the statute.^[16]

Once a reservist returns from military service, however, the courts generally have strictly enforced the requirements governing applications for reemployment. Courts have rejected claims under the statute where reservists failed to request reemployment within the statutory period,^[17] applied timely but to the wrong division of a company,^[18] or even failed to contact the appropriate human resources employee after being directed to do so by a supervisor.^[19] The burden is on the reservist, not the employer, to prove entitlement to reemployment.^[20]

Other bars to reemployment under the statute include changed circumstances for the employer, such that reemployment of the reservist is "impossible or unreasonable."^[21] A public employer can deny reemployment to a disabled reservist or one who cannot be trained to resume a position if reemployment "would impose an undue hardship on the employer."^[22] The agency also may deny reemployment to a returning reservist where the employment was seasonal or otherwise short in duration and there was no reasonable expectation the position would be available.^[23] The burden is on the employer to prove impossibility or unreasonableness, undue hardship despite accommodation or training, or the nature of the employment.^[24]

Using the “Escalator Principle” to Determine Reemployment Status

Once a returning reservist meets the basic conditions for reemployment, the employee is entitled to prompt reinstatement “according to the following priority”:

- (1) the position the employee would have held had the employment not been interrupted by military service, which is known as the “escalator position”;
- (2) the employee’s original, non-escalator position if the employee is not qualified to hold the escalator position and cannot be made qualified through reasonable efforts; or
- (3) a different position with the same seniority, status, and pay as the position the employee would have held had the employment not been interrupted by military service, or a different position of similar seniority, status, and pay as the original position.[25]

USERRA’s “escalator principle” is so called because, “[t]he returning veteran does not step back on the seniority escalator at the point he stepped off....He steps back on at the precise point he would have occupied had he kept his position continuously during the war.”[26] The “escalator position” — the position the employee would have held had the employment not been interrupted by military service — is always the starting point for determining the proper reemployment position.[27] The reservist may end up at a lower position on the escalator, in other words, but those evaluating a reservist’s reemployment status must start first with asking where the employee would have been in the organization had he or she not left for military duty.

The escalator rule can get tricky when an employee is returning after an extended absence on reserve duty. The phrase, “a position of like seniority, status and pay,” has been the subject of much litigation when a reservist is not returned to the position he or she left, or there have been significant changes to the organizational structure. The statute requires the employer to place the reservist in the same or a similar job unless the reservist is not qualified for the position; in that case, the reservist must be given a job that is as nearly like the prior job as possible. The employer is obligated to provide any training necessary to qualify the reservist to assume or resume the job. The returning reservist even may “bump” any incumbent who has taken the employee’s job in his or her absence. In order to put the service member in the “escalator position” he would have achieved but for his military absence, the reemployment position must include all of the benefits the service member would have received if continuously working.[28]

The reemployment position must include seniority. Consistent with the statutory objective of restoring reservists to their non-military employment without penalty, USERRA entitles any person reemployed after military service to the same seniority and all seniority-based rights and benefits he or she would have had if continuously employed.[29] The sources of seniority rights, status, and pay include collective bargaining agreements, policies, and practices in effect at the beginning of the employee’s military service, and any changes that may have occurred while the

employee was absent.[30]

Thus, “seniority” includes any advantage, privilege, status, or other “gain” (other than wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice.[31] Seniority also may include rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.[32]

Seniority and seniority-based benefits are a two-way street. As California’s public agencies and labor associations negotiate reduced benefits, including pension reform, changes to benefits can be adverse. The returning soldier’s entitlement to the seniority and benefits he or she would have enjoyed had there been no break for military service may mean, in the current environment, that employee benefits are reduced rather than enhanced. There is no entitlement to the same pre-deployment benefits if those benefits do not exist for non-military employees.

Nonetheless, while a collective bargaining agreement or MOU can give the returning veteran greater or additional rights, it cannot take away the veteran’s federal statutory reemployment rights. “No practice of employers or agreements between employers and unions can cut down...benefits that Congress has secured the veteran under the Act.”[33]

Status means more than formal rank or title. Restoration of an employee’s “status” upon reemployment means more than a rank or title. “Status” includes opportunities for advancement, general working conditions, job location, shift assignment, rank, responsibility, and geographical location.[34] Thus, a court has held that placing a veteran in a part-time position with irregular hours violated USERRA and entitled the employee to additional pay and benefits because the job was not the same as his previous position.[35] Similarly, a court held that placing a veteran in a position which lacked the same opportunity to earn extra pay violated the statute and justified a jury’s “generous” damages award.[36]

Returning veterans also must be afforded any opportunity for promotion that occurred during their absence, meaning the employer must provide a promotional examination to the veteran within a reasonable time of his or her return.[37] Assignments, areas of responsibility, and the location of the workplace all must be commensurate with the employee’s pre-deployment status, subject to employer claims of undue hardship or impossibility.

Special rules apply to healthcare benefits and pensions. USERRA gives reservists who are called up for service the right to elect to continue existing health plan coverage for the service member and his or her dependents for up to 24 months.[38] Where the service period is less than 31 days, the employee and employer pay the usual premium share, but where service is longer than 31 days, the employee may be required to pay up to 102 percent of the premium.[39] A reservist who elects not to continue coverage during military service still has the right to be reinstated to the public employer’s health plan immediately upon

reemployment, without any waiting periods or exclusions (e.g., pre-existing condition exclusions) except for military service-connected illnesses or injuries.[40]

Public employee pension plans are not exempt from USERRA's "make whole" rules. While the employer is not required to make contributions to pension or 401(k) plans during the reservist's absence on military leave, the employer must make up those contributions upon the employee's return.[41] Time spent on military leave cannot be treated as a break in service and must count as continuous employment for determining vesting and accrual of retirement benefits. The returning veteran is allowed up to three times the length of the amount of military leave taken, up to a maximum of five years, to make up 401(k) contributions.[42]

Disabled Veterans

Many veterans returning from the wars in Iraq and Afghanistan have disabling injuries, such as amputations, traumatic brain injuries, or post-traumatic stress disorder (PTSD), which may prevent them from returning immediately to work or assuming the same duties and responsibilities of the pre-deployment assignment. USERRA requires employers to make reasonable efforts to accommodate the disabled veteran, including providing retraining, and to make reasonable efforts to assist the veteran in becoming qualified for the same or another job.[43] Service members convalescing from injuries received during service or training may have up to two years from the date of completion of service to return to the job or apply for reemployment.[44] USERRA requirements differ from those under the Americans with Disabilities Act (ADA), and a disabled veteran still must meet ADA standards before he or she can claim reasonable accommodation under that statute.

California Law Mirrors USERRA

State laws that give greater rights than those afforded reservists under federal law are expressly preserved under USERRA.[45] In California, the Military and Veterans Code provides protections similar to the federal law. The statute "is designed to, and reasonably should, aid and expedite the recruiting service of the United States." [46] Like USERRA, "[t]he legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." [47]

California law makes it a misdemeanor to discriminate against an employee on the basis of membership in the military.[48] The statute also requires employers to afford a returning reservist "all of the rights and privileges...of employment which he or she would have enjoyed" had the reservist not been absent.[49] As with USERRA, the reservist must be returned under California law to an "escalator" position of like status, seniority, and pay.[50] The California veteran "steps back on the [seniority escalator] at the precise point he would have occupied had he kept his position continuously during the war," and is entitled to the rights and privileges he or she would have enjoyed had there been no deployment.[51]

Some local governments extended salary and benefits to deploying reservists after 9/11. The state statute limits to 30 days the period for which a reservist who is a public employee must receive a salary from the public agency while absent for military duty.[52] The statute does not, however, prohibit an agency from continuing the reservist's salary and benefits for any period of time while absent.

Remedies Available for Enforcing USERRA Rights

A reservist who believes he or she has been discriminated against or had other rights under USERRA or state law violated may seek administrative and civil remedies. The California Department of Industrial Relations receives complaints regarding violations of the Military and Veterans Code, while the U.S. Department of Labor may investigate USERRA complaints. Reservists may also pursue civil litigation.

Many veterans pursue USERRA claims first through the U.S. Department of Labor; however, there is no exhaustion of administrative remedies required before an employee files a USERRA action. There is no statute of limitations barring claims, but laches is available as an equitable defense to late or dilatory claims.[53] The Eleventh Amendment and sovereign immunity principles act as a jurisdictional bar to USERRA lawsuits against the State of California in the federal courts.[54] Remedies available under the statute include compensation for lost wages and benefits, double-damages for willful violation of the statute, and injunctive relief to enforce statutory rights.[55] USERRA plaintiffs are exempt from fees and court costs.[56]

A good resource for public agency managers dealing with reemploying returning reservists is the [Employer Support for Guard and Reserve](#) (ESGR), an organization operated by the Department of Defense to promote cooperation between reservists and civilian employers. The ESGR handbook, [Employer Resource Guide for Business Leaders](#), has a wealth of information and FAQs. The U.S. Department of Labor website also has links to the statute and answers questions regarding USERRA and reemployment rights and obligations. There are useful [USERRA fact sheets](#). The Department of Labor, [Veterans' Employment and Training Service \(VETS\)](#) investigates and resolves USERRA complaints.

Conclusion

This overview of the Uniformed Services Employment and Reemployment Rights Act is not exhaustive. There are many avenues to avoid USERRA litigation and the publicity that can accompany such claims against public agencies. Practitioners, human resources professionals, and reservists should consult the many available public resources before making decisions that may adversely affect the employment status of a returning veteran.

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[1] U.S. Department of Labor, FY 2011 USERRA Annual Report to Congress (2012).

[2] 38 USCA Sec. 4301.

[3] 38 USCA Sec. 4312; 20 CFR Sec. 1002.18.

[4] 38 USCA Sec. 4311; 20 CFR Sec. 1002.18.

[5] *Fishgold v. Sullivan Drydock & Repair Corp.* (1946) 328 U.S. 275, 286.

[6] 38 USCA Sec. 4304(1)-(4).

[7] *Cole v. Swint* (5th Cir. 1992) 961 F.2d 58, 60.

[8] 38 USCA Sec. 4311(a).

[9] 38 USCA Sec. 4311(c)(1), (2).

[10] *Sheehan v. Department of the Navy* (Fed. Cir. 2001) 240 F.3d 1009, 1013.

[11] *Id.* at pp. 1013-1014; 38 USCA Sec. 4311(c)(1).

[12] 38 USCA Sec. 4312(e) sets the requirements for post-discharge return to work depending on the length of time the returning employee was absent for military service. Employees absent for less than 31 days must report to the employer no later than the first full calendar day following completion of military service, so long as the employee has had eight hours to return home. (38 USCA Sec. 4312(e)(1)(A); 20 CFR 1002.115(a).) Employees absent more than 30 days but less than 181 days must submit an application for reemployment, if possible, no later than 14 days after the service period ends. (38 USCA Sec. 4312(e)(1)(C).) Employees absent more than 180 days must submit an application for reemployment, if possible, no later than 90 days after completing the service period. (38 USCA Sec. 4312(e)(1)(D).)

[13] 38 USCA Sec. 4312(f)(3)(A)(4).

[14] (1st Cir. 2010) 625 F.3d 22.

[15] *Vega-Colon v. Wyeth Pharmaceuticals* (1st Cir. 2010) 625 F.3d 22, 26.

[16] *Hays v. Communication Technologies* (S.D. Iowa 2010) 753 F.Supp.2d 891, 898.

[17] *Ibid.* at p. 898.

[18] *Knowles v. Citicorp Mortgage, Inc.* (8th Cir. 1998) 142 F.3d 1082, 1085.

[19] *McGuire v. United Parcel Service* (7th Cir. 1998) 152 F.3d 673, 677-678.

[20] *Id.* at p. 676.

[21] 38 USCA Sec. 4312(d)(1)(A).

[22] 38 USCA Sec. 4312(d)(1)(B).

[23] 38 USCA Sec. 4312(d)(1)(C).

[24] 38 USCA Sec. 4312(d)(2).

[25] See 38 USCA Sec. 4313(a)(2)(A); 20 CFR Secs. 1002.191, 1002.192, 1002.197.

[26] *Fishgold v. Sullivan Drydock & Repair Corp.* (1946) 328 U.S. 275, 284-85; see also *Hogan v. United Parcel Service* (W.D. Mo. 2009) 648 F.Supp.2d 1128, 1141.

[27] 38 USCA Sec. 4313 (a)(2)(A); 20 CFR Sec. 1002.192.

[28] 20 CFR Sec. 1002.191.

[29] 38 USC 4316(a).

[30] 20 CFR Sec. 1002.193; *Smith v. U.S. Postal Serv.* (Fed.Cir. 2008) 540 F.3d 1364, 1366; *Hogan v. United Parcel Serv.*, *supra*, 648 F.Supp.2d at 1141-42.

[31] 38 USC Sec. 4303(2); 20 CFR Sec. 1002.5.

[32] *Id.*

[33] *Fishgold v. Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at p. 285; see also 38 USC Sec. 4302.

[34] 20 CFR Sec. 1002.193; *Smith v. U.S. Postal Serv.*, *supra*, 540 F.3d 1364, 1366.

[35] *Smith v. U.S. Postal Serv.*, *supra*, 540 F.3d at p. 1366.

[36] *Fryer v. A.S.A.P. Fire and Safety Corp., Inc.* (D. Mass 2010) 680 F.Supp.2d 317, 325-326.

[37] 38 USCA Sec. 4331(a); 20 CFR Sec. 1002.193(b).

[38] 38 USCA Sec. 4317(a); 20 CFR Sec. 1002.171.

[39] 38 USCA Sec. 4317(a)(1)(A)(2).

[40] 38 USCA Sec. 4317(b)(1).

[41] 38 USCA Sec. 4318(b)(1).

[42] 38 USCA Sec. 4318(b)(2).

[43] 38 USCA Sec. 4313; 20 CFR Secs. 1002.198, 1002.225-.226.

[44] 38 USCA Sec. 4312(e)(2)(A).

[45] 38 USCA Sec. 4302.

[46] *Cunningham v. Hart* (1947) 80 Cal.App.2d 902, 909.

[47] *Palaske v. City of Long Beach* (1949) 93 Cal.App.2d 120, 127.

[48] Mil. & Vet. Code Sec. 394(g).

[48] Mil. & Vet. Code Secs. 394(b), 395.1.

[50] Mil. & Vet. Code Sec. 395.1; *Cunningham v. Hart*, *supra*, 80 Cal.App.2d at p. 910.

[51] *Cunningham v. Hart*, *supra*, 80 Cal.App.2d at p. 910; *Palaske*, *supra*, 93 Cal.App.2d at p. 126.

[52] Mil. & Vet. Code Sec. 395.01.

[53] 38 U.S.C. 4327(b); *Maher v. City of Chicago* (N.D. Ill. 2006) 406 F.Supp.2d 1006, 1031.

[54] *Alden v. Maine* (1999) 527 U.S. 706, 712; 38 USCA Sec. 4323(b)(2).

[55] 38 USCA Sec. 4323(d), (e).

[56] 38 USCA Sec. 4323(h).

CPER Journal Online

Court Approves Temporary Ban on Outsourcing Jobs Other Than Special Services

When the City of Costa Mesa approved a plan to contract out city functions ranging from building inspection to park maintenance and to lay off over 100 employees who performed the services, the Costa Mesa City Employees Association went to court. The trial court agreed with the association that the layoffs would cause irreparable harm to the employees, and that the association likely would be able to prove the outsourcing plan violated the collective bargaining agreement and state law. In *Costa Mesa City Employees Assn. v. City of Costa Mesa*, the Court of Appeal upheld the trial court's injunction temporarily prohibiting contracts with private entities for most services performed by city employees until a final judgment after trial.

Eighteen Services Targeted

In March 2011, after the city council decided to contract out 18 city functions, over 100 city employees received layoff notices effective September 30, 2011, contingent on their positions being outsourced. The notices directed employees to the human resources department if they had questions on continuance of benefits, retirement, and unemployment insurance.

CMCEA challenged the decision on two grounds. First, its memorandum of understanding with the city required that the city share information about costs "on a participative basis" and include the association in discussions "regarding the contracting out of services." The city did not meet with the association about either the decision to contract out or the effects of that decision — layoffs. Second, the association contended the Government Code allows cities to outsource employees' jobs to private entities only if they perform special services. Of the services the city was proposing to contract out, only payroll is clearly a special service under Government Code sections 37103 and 53060.

The association asked for a preliminary injunction, claiming that employees would be irreparably harmed if the city were to lay them off before a trial could be completed. CMCEA provided evidence that the city was getting ready to send out requests for proposals for services city employees had long performed, which might result in vendors taking over within months.

The city contended the association had asked for a preliminary injunction too early because only one RFP relating to operation of the city's jail had been issued, and the city was not obligated to accept any proposals if it asked for bids for other city services. It also pointed out that Government Code section 54981 allows it to contract with other local public agencies for any services. It asserted the MOU required it to negotiate only the effects of its decision.

The trial court barred the city from contracting with any entity other than a local public agency for services currently performed by CMCEA's unit members, and from laying off employees due to prohibited outsourcing. The city appealed.

Irreparable Injury

The appellate court acknowledged that the possibility of harm to the employees would not warrant a preliminary injunction, but reminded the city that the employees need not wait until they have suffered actual harm before they apply for one. An injunction is available for threatened violation of their rights, the court explained.

The court disagreed with the city's contention that the employees were not in imminent danger of losing their jobs. Employees had seen drafts of many RFPs, and the city's chief administrative officer had admitted the city was "earnestly pursuing" the outsourcing of city services. The city had issued more than 100 layoff notices which expressed regret that conditions "require[d]" the layoffs. The large scope of the layoffs and the improbability that any employees performing the targeted services would be able to retain their jobs convinced the court that a finding of irreparable harm was within the trial court's discretion.

The court emphasized that job loss in an "era of high unemployment" would be a serious hardship that outweighed the harm to the city from temporarily prohibiting outsourcing. Even under the injunction, the city could continue to lay the groundwork for outsourcing by issuing RFPs and evaluating whether outsourcing would be prudent in light of the bids received, the court pointed out.

Special Services

A preliminary injunction is not warranted unless the plaintiff can show it may win its case at trial. The court agreed with the association that the city had not followed the contract when it made its decision, and that it sent out layoff notices without involving the association in the discussions leading to the decision to outsource.

In addition, the court concluded that the association possibly would prevail on its argument that state law prohibits the city from contracting out to private entities all functions except special services. The statutes list financial, accounting, legal, economic, engineering, and administrative services as matters that can be outsourced to persons who are "specially trained and experienced and competent to perform the special services required."

The city claimed that the special services statutes were intended to exempt those services from the competitive bidding process, not exclude services other than those listed from being subject to outsourcing. The court rejected this contention based on prior cases that consulted the statutes to determine whether outsourcing was authorized, not whether bidding was required. In addition, an attorney general's opinion from 1993 supported the association's contention that contracting out non-special services performed by city employees would violate the law.

The court acknowledged case law that allows public entities to contract out special

services when the agency's workforce is unable to provide the service. But the court found no evidence that the city's employees were incapable of providing the services that the city proposed to outsource. Other than payroll and jail functions, it concluded the legislature did not intend for cities to be able to contract out services that Costa Mesa employees were already doing.

The court was not persuaded by the city's citation to *San Francisco v. Boyd* (1941) 17 Cal.2d 606, 1941 Cal. LEXIS 292, where the court upheld an engineering contract. Because San Francisco is a charter city, the holding was not applicable to the general law city of Costa Mesa. Charter cities have much more control over municipal affairs and are not fettered by the general laws of the state, the court explained.

A 1991 attorney general opinion cited by the city that did not address the special services statutes also was not helpful, the court said. Even though the attorney general concluded that a county was free to contract out to a private detention facility, the reasoning did not apply to cities, where the statutes authorizing the state and counties to contract with a private detention facility did not cover cities. An interdepartmental memo written to the governor when a special services statute was enacted was also not persuasive to the court. While the memo suggested that the new statute would give cities greater authority to outsource services traditionally performed by city employees, the author warned that the new statute was not a blanket authority for contracting out. It specifically pointed to an AG opinion that cities may not outsource other than special services.

The appellate court cautioned that its decision was not conclusive, as factual issues about the nature of the services proposed to be outsourced would be decided at trial. But it found the preliminary injunction warranted by the possibility that CMCEA would prevail on both its contractual and statutory claims, and the irreparable harm to laid off employees, which outweighed the harm to the city from a temporary injunction. The Supreme Court denied review of the decision on November 28.

(*Costa Mesa City Employees Assn. v. City of Costa Mesa* [2012] 209 Cal.App.4th 298, 2012 Cal.App. LEXIS 971.)

CPER Journal Online

CalPERS Prepares to Sue San Bernardino for Unpaid Pension Contributions

The City of San Bernardino dared to thumb its nose at the California Public Employees Retirement System, and CalPERS is responding in court. At stake is the priority historically accorded to pension obligations, even in fiscal emergencies and bankruptcy.

Deferred Contributions

The city has been struggling with declining revenues for several years. In response, it negotiated \$10 million in annual savings with the unions representing its employees, and cut its 1,140-person workforce by nearly 250. Despite its efforts, last summer, the city announced that it was facing a \$45 million deficit, a hole equal to almost 38 percent of its budget. As it attempted to quickly slash expenses, it faced a common problem: personnel costs constituted at least 75 percent of its general fund expenditures. It was spending approximately \$20 million annually in pension contributions, including the employee share for all employees hired prior to 2011.

In July, the city decided it would defer some payment obligations to preserve city services and maintain sufficient cash to pay city employees. It began deferring the employer portion of its CalPERS payment, although it has continued to pay the employee contribution in full.

On August 1, the city filed for bankruptcy. As a general matter, a bankruptcy petition stays all pending litigation. The city attempts to negotiate with its creditors, including labor organizations, and then presents a plan of adjustment to the bankruptcy court.

In late October, CalPERS challenged the bankruptcy petition as premature. The city had not attempted negotiations with creditors, passed a balanced budget, followed through with some of its cost reduction strategies, or filed a plan of adjustment. The city's debts were continuing to grow. For example, by late October, it owed over \$5 million to CalPERS. The retirement system asked the court to set a deadline for a plan of adjustment and hold off on determining whether the city is eligible for bankruptcy until CalPERS and other creditors have time to scrutinize the city's finances and plan.

In late November, the city council approved a pendency plan, making it clear that it would continue to defer payment of its employer pension contributions and attempt to negotiate payment of the amount due over time. It also revealed it would seek to reamortize its pension liability.

The Enforcer

CalPERS reacted swiftly. Although its attorneys contend that the state agency may enforce statutory pension obligations by going to state court without permission from the federal bankruptcy court, it filed a motion for relief from the stay of litigation in an “abundance of caution.”

The obligation to fund employee pensions is statutory, not merely contractual, CalPERS pointed out. Government Code section 28031 requires the city to timely pay employer retirement contributions, and Labor Code section 227.1 makes it unlawful to willfully fail to make payments required by collective bargaining contracts or other agreements with employees. Delaying payment is not a minor problem, the agency asserted, quoting *Board of Administration of the Public Employees’ Retirement System v. Wilson* (1997) 52 Cal.App.4th 1109, 1997 Cal.App. LEXIS 115, 123 CPER 47. “When contributions are delayed beyond the date assumed, the plan falls out of actuarial balance and actuarial soundness is endangered.”

Moreover, CalPERS argued, the city’s deferral of contributions violates the California Constitution as amended by Proposition 162 in 1992. The Constitution gives CalPERS the sole power to administer the retirement systems and provide actuarial services. The purpose of the proposition was to prohibit politicians from tampering with pension funds, particularly by diverting them to other uses. “[T]he City has effectively usurped the authority exclusively vested in CalPERS by the California Constitution to determine what payments are actuarially required to maintain the soundness of the system,” the agency asserted.

CalPERS explained in detail why it believes it should not have to ask the bankruptcy court for relief from the stay of litigation. As an “arm of the state,” CalPERS may exercise its police power to enforce state laws under federal Bankruptcy Code section 362(b)(4). Also, under section 903 of the code, the state may continue to control the actions of a municipality, including its expenditures.

Even if the stay applies, the Bankruptcy Code allows a party to ask for relief from the stay for cause, the agency contended. The failure of a debtor to follow state law has been found by previous courts to be cause to permit litigation to enforce state laws. Since the federal court cannot itself issue an order compelling the city to comply with the retirement and labor laws, the only way to ensure enforcement of those laws is for the court to grant CalPERS relief from the stay, it pointed out.

Relying on *NLRB v. Bildisco* (1984) 465 U.S. 513, 1984 U.S. LEXIS 6, CalPERS argued that compensation of employees, which includes retirement system funding, is entitled to priority over other payments as an administrative expense. Even if the employee’s contract is ultimately rejected in bankruptcy, the employee is entitled to “compensation for the value of the services provided by the employee after the bankruptcy case is filed,” CalPERS explained. Other federal cases have found that severance pay and health care premiums of employees are administrative expenses. As the city’s employees have been working in the belief that they are continuing to earn promised compensation, and the city has made statements that it intends to protect retirement benefits, the pension contributions are administrative expenses that must be given priority, CalPERS insisted.

CalPERS urged the bankruptcy court to allow it to file a petition in state court for an order compelling the city to make the pension contributions and possibly for an order appointing a receiver. As *CPER* was being published, the city's bondholders objected to CalPERS' motion. They claim CalPERS has no authority to exercise police power, and they counter each of the agency's arguments. The court will hear the motion on December 21.

CPER Journal Online

SEIU Holds ULP Strike Prior to Factfinding with Port of Oakland

Claiming that the Port of Oakland has made unilateral changes and refused to provide financial information, workers represented by Service Employees International Union, Local 1021, went on a one-day strike two days before Thanksgiving, during the busiest shipping week of the year. The employees have been working without a contract for over a year, and the port declared impasse in negotiations last May. The port, a quasi-public agency, denies committing any unfair practices. As *CPER* headed to publication, the parties reached a tentative settlement.

Surplus, or Unfunded Liabilities?

The port was hit hard in 2008, when the worldwide economy and trade slowed. Employees were laid off, and the ones who remained were furloughed for six days in 2008-09, 11 days in 2009-10, and 10 in 2010-11. Now, the port is experiencing — and projecting — increased revenues, but has proposed compensation cuts of 15 percent to the maintenance, security, clerical, and administrative workers represented by the union.

The port came to the bargaining table in July 2011 with 42 takeaway proposals, says Anna Bakalis, spokesperson for SEIU Local 1021. She told *CPER* that the union has repeatedly requested financial information to back up the port's claim that it needs to cut employee compensation, but has not seen it yet. The union asserts that its own review of the port's monthly ledgers shows the port had a \$37 million surplus in 2011-12. The union has asked to roll over the contract except for a 2 percent cost-of-living increase. Stoking employees' ire are allegations that the former executive director used \$4,500 in port funds to attend a strip club party and pay for haircuts, wine, massages, golf rounds, and golf shoes.

Brushing the alleged corruption aside, the port's new acting executive director, Debra Ale Flint, and the president of the board of commissioners, Gilda Gonzales, published an article in the *Contra Costa Times* pointing to serious challenges the port is facing. They claim that personnel costs are rising three times faster than revenue. A third of the port's \$311 million operating revenues go to loan payments, and \$89 million is expended for personnel costs. The port would also like to spend \$638 million in capital expenditures over the next five years on items such as a connector to BART from the Oakland Airport, which it runs. It has \$250 million in unfunded pension and retiree health benefits costs. Posted on the port's website are budgets and financial reports for the coming year, as well as a budget presentation made to the Oakland City Council.

A major part of the battle is over employee pension contributions, which the port now

pays. Employees may retire at age 50 with lifetime medical benefits. The employees represented by SEIU enjoyed annual raises of 3 to 4 percent from July 2006 through 2010-11, although furloughs reduced take-home pay from 2 to 4 percent in the last three years. The port asserts that its employees' compensation is 20 percent above the market. The union counters that port workers should not be compared to nearby public employees because they are not paid from tax revenues but from port business revenues. In fact, the port projects it will pay fees of \$14 million to the City of Oakland in the current fiscal year.

Last April, the workers rejected a tentative agreement that would have required employees pay pension contributions without any increase in wages. In response, the port declared a bargaining impasse.

Shutting Down the Port

In early November, workers authorized a strike. The union has filed unfair practice charges with the Public Employee Relations Board and claims that the port has made unilateral changes in overtime pay and revised job descriptions without bargaining. Farbod Pirouzmand, a port labor relations representative, told *CPER* the allegations are "far from the truth."

Trucks rolled into the port on November 20, but they were forced to wait for hours before they could unload or pick up goods. Longshore workers refused to cross the picket lines staffed by hundreds of port employees and other SEIU activists.

After Oakland Mayor Jean Quan stepped in to convince the parties to return to the bargaining table, workers returned to their jobs a few hours early at 7 p.m. The port reported that the workers had successfully shut down all the marine terminals, but that flights at Oakland International Airport were not affected by the job action.

The parties returned to the bargaining table and reached a settlement before factfinding was scheduled to begin on November 29. Employee wages will rise the same percentage as employee pension contributions — 2.5 percent in both 2013 and 2014. Employees will receive \$3,500 signing bonuses for ratifying the four-year agreement. The port's board of commissioners is scheduled to consider the tentative agreement on December 20.

CPER Journal Online

LA Unions Lose on New Pension Tier, Beat Back 401(k) Ballot Measure

Los Angeles city employee unions found themselves facing two attacks on pensions this fall. The city council enacted a second tier for employees hired after June 30, 2013, over the labor organizations' objection. But the unions waged a successful campaign to disrupt signature gathering for a ballot measure that would have established a defined-contribution plan for new hires and increased pension contributions for current employees. The ballot initiative targeted all city pension plans; the city council's new ordinance affects only non-safety pensions.

Unilateral Change for New Hires

After several rounds of layoffs and furloughs, the city was still facing a \$238 million deficit in April 2012, when Mayor Antonio Villaraigosa released his proposed 2012-13 budget. While he trumpeted several safety programs that would be funded at the current levels, he put 669 positions on the chopping block, 231 of which were not vacant. In addition, he proposed pension reform for non-safety employees in the Los Angeles City Employees Retirement System, except for those employed by the Department of Water and Power. He would decrease the maximum factor to 2 percent and raise the age at which an employee earned it to 67, cap the maximum benefit at 75 percent of final pay, change the computation of final pay, and reduce pension cost-of-living adjustments, among other changes.

City unions protested that they had already agreed to increase their pension contributions from 7 percent to 11 percent of pay. They demanded to bargain the proposed retirement changes, but the city insisted it would only consult with them, as it does not consider retirement plans for new hires a mandatory subject of bargaining. The city claims that its unilateral action is authorized by its charter, case law, and past practice.

As the city council considered the proposed ordinance, it changed some features. As passed, the plan requires all employees hired on or after July 1, 2013, to become members of the tier 2 plan. Contributions will be based on 75 percent of normal costs and 50 percent of any unfunded liability for tier 2, except that the city council has the discretion to reduce the contribution rate for three-year periods. Contributions will begin at 10 percent of pay, and may change every three years. Final compensation will be based on the average of the highest three years of pay. An employee may earn a normal retirement with a 2 percent factor by working for 10 years and retiring after reaching age 65. However, an employee may retire at age 55 if the employee has 10 years of service. The maximum benefit is 75 percent of final compensation, with a potential 2 percent annual cost-of-living adjustment.

For new employees, no retiree health benefits accrue until the employee has

completed 10 years of service. While the maximum retiree medical premium subsidy for current employees is \$1,190 per month, the most the city will pay tier 2 retirees is \$596 or the monthly amount equal to the single-party premium for the lowest-cost standard plan available to participants without Medicare Parts A and B.

The new retirement tier is expected to save the city up to \$4.3 billion over the next 30 years.

Riordan Drops Initiative

As the city council was considering the new tier, former mayor Richard Riordan began a campaign for a ballot measure that would have placed all new city employees, including police and firefighters, in a 401(k)-style plan, closed the defined benefit plan to new members, and increased retirement contributions for current employees from 11 to 14 percent of pay.

By mid-November, Riordan began gathering signatures. But the Coalition of LA City Unions sent volunteers to supermarkets and libraries where signatures were being collected for Riordan's initiative. They explained to would-be signatories that city workers are not eligible for Social Security, and defined contribution benefits would not be reliable sources for retirement funds. Some who had already signed Riordan's petition, signed another petition requesting to remove their names from the pension petition.

The Los Angeles Police Protective League challenged Riordan to several debates and questioned his assertion that switching to a defined-contribution plan would save money, in light of a 2005 study that concluded it would not. Eventually the former mayor admitted he had not done an actuarial study to estimate the claimed savings. Within a week, Riordan suspended his campaign, saying he would not be able to gather the 265,000 signatures needed by the December 28th deadline. Riordan vowed he will continue pursuing pension reform, pointing to estimates that the unfunded liability of the pension fund will grow by \$4 billion over the next four years. "I ask the mayor, city council, and union heads to work with me over the next several months to save the city from bankruptcy and drastic cuts to public services," he tweeted.

CPER Journal Online

School Districts and Employees Breathe Collective Sigh of Relief

California schools seem to have avoided their own “fiscal cliff” after a number of successes in the November 6 election. With the passage of Propositions 30 and 39, as well as a number of parcel taxes, the financial picture for school districts, administrators, teachers, and classified employees is finally looking rosier. The additional income secured by these measures, coupled with the Democrats’ supermajority in the state legislature, could mean that the severe cuts and devastating layoffs of the last five years are a thing of the past.

Proposition 30 provides for an increase in the sales tax and raises income tax rates on high earners. Had it failed, schools would have experienced approximately \$5.5 billion in automatic mid-year cuts. Instead, the initiative is expected to bring in between \$6 and \$7 billion this year alone, although not all of those funds are earmarked for schools. While the level of minimum funding for K-12 schools and community colleges will go up by \$2.9 billion, there will be no additional money for new programs this year. That is because \$2.2 billion of the new funds will go toward paying down the \$9.5 billion owed by the state to schools and community colleges for deferred payments accrued over the last 4 to 5 years.

Immediate relief was felt by many districts. Within days of the election, the Los Angeles Unified School District Board of Education increased the academic year, from 175 days to the full 180 days, and restored the 10 days of pay that was to be lost by employees. Prior to passage of Prop. 30, as many as 12 districts faced bankruptcy, which can now be avoided. Community colleges will be able to restore thousands of classes this spring.

Proposition 39, which changes the corporate tax code to provide for a tax increase on out-of-state corporations, is anticipated to raise \$500 million in the first half of 2013, all of which will go into the state general fund and be available for school funding. It will produce approximately \$1 billion annually thereafter, \$550 million of which will go to developing clean energy for the next five years, with the balance to the state budget. After that, all of the income will go to the state treasury.

The passage of 85 of the 106 school construction bond measures and 14 of 22 parcel tax measures on ballots throughout the state also was cause for celebration in those districts that will benefit. Construction bond measures must pass by 55 percent, while parcel taxes require a two-thirds or 66.7 percent majority to pass. Of the eight parcel taxes that failed, five received more than 55 percent of the vote.

Three community college districts put parcel taxes on the ballot, but only one, a \$79-per-parcel tax in the San Francisco Community College District, passed. The others, in the Chabot-Las Positas and Contra Costa community college districts, fell

just short of 66.7 percent.

Now that Democrats hold two-thirds of the seats in the state legislature, it is possible that a constitutional amendment to lower the threshold for parcel taxes to 55 percent will be presented to the voters in the near future. Bills introduced in the legislature that would provide for such a measure in recent years failed to get the necessary two-thirds vote because no Republican would support them.

The newly elected “supermajority” is already being pressured to institute a number of educational reforms as quickly as possible. Preschool and childcare advocates are calling for it to restore nearly \$1 billion in cuts from state preschool and childcare programs over the last four years that eliminated spots for 100,000 children. Other education advocates want to use all available funds to repay the monies withheld from schools and to make on-time payments before funding any other programs. And still others want the legislature to focus on reforming education finance in order to make it more equitable. They support Governor’s Brown’s proposed weighted student formula that would distribute more money to districts with a high number of disadvantaged students.

But there are also calls for caution and pressure to move slowly. Governor Brown and the leaders of both houses of the legislature have said they will not seek new taxes, at least not right away. They also have emphasized that the real impact of Prop. 30 has been to stop the bleeding, and that it will take years for schools to recover the funds they have lost. Further, state officials point to the looming federal debt reduction measure referred to as “sequestration.” If Congress and President Obama fail to stop the series of cuts scheduled to take effect, the U.S. Department of Education will experience a loss of 8.2 percent. That will impact local districts, in particular those that rely on federal funding sources like Title I and the Individuals with Disabilities Education Act. It is estimated that the Orange, San Diego, Long Beach, San Bernardino, and Fresno districts each would experience cuts of more than \$10 million. Los Angeles Unified would experience a shortfall of more than \$60 million.

In spite of it all, however, there is no denying that the future for California schools has looked much brighter since the morning of November 7 than it has looked in a long, long time.

CPER Journal Online

LAUSD and UTLA Agree to Use Student Test Scores in Teacher Evaluations

Coming in just under the wire of a court-ordered deadline, the Los Angeles Unified School District and United Teachers Los Angeles announced a tentative agreement on teacher evaluations on November 30, 2012. For the first time, the district will be able to include student test scores on local and state standardized tests when evaluating teacher performance.

The impetus for negotiations leading up to the agreement was a ruling by Los Angeles Superior Court Judge James C. Chalfant earlier this year in *Doe v. Deasy*. Judge Chalfant found that LAUSD had violated the Stull Act, the law that governs teacher evaluations, by failing to consider students' progress towards district and state standards as a factor in teacher assessments. He gave the district and the union until December 4, 2012, to come up with a plan that would comply with his ruling.

Another motivating factor was the failure of legislation to replace the Stull Act. AB 5, introduced by Assembly Member Felipe Fuentes (D-Sylmar), would have established a statewide uniform teacher evaluation system and would have made all aspects of teacher evaluations subject to collective bargaining. Fuentes withdrew the bill in the face of strong opposition. See story at CPER 207 online.

The agreement, which has yet to be ratified by UTLA members and adopted by the school board, provides that test scores cannot be used for more than 50 percent of the teacher's rating, but the exact extent to which they will be used has not yet been determined. The union made it clear that it had agreed to the use of raw state standardized test scores in individual teacher evaluations, but not the district's method of measuring academic progress, known as Academic Growth Over Time (AGT). UTLA has consistently opposed AGT, considering it "an extremely unstable and unreliable method for measuring instruction outcomes or evaluating teacher effectiveness," as stated in its announcement of the agreement posted on its website. The agreement provides, "Individual AGT scores (as distinguished from the school-level AGT results) are to be used solely to give perspective and to assist in reviewing the past [California Standards Test (CST)] results of the teacher, and shall neither form the basis for any performance objectives/strategies nor be used in the final evaluation."

The agreement also provides that AGT data for individual teachers shall be treated as a confidential personnel file, not available to the public or news media. The district is obligated to defend that position in court.

Under the terms of the tentative pact, observations of classroom practices will be included in evaluations. Also considered will be measures of student progress,

including CSTs or other state-mandated tests that may replace them. Teachers and principals can agree to use a variety of other measures, such as reading and curriculum-based tests, attendance and suspension rates, advanced-placement test passage rates, and others.

A joint committee — made up of an equal number of representatives chosen by the district and the union — will oversee implementation of the agreement, including helping schools resolve disputes.

Describing the current proposed agreement as “limited,” the district and the union will continue to negotiate concerning evaluation procedures. The entire proposed agreement can be found at <http://www.utla.net/system/files/LAUSD-UTLA2012EvaluationProceduresSupplementtoArtX11-29-12Final.pdf>

CPER Journal Online

Torlakson's Task Force Issues Report on Teaching in California

Last January, State Superintendent of Public Instruction Tom Torlakson, working in conjunction with the Commission on Teacher Credentialing, brought together a group of California's leading education experts to address some fundamental issues regarding the teaching profession, including teacher recruitment, skill development, and evaluation. The 48-member Task Force on Educator Excellence issued its report, entitled *Greatness by Design: Supporting Outstanding Teaching to Sustain a Golden State*, in September.

Co-chaired by Stanford University Professor of Education Linda Darling-Hammond, Ph.D., who is also vice chair of the CTC, and Chris Steinhauser, superintendent of the Long Beach Unified School District, the task force included parents, teachers, principals, superintendents, business and community leaders, and leading academics.

The 90-page report details a number of findings and recommendations. In coming to its conclusions, the task force researched school systems of other countries, looking carefully at those that lead the world in student achievement. It discovered that their success is grounded in "substantial investments in teacher and school leader preparation and development." In comparison, it found both federal and California investments in teacher quality to be "paltry" and "highly unequal." Teacher education is uneven; mentoring new teachers is decreasing; professional development is underfunded; evaluation is spotty and does not provide support to improve; leadership pathways are poorly designed and supported; and salaries are "highly inequitable," said the task force.

"It is a tremendously difficult time to be an educator in California," it acknowledged, describing the current context for the state's teachers. "In the midst of tight purse strings and drastic cuts to K-12 education, schools have endured increased class sizes, educator layoffs, a reduction in instructional days and a loss of much professional development. All of these challenges have a direct impact on students' education and learning as they affect the recruitment, retention and effectiveness of the educators who seek to serve them."

The task force laid much of the blame for the poor state of California's education system on the Public Schools Accountability Act, enacted 13 years ago, which introduced high-stakes testing as the major lever of the state's attempt at reform. It concluded that testing without investment in educator's capacity is at fault for the failure to reduce the achievement gap between low- and high-performing schools. "In fact, this dangerous combination has driven many accomplished educators out of the profession and, in some cases, caused more harm than good," it said.

The task force argued that the state needs to empower educators “through investments in capacity and the recreation of a reciprocal accountability system,” and that adopting the report’s recommendations will help meet that goal. It listed three priorities needed for a foundation for reforms: creating a coherent continuum of learning expectations and opportunities for educators throughout their careers, developing a system that supports collaborative learning about effective practices, and, developing a consistent revenue base.

The report’s recommendations focus on six steps, each of which is developed in a separate chapter. The following is a brief summary of those recommendations, but readers are encouraged to read the entire report at

<http://www.cde.ca.gov/eo/in/documents/greatnessfinal.pdf>

Recruitment

The task force listed three problems that require immediate attention. First is the shortage of qualified teachers in certain areas, including science, math, special education, childhood education, foreign languages, and bilingual education. Second is the fact that these shortages are most acute in schools with a high percentage of low-income and minority students. Third, entry into teacher preparation programs has been declining while student enrollment is on the rise. Suggestions for ways to address these problems include:

- Recruit “a diverse pool of high-ability educators for high-need fields and high-need locations” through subsidies that the recipients would pay back over four years of service in the public schools.
- Extend unemployment benefits to laid-off teachers and provide service scholarships or forgivable loans to encourage them to add a second credential in one of the fields in which there is a shortage.
- Develop a system to fix the inequitable distribution of resources to districts.

Preparation

While there are some good programs in California, there is a wide range of quality. Some educators enter the profession with little training and without having met meaningful content and pedagogy standards, the task force cautioned. It recommended the following:

- Update licensing and program accreditation standards for teachers and principals to prepare them to teach more demanding content to more diverse learners, provide intensely supervised clinical preparation, and encourage professional development school network and residency programs for high-need communities.
- Use teacher and administrator performance assessments as a lever for improving preparation.
- Strengthen and streamline accreditation so that all programs meet meaningful standards.
- Remove barriers to undergraduate education majors, lift the one year cap on credits for preparation, and develop “blended” programs that teach content

and pedagogy together, especially in the shortage fields.

Induction of Teachers and Leaders

California's pioneering Beginning Teacher Support and Assessment Program was once one of the strongest teacher induction programs in the nation, said the task force. In the early years, it reduced attrition and improved teacher competence. However, loss of funding has meant that fewer and fewer of the state's teachers now receive the benefits of high-quality mentoring. The task force recommends that the state provide for strong BTSA programs in each district for both teachers and administrators. These programs should include:

- Regular mentoring by a carefully selected and trained mentor;
- Personalized training;
- Competency indicators; and
- Integration with pre-professional preparation and an ongoing career path.

Opportunities for Professional Learning

Many of California's professional learning models have been reduced or eliminated due to deep budget cuts, the task force discovered. The 10 days for professional development time that used to be available are long gone. California's teachers now have only about three to five hours a week of individual planning time, much less than that available to teachers in other countries. The task force recommended that the state rebuild an efficient and effective learning system by:

- Establishing professional learning expectations for educators through individual learning plans linked to credential renewal.
- Establishing a coordinated infrastructure by adopting standards and criteria that define effective professional learning, creating a master plan for professional learning, developing high-quality growth opportunities, and creating a clearing house to share information about the availability and quality of professional development.
- Creating a framework to evaluate professional learning opportunities.
- Providing consistent resources for incentives for schools to establish time within the teaching day for collaborative planning and learning and dedicating a share of the state budget to professional learning investment.

Evaluating Educators

The task force found that current educator evaluation systems are "frequently spotty and rarely designed to give teachers or administrators the feedback and support that would help them improve or provide a fair and focused way to make personnel decisions." To correct this situation, it called for California to support local evaluator systems that:

- Are based on professional standards, i.e., the California Standards for the Teaching Profession and the California Professional Standards for Educational Leaders;

- Consider in relation to each other data from a variety of sources, including valid measures of teacher and administrator practice, student learning, and professional contributions;
- Include both formative assessments — of the process of increasing knowledge and improving professional practice, and substantive assessments — of outcomes;
- Link the evaluation to useful feedback and to job-related learning opportunities that are relevant to the individual teacher's or administrator's needs and goals;
- Offer support based on the individual's level of experience and needs;
- Provide successful peer assistance and review models for teachers and administrators requiring assistance;
- Promote collaborative peer consultation; and
- Are made a priority within the district.

The task force was clear that, although student test scores on some standardized tests could be included as one measure of student learning, many studies have shown that measures based on the value-added model — statistical methods for examining changes in students' test scores over time — “are very unreliable and often inaccurate on the individual teacher level” and should not be used to evaluate the teacher's effectiveness.

State Superintendent Torlakson emphasized this point in his letter introducing the report:

The goal of teaching is learning, so there can be no honest assessment of a teacher's performance without considering what students have learned. Teachers want honest feedback to understand their strengths and focus attention on areas they need to improve.

But just as no attorney would be fairly judged by the outcome of a single case, and no doctor's skills would be properly assessed by the results for a single patient, no teacher's work should be gauged by how students perform on a single test taken on a single day. Teachers are expected to work hard every day to help students learn many more things than are evaluated on one test. Fairness demands they be evaluated on the sum of their efforts.

The task force also argued that evaluation systems must be developed locally among all stakeholders to be effective, and must become part of the collective bargaining process. “[T]he state must give local education agencies flexibility on how they implement these policies within the framework,” it said. “To do otherwise risks ineffective implementation and jeopardizes the future of our public school system, our state and our nation,” it warned.

Leadership and Career Development

Implementation of many of the report's recommendations will require policy changes at the state and district level and will require a new generation of leaders. The task force urged California to “support new leadership roles for teachers by creating a

career development framework that describes a continuum of career options” and “promote labor-management collaboration to enable innovation in educator roles, responsibilities and compensation systems.” It also recommended that the California Department of Education and the California Commission on Teacher Credentialing “focus on becoming leaders of a learning system” through partnering with universities and other agencies and organizations in order to share research and expertise with schools and districts.

Final Thoughts

The task force urged that the report “be treated as a living document” and reviewed bi-annually to evaluate progress and to reassess and update the recommendations contained in it.

The task force recognized that it is “launching a long-term effort” to rebuild the state’s education system, likening it to the Marshall Plan that rebuilt post-World War II Europe.

“While the effort will be substantial, our goal should be nothing less than a Golden State that represents, as it once did, the best place on earth for educators to work and students to learn — a state that cultivates the human ingenuity and intelligence that will fuel our economy, create a sustainable, healthy environment and ensure that all citizens are able to make contributions that reflect their unique passions and highest potential,” it concluded.

CPER Journal Online

Parents Pull Charter School Trigger for First Time

After 18 months of litigation and acrimony, a superior court judge ruled that parents of children at Desert Trails Elementary School, in Adelanto, California, could proceed to convert the school to a charter. This is the first time that a “parent trigger” law was successfully used to take control of a school anywhere in the nation, although such laws exist in seven states.

California’s Parent Empowerment Act of 2010 allows for the transformation of low-performing schools where more than 50 percent of the parents or guardians of students attending have signed a petition in support. There are four options allowed by the law — choose a charter to run the school, close the school, restart it with a new principal, or replace at least 50 percent of the teachers.

Desert Trails’ students tested in the bottom 10 percent on state standardized tests. Only 28 percent of sixth graders are rated proficient in reading and 30 percent proficient in math. With the assistance of Parent Revolution, a non-profit organization funded by the Melinda and Bill Gates and the Broad foundations, parents started the Desert Trails Parent Union and began collecting signatures on two petitions. The first sought to institute reforms at the school while maintaining the same staff. The reforms would have included changes to the teacher collective bargaining agreement, curriculum, and professional development. The other was to transform Desert Trails to a charter school under the PEA. Parents were encouraged to sign both petitions. Organizers explained that the second petition was to give them negotiating power to achieve the reforms set out in the first. However, only the petition for a charter was submitted to the Adelanto Elementary School District Board of Trustees. It contained the signatures of more than half the parents.

Ninety-seven parents subsequently rescinded their signatures on the charter petition, many stating that they felt deceived into signing it when all they really wanted was the reforms outlined in the first petition. The board invalidated some of the other signatures because it could not find a signature in its files to match the parent’s name on the document. The elimination of the rescinded and invalidated signatures reduced the number to below the 50 percent required under the act, and the board rejected the petition on that basis.

The parents union and Parent Revolution took the matter to court, arguing that the parents who had rescinded their signatures had been intimidated into doing so, and that the act did not allow for rescission. San Bernardino County Superior Court Judge Steve Malone agreed. On July 18, he ruled that the district trustees had illegally rejected the petition. He acknowledged that some of the signatures were invalid, but found that the act does not permit rescission of signatures. Once the petition was submitted, the board’s power was limited to verifying the signatures’ accuracy. He ordered the board to accept the petition and allow the parents to

proceed with soliciting and selecting a charter operator.

Instead, the board voted to accept the petition for transformation, but it rejected the charter option, concluding that there was not enough time to put a charter in place by the start of the 2012-13 school year. It began investigating and instituting a number of reforms. Board president Carlos Mendoza explained in his blog that the board, “as allowed under the Parent-Trigger law, chose another intervention that supported the reforms instead,” which was “what the parents wanted.”

<http://educatormusing.blogspot.com/>

The parents union and Parent Revolution returned to court and, on October 12, San Bernardino County Superior Court Judge John Vander Feer ruled that the district had to accept the option selected by parents. He ordered the board to immediately proceed with the conversion of the school to a charter effective fall 2013.

Charter operators were solicited and a vote was taken on October 18. Under the provisions of the act, only those parents who signed the petition were eligible to vote on the choice of the charter. No more than 180 current parents could be verified by the time of the vote, and only 53 of those cast ballots. They selected LaVerne Elementary Preparatory Academy, a non-profit, non-union charter.

“Their vote sends a powerful message to parents across America that they, too, can have a direct voice in reclaiming and transforming failing schools,” said Ben Austin, executive director of Parent Revolution, in a statement posted on its website. “No parent need ever feel intimidated when they look at what the parents of Desert Trails have achieved.”

Mendoza and others opposed to the charter opined that the low turnout was indicative of lack of support for the trigger option.

Both Mendoza and incumbent Holly Eckles lost their seats on the board in the November 6 election. They were replaced by Teresa Rogers and Elaine Gonzales. According to Parent Revolution’s website, Rogers, who received the greatest number of votes, is a member of the Desert Trails Parent Union. “Voters affirmed the courageous vision of Teresa and the Desert Trails Parent Union, backing by substantial margins her campaign to join the Adelanto School Board and change its direction,” said Parent Revolution. It called the results “a great night for kids and parents.”

Although Desert Trails will go down in history as the first school to be transformed under the PEA, it is unlikely to be the last. A cursory review of the Parent Revolution website makes it clear that it is encouraging parents at other underperforming schools to pick up the gun and pull the trigger. It provides a step-by-step organizing model for parents seeking to change their child’s school and promises that, “at every step of this process, Parent Revolution is here to support you in your organizing journey.” <http://parentrevolution.org/content/getting-started>

“There is no such thing as a free lunch,” blogged Mendoza. He cautioned that Parent Revolution’s “expert advice and related professional services may be called ‘pro

bono,' but it is not free. They have an agenda that must be satisfied."

CPER Journal Online

Districts and Unions at Odds Over ‘Race to the Top’ Funds

The deadline for applications for the last \$400 million in federal Race to the Top grants has passed. Although the funding was earmarked for individual school districts, most California districts did not submit applications because of the refusal of their teachers unions to agree that student test scores will be used in teacher evaluations. The federal grant application required that, by 2014, districts commit to enacting a teacher evaluation system that gives significant weight to measures of learning, including state standardized test scores. The local teachers union must have committed in writing to the terms of the grant.

Eight California districts, all members of a district collaborative known as the California Office to Reform Education, worked together for a number of months to prepare applications for the funding, which could have totaled in excess of \$100 million over four years. The Oakland and San Francisco school districts were hoping for awards of up to \$15 million each to develop high-level math classes for upper elementary and middle school students. They originally planned to join with Sacramento City Unified, Sacramento Unified, Clovis Unified, and Sanger Unified for the math grants. However, only the Clovis and Sanger teacher organizations agreed to sign the applications seeking \$20 million for their districts.

Fresno and Long Beach planned to apply for funds for an early-literacy program for Pre-K through third grade. The Los Angeles Unified School District hoped for money to expand partnership academies in low-performing high schools. While the Fresno Teachers Association agreed on negotiated language in the district's application seeking \$37.5 million, Long Beach and Los Angeles were unable to arrive at an agreement with their respective teachers unions.

As a result, Fresno, Sanger, and Clovis filed a joint application. They asked for an additional \$2 million because they promised to work together and share their findings with the other CORE districts.

Some of the teacher organizations that refused to sign applications did enter into discussions with their districts in an attempt to reach agreement. The United Educators of San Francisco refused to reopen the current contract, which provides for evaluations based on California Standards for the Teaching Profession, not test data. Rather than using scores as a measure of performance, the union suggested evaluations could consider how teachers use test scores to improve their teaching. The Sacramento City Teachers Association declined in September to participate in the application, stating that it did not want to be “rushed” into agreeing to a new evaluation system. It pointed to a report prepared by state Superintendent Tom Torlakson's task force on educators that recommended deemphasizing testing. (The full report entitled “Greatness by Design,” can be found at:

<http://www.cde.ca.gov/eo/in/documents/greatnessfinal.pdf> and is discussed in [this section](#) of *CPER*.) However, separate from any application for Race to the Top funding, the district and the association have agreed to begin discussions on a new teacher evaluation system based on the report.

LAUSD and United Teachers of Los Angeles negotiated unsuccessfully on an application seeking \$40 million to help 25,000 students in 35 low-performing middle and high schools. According to statements made by union president Warren Fletcher to the *Los Angeles Times*, the union's major objection was financial, fearing that the application process could have committed the district to programs which would cost more than the grant and result in future layoffs of teachers and cutbacks in student services. The district argued the funds would go toward existing programs that would go forward whether the grants were received or not, and could have allowed for the hiring of more teachers. LAUSD elected to file the application without the union's signature, accompanied by a letter from Superintendent John Deasy to U.S. Secretary of Education Arne Duncan. "It is simply wrong for the opposition of one organization — UTLA — to deny LAUSD the opportunity to funding that would provide tremendous benefits to our students," Deasy wrote. "Though Department rules mandate union support for the application, I appeal to you to consider the LAUSD grant. There is a common saying that extraordinary times demand extraordinary measures. With LAUSD continuing to face historic budget challenges while demonstrating historic gains, we believe we are in the midst of such times." Department of Education officials made it clear that the application would not be considered.

Riverside Unified submitted an application for \$30 million, and Central Unified applied for \$27.5 million. The Riverside City Teachers Association agreed to set up a separate process with the district to develop a teacher evaluation system that would include test scores. Central Unified worked with the Central Unified Teachers Association to craft language to address the teachers' concerns about the use of test scores in evaluations and unfunded mandates. The district agreed to give the teachers the right to pull out if the grant's requirements became too burdensome.

Of the 21 California districts that submitted applications, only four made it to the finals, and only three were among the 16 winners nationwide. New Haven Unified, a district with 13,000 students, located in Union City, was awarded \$29 million over four years to expand and improve current programs. The funds will also be used to provide each student with a digital tablet. Located in the Central Valley, Lindsay Unified, with 4,100 students, was awarded \$10 million to speed up its transition to performance-based learning. The 3,800-student Galt Elementary District, also located in the Central Valley, will also receive almost \$10 million to develop personalized learning programs. The fourth finalist, Green Dot Public Schools, a Los Angeles-based charter school operator with 10,400 students, submitted an application seeking \$30 million. Green Dot had previously come to an agreement with its teachers to include test scores in its evaluations. However, its bid did not make the final cut.

A complete list of all 371 applicants, representing more than 1,100 school districts

nationwide, can be found at <http://www2.ed.gov/programs/racetothetop-district/rttd-applicants.pdf> .

CPER Journal Online

Legislature's Failure to Expressly Approve Both Court-Mandated and Negotiated Raises Dooms Higher Salaries

For six years, the state and SEIU Local 1000 have been battling over raises the union bargained for medical workers in 2006, just before a federal court ordered salary increases for the same employees. Even though cost analyses submitted to the legislature mentioned the possibility of court-ordered raises, the court found that lawmakers did not approve the double raises when they approved the memorandum of understanding between the state and Local 1000. As a result, the court held in *California Department of Human Resources v. Service Employees International Union, Loc. 1000*, an arbitrator's award of higher salaries — based on his finding that the parties had agreed to implement both sets of raises — violated public policy.

DPA Refuses to Raise Salaries Twice

In December 2005, a court overseeing the state's prison medical system ordered 18 percent salary differentials for registered nurses and other medical workers, such as laboratory technicians, who worked for the California Department of Corrections and Rehabilitation. The employees were in two bargaining units represented by Local 1000. During the spring of 2006, the Department of Personnel Administration, now the California Department of Human Resources, agreed with the union to increase the salary ranges for the nurses and other medical employees who worked in the state's prisons. General raises of 3.5 percent took effect July 1, 2006, and extra equity increases of 5 to 10 percent for some classifications were scheduled for January 1, 2007. The agreements for both bargaining units were approved by the legislature in September 2006.

A week later, a receiver appointed by the court to overhaul prison medical care asked the federal court for approval of another 18 percent increase to the same salary ranges, effective retroactive to September 1, 2006. DPA did not object. The court-ordered raises were higher than the equity increases the union had negotiated and brought medical personnel salaries to market level.

The state refused to implement the negotiated equity boosts on January 1, 2007, insisting that they had been superseded by the larger court-ordered increases. The union filed a grievance. The arbitrator found that the parties agreed to the double sets of raises, and ordered back pay to the affected employees. He also retained jurisdiction over any disputes over the remedy.

The state asked the trial court to vacate the arbitrator's award, and the union countered with a request to confirm the award. The trial court sided with the union. The state appealed the trial court's decision, contending that the legislature did not approve the higher salaries.

After the trial court's decision, the state asked the federal court to clarify that its order did not include the negotiated equity raises. The court, however, refused to say what it would have decided, since no one had informed it of the newly negotiated MOUs when it approved the raises in October 2006. It neither approved nor prohibited the negotiated increases.

Arbitrator's Interpretation Affirmed

The agreements called for the equity increases to be "added to the maximum salary rate" of the selected salary ranges effective January 1, 2007. They also stated that the employees receiving the December differential would have their court-ordered differential adjusted downward so that they did not receive a higher salary after the general raise was implemented. The MOU covering vocational nurses and medical technicians stated that a 10 percent differential would remain and also provided, "Should the Court order any additional adjustments, the parties shall meet and confer over the appropriate adjustments, if necessary," for non-prison classes.

The state argued that the negotiated raises became moot after the second 18 percent differential was ordered. The union contended that the MOU raises were intended to raise the "maximum" rate that existed on January 1, 2007. The appellate court agreed with the trial court that either interpretation was plausible, and therefore, the arbitrator's interpretation must be affirmed.

Fatal Legislative Silence

An interpretation in favor of the union was insufficient to affirm the trial court's ruling, however. The award of back pay and an increase to the salary ranges could only be upheld if the legislature approved application of the equity increases on top of the court-ordered raises, the court explained. Its reasoning was based on *California Statewide Law Enforcement Assn. v. California Department of Personnel Administration* (2011) 192 Cal.App.4th 1, 2011 Cal.App. LEXIS 84, [CPER 202 online](#).) The issue before the CSLEA court was whether an agreement to retroactively convert miscellaneous members to safety members of the retirement system could be enforced, since the legislature did not expressly approve the retroactive aspect of the agreement. Even though the fiscal analysis given to the legislature had noted the possibility of the retroactive effect of the agreement, the CSLEA court held that the legislature had to be informed of the retroactivity of the benefit, provided with a fiscal analysis of the retroactive benefit, and vote to approve it. Since the fiscal analysis did not reflect the retroactivity, the court vacated the award.

Here, before the legislature approved Local 1000's memoranda of understanding, it was given a costing summary that contained the language in the contract on reducing the previous differentials. The costing summary stated, "If the Court orders any additional adjustments, the parties shall meet and confer over the appropriate adjustments, if necessary," for employees not affected by the court order. Reports of the Legislative Analyst's Office and the Department of Finance estimated a \$344 million cost for these and other MOUs approved in the same bill.

The court found that the MOUs were ambiguous concerning how any future court-ordered raises would mesh with the negotiated increases and that the legislature did not approve “maximums” above the amounts stated in the MOUs. Instead, lawmakers were silent on the issue, the court emphasized. “Accordingly, to the extent the arbitrator ordered the State to implement the [court-ordered] increases on top of the MOU increases, the award violates public policy because it mandates a fiscal result that was not explicitly approved by the Legislature,” it held.

The court turned aside the union’s theory that the legislature had delegated to the arbitrator the task of resolving disputes over the equity adjustment language. The authority to interpret an agreement is not the “power to authorize legislative expenditures above those authorized by the Legislature,” the court said. It also nullified the arbitrator’s retention of jurisdiction over implementation of the remedy.

The court disapproved the trial court’s reasoning that the award could be upheld because the state did not show that it had no funds to pay the remedy. “Neither the arbitrator nor DPA and CDCR can arrogate the authority to spend unappropriated funds, or divert appropriated funds to an undesignated purpose,” the court explained. Nor can they force the legislature to approve the extra salary payments. The union’s remedy is a political one — obtaining passage of a bill approving the higher salaries — not a legal one, the court instructed.

The appellate court directed the lower court to vacate the award to the extent it required payment of the higher salaries without legislative approval. (*California Department of Human Resources v. Service Employees International Union, Loc. 1000* (2012) 209 Cal.App.4th 1420, 2012 Cal.App. LEXIS 1070.)

CPER Journal Online

UC: No Pension Agreement, No Pay Raises

Efforts by the University of California to convince unions to agree to increased employee contributions and two-tier pension and retiree health benefit programs are not going well. Health care professionals represented by University Professional and Technical Employees voted in October to strike if the union decides a job action is necessary. AFSCME-represented patient care technical employees have declared impasse, and librarians represented by UC-AFT are also embroiled in the pension fight. The California Nurses Association and other units will begin to bargain over the university's plan in the new year.

Tier 2 for July 2013 Hires

UC is not subject to the Public Employee Pension Reform Act of 2012. It began its own pension reform planning in 2009, a few years after it recognized that taking a retirement contribution holiday for the previous two decades inevitably would lead to skyrocketing costs in the near future to avoid large unfunded pension liabilities. UC's pension problem is not due to enhanced pension formulas, as the 2.5 percent at 60 maximum formula has been in effect for more than two decades.

In December 2010, the UC Board of Regents approved a plan to change retirement ages, employee contributions, and several other features for future employees and raise contributions for current employees. Employees hired beginning July 1, 2013, will have to work until 65 to obtain the maximum 2.5 percent factor. Whereas employees now can retire with a lower benefit at 50 years of age, the minimum retirement age will be 55 for those hired after June 2013. (See story in [CPER No. 201](#), pp. 43-45.) Major changes were announced for retiree health benefits as well, which are not accrued or vested benefits and can be changed even for current employees.

The university has imposed increasing retirement contributions on current unrepresented employees, beginning with a redirection of a mandatory 2 percent deferred compensation contribution to the pension fund in May 2010. The contribution rate has risen to 5 percent of pay this fiscal year and will increase again to 6.5 percent in July 2013. But any changes for represented employees are subject to bargaining. Obtaining agreements to redirect the deferred compensation deduction and raise unionized employee contributions to 5 percent has taken several years. The labor organizations are digging in their heels even more on the pension and retiree health plan redesigns.

Pay Raises Held Hostage

While most workers' salaries are set by the university or bargained by their unions, employees in some academic positions are entitled to be considered for merit increases every three years and, if approved, receive them regardless of fiscal

conditions. Approximately one third of the 340 university librarians represented by UC-AFT enjoy merit raises each fiscal year.

Not this year. Because the librarian unit has resisted retirement changes, UC is refusing to pay out merit increases that have been fully approved. Language in the collective bargaining agreement allows the university to withhold merit raises during bargaining over compensation. UC has used the strategy before, but librarians say its effect is different this time because the university is insisting that no part of its retirement plan for new hires can be negotiated. Essentially the university is demanding that the unit give up the right to bargain retirement issues in return for earned merit raises, UC-AFT asserts.

“It is clearly a bullying tactic, meant to divide me and similarly situated colleagues from those of our peers who happen not to be under review at a time when our contract is under negotiation,” wrote UC Berkeley law librarian I-Wei Wang in an open letter to the university administration. Referring to the tactic as “blackmail,” he continued, “It’s not about saving money in tough economic times; it’s a blatant attempt to cut off negotiations.”

The university has offered to remove the language allowing withholding of merit pay for the future and award the merit raises retroactively if the union accepts the university’s pension and retiree health proposal in full. Librarian pensions would be protected by contractual language that guarantees no lesser pension benefits than those received by academic senate faculty, who the university likely will take care not to upset with non-competitive compensation changes.

Librarians are not the only workers who feel pay raises are being held hostage. The university’s medical centers, which are largely unaffected by state budget allocations, have money. UPTC health care professionals assert that medical center administrators have told them that they want to raise salaries, but the university administration will not agree. The union is demanding a 3.5 percent wage increase and is willing to agree to raise employee contributions to 5 percent of pay from 3.5 percent.

Union Actuarial Report

While some union representatives acknowledge that the university’s retirement fund is in danger if changes are not made to the pension rights of new hires, other unions insist that the second tier is not necessary. UPTC claims that UC wants to “front-load” the payments required to restore the pension system from 82.5 percent to 100 percent funded. Tellingly, the union says, UC is paying employer contributions of only 10 percent of payroll now, even though it claims that the system needs cash infusions amounting to 30 percent of payroll. AFSCME and CNA joined with UPTC to obtain services of an independent actuary to counter the university’s proposals. AFSCME’s patient care unit presented an actuarial report at the bargaining table in November. When UC did not make a counteroffer on wages or benefits, the union declared impasse.

UC has a long road ahead on the path to equal pension rights for represented and

unrepresented employees. UPTe's technical and researcher unit is beginning bargaining over retirement benefits this month. AFSCME began negotiations over the issue for service workers in October, and the Federated University Police Officers Association began bargaining this summer for a successor contract, including employee retirement contributions and the second tier plan.

Clerical workers represented by CUE-Teamsters agreed in a previous round of bargaining to increased employee contributions and retiree health care changes. While the union reserved the right to bargain over an alternative to the second tier pension benefits last winter, its contract allows the university to implement its plan if there is no agreement reached by January 1, 2013.

CPER Journal Online

Court Committee Has Legislative Immunity From Suit Based on Its Enactment of Policy-Setting Minimum Qualifications for Subordinate Judicial Officer

In *Schmidt v. Contra Costa County*, the Ninth Circuit Court of Appeals defined the authority of a superior court to establish minimum qualifications for employees and held that judges on a court executive committee are immune from a lawsuit if their action is legislative in nature. The appellate court noted the adoption of new qualifications occurred suspiciously soon after a temporary commissioner ran against a sitting judge, but established law does not allow an inquiry into whether the judges had a retaliatory motive for adopting qualifications that the temporary commissioner could not meet. The judges' immunity barred the commissioner's claims of retaliation for exercising her rights to free speech under both the state and federal constitutions.

Running for Judge

Denise Schmidt served as a temporary superior court commissioner for the Contra Costa County Superior Court for six years beginning in 1998. While she was a commissioner, she was a member of the bar, but in inactive status. In November 2003, she filed her application to run for judicial office against an incumbent judge.

Earlier that year, the superior court's executive committee had begun consideration of a new policy establishing minimum qualifications for temporary judges. It would not have applied to temporary court commissioners. Discussion of the first draft suggested a requirement that a temporary judge be an active member of the bar for at least five years immediately prior to appointment.

Schmidt lost the election in March 2004. Six weeks later, the executive committee adopted a policy very similar to the one drafted the previous year. In mid-May, Schmidt applied for a position as permanent commissioner. Two days later, the executive committee held a meeting during which it looked at a report of the bar membership status of all pro tem judges, private judges, and temporary commissioners. It then voted to broaden the reach of the policy to temporary referees and commissioners. The new requirement affected three other subordinate judicial officers — a retired judge and two private judges. Schmidt was told about the new requirement in a telephone call with a member of the executive committee. She never again served as a temporary judge.

Schmidt filed a lawsuit in federal court against the county, the judges on the executive committee, the court executive officer, and other entities, alleging that the court had adopted the policy in retaliation for exercising her constitutionally protected free speech rights to run for election, in addition to other legal claims. The district court dismissed her claims against the judges on the defendants' summary

judgment motion, and she appealed. While the trial court's judgment was based on numerous reasons, the Court of Appeals addressed only the issue of legislative immunity of the state court judges.

Legislative Power

As courts are entitled to legislative immunity only if they perform legitimate legislative functions, the federal court first had to determine whether the court was authorized to enact minimum qualifications for temporary court commissioners. The California Constitution gives the state Judicial Council the power to adopt rules for court administration. The legislature has also given the council the right to establish the minimum qualifications for subordinate judicial officers, but there is no express authority for an individual superior court to adopt its own employment qualifications for subordinate judicial officers.

The federal court found authority in the Judicial Council's California Rules of Court. In Rule 10.601(b)(3), the council granted superior courts the power to "[m]anage their personnel systems, including the adoption of personnel policies." Rule 10.601(c)(4) directs them to adopt personnel policies on recruitment, selection, and promotion.

In addition, superior court personnel policies must be consistent with California law and court rules and standards. The rules of court merely require that a subordinate judicial officer be a member of the bar and have been admitted to practice law for a specified number of years. The federal court was not persuaded by Schmidt's argument that a policy requiring higher qualifications than those imposed by the Judicial Council was inconsistent with the rules. The rules establish "a statewide floor" for employment qualifications and do not prevent superior courts from adding qualifications, the federal court decided. It therefore found that the judges had acted within the court's legitimate sphere of authority when they adopted the new qualifications.

Legislative Immunity

The federal court found that the new policy was a legislative act, rather than a decision affecting a particular individual. To be eligible for legislative immunity, an action must be a formulation of policy rather than an ad hoc decision. It must apply to a sufficiently large population, have been accomplished using formal legislative procedures, and contain the "hallmarks of traditional legislation."

The court found that the adoption of minimum qualifications was not an ad hoc decision affecting only a few persons, but a rule affecting all attorneys applying for subordinate judicial positions. Although it did not affect many people initially, it is not limited to the four immediately affected, but will be applied to future applicants. It was passed in a formal meeting where minutes were taken, procedures were followed, and a vote was used to approve the new policy.

The federal court found that the policy adoption had the hallmarks of legislation. It was a discretionary act, not required by law. It affected the provision of services.

And, it had prospective implications for future applicants for subordinate judicial officer. It therefore qualified for immunity under federal law.

The court ruled that the state constitution also provided the judges legislative immunity. The doctrine of separation of powers requires that those enacting legislation have absolute immunity from damage suits based on legislative acts, the court explained. Using the same reasoning it employed under federal law, the court found that the adoption of minimum qualifications was a legislative act, and the judges were entitled to immunity under the state constitution.

While it mentioned the suspicious timing, the appellate court refused to inquire into whether the executive committee had a retaliatory motive for its act. The court affirmed the dismissal of the free speech claims against the judges on the committee. (*Schmidt v. Contra Costa County* [9th Cir. 2012] 693 F.3d 1122, 2012 U.S. App. LEXIS 18973.)

CPER Journal Online

2013 Ushers in Changes to the Fair Employment and Housing Act

In addition to the elimination of the Fair Employment and Housing Commission as of January 1, 2013 (discussed in [CPER 207 online](#)), there are other revisions to the Fair Employment and Housing Act and its implementing regulations that will go into effect next year.

A.B. 1964: The Workplace Religious Freedom Act of 2012

This bill, sponsored by Assembly Member Mariko Yamada (D-Davis) and signed into law by Governor Jerry Brown on September 8, 2012, amends Government Code section 19240's prohibition against religious discrimination, effective January 1, 2013.

First, the bill specifies that the definition of "undue hardship" to be applied when assessing the duty to provide reasonable religious accommodation is that found in section 12926(t) of the act. This makes it clear that an employer who is seeking to avoid accommodating an employee's religious belief, observance, or practice must show that to do so would result in a "significant difficulty or expense" rather than meeting the lower federal "de minimus" standard.

The bill specifies that a "religious dress practice" or a "religious grooming practice" is a belief or observance covered by the protections against religious discrimination. Both terms are to be construed broadly. A "religious dress practice" includes "the wearing of or carrying of religious clothing, head or face coverings, jewelry, artifacts, and any other item that is part of the observance by an individual of his or her religious creed." A "religious grooming practice" includes "all forms of head, facial, and body hair that are part of the observance by an individual of his or her religious creed." The amendment further provides that an accommodation of an individual's religious dress or grooming practice is not reasonable if it requires segregation from the public or from other employees.

The act was also amended to provide that an accommodation is not required if it would result in the violation of specified laws protecting civil rights. This provision applies to accommodations of religious beliefs or observances and disabilities.

Pregnancy Discrimination Regulations

Modifications to regulations governing pregnancy discrimination under the FEHA to bring them into conformance with changes in the law were proposed by the FEHC and approved by the Office of Administrative Law. One notable difference is that now an employer must maintain group health care benefits for employees on pregnancy disability leave regardless of its policies regarding such coverage for other temporary disabilities. This change is in accord with S.B. 299, which became

effective January 1, 2012. Under prior law, employers were required only to provide health care benefits to the same extent and under the same conditions as would apply to any other temporary disability leave.

The act prohibits discrimination based on pregnancy, childbirth, or related medical conditions. The new regulations specify that “lactation” is a related medical condition. By including the term, they clarify that the employer has an affirmative duty to reasonably accommodate a lactating woman.

The new regulations are effective December 30, 2012.

Disability Discrimination Regulations

The FEHC also proposed modifications to the regulations governing disability discrimination to bring them into conformance with the law. The Commission based the changes on three sources. The first was the Prudence Kay Poppink Act of 2000, which affirmed that the legislature intended the FEHA to provide wider coverage and stronger protections to disabled California employees and applicants than that provided by the federal Americans with Disabilities Act of 1990. The PKP Act also made the failure to engage in the reasonable accommodation interactive process a separate FEHA violation.

The second source was the California Supreme Court’s decision in *Green v. State of California* (2007) 42 Cal.4th 254, 2007 Cal.LEXIS 8910, 186 CPER 62, holding that a plaintiff alleging discrimination on the basis of disability under the act bears the burden of proof that he or she is a qualified individual, meaning, “is capable of performing the essential functions of the job with or without reasonable accommodation.” The third source was the Genetic Information Non-Discrimination Act of 2008, which prohibits discrimination on the basis of genetic make-up.

The Office of Administrative Law requested two minor changes to the proposed regulations, which were adopted by the Commission on November 29, 2012. The public comment period on these modifications expires December 17, 2012. It is anticipated that they will be approved and become effective before the end of the year. For more information, visit the FEHC website, <http://fehca.ca.gov/act/disabilityregulation.asp>.

CPER Journal Online

‘Motivating Reason’ Enough to Prevail on FEHA Claim

The Second District Court of Appeal has determined that a plaintiff alleging unlawful discrimination under the Fair Employment and Housing Act need only prove that her protected status was a “motivating reason” for her discharge to prevail, not that it was the “but for” cause. In *Alamo v. Practice Management Information Corp.*, the appellate court noted that the issue may be decided by the state Supreme Court in a case currently before it, *Harris v. City of Santa Monica* (review granted 4-22-10, S181004. (See [CPER No. 198](#), pp. 61-63, for a discussion of the Court of Appeal decision.) However, the Court of Appeal found sufficient authority to render its decision in *Alamo* without waiting for the Supreme Court’s decision in that case.

Lorena Alamo, a clerk working for PMIC, a publishing company, went out on a two week pregnancy-related leave followed by six weeks of maternity leave. While she was gone, her supervisor allegedly discovered problems with Alamo’s performance. When Alamo returned from leave, she was fired.

Alamo filed a lawsuit alleging pregnancy discrimination in violation of the FEHA and wrongful termination. At trial, the jury returned a general verdict in favor of Alamo and awarded her \$10,000. The trial court awarded her over \$50,000 in attorney’s fees as the prevailing plaintiff under the FEHA.

PMIC appealed, arguing that the trial court erred by failing to instruct the jury that the FEHA requires an employee alleging a discriminatory or retaliatory discharge to prove that she would not have been terminated “but for” her protected status. It also contended the trial court should have instructed that when a discharge is based on a “mixed motive” of both permissible and impermissible factors, the employer should prevail if the jury determines that the employer would have made the same decision in the absence of a discriminatory or retaliatory motive. In addition, PMIC maintained that Alamo should not have been awarded attorney’s fees because it was not clear from the verdict form whether the jury made its decision under the FEHA or wrongful termination causes of action.

‘Motivating’ or ‘But For’ Reason?

The Court of Appeal was not persuaded by any of PMIC’s arguments. It rejected the contention the trial court erred by instructing the jury that it could only find for Alamo on the FEHA cause of action if she proved that her pregnancy or pregnancy-related leave was “a motivating reason” for her discharge, rather than the sole or “but for” reason. The appellate court noted the legislature specified that the purposes of the FEHA are “to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons,” and that the provisions of the act “shall be construed liberally to accomplish its purposes.”

While the state Supreme Court has not yet specifically ruled on the issue, it has suggested in dicta that “‘a motivating reason’ or a ‘motivating factor’ is the proper causation factor under FEHA,” said the appellate court, citing *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 2000 Cal. LEXIS 7498, 145 CPER 57. In *Guz*, the high court stated that in a FEHA discrimination case the ultimate issue is “whether the employer acted with a *motive to discriminate illegally*.”

The Second District also listed a number of Court of Appeal decisions in which the phrase “a motivating factor” or “a motivating reason” was used when describing the standard of causation in a FEHA discrimination or retaliation case. It distinguished cases relied on by PMIC. In the main case cited by PMIC, *Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. 167, 2009 U.S. LEXIS 4535, 196 CPER 63, the United States Supreme Court held that a plaintiff alleging age discrimination under the federal Age Discrimination in Employment Act must prove that age was the “but for” cause of the adverse employment action. However, noted the *Alamo* court, the high court based its decision on the specific legislative history of the ADEA. At the time Congress amended Title VII of the Civil Rights Act of 1964 to provide that a plaintiff alleging employment discrimination because of race, color, religion, sex, or national origin need only show that his or her protected status was “a motivating factor for any employment practice, even though other factors also motivated that practice,” it did not amend the ADEA to include similar language. “Given these conflicting standards of causation that now apply under the federal anti-discrimination statutes, we decline to follow *Gross* in considering the proper standard of causation under FEHA,” said the court.

The appellate court rejected PMIC’s argument that because the FEHA specifically states the “motivating factor” standard is to be used in housing discrimination cases but not in reference to employment discrimination, the legislature must have intended a different standard to be used in employment cases. The court countered that “a review of the relevant provisions...shows that both the employment and housing sections of the statute use the same terminology — ‘because of’ — in defining the prohibited act of discrimination.”

Mixed-Motive Defense Not Applicable

The court noted that the question of whether a mixed-motive defense is available under the FEHA also may be decided by the Supreme Court in *Harris*. It determined, however, that it did not need to decide that issue in this case because it was tried by both parties as a single-motive, not a mixed-motive, case.

In *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 1989 U.S. LEXIS 2230, 81 CPER 72, where the United States Supreme Court first introduced the mixed-motive defense, the distinction between a mixed-motive and a single-motive, or pretext, case was specifically discussed, noted the *Alamo* court. “In pretext cases the issue is whether either illegal or legal motives, but not both, were the ‘true’ motives behind the decision,” explained Justice White in his concurrence. “In mixed-motive cases, however, there is no one ‘true’ motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.” While a case may not

be labeled at the beginning, clarified Justice White, at some point the trial court must decide whether the case involves mixed motives and instruct the jury accordingly.

Here, both parties treated the case as a single-motive pretext case, said the court. “PMIC consistently argued that its decision to terminate Alamo was based entirely on her performance and insubordination issues, whereas Alamo maintained that PMIC’s proffered reasons were a mere pretext for pregnancy discrimination.” Therefore, it concluded, the trial court did not err by refusing to give the mixed-motive jury instruction.

Attorney’s Fees Award Proper

PMIC argued that because a general verdict form was used, the jury may have decided in Alamo’s favor on the wrongful termination cause of action and not on the FEHA cause of action, in which case she would not be entitled to attorney’s fees.

The court rejected this contention. First, it found the claim barred by the doctrine of invited error because PMIC’s attorney decided to use and prepared the general verdict form. Second, the two causes of action were related in that the wrongful termination claim was based on a violation of public policy — employment discrimination in violation of the FEHA. Because the wrongful termination cause of action was derivative of her FEHA claim, the court concluded that the jury must have found that PMIC violated the FEHA in order to find in favor of Alamo.

The judgment was affirmed, and Alamo was awarded costs on appeal. (*Alamo v. Practice Management Information Corp.* [2012] 210 Cal.App.4th 95, 2012 Cal.App. LEXIS 1086.)

CPER Journal Online

Employer May Not Deny Reinstatement After CFRA Leave Based on ‘Honest Belief’ Employee Abused His Leave

The Second District Court of Appeal ruled that an arbitrator made a clear legal error when he upheld an employer’s refusal to reinstate an employee because the employer had an “honest belief” that the employee had violated company policy when he worked at his own restaurant while on approved medical leave under the California Family Rights Act. The court in *Richey v. AutoNation, Inc.*, found the honest belief defense to be incompatible with California statutes, regulations, and case law.

Avery Richey, a sales manager at a car dealership, was granted leave under CFRA after suffering a back injury. Approximately four weeks before he was scheduled to return to work, he was terminated for violating a company policy prohibiting employees from working for another company while on CFRA leave. AutoNation believed that Richey was working at a restaurant he owned, based on the brief observations of two other employees. Richey claimed he had only engaged in limited, light-duty functions authorized by his doctor.

The matter went to arbitration in accord with an arbitration agreement that Richey signed when first employed. The arbitrator, relying on federal court decisions interpreting the federal Family and Medical Leave Act of 1993 and one California decision, concluded, “an employer who honestly believes that it is discharging an employee for misusing FMLA [leave] is not liable even if the employer is mistaken.”

A trial court denied Richey’s motion to vacate the arbitration award, and Richey appealed.

‘Honest Belief’ Defense Not Available in California

The Court of Appeal explained that, under the CFRA and implementing regulations, once leave is granted, the employer is deemed to have guaranteed the employee reinstatement to the same or a comparable position upon expiration of the leave, subject to specific defenses set out in the act. The same is true under the FMLA and implementing regulations. Under both acts, an employer is permitted to terminate an employee and deny reinstatement when the employee’s employment otherwise would have ceased. The employer bears the burden of proving that the employee would not otherwise have been employed at the expiration of the leave in order to avoid liability for denying reinstatement. Here, by adopting the “honest belief” rule, “the arbitrator improperly imposed the burden of proof on Richey, rather than on his employer,” said the court.

The rule was developed in a series of federal Seventh Circuit Court of Appeals

decisions in discrimination cases, the court noted. It provides that “so long as the employer honestly believed in the proffered reason given for its employment action, the employee cannot establish pretext even if the employer’s reason is ultimately found to be mistaken, foolish, trivial, or baseless,” the court explained, quoting from *Smith v. Chrysler Corp.* (6th Cir. 1998) 155 F.3d 799, 1998 U.S. App. LEXIS 22396, discussing *Kariotis v. Navistar International Transportation Co.* (7th Cir. 1977) 131 F.3d 672, 1997 U.S. App. LEXIS 34378. The rule focuses on the intent of the employer in a discrimination suit. If the employer honestly believes in the non-discriminatory reason for the employment decision, then it lacks discriminatory intent and is not liable, even if the reason lacks any factual support, the court explained. The *Kariotis* court assumed that the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 1973 U.S. LEXIS 154, applied not only to Title VII discrimination cases but to other employment rights statutes as well, including the FMLA, explained the court in this case.

While *Kariotis* is still followed in the Seventh Circuit, the honest belief defense has been rejected by many other federal courts. Many also have refused to apply the *McDonnell Douglas* burden-shifting framework to place the burden of proof on the employee to disprove the employer’s subjective intent in FMLA cases, instructed the court. As an example, it pointed to the Ninth Circuit’s decision in *Bachelder v. America West Airlines, Inc.* (9th Cir. 2001) 259 F.3d 1112, 2001 U.S. App. LEXIS 17691, in which the court stated that “the issue is one of *interference* with the exercise of FMLA rights...not retaliation or discrimination.” The *Bachelder* court placed the burden of proof on the employer defending a claim of interference, as have several others.

Most federal courts now recognize two theories for recovery on FMLA claims, explained the Court of Appeal. They are the “entitlement or interference theory” and the “retaliation or discrimination theory.” In order to prevail on an entitlement or interference claim, a plaintiff must prove that he or she was an eligible employee, the defendant was an employer under the FMLA, the employee was entitled to leave under the FMLA, the employee gave the employer notice of his or her intention to take leave, and the employer denied him or her benefits under the FMLA. When the issue involved is a denial of reinstatement, “the employer must demonstrate ‘a legitimate reason to deny [the] employee reinstatement,’” said the court, quoting from *Sanders v. City of Newport* (9th Cir. 2011) 657 F.3d 772, 2011 U.S. App. LEXIS 20146. The employer’s intent or good faith is irrelevant.

California courts have interpreted the CFRA in a similar manner, the court instructed, citing a number of cases. And, in *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 2008 Cal. LEXIS 3796, 190 CPER 72, the California Supreme Court specifically held that an employer may not terminate an employee on CFRA leave solely because the employee was working part time in another comparable job, the court noted. There, the high court found that the relevant inquiry in such a situation is whether the employee’s medical condition renders her unable to do the current job, not whether she can perform the essential functions of the job generally. “Thus, ...*Lonicki*...necessarily stands for the proposition that an employer may not, in

terminating or failing to reinstate an employee who has been granted CFRA leave, defend a lawsuit from that employee based on its honest belief the employee was abusing his or her leave,” said the Court of Appeal. “Instead the employer must demonstrate evidentiary facts sufficient to carry the burden of proof imposed by CFRA and FMLA.”

The court distinguished the one California case cited by the defendant in support of its position, *McDanel v. Eastern Municipal Water Dist.* (2003) 109 Cal.App.4th 702, 2003 Cal.App. LEXIS 844, 161 CPER 75. In that case, unlike in *Richey*, sufficient evidence was produced to support the defendant’s claim that the plaintiff had misused his leave and then lied about it, said the court.

“In sum, we reject AutoNation’s contention an employer may simply rely on an imprecisely worded and inconsistently applied company policy to terminate an employee on CFRA leave without adequately investigating and developing sufficient facts to establish the employee had actually engaged in misconduct warranting dismissal,” the court concluded. “Whether the arbitrator’s ruling resulted from his improper acceptance of the honest belief defense or the employer’s reliance on a policy that violated Richey’s substantive right to reinstatement, neither comports with the substantive requirements of CFRA.”

Arbitration Award Vacated

The court noted that the arbitration agreement in this case specifically required that the arbitrator resolve any claim “solely upon the law,” and that the arbitrator’s legal error denied Richey a hearing on the merits of his statutory claim. It also found that the arbitrator failed to make relevant findings of fact and conclusions of law related to Richey’s CFRA claims. For all of those reasons, the court reversed the judgment confirming the arbitration award and remanded it to the trial court for further proceedings consistent with its opinion. (*Richey v. AutoNation, Inc.* [11-13-12] B234711 [2nd Dist.] ____ Cal.App.4th ____, 2012 Cal.App. LEXIS 1177.)

CPER Journal Online

MOU Language Ratified by City Council Sufficient to State Claim for Vested Retirement Health Benefits

Retiree health benefits promised in a collective bargaining agreement may be vested rights that cannot be unilaterally eliminated, the Court of Appeal decided in *International Brotherhood v. City of Redding*. The language used in the contract and the city council's ratification of the collective bargaining agreement led to the court's conclusion. A petition for review by the Supreme Court has been filed.

'In the Future'

In 1978, the City of Redding agreed to contribute to retiree health premiums. In every collective bargaining agreement between the city and International Brotherhood of Electrical Workers since 1979, the city has promised to pay 50 percent of the premium "for each retiree and their dependents...presently enrolled and for each retiree in the future." The memoranda of understanding also provided that they remain in effect unless modified by mutual agreement. Each MOU was approved by the city council.

In 2010, the city proposed to change the contribution to 2 percent of the premium for each year of service up to 50 percent of the cost. When the parties reached impasse, the city imposed its plan.

The union filed a petition in court challenging the city's unilateral action. The city successfully filed a motion to dismiss the petition. The trial court ruled that active employees' rights to the benefits could not vest because they were subject to the collective bargaining process, and an MOU could not provide vested rights because it no longer remains in effect after it expires. The union appealed.

Parties' Intent Governs

The appellate court relied on *Retired Employees Association of Orange County v. County of Orange* (2011) 52 Cal.4th 1171, 2011 Cal. LEXIS 12109, [CPER 204 online](#), to decide that the union's lawsuit should proceed. In that case, the court held that a vested right to health benefits for retired county employees could be implied from a county ordinance or resolution approving a collective bargaining agreement. Whether the promised benefit vests "is a matter of the parties' intent," the Supreme Court instructed.

Applying the principles announced in *REAOC*, the court here found that the facts as stated by IBEW showed that the parties intended to create a vested right. It based its decision on the language promising the benefit to "each retiree in the future," and on the ratification of the contracts by the city council as required by the Meyers-Milias-Brown Act. It turned aside the city's contention that the promises could not vest because they were contained in expired collective bargaining agreements.

Although most contractual obligations end when a collective bargaining agreement expires, some may vest and will survive expiration of the contract, the court explained, citing *Litton Financial Printing Div. v. NLRB* (1991) 501 U.S. 190, 1991 U.S. LEXIS 3486, 90 CPER 57.

The city contended that there was no express legislative authorization of the retiree health benefit promise. The court's interpretation of the language was that "each retiree in the future" referred to employees who retired after the expiration of the agreement, since the phrase "presently enrolled" must mean active employees who retired during the term of the contract. "If the parties had intended the retiree medical insurance premium benefit to apply only until the MOU expired, 'in the future' was mere surplusage," the court reasoned. The vested right was legislatively authorized when the city ratified this express promise, the court concluded.

The city argued that vesting of a benefit cannot occur because the MMBA allows a city to impose its last, best, and final offer after impasse. But the court found the city's position conflicted with the Supreme Court's holding in *REAOC* that an MOU may create vested rights.

The court also dismissed the city's contention that the language did not create a vested right to a specified level of benefits even if the city could not afford it. The city provided no legal authority that showed the relevance of its financial situation, the court pointed out.

The city contended that retiree health benefits do not vest until an employee retires. Again, the language of the agreements defeated the city's argument. "[T]he most reasonable interpretation of this language is that the City committed itself to pay 50 percent of medical insurance premiums 'in the future' on behalf of then-active employees when they retired," the court emphasized.

The court determined it did not need to consider additional allegations that the city also conveyed the retiree health benefits promise in job announcements and other non-collectively bargained documents. It ordered the trial court to vacate its decision dismissing the union's petition. (*International Brotherhood etc. v. City of Redding* [2012] 210 Cal.App.4th 1114, 2012 Cal.App. LEXIS 1149.)

CPER Journal Online

Under PSOPBRA, Hearing Officer May Order Production of Officers' Records Relevant to Claim of Disparate Treatment

The statutory scheme for discovery of peace officer personnel records permits a hearing officer to order a law enforcement employer to produce disciplinary records of other officers for a peace officer's disciplinary appeal, the Court of Appeal held in *Riverside County Sheriff's Department v. Stiglitz*. The court held that a reading of the statute that limits such powers to courts, rather than administrative bodies, would conflict with due process requirements.

Officer Records Sought

Kristy Drinkwater, a deputy in the Riverside County Sheriff's Department, was terminated for falsification of her time records. She appealed her discipline under the memorandum of understanding between the county and the union that represented her, the Riverside Sheriff's Association. The MOU outlined an appeal procedure as provided in Government Code section 3304, a provision of the Public Safety Officers Procedural Bill of Rights Act. It called for a hearing officer to preside over the appeal, and authorized the hearing officer to issue subpoenas. The MOU required the county employee relations manager to arrange for the production of relevant county records. By the terms of the MOU, the appeal hearing is private.

Drinkwater asserted that she was treated more harshly than others who had falsified their time records. She made a motion to the hearing officer, Jan Stiglitz, for production of disciplinary records of several officers, and agreed that the county could redact the officers' names from the records. The county did not challenge Stiglitz' authority to rule on the motion, but argued there was no good cause for production of other officers' records. After Stiglitz ordered production of the records, the county petitioned the trial court to vacate the decision. Before the trial court ruled, an appellate court decided, in *Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 2010 Cal.App. LEXIS 558, that a hearing officer in a Department of Motor Vehicles administrative hearing had no authority to rule on a motion to discover officer records. Relying on *Brown*, the trial court ordered Stiglitz to deny the discovery motion. Drinkwater and RSA appealed.

Trial Court's Jurisdiction

Before reaching the discovery question, the appellate court had to determine whether the trial court had jurisdiction to rule on the county's petition for a writ of administrative mandamus. Usually, a party cannot petition for a writ until the administrative proceeding is final. A discipline appeal would not be final until the hearing officer decided whether the discipline was warranted. But the appellate court found that this case met one of the exceptions to the rule. Because the motion

involved confidential personnel records, the court determined there would be irreparable harm if the county had to wait until the end of the hearing to challenge an order to produce the records.

For the same reason, the court found that the usual rule that a party must exhaust administrative remedies before resorting to the court did not bar the county's challenge to Stiglitz' authority. Although the county did not object to his authority at the administrative hearing, the appellate court ruled the trial court had jurisdiction to decide the petition for writ of administrative mandamus because of the possibility of irreparable harm.

'Pitchess' Statutes Permit Administrative Discovery

In 1978, after the California Supreme Court ruled that a criminal defendant could discover prior complaints about an officer's use of excessive force, the legislature enacted several laws that govern the discovery of peace officer personnel records. The law requires that a party seeking personnel records file a "*Pitchess*" motion — named after the Supreme Court case — with a court or administrative body. Evidence Code section 1043 allows discovery of the records if they are sufficiently relevant to the pending litigation, but section 1045 requires that certain information may not be disclosed, that the court inspect the records prior to disclosure, and that the court consider the privacy rights of the officers in ordering disclosure.

The use of the phrase "administrative body" in section 1043, but only "court" in section 1045, led the *Brown* court to decide that the DMV hearing officer had no authority to order production of peace officer records. It also found that the statute that governs DMV hearings does not provide for discovery of officer records, and that those records would not be relevant in a DMV hearing.

The appellate court here declined to follow that reasoning. It recognized the absence of the reference to an administrative body in section 1045, but decided the legislature did not intend to preclude administrative hearing officers from ruling on *Pitchess* motions since it provided no legal mechanism for the question to be presented to a court in an administrative proceeding. The court pointed out that PSOPBRA hearings are governed by different statutes than DMV hearings, and that evidence of harsher discipline of one officer than of others committing the same misconduct is relevant in a disciplinary hearing.

More importantly, the court held that excluding disparate treatment evidence would violate the due process rights of the disciplined officer. It held that "where that defense is raised in a section 3304(b) hearing, due process mandates that the officer who is subject to discipline must have the opportunity to demonstrate the relevance of the personnel records of other officers."

The court turned aside the claim that confidential records should not be disclosed in an administrative proceeding, noting that the MOU in this case made the hearing private. The court also pointed out that section 1045 permits a court to limit use of the records and make other orders "to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." The court dismissed the

notion that hearing officers may not have the qualifications to rule on *Pitchess* motions.

Since disclosure to a disciplined officer of others' personnel records, if relevant, is required by due process, the court found that the MOU must be interpreted to allow such discovery. (*Riverside County Sheriff's Department v. Stiglitz* [2012] 209 Cal.App.4th 883; 2012 Cal.App. LEXIS 1025.)

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IT Manager's Involvement in Personal Use of Confidential Data Leads to Reduction in Subordinate's Penalty

Curious about his likely eligibility for an early retirement incentive program, a systems analyst printed a report showing the hire dates of his coworkers. He also told his union about a discrepancy in another employee's hire date. Arbitrator Walter Kaufman agreed with the employer, Community Redevelopment Agency of the City of Los Angeles (CRA/LA), that the appellant had breached his duty of confidentiality. But his supervisor's acquiescence in the misconduct rendered the appellant's five-day suspension and personal improvement plan unwarranted, Kaufman decided.

'All Data Are Confidential'

In 2010, rumors were swirling about a retirement incentive package the agency was considering. As an employee in the information technology department, the appellant could access data, but was not authorized to distribute it without permission from the proper department head. When he looked at a human resources report to see whether his hire date would qualify him for the full retirement package, he noticed that a coworker's hire date had not been updated to reflect a five-year break in service.

The systems analyst showed the report to his supervisor. He testified that he told his supervisor about the coworker's hire date discrepancy and that he was going to alert the union. According to the appellant, his supervisor did not object to alerting the union about the incorrect seniority date.

The appellant's email to the union's business agent was titled "ERIP Agency Rehires Report." He questioned whether the union had an up-to-date report and disclosed the discrepancy on the report he had viewed, but he did not provide a copy of the report. The appellant also emailed the local union president and the human resources director, suggesting that the human resources department generate a report of rehire and adjusted anniversary dates.

When told a report was "floating around" that had been leaked by the IT department, the IT director became alarmed. He testified his employees are told all data is confidential and they may not distribute it without permission.

At a pre-disciplinary interview, the appellant produced the report, which contained employee identification numbers as well as names and hire dates. The agency issued a notice of intent to suspend him for 10 days, but the suspension was reduced to five days because the supervisor admitted that the appellant had told him before emailing the union about the hire date report.

Unduly Severe Penalty

AFSCME Local 585 argued that the appellant was being targeted for his protected involvement in the union's negotiations. Arbitrator Kaufman questioned whether the appellant's emails were protected concerted activity, but he decided that, even protected activity "does not usually serve as a shield against the disciplinary consequences of violating company rules."

Arbitrator Kaufman also turned aside the union's contention that the report was not confidential. While no policy described what information was confidential, and the information was distributed later by the agency, Kaufman refused to ignore the industry standard that requires IT employees to keep information private. Since "the information in the report is confidential because the Agency deems it to be 'confidential,'" he decided there was cause for discipline.

The level of discipline, however, was too severe, Kaufman determined. The appellant had been given an oral warning the previous year for accessing confidential salary information. But Kaufman rejected the agency's contention that a five-day suspension was warranted because it was the appellant's second offense. According to the agency's disciplinary action guide, the discipline for a first offense is a written reprimand, not an oral warning, Kaufman pointed out. In this case, the oral warning was not documented. And, he found a substantial disparity between an oral warning and a five-day suspension.

In addition, it was the very same supervisor who previously had disciplined the appellant for improper access who failed to correct the appellant's conduct before he emailed the union. As a result, the arbitrator found the appellant "had reason to think that [the supervisor's] failure to disapprove the misconduct...was sufficient indication that it was not objectionable."

In addition, the misconduct was inconsequential, since the human resources director testified the appellant could have called her to find out his seniority. Although there was a "buzz" in the agency about the ERIP, the appellant's email to the union was not the source of the rumors, Kaufman found. Thus, a monetary penalty was unduly severe. Kaufman ordered the agency to rescind the suspension and issue a written reprimand. As the personal improvement plan had been completed, the dispute over it was moot. (*CRA/LA and AFSCME, Loc. 585* [6-8-12] 13 pp. *Representatives*: Alison R. Platt [deputy city attorney] for the agency; Steve Koffroth [business representative] for the union. *Arbitrator*: Walter Kaufman.)

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Public Sector Arbitration Log

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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
- Work assignment
- Hiring

San Francisco Unified School Dist. and United Educators of San Francisco (9-12-12; 12 pp.) *Representatives:* William Michael Quinn, Jr. (senior deputy general counsel) for the employer; Stewart Weinberg (Weinberg, Roger & Rosenfeld) for the union. *Arbitrator:* Paul Staudohar. (CSMCS Case No. ARB-11-0183).

Issue: Did the employer violate the contract when it did not hire a part-time substitute teacher to assist a lead teacher who was performing extra duties?

Union's position: (1) The contract states that a lead teacher substituting for an absent site manager will be provided with a part-time substitute when the lead teacher deems it necessary. This clear and unambiguous language gives the lead teacher complete discretion to decide if a substitute is needed.

(2) The grievant was a lead teacher in a pre-kindergarten school. When the site manager was absent on vacation, an alternate manager was assigned from another site, but the grievant spent several hours interviewing parents and enrolling new students. After initially assigning a part-time substitute to cover her regular classroom duties, the district violated the contract when it denied her subsequent requests for a substitute.

(3) The district is wrong in claiming that the grievant should not be handling enrollment, because clerical employees were inexperienced or lacked the necessary license, and the backup manager assigned was covering other sites. Therefore, the grievant as lead teacher was required to fulfill the manager's

enrollment duties, since it was necessary to process enrollments while the site manager was absent.

(4) The district proposed in negotiations to eliminate the provision that a substitute must be provided when the lead teacher deems it necessary. But the contract language remains, and it required the district to do so.

Employer's position: (1) The grievant as a lead teacher has no role in enrolling students. Her sole responsibility in the absence of a site manager is to oversee the initial response to emergency situations, or what the state licensing authority refers to as an "unusual incident or child abuse that threatens the physical or emotional health or safety of any child," and then only until the site manager arrives on site.

(2) The site manager was gone on vacation for only five days, during which a manager from another site was assigned as backup manager. The grievant was never told she had responsibility for enrollment duties during that period.

(3) The contract provision applies when a site manager is absent and a lead teacher is required to substitute; however, the grievant was not required to "substitute" for the manager because a manager was assigned from another site to cover his duties.

Arbitrator's holding: The grievance is granted.

Arbitrator's reasons: (1) The clear language of the contract requires the district to hire a substitute when the lead teacher who is substituting for an absent site administrator deems that a substitute is necessary.

(2) The evidence shows the district recognized this meaning. It granted the grievant's first request for a substitute, and it attempted in negotiations to modify the language to remove the lead teacher's discretion to determine that a substitute is necessary, so that the contract would be consistent with district policies.

(3) The district contends the contract provision does not apply because the grievant was not "substituting" for an "absent" site manager, since a backup manager was assigned and she was never told to perform enrollment duties. According to dictionary definitions, "substitute" means "to put or use in place of another" and "to take the place of." The grievant, in performing the site manager's enrollment duties, was "substituting" for him when he was both "away" and "absent" in the conventional meaning of these words.

(5) Enrollment and parent interviews are a vital part of the school operations and a function that the grievant performed, and which the clerical staff could not perform, when the site manager was away. The grievant testified that no one told her that a backup manager had been assigned, or that she should ask for another site manager's assistance when the regular manager was away and not available to handle enrollment.

(6) The district violated the contract when it denied the grievant's request for a

substitute to cover her classroom duties while she substituted for the site manager. The grievant is to receive back pay for the additional hours she worked because her request for a substitute was denied.

(Binding Grievance Arbitration)

- Discharge
- Dishonesty of a police officer
- Quantum of proof

City of Tracy and Tracy Police Officers Assn. (9-7-12; 33 pp.) *Representatives:* Todd Simonson (Jackson Lewis) for the employer; Christopher W. Miller (Mastagni, Holstedt, Amick, Miller & Johnsen) for the association. *Arbitrator:* Richard John Miller. (CSMCS Case No. ARB-11-0219).

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

Employer's position: (1) The city had just cause to terminate the grievant, a police detective, because he was dishonest in testimony before a grand jury.

(2) The grievant had meticulously documented the details of his investigation in a high-profile kidnap and murder case, recording and booking into evidence all contacts with witnesses, but with one exception: He deleted his recorded conversation with the primary suspect, after the suspect had invoked *Miranda* rights and had been arrested. The grievant acknowledged he deleted the recording of his arguably coercive statements that potentially led to the suspect's second interview with a different officer, in which she confessed.

(3) The grievant knew the recording constituted evidence in a criminal case that department policy required him to preserve, and which could affect the admissibility of the suspect's subsequent confession. Yet he deleted the recording and omitted any mention of it in his initial report. He then lied under oath about his responsibility to preserve the recording in his testimony before the grand jury. During the arbitration he again made untruthful statements.

(4) Because of the requirement that his dishonesty be disclosed in future criminal proceedings in which he is involved, any future court testimony would be subject to credibility challenges. Therefore, the district attorney determined he could not testify in any criminal proceeding, which rendered him unable to perform an essential function of his job, justifying his termination.

Association's position: (1) The city offered no proof that the grievant deliberately deleted material evidence in violation of department policy or that he lied about it in sworn testimony. The grievant had no notice that his exercise of discretion not to retain the recording would be cause for discipline. The "capital punishment" of dismissal cannot be sustained on speculation, assumptions, and the unreliable testimony of witnesses.

(2) While it would have been better had the grievant retained the recording, the only issue before the arbitrator is whether he lied under oath about his deletion of the recording and whether the grievant is rendered unemployable based on a request by the district attorney that he not testify for five years. The city's case is not supported by the evidence. The grievant cannot be terminated on a theory that requires the arbitrator to "read between the lines" or make the same leaps of illogic made by the city.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasons: (1) The parties disagree as to the quantum of proof required to sustain discharge. The city contends its burden in an arbitration proceeding is to prove the charges by a "preponderance of the evidence," whereas the association argues that, because a charge of dishonesty can carry a career-ending stigma for a police officer, the city bears the burden of proving the charge with "clear and convincing" evidence. Rather than assigning either definition, a better and more realistic approach is to determine whether the grievant was guilty of the charges and, if so, whether his misconduct was serious enough to justify discharge.

(2) The grievant's theory that he understood the department policy gave him discretion to delete a recording is contradicted by the policy's language, which does not state that an officer has the option to delete or dispose of a recorded contact with a potential witness. Rather, it requires officers to record and preserve any evidence the "officer reasonably believes constituted evidence in a criminal case." Thus, the grievant's sworn grand jury testimony that the city has no firm policy regarding the retention of recordings of potential suspects, and that he had the discretion to delete or discard recordings, was untruthful.

(3) Under *Brady v. Maryland* (1963) 373 U.S. 83, evidence of a police officer's dishonesty is exculpatory evidence that must be turned over to a criminal defendant. The grievant's dishonesty before the grand jury would have to be disclosed in any future criminal proceeding; therefore, he would be precluded from performing the essential job function of providing credible testimony and evidence in court. Because the city could not accommodate that limitation for the five-year period the grievant would be on the *Brady* list, it had just cause to terminate him.

(4) The arbitrator does not have authority to decide disputes over whether the officer's inclusion on the *Brady* list was based on time-barred allegations or on material that was improperly obtained by the district attorney.

(Binding Grievance Arbitration)

- Layoff
- Rehire rights
- Burden of proof

University of California, San Diego, and AFSCME Loc. 3299 (6-19-12; 7 pp.)

Representatives: Otis Crockett, labor relations advocate, for the employer; Matias Marin, lead organizer, for the union. *Arbitrator:* Edward Scholtz.

Issue: Did the employer violate the contract by returning two employees to layoff status?

Union's position: The grievants were laid off with contractual preferential rehire rights. Five months after they were rehired, they were returned to layoff status, which violated the contract because the return to layoff status was without just cause.

Employer's position: The layoffs complied with the contract, which states: "Employees preferentially rehired from layoff status, who fail to perform satisfactorily may, at any time during the six months following such return, be returned to layoff status." The grievants were returned to layoff status for poor performance.

Arbitrator's holding: The grievance is granted.

Arbitrator's reasons: (1) The employer did not present persuasive evidence that the two grievants' performance as custodians, after they were returned from layoff status, was unsatisfactory; therefore, the employer did not meet its burden of proving its claim that this action was permitted by the contractual provision allowing return to layoff status for unsatisfactory performance.

(2) The grievants credibly testified to inadequate training in the rehire jobs and to verbal assurance from their immediate supervisor that they were doing a good job. Testimony of the manager, who claimed they were told of their inadequate performance, lacked credibility. The employer's failure to call the immediate supervisor as a witness undercut the credibility of the claim of unsatisfactory performance. The inspection reports that reflected deficiencies were never shown to the grievants until they were laid off, and in fact, showed improved performance.

(3) The evidence supports the grievants' claim that the supervisor was biased against them, because they did not support her sexual harassment complaint. She told them their rehire positions were temporary because the positions were intended for other employees.

(4) The employer's contention, that their performance in the rehired positions was not satisfactory, is not credible. They received several years' satisfactory evaluations in positions they held prior to their initial layoffs. Testimony regarding their performance in current positions, in a medical center with higher work standards, shows their performance is considered excellent.

(5) Grievants have subsequently been recalled from layoff, so the sole remedy is back pay for the period they were wrongfully returned to layoff status.

(Binding Grievance Arbitration)

- Discharge
- Performance improvement plan
- Progressive discipline

Los Angeles County Dept. of Agriculture and Individual Appellant (8-17-11; 12 pp.) *Representatives:* Mario Rivera (Shelden and Rivera) for the employer; Jed Smith, representative, AFSCME Local 830, for the appellant. *Arbitrator:* Philip Tamoush. (L.A. County Civil Service Commission No. 10-73).

Issue: Are the allegations supporting the decision to discharge the appellant true? If any or all are true, is the discipline appropriate?

Employer's position: (1) The appellant was placed on a performance improvement plan requiring improvement in the quality and quantity of work to an acceptable level; his failure to comply with the plan resulted in an overall rating of "unsatisfactory" in his performance evaluation, and is unacceptable.

(2) The appellant was informed that failure to comply with the goals in the improvement plan would result in an "unsatisfactory" evaluation and, ultimately, discharge from county service.

(3) Discharge was an appropriate step in progressive discipline. In the two years prior to the performance improvement plan, the appellant received a warning letter and two notices to improve. In the five months after the PIP was initiated, he received six counseling memos regarding ongoing failure to meet stated performance standards.

(4) The appellant's unsatisfactory performance as an agricultural inspector aide, including inadequate quality and quantity of work in violation of state and department standards, poor work habits, and personal relations, impacts public safety. His complaints about being unable to take breaks and needing to ignore traffic rules are unacceptable excuses. The discharge should be upheld.

Appellant's position: (1) The employer did not give sufficient time, counseling, or assistance to enable the appellant to maintain competent performance in the quantity and quality of work.

(2) He was subject to a hostile work environment because of his strained relationships with immediate supervisors, who did not effectively counsel or assist him in understanding how to improve.

(3) The appellant "worked to book" in following state and local guidelines in performing his job, and had told management that he could not perform adequately to standards, as long as the department did not "clean up its act" regarding meeting state guidelines.

(4) Disciplinary options other than termination, including reprimand, suspension, reduction in pay, and demotion, were ignored. He should be returned to his position or demoted to another permanent position and reimbursed for all lost wages and

benefits.

Arbitrator's holding: The appeal is denied.

Arbitrator's reasons: (1) The appellant does not dispute his failure to meet the objective standards of the state, county, and department regarding expected work performance of agricultural inspector aides, including quantity and quality of work.

(2) Credible testimony indicated the appellant should have been able to operate as a journeyman after two weeks of orientation and training. Although performing competently during his probationary period, his performance deteriorated to lesser efficiency and productivity afterward.

(3) The department met its burden in proving the allegations both through the objective measurement of the appellant's workload, as well as the subjective perceptions of his supervisors and managers. It met its burden in proving that discharge is appropriate discipline for his failure to perform to acceptable standards.

(Proposed findings of fact, conclusions of law, and recommended award)

CPER Journal Online

Public Employment Relations Board Orders and Decisions

Summarized below are all decisions issued by PERB in cases appealed from proposed decisions of administrative law judges and other board agents. ALJ decisions that become final because no exceptions are filed are not included, as they have no precedential value. They may be found in the PERB Activity Report. Cases are arranged by statute – the Dills Act, EERA, HEERA, MMBA, TEERA, the Trial Court Act, and the Court Interpreter Act – and subdivided by type of case. In-depth reports on significant board rulings and ALJ decisions appear in news sections above. The full text of cases is available at <http://www.perb.ca.gov>.

DILLS ACT CASES

EERA CASES

HEERA CASES

MMBA CASES

TRIAL COURT ACT CASES

DILLS ACT CASES

Unfair Practice Rulings

Steward's conduct as employee representative at disciplinary meetings was protected activity: Dept. of Corrections and Rehabilitation.

(SEIU Loc. 1000 v. State of California [Dept. of Corrections and Rehabilitation], No. 2282-S, 8-21-12. By Member Huguenin, with Chair Martinez; Member Dowdin Calvillo concurring.)

Holding: A job steward's speech and conduct while serving as an employee's representative during a disciplinary meeting was protected activity, and the discipline imposed by the department for that behavior violated Secs. 3519(a) and (b) of the Dills Act.

Case summary: The union alleged that the department discriminated against an employee for conduct undertaken as an SEIU job steward. The steward represented two employees in meetings with their supervisors and, thereafter, was issued a letter of instruction, a formal corrective action. The department charged that the steward had been insubordinate and discourteous during the meetings, and it threatened to exclude her from future disciplinary meetings on behalf of other employees if her conduct were to recur.

An administrative law judge determined that the steward had engaged in protected

activity, that the issuance of the letter of instruction was an adverse action, and that the discipline was taken against the steward because of her protected activity. The department filed exceptions to the ALJ's proposed decision.

On appeal, the board instructed that both union and management representatives may occasionally resort to intemperate speech when seeking to resolve conflicting interests during meetings. Party representatives are afforded significant latitude in their speech and conduct, the board said; stewards must be allowed to speak and act for the union free of employer interference, restraint, or coercion.

PERB recognized that employee speech may lose statutory protections where it is sufficiently opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause disruption or interference with the workplace. But, the board explained, an employer who would discipline an employee for speech or action as a job steward "must take care not to punish protected activity. To justify such discipline, an employer must demonstrate that the employee's speech or actions were so disruptive as to shed the protected status such activity otherwise enjoys." The court found cases that CDCR relied on unpersuasive because they did not involve stewards' behavior while representing employees.

In agreement with the ALJ, the board found the steward's speech was protected "impulsive behavior" that did not seriously impair the maintenance of workplace discipline. Only three individuals witnessed the steward's conduct at the two meetings; as a result, the opportunity for interference with the department's operations or discipline "was minimal to non-existent." The board further instructed that it will assess speech and conduct in the workplace on an objective, not subjective, standard. Therefore, "a supervisor's personal pique over perceived disrespect is not sufficient basis to find that [the steward's] speech and gestures, undertaken in a representational capacity on behalf of SEIU, exceeded the bounds of statutory protection."

The board also dismissed the department's contention that there was no nexus between the steward's conduct and the adverse action. PERB found direct evidence of nexus, as the letter of instruction issued to the steward said that discipline was being imposed when she was acting as a union representative. The board also brushed aside the department's assertion that it would have disciplined the steward in the absence of her protected conduct. The letter of instruction was issued for conduct exhibited while acting as a union representative, the board said, and the department "is bound by its description of the basis for the discipline."

The department violated Dills Act section 3519(a) by retaliating against the steward for exercising her protected rights. The board found that the same conduct violated section 3519(b) because it was inherently destructive of SEIU's right to represent bargaining unit employees in their employment relations.

PERB upheld the ALJ's remedial order directing the department to rescind, remove, and destroy the letter of instruction, and to remove from her personnel file all references to the discipline. Even if the department already had removed the letter of instruction from the steward's personnel file, the board still would order a posting of

the full remedial order so that employees may learn of PERB's order and the department's full compliance with the notice provisions of the order.

Member Dowdin Calvillo filed a concurring opinion agreeing that the steward's conduct was protected activity. She cautioned, however, that that determination should not be viewed as license for employees to "use their protected activity as a shield from discipline for violating the employer's rules with impunity." She cited prior cases holding that employees may be disciplined for violating employer rules even while engaged in protected activity. And, she concluded that, while the steward's conduct was not so egregious as to lose its protected status, such conduct was neither appropriate nor professional. "Both employee and employer representatives are expected to maintain professional standards of behavior in the workplace."

Employer's 'cease and desist' order directed at job steward interfered with protected activity: Dept. of Corrections and Rehabilitation.

(*SEIU Loc. 1000 v. State of California [Dept. of Corrections and Rehabilitation]*, [No. 2285-S](#), 9-17-12. By Chair Martinez, with Members Huguenin and Dowdin Calvillo.)

Holding: The department interfered with the right of an employee to participate in protected activity and with the union's right to represent employees in their employment relations with the state when it ordered a union steward to cease investigating a potential grievance.

Case summary: After nurses at the Kern Valley State Prison reported that a supervisor had been extorting meal tickets from her subordinates, an investigation was launched by the Investigative Services Unit. The supervisor at the center of the controversy began contacting nursing staff and making inquiries into the ongoing investigation. Fearful that the supervisor would retaliate against them, employees asked SEIU to file a grievance. A union job steward talked to the snack bar cashier about the meal ticket process. This exchange was reported to a labor relations advocate, who directed a correctional civil service class sergeant with the Investigative Services Unit to tell the job steward to "cease and desist" from conducting her own investigation. The job steward felt threatened by the sergeant and feared that she would lose her job at the prison facility if she continued to work on the union's behalf.

An administrative law judge found the department did not interfere with employees' rights, and the union filed exceptions to the ALJ's proposed decision.

The board first remarked that an employee's right to participate in union activities includes the right to represent members in grievance proceedings. "An employee organization's ability to independently investigate a potential grievance is an essential tool for determining whether the grievance has any merit and, if it does, for providing effective representation in grievance proceedings," the board said. Therefore, the job steward "had a protected right to engage in factfinding for the purpose of determining whether a grievance concerning the meal ticket controversy

should be filed.”

The board declined to give deference to the ALJ’s credibility assessment of the sergeant’s testimony because the credibility determination was based on generalizations about law enforcement personnel. It found that the sergeant told the job steward she could be “walked off the job” or find herself under investigation for impeding the current investigation. PERB found these statements were threatening and intimidating, and caused at least slight harm to employee organizational rights for purposes of an interference analysis.

In addition, PERB found that instructing the job steward to “cease and desist” from investigating the meal ticket controversy also caused at least slight harm to organization rights, as it caused the steward to question whether she should continue to serve as a union representative. The fact that she was persuaded to remain a job steward “does not nullify the wrong,” the board said. “An employee organization’s ability to recover from a harm that is inflicted by the state...cannot serve as the basis for absolving the state of its responsibility for its actions in the first instance.” The board agreed with the ALJ that permitting the steward to file a request for information was not a reasonable alternative.

The board found that the department’s conduct was not justified by a legitimate business reason. The job steward’s conversation with the snack bar cashier was not about the supervisor charged with extortion; her questions pertained to how meal tickets were processed. Therefore, PERB reasoned, the job steward was not interfering with the investigation. The board also credited the job steward’s testimony that she was not aware of the investigation of the supervisor when she spoke to the cashier.

In balancing the competing interests of the parties, the board concluded that interference with employee organizational rights outweighed the business justification advanced by the department. The conduct interfered with employee rights to participate in the organizational activities of the union and denied the union its right to represent its members in their employment relations with the state.

Duty of Fair Representation Rulings

No DFR violation alleged in charge: AFSCME Loc. 2620.

(McGuire v. American Federation of State, County, and Municipal Employees, Loc. 2620, No. 2286-S, 9-24-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party failed to allege sufficient facts to demonstrate a prima facie case of the union’s breach of its duty of fair representation.

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to adequately represent her in dealings with her former

employer, the California Department of Social Services. She alleged the union representative pressured her to accept settlements of several State Personal Board cases, failed to follow through with grievances, advised her she could file her own grievances, and failed to attend a non-disciplinary meeting with her. A board agent found most of the allegations to be untimely and that the charge failed to state a prima facie case of a violation of the duty of fair representation or of retaliation.

The board affirmed the B.A.'s dismissal. It did not find good cause to consider documents or factual allegations that could not have been included in the original charge. In addition, the board said that, even with the additional allegations and evidence, the charge still did not state a prima facie case. AFSCME voluntarily represented the charging party at a *Skelly* meeting and an SPB settlement conference. The union's attempt to determine whether the charging party was represented by private counsel before sending a business representative to the hearing did not violate its duty of fair representation.

EERA CASES

Unfair Practice Rulings

No good cause for late filing of appeal: Federation of United School Employees, Loc. 1212.

(*Corrigan v. Federation of United School Employees, Loc. 1212*, [No. Ad-395](#), 6-29-12. By Member Huguenin, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The charging party failed to demonstrate good cause for failing to file a timely appeal of the dismissal of his charge.

Case summary: The charging party filed an unfair practice alleging that the union breached its duty of fair representation when it declined to move a grievance to the next level. A board agent dismissed the charge. The charging party failed to file a timely appeal of the dismissal, and he appealed that determination to the board.

As good cause for the late filing, the charging party asserted that he had changed his mailing address which caused a five-day delay in his receipt of the board agent's dismissal letter. A five-day delay in receipt of documents served by mail is contemplated by PERB regulations, the board pointed out. Even with that delay, the board said, the charging party had 20 days to prepare and file his appeal. He failed to explain what prevented him from doing so, the board said. Nor did he explain why he did not seek an extension of time, as the board agent described in the dismissal letter.

The board found the appeal failed to demonstrate good cause to excuse the late filing.

Sufficient factual allegations to issue retaliation, interference complaints: Jurupa USD.

(*Lukkarila v. Jurupa Unified School Dist.*, No. 2283, 8-21-12. By Member Huguenin, with Chair Martinez; Dowdin Calvillo, concurring and dissenting.)

Holding: The charging party timely filed a charge alleging sufficient facts to support a prima facie case that the district retaliated against her for engaging in protected activity and interfered with her rights conveyed by EERA.

Case summary: The charging party, a high school teacher employed by the district, made several claims of retaliation and interference with her protected rights under EERA.

The general counsel concluded that the charging party lacked standing to allege an employer's violation of an employee organization's right or an employer's failure to meet and negotiate in good faith or to provide information in response to an employee organization's request. On appeal, the board affirmed the board agent's ruling. PERB also found that the charging party lacked standing to bring a charge alleging that the employer dominated or interfered with the administration of an employee organization in violation of EERA Sec. 3543.5(d).

The board also affirmed the B.A.'s finding that the charging party's allegations of discrimination based on age, gender, pregnancy, and education are outside of PERB's jurisdiction.

The board disagreed with the B.A.'s conclusions that allegations referring to events that occurred more than six months prior to the filing of the charge were untimely. PERB reasoned that the charging party's complaint filed under the unit member complaint resolution procedure in the collective bargaining agreement qualifies for equitable tolling. Through this complaint procedure, the charging party sought to resolve a dispute that is the subject of the unfair practice charge, i.e., three instances of retaliation by her principal because she obtained union assistance regarding her evaluation. The statute of limitations was tolled for the duration of the complain process.

The board agreed with the B.A.'s conclusions that the charging party engaged in protected activity when she sought and obtained union assistance with her performance evaluation and sought union representation at a meeting, and that her participation with other employees in an unrelated group complaint was also protected activity.

The board disagreed with the B.A.'s finding that the charging party's filing of an individual discrimination complaint under the contractual complaint resolution procedure was not protected activity. Under EERA, the board explained, a union and employer may negotiate to incorporate substantive statutory or constitutional rights in the collective bargaining agreement, thereby making those rights enforceable under collectively bargained procedures. Seeking individually to enforce provisions of a collectively bargaining agreement is a logical continuation of group activity and

protected by EERA, the board said.

PERB found that the charging party's 2010 annual performance evaluation was an adverse action, as was the principal's negative report regarding her teaching and his warning, which threatened insubordination over her alleged failure to respond speedily to a message from his secretary. The board also found that the district's letter instructing that the charging party submit to a consecutive annual evaluation was an adverse action. As a permanent certificated employee subject to evaluation bi-annually, this directive was the functional equivalent of an unsatisfactory evaluation and an adverse action.

The B.A. concluded that suspicious timing existed between the charging party's protected activities in February and March 2010 and the district's May 2010 evaluation, and between her participation in the group grievance and complaint in mid-June 2010 and the district's fall 2010 investigation of her for misconduct and discipline. Despite the suspicious timing, the B.A. found that the charging party failed to show a connection between her protected activity and the adverse actions. The board, however, found sufficient allegations to establish nexus, citing: the timing of the insubordination letter, the district's departure from past practice, and the principal's exaggerated response to her conduct; a departure from the evaluation procedures; a departure from the unit member complaint resolution procedures and perfunctory consideration of her complaint; the district's sharply hostile responses to the group grievance and complaint; and the departure from the investigation and discipline procedures following a parental complaint.

In addition to retaliation charges, the board reviewed allegations of interference with protected rights. Here, PERB found alleged conduct on the part of the district that demonstrated a prima facie instance of interference when the personnel director issued a written communication to employees criticizing them for filing a group grievance and complaint. The board found that the harmful effect of scheduling an investigatory interview at a time when the charging party's preferred union representative was unavailable, and denying her request to confer with the new union representative in private, was not interference because she had two weeks to meet with the representative. The board agreed with the general counsel's office that no prima facie case was alleged based on the district's failure to accommodate her choice of union representative or to allow her own attorney in an investigatory interview.

Member Dowdin Calvillo filed a concurring and dissenting opinion. She disagreed that a directive to submit to consecutive annual evaluations was an adverse action. She emphasized that the language in the contract and the Education Code provide for evaluations of permanent employees "at least" every other year. The decision to require a consecutive evaluation so that the employer may have a fair basis for evaluating an employee after a lengthy absence, as occurred here, is consistent with the statute and the contract.

No refusal to bargain where district failed to make timely request to reopen

contract: Inglewood USD.

(*Inglewood Unified School Dist. v. Inglewood Teachers Assn.*, [No. 2290](#), 10-29-12. By Chair Martinez, with Member Huguenin; Member Dowdin Calvillo dissenting.)

Holding: The timely allegations in the charge failed to demonstrate that the association was under an obligation to bargain.

Case summary: In 2010, the parties negotiated an agreement that included a zipper clause and a reopener clause. The latter allowed each party to reopen negotiations no later than April 1 on two articles of the contract except for Article 12 (compensation) and Article 13 (fringe benefits).

In February 2011, the district provided the association with a “proposal” indicating that a fiscal recovery plan had been initiated. The “proposal” cited the need to reduce services and, as an alternative, institute furloughs, eliminate certain fringe benefits, roll back salaries, freeze step increases, and increase class-size ratios. The district also created and distributed a certificated staffing formula. The formula was approved by the district board.

Meetings ensued between the parties. It is undisputed, however, that as a ground rule, they agreed that they were not engaged in meeting and negotiating.

On April 20, 2011, the district assistant superintendent informed the association that the district would be submitting an initial proposal under the reopener provision of the contract and that the association should consider the letter to be a formal demand to bargain. The association informed the district that its demand to bargain was untimely, as the reopener language required that such a request be made no later than April 1. The association also stated that the district was not permitted to reopen on compensation or fringe benefits. The association refused to negotiate, and the district filed an unfair practice charge.

A board agent dismissed the charge, concluding that allegations relating to the February proposal were untimely, and the association was under no obligation to bargain. The district filed an appeal.

The board adopted the general counsel’s letter reasoning that the allegations relating to the refusal to bargain the February proposal were untimely because there was no identification of the date the union refused to bargain the proposal.

As a preliminary matter, the board rejected the district’s argument that there was “factual confusion” as to whether the February document created a bargaining obligation on the part of the association. The board found no factual allegations “to even infer that the parties were confused.” The parties engaged in meetings over the fiscal crisis but agreed they were not engaged in bargaining. Nor did the district sunshine its “proposal” or indicate that it was exchanged with the association for the purpose of initiating negotiations. In fact, the board noted, the district board adopted the formula five days after it gave the “proposal” to the association as a basis for the district to make staffing *decisions*.

The board concluded that the district's proposal did not have the effect of reopening the contract. By operation of the zipper clause, negotiations were barred unless there was mutual agreement by the parties to reopen, which there was not, or the contract was reopened under the terms of the reopener language. The district's attempt to reopen was conveyed to the association on April 20, 2011, after the April 1 deadline.

PERB rejected the district's argument that the letter of April 20 relates back to the "proposal" provided the association in February, noting it was not even referenced in the April 20 document.

The board reiterated that at this stage of the proceedings, it is not appropriate for it to determine whether the district's factual allegations are credible. But, it explained, the district's central contentions — that the February "proposal" had the effect of reopening the contract or that the April letter relates back to the "proposal" — are not factual. "They are conclusory characterizations of the facts girded to no viable theory of law," the board said.

The board emphasized the legal importance of the contractual zipper clause. Its purpose was to foreclose further negotiations and operated as a shield to protect both the district and the association against the unwanted imposition of a duty to negotiate changes to the status quo during the term of the contract.

In her dissenting opinion, Member Dowdin Calvillo concluded that the charge set out sufficient factual allegations to state a prima facie case. She found a factual dispute as to whether the February document constituted a valid demand to bargain.

Duty of Fair Representation Rulings

Dismissal of DFR charge upheld: Palos Verdes Faculty Assn.

(*Stever v. Palos Verdes Faculty Assn.*, [No. 2289](#), 10-15-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party presented new evidence and factual allegations to the board that could have been presented to the board agent prior to the dismissal of her charge; the board upheld the dismissal.

Case summary: The charging party alleged that the association breached its duty of fair representation by failing to adequately represent her in resolving grievances against her employer, the Palos Verdes Unified School District. As association representatives represented the charging party throughout the grievance process, the board agent found that the charge failed to state a prima facie case and dismissed the charge.

On appeal, the board found that the charging party merely had restated the facts alleged in the original charge, but failed to identify any portion of the B.A.'s

determination to which the appeal was taken. In addition, the board noted that the charging party presented new factual allegations not presented in the original charge without a showing of good cause as to why the information provided to the board could not have been obtained through reasonable diligence prior to the B.A.'s dismissal. Therefore, the board affirmed the board agent's dismissal of the charge.

HEERA CASES

Unfair Practice Rulings

Foreseeability, not actual change, is standard for negotiability of effects of non-negotiable decisions: CSU.

(*California Faculty Assn. v. Trustees of the California State University*, No. 2287-H, 10-4-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The reasonably foreseeable prospective effects of a non-negotiable management decision are negotiable.

Case summary: The charging party alleged that the university implemented an executive order regarding the provision of student mental health services without first bargaining over the effects of the order on the terms and conditions of employment, including workload. A board agent dismissed the charge, and the faculty association appealed.

On appeal, the board first explained that, while the charging party bears the burden of alleging facts demonstrating a reasonably foreseeable impact on employees' working conditions, it is not necessary to prove the occurrence of an actual change as a precondition to finding a duty on the part of the employer to negotiate the impact of the decision. But there is no obligation to bargain effects that are purely speculative, the board cautioned.

"Because bargaining over effects contemplates that negotiations will occur prior to implementation of the non-negotiable decision," PERB instructed, "the parties must assess the effects of the decision *prospectively*, without the benefit of hindsight. The effects must be reasonably likely to occur, not proven to have already occurred." The board clarified that, in cases involving the alleged failure to bargain the negotiable effects of a non-negotiable decision upon a timely request from the union prior to implementation, the appropriate standard is foreseeability. Language in unilateral change cases requiring the charging party to show an actual change is not applicable to a charge of failure to bargain the effects of a non-negotiable management revision.

Here, the university's executive order imposed an increase in direct counseling services unaccompanied by a decrease in other required workload demands. "Based on mathematics alone," the board found that the effects on employees' workload are reasonably foreseeable to state a *prima facie* case of a refusal to

bargain. “Whether or not such effects actually materialize is not the issue,” the board underscored. “The alleged *prospective* effects here are demonstrable by projections based on current workload demands,” PERB concluded. The board held that neither language allowing for individual adjustment of schedules nor language disclaiming the intent to supersede the contract immunized the decision from the obligation to negotiate its effects. It remanded the charge to the general counsel for issuance of a complaint.

MMBA CASES

Unfair Practice Rulings

Complaint to issue on two allegations of retaliation, others untimely: County of Santa Barbara.

(*Quinn v. County of Santa Barbara*, [No. 2279-M](#), 8-9-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: Some allegations were untimely, but the charging party alleged sufficient facts to support a prima facie case of retaliation for his activities as a shop steward and for filing grievances on his own behalf.

Case summary: The charging party alleged that the county retaliated against him based on his protected activity. The Office of the General Counsel partially dismissed the charge, having determined that allegations in an amended charge concerning the alleged retaliatory conduct that occurred more than six months before were untimely, and that the remaining allegations failed to state a prima facie case. The charging party challenged the two conclusions reached by the general counsel, which the board reviewed on appeal.

The first issue raised on appeal concerned the board agent’s failure to apply the doctrine of equitable tolling. The charging party argued that a grievance proceeding was pending concerning a charge levied against the executive director of the county department in which the charging party worked, and that other grievances regarding retaliatory acts were accepted by the county and advanced through the grievance procedure to mediation.

PERB first concluded that the new allegations included in the amended charge did not relate back to the allegations in the original charge. Therefore, the board reasoned, the retaliatory acts enumerated in the first amended charge that were different from the four listed in the initial charge are subject to the limitations period beginning on the filing date of the first amended charge. Based on this calculation, the board found the new allegations were untimely.

The board also determined that the charging party did not provide PERB with sufficient information, such as the grievance procedure, from which it could conclude that the doctrine of equitable tolling rendered the allegations timely. Based

on a lack of information concerning the time of filing of the grievance, the board declined to apply the equitable tolling doctrine to the allegation that the executive director asked the charging party's coworker about his union activities and the allegation that the county failed to properly investigate his complaint.

With regard to four other allegations, the board found there was "an arguable case" for finding that the doctrine of equitable tolling applied because grievances concerning the issues raised in these allegations targeted the same issues as were addressed in the grievances. However, PERB calculated that these four allegations were still untimely under the equitable tolling doctrine because the charging party's use of the grievance procedure ended with an unsuccessful mediation more than six months before the charge was filed.

The board agreed with the charging party's assertion that the first amended charge incorporated the allegation that his job duties had been changed as a result of protected activity, and that his job performance was subjected to increased levels of scrutiny because of his union involvement.

The board also found that the further factual detail added to the first amended charge provided a basis for finding that the conduct complained of was an adverse action, and that there were sufficient facts to create an inference of unlawful motive to support a prima facie case.

The board instructed that at the evidentiary hearing the county would have an opportunity to prove that the changed job duties and increased scrutiny were occasioned by the charging party's new telecommute arrangement.

County must accept unit modification petition under its own local rules: County of Riverside.

(*SEIU Loc. 721 v. County of Riverside*, [No. 2280-M](#), 8-14-12. By Member Huguenin, with Chair Martinez and Member Dowdin Calvillo.)

Holding: The county was required to process the union's unit modification petition under its existing local rules that do not require a showing of support among the employees the union seeks to add to existing bargaining units it represents.

Case summary: The union represents three bargaining units in county government, a professional unit, a paraprofessional unit, and a registered nurses unit. The charging party sought to accrete into each the employees who work in a temporary assignment program whose assignments, working titles, or duties are the same or close to those performed by the regular full-time or part-time employees in each unit. The union did not provide proof of support that the petitioned-for TAP employees desired to be represented by SEIU or included in an SEIU bargaining unit.

The county denied the petition because SEIU failed to demonstrate any support from

the affected TAP workers. Although its local rule did not require proof of support, the county contended that the requirement should be read into the rule to prevent employees from being involuntarily unionized.

An administrative law judge concluded that the county's decision to deny the union's petition was inconsistent with its unit modification rule, as there is no requirement that a petitioning employee organization provide employee support for a unit modification. Assuming that the local rule did not apply, the ALJ found that the county relied on an unwritten policy when it required majority support and that the policy was adopted without meeting and conferring with the union.

On appeal, the board first relied on its prior ruling in *County of Riverside* (2011) No. 2163, CPER 207 online, finding that the county's local rule applies to unit modification petitions and that no majority showing of interest is required if the number of employees to be added would not increase the size of the unit by more than 10 percent. Based on that ruling, the board also rejected the county's contention that SEIU's petition would force unrepresented employees to join a union without their consent or vote.

PERB also turned aside the county's argument that due process principles contained in the Fourteenth Amendment prohibit the county from accreting unrepresented employees into an existing bargaining unit. MMBA section 3502 protects the right of employees to join or not to join an employee organization, the board said. Neither represented nor unrepresented employees may contest placement of their position or job classification in a particular bargaining unit. Due process protections (*Hudson* procedures) required as a condition to implementing an agency fee are sufficient to protect employees' interests under the Fourteenth Amendment.

The board also found misplaced the county's reliance on *Mariscal v. Employee Relations Board of the City of Los Angeles* (2010) 187 Cal.App.4th 164, 200 CPER 36. That case concerned a merger of union locals and the rights of union members to participate in internal union decision making about the merger. It did not establish rights for unrepresented employees when their employer receives a petition to modify a bargaining unit to include employees in that unit, PERB said.

Finally, for reasons already discussed, the board found that by seeking to enforce the county's unit modification rule, SEIU did not seek to cause, or attempt to cause, the county to engage in conduct prohibited by the MMBA or the county's local rules. The county was required to process SEIU's petition under its existing local rule.

Alleged retaliation charge untimely: City of Berkeley.

(*Larsen-Orta v. City of Berkeley*, [No. 2281-M](#), 8-17-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party's allegation that she was terminated by the city

because of protected activity was untimely filed, and she failed to demonstrate entitlement to the doctrine of equitable tolling.

Case summary: The charging party filed an unfair practice charge alleging that the city terminated her from her employment because of her protected activity. The general counsel dismissed the charge.

On appeal, the board agreed that the allegations included in her charge were untimely filed. PERB also rejected the charging party's contention that an arbitration award issued after her union representative grieved her termination was repugnant to the act. Even if the charging party were to prevail on her repugnancy claim, the board said, the underlying allegations in her unfair practice charge are untimely.

The board noted that the statute of limitations arguably was tolled during the pendency of the grievance proceeding. However, the charging party failed to provide PERB with a copy of the grievance or to show that the retaliation allegation in her charge was the same dispute presented to the arbitrator.

Formal approval or disapproval of tentative bargaining agreement by city council not required by statute: City of Lincoln.

(*Stationary Engineers Loc. 39, IUOE, AFL-CIO v. City of Lincoln*, [No. 2284-M](#), 9-6-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The city council satisfied the requirement of the MMBA that it make a determination about a tentative agreement with the union when it directed city staff to continue to negotiate.

Case summary: The city and the union were parties to a memorandum of understanding that expired on June 30, 2011. On June 29, the parties reached a tentative agreement that was presented to the union membership for ratification. On two occasions, the members voted to reject tentative agreements. On August 10, the city declared impasse and presented its last, best, and final offer to the union and to the city council for consideration.

Thereafter, the union notified the city that its members had voted to authorize a strike. The city council voted to impose the last, best offer, and employees went on strike.

The parties continued to meet and negotiate, and reached a third tentative agreement. It was ratified by the union members. The city placed the third tentative agreement on the city council's agenda, recommending that the council authorize the city manager to enter into a new MOU with the union. Council members indicated that the tentative agreement represented "a good effort," but directed city staff to continue to work with the union to come to an acceptable comprehensive agreement. The council failed to take a formal vote on the tentative agreement.

The union filed an unfair practice charge alleging that the city failed to meet and

confer in good faith when it did not take a formal vote. An administrative law judge found that the council's direction to continue to work with the union was sufficient to demonstrate the city council's rejection of the tentative agreement. She concluded that the city had not violated the act.

In its exceptions to the ALJ's proposed decision, the union focused on the language of MMBA section 3505.1, which provides that the parties jointly prepare a written MOU and present it to the governing body "for determination." The union argued that the city failed to make a determination when it did not take formal action on the tentative agreement or give specific instructions as to the deficiencies of the tentative agreement.

In agreement with the ALJ, the board relied on *Beverly Hills Firemen's Assn. v. City of Beverly Hills* (1981) 119 Cal.App.3d 629, 1981 Cal.App.LEXIS, 50 CPER 34. In that case, the Court of Appeal instructed that section 3505.1 calls for a determination "either that the MOU is approved and shall be effective or that it is not approved, in which event further negotiations to reach an acceptable agreement are in order." The statute "does not require the use of any specific words to express the council's ratification," said the court.

Here, the board found the city council expressed the opinion that further negotiations to reach an acceptable agreement were in order, "thereby signifying their disapproval of the tentative agreement presented." The council was not obligated to do more than indicate its approval or disapproval of the agreement; nor was it required to provide guidance to the union regarding what was needed to make the tentative agreement acceptable to the council. There is no such requirement in section 3505.1, the board said. If the council had simply voted to reject the tentative agreement, it would not have needed to provide any reasons or directive.

Complaint issues where charge states 'viable theory of law' relating to pension rights: City of Pinole.

(*United Professional Firefighters, Loc. 1230 v. City of Pinole*, [No. 2288-M](#), 10-15-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charge failed to allege sufficient facts in support of the charging party's claims that the city failed to provide information, engaged in surface bargaining, made an unlawful unilateral change, and improperly implemented its last, best, and final offer. The charging party stated a viable legal theory in support of the union's assertion that the city insisted to impasse on a non-mandatory subject of bargaining.

Case summary: The charging party alleged that the city refused to meet and confer, made unilateral changes to terms and conditions of employment, refused to provide requested information, and insisted to impasse on non-mandatory subjects of bargaining.

A board agent dismissed the allegation regarding the union's unspecific request for information, finding the charge failed to allege facts to show that the city either ignored the request or responded with deliberately misleading information. The board agreed, noting that when the union requested the total value of the concessions sought by the city, it was informed that the city did not break down its concessions in that manner. Therefore, the board said, the city did not have the information requested. And, the allegation that the city provided conflicting information at meetings of the city council as to savings it estimated would be achieved by temporarily closing a fire station does not establish that the city failed to comply with a request to provide specific information.

The union also alleged that the city engaged in surface bargaining by proposing and insisting to impasse on pension proposals that were based on a document prepared by a joint working group of local government managers. The board agreed with the B.A. that this did not establish a prima facie case of surface bargaining. The fact that the city presented proposals similar to those recommended or used by other employers does not indicate the city lacked a genuine desire to reach agreement, the board added.

The union alleged that the city made an unlawful unilateral change when it precluded firefighters from attending city council meetings while on duty and in uniform. The board found sufficient allegations that there was an established past practice of permitting on-duty firefighters to attend city council meetings, that the city failed to give the union an opportunity to bargain over the change, and the directive amounted to a policy change, not an isolated breach of contract. But, PERB said, the charge failed to allege that the on-duty attendance at council meetings related in any way to the job duties or working conditions of firefighters.

The charge alleged that the city bargained in bad faith by insisting to impasse on a proposal that amounted to a waiver of statutory rights limiting employee pension contributions. The board rejected the city's argument that the interpretation of state pension laws exceeded PERB's jurisdiction. It is true, the board explained, that it does not have jurisdiction to enforce the Education Code or statutes governing municipal pensions. But, PERB necessarily must interpret certain statutes in the course of administering collective bargaining laws. The board concluded that the allegations in the charge were sufficient to support "a viable theory of law" to warrant the issuance of a complaint.

The board affirmed the dismissal of the allegation that the city was not permitted to implement its last, best, and final offer because the parties continued to negotiate over those proposals. Once an employer has exhausted applicable impasse resolution procedures, it may lawfully implement policies reasonably comprehended in its pre-impasse proposals. Having bargained in good faith to impasse, the board said, the city was free to implement its final offer.

CPER Journal Online

PERB Activity Report

The following report was submitted by the Public Employment Relations Board

ALJ PROPOSED DECISIONS

Sacramento Regional Office — Final Decisions

Brooks v. State of California (Dept. of Corrections & Rehabilitation), Case No. SA-CE-1858-S. ALJ Cloughesy. (Issued 8-24-12, final 9-19-12, HO-U-1063-S.) A dentist who was a UAPD job steward at a state prison received a 10 percent pay reduction for 18 months for calling an unauthorized union meeting on state time and for being dishonest when he denied doing so. Retaliation and interference were not found as the health care manager would have taken adverse action but for the job steward's protected activity. The state prison was justified/compelled to take action for such offenses.

CDF Firefighters v. State of California (Dept. of Forestry & Fire Protection/CalFIRE), Case No. SA-CE-1835-S. ALJ Bologna. (Issued 8-28-12; final 09-24-12, HO-U-1065-S.) Nevada-Yuba-Placer (NYP) is 1 of 21 geographic units in CalFIRE, with 350 employees during the fire season and half that number during the November-May off-season. The chain of command is Unit Chief Bradley Harris, Deputy Chief Randy Smith, three division chiefs for Northern and Southern Operations and Administrative, 12 battalion chiefs, 59 fire captains, fire apparatus engineers, and firefighters. The NYP executive staff consists of the unit chief through division chief. Battalion chief through firefighters are in bargaining unit 8. In 2009, Gary Brittner was the NYP administrative chief and Chris DeSena was the acting Northern Division Operations chief. Ten fire captains work at inmate crew camps, and 49 run the daily operations of 12 fire stations, 2 captains per station. Six battalion chiefs administer the fire stations, 2 stations per battalion; other battalion chiefs have specialized program responsibilities. Joseph Ten Eyck is a fire Captain at Fire Station 20 (Nevada City) who has held union office since 1999. Glen Ford was a fire captain at Fire Station 40 (Smartsville) who held chapter offices in NYP since 2001. Christine York is the second fire captain at Fire Station 40 who promoted in 2009 when she was NYP secretary-treasurer and chapter director. Ken Hale is the firefighters state rank-and-file director/leader of the union bargaining team since 2004. Jim Matthias is a battalion chief, the NYP training chief, and a local chapter officer. The unfair practice complaint alleges four discriminatory acts against Ten Eyck (cancellation of his brush removal project, termination of his work email account, removal from training coordinator, email alleging station mismanagement); two retaliatory acts against Ford (email alleging station mismanagement, closure of Fire Station 40 for 2009-10 winter); two retaliatory acts against York (email alleging station

mismanagement, closure of Fire Station 40 for 2009-10 winter); two claims of interference with Ten Eyck and Ford (failure to notify overtime coordinator to obtain coverage for union leave so leave could not be used); and one unilateral change in policy/past practice concerning on-call overtime for battalion chiefs. All discrimination/retaliation claims were dismissed for failure to demonstrate adverse action and/or nexus/unlawful motive by a preponderance of credible non-hearsay evidence. The unilateral change allegation was dismissed because the charging party did not meet its burden of proving a past practice existed. No evidence was presented on Ford's inability to use requested and approved union leave. Although the evidence did not support the precise allegation of the complaint, it is undisputed that Ten Eyck was unable to use at least one day of union leave because notification of its approval arrived too late. Harm to the employee and union rights was established, and CalFIRE offered no legitimate justification for its conduct/inaction. The remedy was a cease-and-desist order. Statewide posting is appropriate even though only NYP conduct was involved because the union leave bank is in the statewide MOU.

Foresthill Public Utility Dist. and International Union of Operating Engineers, Stationary Engineers, Loc. 39, AFL-CIO, Case No. SA-PC-16-M. Hearing Officer Nyman. (Issued 09-10-12; final 10-04-12, HO-R-182-M.) The Stationary Engineers petitioned for certification of a bargaining unit to include nine unrepresented classifications. Prior to a hearing, the parties stipulated to the exclusion of the business manager classification. The petition seeking representation of the remaining eight classifications was granted. The lead utility operator V classifications work similar hours to the other employees in the petitioned-for bargaining unit and have similar benefits and terms and conditions of employment. The lead utility operator V classifications share a community of interest with unit employees, and the district's request to exclude lead utility operator V classifications from the unit based on arguable supervisory duties was denied. The customer service representatives also share a significant community of interest with the remaining employees in the petitioned-for bargaining unit and perform no confidential duties to warrant exclusion.

United Public Employees of California v. County of Sacramento, Case No. SA-CE-754-M. ALJ Cloughesy. (Issued 10-25-12, final 12-04-12, HO-U-1074-M.) The association alleges that the county committed an unlawful unilateral change when it decided it wanted to manage its compensatory time off (CTO) for its data processing professional unit in its Department of Human Assistance. The county and the association did not have an existing collective bargaining agreement yet. The county alleged its personnel ordinance gave it discretion to manage its CTO, and therefore there was no change in policy. The ALJ agreed with the county.

California School Employees Assn. & Its Chap. 622 v. Raisin City Elementary School Dist., Case Nos. SA-CE-2608-E and SA-CE-2617-E. ALJ Cloughesy. (Issued 10-31-12; final 11-27-12, HO-U-1074-E.) After the district laid off all of the CSEA-classified employees on July 1, 2011, the district superintendent mowed the school's lawn and hired a custodian to do some of the work performed by the two laid-off custodians. The district did not notice CSEA of the transferring out of

bargaining unit work and provide an opportunity to meet and negotiate. The school board passed a directive to offer employees their jobs back at reduced work hours, without notifying and providing CSEA an opportunity to meet and negotiate over the change. Violations of EERA sections 3543.5(a), (b) and (c) were found.

Oakland Regional Office — Final Decisions

Rachlis v. California Association of Professional Scientists, Case No. SF-CO-60-S. ALJ Cloughesy. (Issued 8-27-12, final 09-24-12, HO-U-1064-S) The policy manual of the union states that a disciplinary member hearing needs to begin 30 days from the date the union disciplinary committee receives charges. The union decided not to assign the case to the committee until after the election period. The delay, between two-and-a-half to four months later, was found to violate Government Code section 3515.5.

State Employees Trades Council, United v. Regents of the University of California (Los Angeles), Case No. SF-CE-915-H. ALJ Cu. (Issued 10-05-12; final 11-01-12, HO-U-1071-H.) The allegations were that the employer (1) unilaterally implemented a reduction in its time base plan; (2) discriminated against unit members; (3) bypassed the union; (4) failed to properly respond to information requests; and (5) engaged in surface bargaining. Violations were found. With regard to (1), implementation of the reductions plan was inconsistent with the parties' agreement and changed a policy within the scope of representation. The business necessity defense does not apply because the university had readily available alternatives. It was not appropriate to defer the matter to arbitration because an arbitration order to bargain over a remedy without first ordering a return to status quo is repugnant to collective bargaining laws. With regard to (2), under *Campbell Municipal Employees Association v. City of Campbell* (1982) 131 Cal.App.3d 416, an employer's actions are discrimination if "inherently destructive" of employee rights. PERB has regularly found that unilateral policy changes are "inherently destructive" of employee rights. This is sufficient to establish a violation under the *Campbell* standard. With regard to (3), the employer's solicitation of employee sentiment about proposals prior to engaging in bargaining with the union bypasses and undermines the union. With regard to (4), documents were not provided or were provided in an illegible form. No violation was found where (5) the parties were signatories to a memorandum of understanding covering both salary and reductions in time, meaning there was no duty to bargain over those subjects after the agreement was ratified. Thus, the employer's conduct does not violate the duty to negotiate in good faith.

Coalition of University Employees v. Regents of the University of California (Lawrence Berkeley National Laboratory), Case No. SF-CE-945-H. ALJ Wesley. (Issued 10-31-12; final 11-27-12, HO-U-1073-H.) An employee filed a grievance in October 2009, challenging receipt of a warning letter. In February 2010, the university issued the employee a final disciplinary warning letter addressing excessive personal calls; the failure to use a security badge to enter the office, causing other employees to stop working to admit her; and a verbal confrontation with another employee. No violation was found because the university established it would have issued the warning letter notwithstanding the filed grievance.

Los Angeles Regional Office — Final Decisions

Monrovia Firefighters Assn., IAFF Loc. 2415 v. City of Monrovia, Case No. LA-CE-610-M. Hearing Officer Partovi. (Issued 08-03-12; final 09-18-12, HO-U-1061-M.) By a February 4, 2010, letter to employees, the city attempted to bypass, undermine, and derogate the authority of the exclusive representative, and interfered with employee and union rights. No violation was found for the bypass allegation since the city's February 4, 2010, letter was not made in the context of bargaining. A violation was found for the interference allegation since the letter contained impliedly threatening and coercive statements. The letter suggested to employees and union representatives that criticism of the fire chief's policies constituted insubordination. By imploring employees to review an unfair practice charge filed by the union on employees' behalf while noting that the city expects to prevail in such a charge, the letter discouraged employees from supporting the union's pursuit of the charge. The city did not provide a legitimate business justification for issuing the letter. The remedy is an order to cease and desist the threatening statements.

AFSCME Loc. 3299 v. Regents of the University of California (San Diego), Case No. LA-CE-1158-H. Hearing Officer Wu. (Issued 08-13-12; final 09-10-12, HO-U-1060-H.) The union alleged that the university failed to timely respond to requests for information. The university contended that the five- to seven-month delay did not prejudice the union. The university's reduced staff and lack of prioritization did not justify its delay in responding and a violation was found.

United Teachers Los Angeles v. Los Angeles Unified School Dist., Case No. LA-CE-5583-E. ALJ Cu. (Issued 08-23-12; final 9-18-12, HO-U-1062-E.) The union alleged that the district disciplined a union activist for profane comments made during a labor-management meeting. A violation was found. EERA protects a variety of speech activity, including statements critical of supervision when the speech relates to employees' working conditions. The statements, although crude, were intimately involved with protected subjects, including the reemployment rights of adult educators. These statements are protected by EERA. The district's asserted justification that it would have disciplined any employee for similar statements, even if not during a union meeting, was unpersuasive because it is not possible to divorce the employee's words from their protected context. The remedy includes rescission of discipline and restoration of lost wages.

Lankster v. Los Angeles Unified School Dist. (Gardena High School), Case No. LA-CE-5587-E. ALJ Allen. (Issued 8-29-12; final 9-25-12, HO-U-1066-E.) No retaliation was found where there was no evidence that the teacher's reassignment had an adverse impact on his employment.

Rice v. Whittier Union High School Dist., Case No. LA-CE-5551-E. ALJ Cu. (Issued 08-30-12; final 9-25-12, HO-U-1067-E.) The charge, that the district transferred the employee in retaliation for grievance activity, was filed more than six months from the date of the transfer. Equitable tolling applied during the time the parties participated in the advisory arbitration grievance process, but did not apply for a sufficient time to make the charge timely. The charging party's argument that the parties were still participating in the grievance process until the district affirmatively

accepted or rejected the arbitration decision is not supported by the record. Earlier steps in the process terminate naturally when the district declines to take any action. The charging party offered no basis for concluding that the district is required to respond at the final step, when no response is required earlier in the process. Even if the case were timely, the charging party failed to show that the transfer options offered to him were objectively adverse. The charging party's unfamiliarity with the curriculum of the offered transfer location is not a sufficient basis to find that the transfer was adverse to employment. The record also shows that the district transferred the charging party and another employee out of a genuine concern about the interpersonal conflicts at the school site, not his 2008 grievance activity.

Berry v. Los Angeles Community College Dist., Case No. LA-CE-5677-E. ALJ Allen. (Issued 09-04-12; final 10-04-12, HO-U-1068-E.) No retaliation was found where the district was recommending dismissal before as well as after the employee's exercise of representation rights.

Vallecitos Water Dist. and Vallecitos Water District Public Service Employees Assn. and Vallecitos Water District Employees Assn., Case No. LA-SV-171-M. Hearing Officer Partovi. (Issued 9-18-12; final 10-16-12, HO-R-183-M.) The severance petition seeking to sever a unit consisting of mostly operations and maintenance (O&M) employees from the existing wall-to-wall unit was dismissed. There was no evidence presented showing buildings and grounds workers — the only non-O&M classification sought to be included in the petitioned for unit — share a community of interest with the proposed unit. The O&M employees do not share a community of interest separate and distinct from the remaining employees in the unit. O&M employees share the following among some non-O&M employees: use of steel-toed boots in the work area, uniforms, fringe benefits, overtime and stand-by pay, and technical certifications. Supervisors within the proposed unit perform administrative duties similar to those excluded from the proposed unit. Moreover, there was no evidence showing the interests of one group trampled the interests of O&M employees.

Finley v. Los Angeles Unified School Dist., Case No. LA-CE-4922-E. ALJ Cloughesy. (Issued 9-25-12; final 10-24-12, HO-U-1069-E.) On July 13, 2007, Finley and the district entered into a memorandum of understanding, which included resolution of the complaint. While Finley signed the MOU, she would not sign the long-form settlement agreement. A superior court judge enforced the MOU on January 22, 2008, under Code of Civil Procedure section 664.6, including dismissal of her PERB action. Finley received money set forth in the MOU. Finley did not want to withdraw her charge because she entered into the agreement under duress. The MOU specifically mentions settling the PERB case at issue in these proceedings, and a superior court judge has ordered that the MOU be enforced, which includes the dismissal of the PERB case. While Finley does not agree that she should be held to the terms of the MOU, a superior court judge has deemed otherwise, and that order has not been revoked or modified. Monies from the settlement have been deposited into a trust and used for Finley's benefit. The superior court order has been in effect for over four years. Given the clear language of the MOU encompassing the resolution of this case and the court order enforcing the MOU

and expressly ordering the dismissal of the pending PERB case, it effectuates the purpose of EERA to dismiss the complaint.

Jones v. AFSCME Loc. 3299, Case No. LA-CO-520-H. ALJ Cloughesy. (Issued 9-27-12; final 10-24-12, HO-U-1070-H.) Jones was a senior emergency medical technician employed at UCLA and a member of AFSCME Local 3299. He was dismissed on June 16, 2012, due to an incident on an emergency transport where the registered nurse and respiratory therapist were not able find suctioning tubing to work on a 14-month-old patient. Eventually, AFSCME decided not to proceed to arbitration with his dismissal action as the case was not winnable. But they neglected to tell Jones until a number of months had passed where he placed numerous phone calls to the union, inquiring as to the status of his grievance. Jones contended AFSCME violated its duty to fairly represent him by not providing an explanation for denying his representation and for not returning his many inquiries. AFSCME's explanation was similar to that given in *United Faculty Association of North Orange County Community College Dist. (Kiszely)* (1998) PERB Dec. No. 1269, and Jones was not able to show that the failure to return the calls was other than mere negligence or inadvertence. No violation was found.

Torrance City Employees Assn. et al. v. City of Torrance, Case No. LA-CE-579-M. ALJ Cloughesy. (Issued 10-26-12; final 11-20-12, HO-U-1072-M) The Torrance City Employees Association (TCEA), Engineers and Torrance Fiscal Employees Association (ETFEA), and Torrance Professional and Supervisory Association (TPSA) contended that the City of Torrance violated Torrance Municipal Code section 14.8.7 when it did not place non-civil service classifications through the civil service commission through its employee relations committee to be assigned to a representation unit. The unrepresented classifications were created prior to 1995 to September 25, 2007, and were created by city council resolution and not by the city's civil service commission. The unfair practice charge was filed on November 24, 2009. Allegations are untimely. All of the positions at issue were created prior to 1995 to September 25, 2007. The most recent position was created more than two years from the date that the associations filed their charge. The associations claim they did not become aware of the practice at issue until June/August/September 2009. However, the city had been mailing the city council agendas to the association presidents since 2005, and later emailed the agendas. Additionally, the salary resolutions for unrepresented or certain full-time or part-time employees had been adopted many times over the years.

Trustees of the California State University and State Employees Trades Council United, Case No. LA-UM-810-H. Hearing Officer Trump. (Issued 11-02-12; final 11-30-12, HO-R-184-H.) SETC petitioned for unit modification to include unrepresented skilled crafts "casual employment" classifications in the systemwide skilled crafts bargaining unit. Skilled trades casual employment workers share the same skills and qualifications, job duties, supervision, and worksites as regular skilled crafts unit employees. The similarities among these groups in their overall functions outweigh differences in wages and benefits, regularity and length of employment, and history of representation. Skilled trades casual employment workers share a community of interest with unit employees, and the requested unit is found to be an appropriate

unit.

Sacramento Regional Office — Decisions Not Final

Rocklin Teachers Professional Assn. v. Rocklin Unified School Dist., Case No. SA-CE-2562-E. ALJ Wesley. (Issued 9-26-12, exceptions filed 11-7-12.) After communication deteriorated between the school nurses and their supervisor, the nurses started bringing the union president to their meetings with managers and complaining about workload and safety issues. As a result of projected funding shortfalls, the district issued layoff notices to 77 employees, including all four school nurses. In furlough negotiations, the district raised several options for providing health services without nurses. The union refused to bargain over anything but furloughs, stating it did not want to pick one group of employees over another. After concession bargaining, most of the employees' positions were restored, but not the nurse positions. Thereafter, some of the nurses' work was transferred to non-unit employees or performed by contractors. Retaliation was found. After the union established a prima facie case, the district was unable to meet its burden of showing it would have laid off the nurses regardless of their participation in protected activity. Transfer and contracting out allegations were dismissed. The union waived its right to bargain by refusing to discuss providing health services without nurses.

Merced County Sheriff's Employee Assn. v. County of Merced, Case Nos. SA-CE-640-M and SA-CE-690-M. ALJ Cloughesy. (Issued 10-08-12, exceptions filed 10-29-12.) The Merced County Sheriff's Employee Association sent a letter to the Merced County sheriff notifying him of issues regarding the removal of a pepper ball gun from a security attendant overseeing the main jail yard and the removal of bargaining unit work. Merced County Sheriff Department commanders ordered the MCSEA chapter president to disclose who had told him that an inmate fight occurred on the yard. The department commander stated in front of the rank-and-file correctional officer that MCSEA better withdraw the letter or else desirable positions would be removed from bargaining unit work. The department initiated an investigation against two MCSEA union activists for, inter alia, telling an MCSEA member who opposed the union's methods that her father's "good ole boys" were going to be retiring and she soon would not have any protection. The department ordered two MCSEA officers to return an internal affairs investigative file that was erroneously released to them pursuant to a California Public Records Act request. The department did not have a legitimate business justification to ask who provided information during MCSEA's representatives meeting with their attorney. The department had no legitimate business justification to issue such a threat. It would have initiated investigation against the two union activists but for their protected activities especially on the allegation that a union activist told the member that her father's "good ole boys" were going to be retiring and she would no longer have protection. The department had legitimate business justification to retrieve the custodial officer's investigative file pursuant to Penal Code sections 832.7 and 832.8, and Evidence Code sections 1043 and 1045.

Service Employees International Union (SEIU) United Health Workers West (UHWW) v. Fresno County In-Home Supportive Services (IHSS) Public Authority,

Case No. SA-CE-671-M. ALJ Bologna. (Issued 11-28-12; exceptions due 12-24-12.) UHWW is the exclusive representative for approximately 10,000 IHSS providers in Fresno County. Fresno County IHSS Public Authority is a county department and separate legal entity with its own labor relations ordinance. The ordinance prohibits strikes and work stoppages; mediation is voluntary. The Authority contracts with the county's Office of Labor Relations for representation. The September 2006-September 2009 memorandum of understanding between UHWW and the Authority established wages of \$9.05/hour and \$.75 for benefits October 1, 2006; \$9.65/\$.80 October 1, 2007; and \$10.25/\$.85 October 1, 2008. Wages and benefits were subject to a contingency article; if federal or state funding were reduced, IHSS providers' wages/benefits would be reduced in proportion. Factfinding would resolve disputes. The contract included separability of provisions/savings and no strike/no lockout clauses for the term of the agreement. In September 2008, the Authority proposed to reduce wages because of reduced state realignment funds, triggering the contingency article. UHWW disagreed. Two factfinding reports in April and June 2009 concluded that the Authority was entitled to invoke the contingency article due to reduced realignment funding in the last two fiscal years; factfinding was advisory; and no reductions in wage and benefits should occur because successor contract negotiations would soon start and federal stimulus money was available to meet contractual obligations. In late-June 2009, a federal district court issued a preliminary injunction preventing the state from implementing legislation and reducing the cap on its participation in wages and benefits. In late-June 2009, the Authority requested negotiations over a successor agreement. On July 1, UHWW notified the Authority of its intent to amend the contract. UHWW made four requests for information to which the Authority timely responded and provided information by October 23. The parties met 11 times from August 12, 2009, through April 14, 2010. The Authority scheduled numerous bargaining sessions and sought to meet more often; presented numerous proposals before contract expiration and afterwards, separately, and as packages; reached tentative agreement on 18 articles; and participated in mediation in May 2010. The Authority consistently proposed economic concessions and reduction in wages and benefits, based on data and documentation demonstrating that money was not available to maintain obligations under the expired contract. But it accompanied these with extended MOU terms, withdrawal of proposals for advisory arbitration, stronger contingency language, and delayed wage decreases. UHWW never wavered from its desire to maintain the status quo on benefits and proposed 8 new paid benefits and 3 wage increases despite data and documentation demonstrating that money was not available to fund current contract obligations. No violation was found. No regressive bargaining was found; although the Authority's last, best, and final offer was less than its prior package wage and benefit proposal, it was accompanied with withdrawal of proposals and delayed wage reductions. No premature impasse was found because the parties were clearly at impasse in economics with a difference of \$2.50/hour in each side's last proposal. No waiver of statutory rights was found because the separability of provisions/savings and no strike/no lockout clauses were part of the tentative agreement and both parties agreed to include all TAs as part of their final proposals. The union failed to meet its burden of proof that the Authority unlawfully refused to bargain in good faith over the decision and/or the effects of reduced wages and benefit contributions for IHSS providers and other

implemented terms.

Oakland Regional Office — Decisions Not Final

SEIU Loc. 521 v. Santa Clara County Superior Court, Case No. SF-CE-15-C. ALJ Racho. (Issued 10-12-12, exceptions filed 11-19-12.) After the legislature enacted Government Code section 68106 in June 2009, authorizing court closures for one day a month to offset a projected \$360 million funding shortfall due to the ongoing state fiscal crisis, the Santa Clara County Court notified SEIU that employees would be furloughed without pay one day a month. Section 68106(b)(3) stated that the impact of the court closures would be subject to bargaining under section 71634 of the Trial Court Act, and that any reduction in earnings that resulted because of court closures would not constitute a reduction in salary or service for the purpose of calculation of retirement or other employment-related benefits for court employees. The court and SEIU met once over the issue in July 2009. A follow-up meeting over the issue was cancelled by SEIU, and the court later wrote to SEIU attempting to reschedule an effects bargaining session. The union did not attempt to reschedule negotiations or make any demand to bargain over the negotiable effects of court closures. The court ultimately imposed 10 furlough days between September 2009 and June 2010. No violation was found because there was a clear legislative intent in section 68106 to limit the scope of bargaining over court closures solely to impacts on matters within the scope of representation under the Trial Court Act. Section 68106 relieved the court of the duty to bargain over the decision to close courts for the transaction of judicial business, which necessarily included that employees would not report to work when courts were closed. The court stood ready to bargain over the effects of its non-negotiable decision, but SEIU never demanded to bargain over effects.

Torres v. Regents of the University of California, Case No. SF-CE-939-H. ALJ Ginoza. (Issued 10-4-12, exceptions filed 11-13-12.) From the university's internal temporary pool, a temporary clerical employee accepted an assignment in the hospital's pediatrics department. Under the terms of her collective bargaining agreement, she was entitled to convert to a career appointment if she exceeded 1,500 hours in the same assignment. The university directed her to an outside temporary agency just prior to the 1,500 hour limit so that she could return to complete the remainder of her assignment. The employee filed a grievance seeking conversion to career status. After agreeing that the transfer did not achieve a valid break in service, the university proposed a remedy of career status but in a funded position in another unit of the department. The employee objected because she believed she did not have the skills necessary to succeed in that position. The university proposed to close the grievance. The employee responded with a second grievance. Again the university responded by proposing a career position in a different unit. Again the employee rejected the offer, contending the position's responsibility were more onerous than her temporary assignment. The claim that the university retaliated against the employee for grievance prosecution was rejected. The claim that the two offered positions constituted a constructive discharge was rejected because the employee merely anticipated the negative conditions; she never experienced them. The university's offering of two positions

with arguably more onerous working conditions did not constitute an adverse action under the unique facts of this case because the university acted consistent with its practice of converting the employee to a roughly equivalent position that was vacant and funded. There was no permanently funded position associated with the original temporary assignment; to have placed her in such a position would have defeated the purpose of the career appointment. In addition, even if the offers were adverse actions, there was insufficient evidence of animus toward protected activity.

Calistoga Police Officers Assn. v. City of Calistoga, Case No. SF-CE-889-M. ALJ Ginoza. (Issued: 11-26-12; exceptions due 12-21-12.) The city was found not to have engaged in bad faith bargaining by seeking similar concessions from its three bargaining units. Facing severe budget constraints, the city proposed proportional concessions in negotiations with each of the unions representing the three units. All employees were asked to contribute 100 percent of the city's PERS contribution and increase their contribution for health premiums from 10 percent to 45 percent of the cost. Each union negotiated separately. Two unions reached agreement, one of them accepting a plan similar to the city's original proposal. The city invited the association to consider alternatives much as the other union had. No agreement was reached. The association alleged the city engaged in unlawful coordinated bargaining. No violation was found because the city did not demand that the three unions negotiate together, nor did it condition an agreement with the association on the acceptance of the same or similar contracts by the other unions.

Lewis v. City of Oakland, Case No. SF-CE-808-M. ALJ Cu. (Issued 11-01-12, exceptions filed 11-21-12.) The allegation charged that the city retaliated against the employee for union activity. No violation was found. Undisputed facts show that the employee was an active union representative and that the city knew about such activity. The record further shows that her layoff was an adverse employment action. There is sufficient evidence of nexus given that her layoff occurred during negotiations over a minimum billable hours provision and the city attorney took the negotiations personally. However, the city attorney's personal animus toward the union did not have a significant effect on the city's layoff decisions. Prior layoffs did not disproportionately affect union representatives. Furthermore, the record shows that the charging party's position was selected in an effort to distribute layoffs equitably and to eliminate the most expendable position. The retaliation allegation was dismissed. A previously unalleged separate interference allegation based on the same facts was not appropriate for consideration because the city did not have sufficient opportunity to address this claim, and because interference claims arising out of adverse personnel actions are more appropriately considered under PERB's retaliation analysis.

Los Angeles Regional Office — Decisions Not Final

Pasadena Management Assn. v. City of Pasadena, Case No. LA-CE-574-M. Hearing Officer Mary Weiss. (Issued 09-10-12, exceptions filed 10-05-12.) In a prior decision, the ALJ concluded that the City of Pasadena had violated the MMBA by unilaterally implementing a stand-by call-out procedure for bargaining unit employees when responding to electrical emergencies. The ALJ ordered the city to

compensate bargaining unit employees for financial losses, if any, that occurred as a direct result of the city's unlawful unilateral action. The city contended there were no financial losses and, even if there were, any back pay would be too speculative. The association contended the bargaining unit members were entitled to back pay at their overtime rate, their regular rate, or at the rate paid for stand-by work to employees in other bargaining units under other MOUs in Pasadena, Burbank, or Glendale. The hearing officer determined the bargaining unit employees suffered financial losses and ordered the city to provide back pay at the same rate provided to the Pasadena IBEW-represented bargaining unit because the work and other conditions of employment were comparable. In addition, the use of the formula was reasonable and was a non-arbitrary solution to the problem that no level of compensation was ever negotiated between the parties.

University Council-AFT v. Regents of the University of California, Case No. LA-CE-1103-H. ALJ Allen. (Issued 9-20-12; exceptions filed 11-5-12.) The unilateral change allegation was dismissed as untimely, despite equitable tolling, where the union failed to prove the parties were still using the grievance process six months before the charge was filed. Failure to provide information was found where the university did not respond to a clear and specific request as to what non-teaching duties were assigned to employees in that academic year.

California School Employees Assn. & its Chap. 224 v. Capistrano Unified School Dist., Case No. LA-CE-5621-E. ALJ Cu. (Issued 10-10-12, exceptions filed 11-05-12.) The allegation charged that the district denied the right to representation during an investigatory meeting. A violation was found. The meeting was an investigatory interview and the employee requested representation. The supervisor was not merely trying to give corrective action, but was questioning the employee to determine her understanding of new policies he created. The employee had a reasonable expectation of discipline because of her acrimonious relationship with her supervisor. In the past, the two have yelled at each other, and she recently hung up the telephone on him twice. The meeting itself was tense. The employee was denied representation because the supervisor continued questioning immediately after she requested representation. The remedy is to cease and desist and notice posting. Written reprimand should also be removed because it was based, at least in part, on the meeting where the employee was denied representation.

California School Employees Assn. and its Chapter 32 v. Bellflower Unified School Dist., Case No. LA-CE-5508-E. ALJ Cu. (Issued 10-12-12, exceptions filed 10-30-12.) The allegation charged that the district failed to bargain in good faith over layoffs and reductions in hours. A violation was found on the layoff claim. Districts are obligated to bargain over the effects of a layoff once a firm decision is made, even though the full extent of implementation remains speculative. Here, the evidence showed that the district was proposing layoffs and the union demanded to bargain over specific effects. The totality of the district's conduct, namely the failure to either schedule meetings or offer counterproposals, demonstrated a subjective lack of intent to bargain in good faith. The remedy was to cease and desist and bargain upon request. There was no evidence that a layoff or reduction in hours actually occurred, so those allegations were dismissed.

Armantrout v. California Statewide Law Enforcement Assn., Case No. LA-CO-132-S. ALJ Allen. (Issued 10-15-12; exceptions filed 11-28-12.) The allegation that the union failed to follow reasonable procedures in suspending the employee's union membership was dismissed, where the employee failed to exhaust internal union appeal procedures, as required by the union's reasonable standing rules.

Raines et al., v. United Teachers Los Angeles, Case No. LA-CO-1394-E. ALJ Allen. (Issued 11-01-12; exceptions due 12-24-12.) Violation of the duty of fair representation was found where the union president signed a side letter potentially costing substitute teachers millions of dollars without notice and an opportunity to be heard. The remedy is to be determined in further proceedings.

Crespo, Bautista, and Fox v. Rio Teachers Assn., Case No. LA-CO-1437-E. ALJ Cu. (Issued 11-15-12, exceptions due 12-10-12.) The union began deducting agency fees from nonmember charging parties on December 9, 2009, without providing written notice beforehand as required by PERB Reg. 32992. No notice was provided at any point from December 2009 through July 2010. This amounts to a violation. The remedy was a cease-and-desist order and an order to reimburse the charging parties for all fees collected during the 2009-10 annual notice period. Notice posting was ordered as well. Reimbursement of litigation fees was not appropriate because there was no showing that the union was attempting to abuse the process or act in bad faith. To the contrary, its admission of wrongdoing expedited the process. Remedies concerning future annual notice periods are also inappropriate as outside the scope of the PERB complaint.

Inglewood Management Employees Assn. and Inglewood Police Civilian Management Assn. v. City of Inglewood, Case No. LA-CE-662-M. ALJ Cu. (Issued 11-20-12; exceptions due 12-17-12.) The allegation charged that the city unilaterally changed its policy regarding offering unit members reassignment to vacant positions during a layoff. The city's civil service rule (CSR) VIII, section 2(b), states that an employee cannot be laid off "before he has been made a reasonable offer of reassignment, if such offer is immediately available." This rule has been applied in the past to mean that employees subjected to layoff are given offers of reassignment to vacant positions when they are qualified and when the city has decided to fill the vacancy. CSR Rule VIII, section 2(d), gives the city administrator discretionary authority to "approve the appointment of an employee who is to be laid off to an existing vacancy in a lower or equal class for which he is qualified," without going through the promotional process. The fact that the city did not make reassignments during a layoff in 2010 is not sufficient to demonstrate a violation of the policy set forth in CSR Rule VIII, section 2(b). The charging parties did not offer evidence indicating that any of its laid-off members were qualified to fill available vacancies or that any of the vacancies they identified were available. Nor was evidence presented that CSR Rule VIII, section 2(d), created a mandatory obligation to fill vacancies with laid-off unit members. Just because the city exercised its discretionary authority in the past, does not mean it was required to continue doing so.

ALJ PROPOSED DECISIONS

Sacramento Regional Office — Final Decisions

Brooks v. State of California (Dept. of Corrections & Rehabilitation), Case No. SA-CE-1858-S. ALJ Cloughesy. (Issued 8-24-12, final 9-19-12, HO-U-1063-S.) A dentist who was a UAPD job steward at a state prison received a 10 percent pay reduction for 18 months for calling an unauthorized union meeting on state time and for being dishonest when he denied doing so. Retaliation and interference were not found as the health care manager would have taken adverse action but for the job steward's protected activity. The state prison was justified/compelled to take action for such offenses.

CDF Firefighters v. State of California (Dept. of Forestry & Fire Protection/CalFIRE), Case No. SA-CE-1835-S. ALJ Bologna. (Issued 8-28-12; final 09-24-12, HO-U-1065-S.) Nevada-Yuba-Placer (NYP) is 1 of 21 geographic units in CalFIRE, with 350 employees during the fire season and half that number during the November-May off-season. The chain of command is Unit Chief Bradley Harris, Deputy Chief Randy Smith, three division chiefs for Northern and Southern Operations and Administrative, 12 battalion chiefs, 59 fire captains, fire apparatus engineers, and firefighters. The NYP executive staff consists of the unit chief through division chief. Battalion chief through firefighters are in bargaining unit 8. In 2009, Gary Brittner was the NYP administrative chief and Chris DeSena was the acting Northern Division Operations chief. Ten fire captains work at inmate crew camps, and 49 run the daily operations of 12 fire stations, 2 captains per station. Six battalion chiefs administer the fire stations, 2 stations per battalion; other battalion chiefs have specialized program responsibilities. Joseph Ten Eyck is a fire Captain at Fire Station 20 (Nevada City) who has held union office since 1999. Glen Ford was a fire captain at Fire Station 40 (Smartsville) who held chapter offices in NYP since 2001. Christine York is the second fire captain at Fire Station 40 who promoted in 2009 when she was NYP secretary-treasurer and chapter director. Ken Hale is the firefighters state rank-and-file director/leader of the union bargaining team since 2004. Jim Matthias is a battalion chief, the NYP training chief, and a local chapter officer. The unfair practice complaint alleges four discriminatory acts against Ten Eyck (cancellation of his brush removal project, termination of his work email account, removal from training coordinator, email alleging station mismanagement); two retaliatory acts against Ford (email alleging station mismanagement, closure of Fire Station 40 for 2009-10 winter); two retaliatory acts against York (email alleging station mismanagement, closure of Fire Station 40 for 2009-10 winter); two claims of interference with Ten Eyck and Ford (failure to notify overtime coordinator to obtain coverage for union leave so leave could not be used); and one unilateral change in policy/past practice concerning on-call overtime for battalion chiefs. All discrimination/retaliation claims were dismissed for failure to demonstrate adverse action and/or nexus/unlawful motive by a preponderance of credible non-hearsay evidence. The unilateral change allegation was dismissed because the charging party did not meet its burden of proving a past practice existed. No evidence was presented on Ford's inability to use requested and approved union leave. Although the evidence did not support the precise allegation of the complaint, it is undisputed

that Ten Eyck was unable to use at least one day of union leave because notification of its approval arrived too late. Harm to the employee and union rights was established, and CalFIRE offered no legitimate justification for its conduct/inaction. The remedy was a cease-and-desist order. Statewide posting is appropriate even though only NYP conduct was involved because the union leave bank is in the statewide MOU.

Foresthill Public Utility Dist. and International Union of Operating Engineers, Stationary Engineers, Loc. 39, AFL-CIO, Case No. SA-PC-16-M. Hearing Officer Nyman. (Issued 09-10-12; final 10-04-12, HO-R-182-M.) The Stationary Engineers petitioned for certification of a bargaining unit to include nine unrepresented classifications. Prior to a hearing, the parties stipulated to the exclusion of the business manager classification. The petition seeking representation of the remaining eight classifications was granted. The lead utility operator V classifications work similar hours to the other employees in the petitioned-for bargaining unit and have similar benefits and terms and conditions of employment. The lead utility operator V classifications share a community of interest with unit employees, and the district's request to exclude lead utility operator V classifications from the unit based on arguable supervisory duties was denied. The customer service representatives also share a significant community of interest with the remaining employees in the petitioned-for bargaining unit and perform no confidential duties to warrant exclusion.

United Public Employees of California v. County of Sacramento, Case No. SA-CE-754-M. ALJ Cloughesy. (Issued 10-25-12, final 12-04-12, HO-U-1074-M.) The association alleges that the county committed an unlawful unilateral change when it decided it wanted to manage its compensatory time off (CTO) for its data processing professional unit in its Department of Human Assistance. The county and the association did not have an existing collective bargaining agreement yet. The county alleged its personnel ordinance gave it discretion to manage its CTO, and therefore there was no change in policy. The ALJ agreed with the county.

California School Employees Assn. & Its Chap. 622 v. Raisin City Elementary School Dist., Case Nos. SA-CE-2608-E and SA-CE-2617-E. ALJ Cloughesy. (Issued 10-31-12; final 11-27-12, HO-U-1074-E.) After the district laid off all of the CSEA-classified employees on July 1, 2011, the district superintendent mowed the school's lawn and hired a custodian to do some of the work performed by the two laid-off custodians. The district did not notice CSEA of the transferring out of bargaining unit work and provide an opportunity to meet and negotiate. The school board passed a directive to offer employees their jobs back at reduced work hours, without notifying and providing CSEA an opportunity to meet and negotiate over the change. Violations of EERA sections 3543.5(a), (b) and (c) were found.

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Rachlis v. California Association of Professional Scientists, Case No. SF-CO-60-S. ALJ Cloughesy. (Issued 8-27-12, final 09-24-12, HO-U-1064-S) The policy manual of the union states that a disciplinary member hearing needs to begin 30 days from the date the union disciplinary committee receives charges. The union decided not to

assign the case to the committee until after the election period. The delay, between two-and-a-half to four months later, was found to violate Government Code section 3515.5.

State Employees Trades Council, United v. Regents of the University of California (Los Angeles), Case No. SF-CE-915-H. ALJ Cu. (Issued 10-05-12; final 11-01-12, HO-U-1071-H.) The allegations were that the employer (1) unilaterally implemented a reduction in its time base plan; (2) discriminated against unit members; (3) bypassed the union; (4) failed to properly respond to information requests; and (5) engaged in surface bargaining. Violations were found. With regard to (1), implementation of the reductions plan was inconsistent with the parties' agreement and changed a policy within the scope of representation. The business necessity defense does not apply because the university had readily available alternatives. It was not appropriate to defer the matter to arbitration because an arbitration order to bargain over a remedy without first ordering a return to status quo is repugnant to collective bargaining laws. With regard to (2), under *Campbell Municipal Employees Association v. City of Campbell* (1982) 131 Cal.App.3d 416, an employer's actions are discrimination if "inherently destructive" of employee rights. PERB has regularly found that unilateral policy changes are "inherently destructive" of employee rights. This is sufficient to establish a violation under the *Campbell* standard. With regard to (3), the employer's solicitation of employee sentiment about proposals prior to engaging in bargaining with the union bypasses and undermines the union. With regard to (4), documents were not provided or were provided in an illegible form. No violation was found where (5) the parties were signatories to a memorandum of understanding covering both salary and reductions in time, meaning there was no duty to bargain over those subjects after the agreement was ratified. Thus, the employer's conduct does not violate the duty to negotiate in good faith.

Coalition of University Employees v. Regents of the University of California (Lawrence Berkeley National Laboratory), Case No. SF-CE-945-H. ALJ Wesley. (Issued 10-31-12; final 11-27-12, HO-U-1073-H.) An employee filed a grievance in October 2009, challenging receipt of a warning letter. In February 2010, the university issued the employee a final disciplinary warning letter addressing excessive personal calls; the failure to use a security badge to enter the office, causing other employees to stop working to admit her; and a verbal confrontation with another employee. No violation was found because the university established it would have issued the warning letter notwithstanding the filed grievance.

Los Angeles Regional Office — Final Decisions

Monrovia Firefighters Assn., IAFF Loc. 2415 v. City of Monrovia, Case No. LA-CE-610-M. Hearing Officer Partovi. (Issued 08-03-12; final 09-18-12, HO-U-1061-M.) By a February 4, 2010, letter to employees, the city attempted to bypass, undermine, and derogate the authority of the exclusive representative, and interfered with employee and union rights. No violation was found for the bypass allegation since the city's February 4, 2010, letter was not made in the context of bargaining. A violation was found for the interference allegation since the letter contained impliedly threatening and coercive statements. The letter suggested to employees and union

representatives that criticism of the fire chief's policies constituted insubordination. By imploring employees to review an unfair practice charge filed by the union on employees' behalf while noting that the city expects to prevail in such a charge, the letter discouraged employees from supporting the union's pursuit of the charge. The city did not provide a legitimate business justification for issuing the letter. The remedy is an order to cease and desist the threatening statements.

AFSCME Loc. 3299 v. Regents of the University of California (San Diego), Case No. LA-CE-1158-H. Hearing Officer Wu. (Issued 08-13-12; final 09-10-12, HO-U-1060-H.) The union alleged that the university failed to timely respond to requests for information. The university contended that the five- to seven-month delay did not prejudice the union. The university's reduced staff and lack of prioritization did not justify its delay in responding and a violation was found.

United Teachers Los Angeles v. Los Angeles Unified School Dist., Case No. LA-CE-5583-E. ALJ Cu. (Issued 08-23-12; final 9-18-12, HO-U-1062-E.) The union alleged that the district disciplined a union activist for profane comments made during a labor-management meeting. A violation was found. EERA protects a variety of speech activity, including statements critical of supervision when the speech relates to employees' working conditions. The statements, although crude, were intimately involved with protected subjects, including the reemployment rights of adult educators. These statements are protected by EERA. The district's asserted justification that it would have disciplined any employee for similar statements, even if not during a union meeting, was unpersuasive because it is not possible to divorce the employee's words from their protected context. The remedy includes rescission of discipline and restoration of lost wages.

Lankster v. Los Angeles Unified School Dist. (Gardena High School), Case No. LA-CE-5587-E. ALJ Allen. (Issued 8-29-12; final 9-25-12, HO-U-1066-E.) No retaliation was found where there was no evidence that the teacher's reassignment had an adverse impact on his employment.

Rice v. Whittier Union High School Dist., Case No. LA-CE-5551-E. ALJ Cu. (Issued 08-30-12; final 9-25-12, HO-U-1067-E.) The charge, that the district transferred the employee in retaliation for grievance activity, was filed more than six months from the date of the transfer. Equitable tolling applied during the time the parties participated in the advisory arbitration grievance process, but did not apply for a sufficient time to make the charge timely. The charging party's argument that the parties were still participating in the grievance process until the district affirmatively accepted or rejected the arbitration decision is not supported by the record. Earlier steps in the process terminate naturally when the district declines to take any action. The charging party offered no basis for concluding that the district is required to respond at the final step, when no response is required earlier in the process. Even if the case were timely, the charging party failed to show that the transfer options offered to him were objectively adverse. The charging party's unfamiliarity with the curriculum of the offered transfer location is not a sufficient basis to find that the transfer was adverse to employment. The record also shows that the district transferred the charging party and another employee out of a genuine concern about

the interpersonal conflicts at the school site, not his 2008 grievance activity.

Berry v. Los Angeles Community College Dist., Case No. LA-CE-5677-E. ALJ Allen. (Issued 09-04-12; final 10-04-12, HO-U-1068-E.) No retaliation was found where the district was recommending dismissal before as well as after the employee's exercise of representation rights.

Vallecitos Water Dist. and Vallecitos Water District Public Service Employees Assn. and Vallecitos Water District Employees Assn., Case No. LA-SV-171-M. Hearing Officer Partovi. (Issued 9-18-12; final 10-16-12, HO-R-183-M.) The severance petition seeking to sever a unit consisting of mostly operations and maintenance (O&M) employees from the existing wall-to-wall unit was dismissed. There was no evidence presented showing buildings and grounds workers — the only non-O&M classification sought to be included in the petitioned for unit — share a community of interest with the proposed unit. The O&M employees do not share a community of interest separate and distinct from the remaining employees in the unit. O&M employees share the following among some non-O&M employees: use of steel-toed boots in the work area, uniforms, fringe benefits, overtime and stand-by pay, and technical certifications. Supervisors within the proposed unit perform administrative duties similar to those excluded from the proposed unit. Moreover, there was no evidence showing the interests of one group trampled the interests of O&M employees.

Finley v. Los Angeles Unified School Dist., Case No. LA-CE-4922-E. ALJ Cloughesy. (Issued 9-25-12; final 10-24-12, HO-U-1069-E.) On July 13, 2007, Finley and the district entered into a memorandum of understanding, which included resolution of the complaint. While Finley signed the MOU, she would not sign the long-form settlement agreement. A superior court judge enforced the MOU on January 22, 2008, under Code of Civil Procedure section 664.6, including dismissal of her PERB action. Finley received money set forth in the MOU. Finley did not want to withdraw her charge because she entered into the agreement under duress. The MOU specifically mentions settling the PERB case at issue in these proceedings, and a superior court judge has ordered that the MOU be enforced, which includes the dismissal of the PERB case. While Finley does not agree that she should be held to the terms of the MOU, a superior court judge has deemed otherwise, and that order has not been revoked or modified. Monies from the settlement have been deposited into a trust and used for Finley's benefit. The superior court order has been in effect for over four years. Given the clear language of the MOU encompassing the resolution of this case and the court order enforcing the MOU and expressly ordering the dismissal of the pending PERB case, it effectuates the purpose of EERA to dismiss the complaint.

Jones v. AFSCME Loc. 3299, Case No. LA-CO-520-H. ALJ Cloughesy. (Issued 9-27-12; final 10-24-12, HO-U-1070-H.) Jones was a senior emergency medical technician employed at UCLA and a member of AFSCME Local 3299. He was dismissed on June 16, 2012, due to an incident on an emergency transport where the registered nurse and respiratory therapist were not able find suctioning tubing to work on a 14-month-old patient. Eventually, AFSCME decided not to proceed to

arbitration with his dismissal action as the case was not winnable. But they neglected to tell Jones until a number of months had passed where he placed numerous phone calls to the union, inquiring as to the status of his grievance. Jones contended AFSCME violated its duty to fairly represent him by not providing an explanation for denying his representation and for not returning his many inquiries. AFSCME's explanation was similar to that given in *United Faculty Association of North Orange County Community College Dist. (Kiszely)* (1998) PERB Dec. No. 1269, and Jones was not able to show that the failure to return the calls was other than mere negligence or inadvertence. No violation was found.

Torrance City Employees Assn. et al. v. City of Torrance, Case No. LA-CE-579-M. ALJ Cloughesy. (Issued 10-26-12; final 11-20-12, HO-U-1072-M) The Torrance City Employees Association (TCEA), Engineers and Torrance Fiscal Employees Association (ETFEA), and Torrance Professional and Supervisory Association (TPSA) contended that the City of Torrance violated Torrance Municipal Code section 14.8.7 when it did not place non-civil service classifications through the civil service commission through its employee relations committee to be assigned to a representation unit. The unrepresented classifications were created prior to 1995 to September 25, 2007, and were created by city council resolution and not by the city's civil service commission. The unfair practice charge was filed on November 24, 2009. Allegations are untimely. All of the positions at issue were created prior to 1995 to September 25, 2007. The most recent position was created more than two years from the date that the associations filed their charge. The associations claim they did not become aware of the practice at issue until June/August/September 2009. However, the city had been mailing the city council agendas to the association presidents since 2005, and later emailed the agendas. Additionally, the salary resolutions for unrepresented or certain full-time or part-time employees had been adopted many times over the years.

Trustees of the California State University and State Employees Trades Council United, Case No. LA-UM-810-H. Hearing Officer Trump. (Issued 11-02-12; final 11-30-12, HO-R-184-H.) SETC petitioned for unit modification to include unrepresented skilled crafts "casual employment" classifications in the systemwide skilled crafts bargaining unit. Skilled trades casual employment workers share the same skills and qualifications, job duties, supervision, and worksites as regular skilled crafts unit employees. The similarities among these groups in their overall functions outweigh differences in wages and benefits, regularity and length of employment, and history of representation. Skilled trades casual employment workers share a community of interest with unit employees, and the requested unit is found to be an appropriate unit.

Sacramento Regional Office — Decisions Not Final

Rocklin Teachers Professional Assn. v. Rocklin Unified School Dist., Case No. SA-CE-2562-E. ALJ Wesley. (Issued 9-26-12, exceptions filed 11-7-12.) After communication deteriorated between the school nurses and their supervisor, the nurses started bringing the union president to their meetings with managers and complaining about workload and safety issues. As a result of projected funding

shortfalls, the district issued layoff notices to 77 employees, including all four school nurses. In furlough negotiations, the district raised several options for providing health services without nurses. The union refused to bargain over anything but furloughs, stating it did not want to pick one group of employees over another. After concession bargaining, most of the employees' positions were restored, but not the nurse positions. Thereafter, some of the nurses' work was transferred to non-unit employees or performed by contractors. Retaliation was found. After the union established a prima facie case, the district was unable to meet its burden of showing it would have laid off the nurses regardless of their participation in protected activity. Transfer and contracting out allegations were dismissed. The union waived its right to bargain by refusing to discuss providing health services without nurses.

Merced County Sheriff's Employee Assn. v. County of Merced, Case Nos. SA-CE-640-M and SA-CE-690-M. ALJ Cloughesy. (Issued 10-08-12, exceptions filed 10-29-12.) The Merced County Sheriff's Employee Association sent a letter to the Merced County sheriff notifying him of issues regarding the removal of a pepper ball gun from a security attendant overseeing the main jail yard and the removal of bargaining unit work. Merced County Sheriff Department commanders ordered the MCSEA chapter president to disclose who had told him that an inmate fight occurred on the yard. The department commander stated in front of the rank-and-file correctional officer that MCSEA better withdraw the letter or else desirable positions would be removed from bargaining unit work. The department initiated an investigation against two MCSEA union activists for, inter alia, telling an MCSEA member who opposed the union's methods that her father's "good ole boys" were going to be retiring and she soon would not have any protection. The department ordered two MCSEA officers to return an internal affairs investigative file that was erroneously released to them pursuant to a California Public Records Act request. The department did not have a legitimate business justification to ask who provided information during MCSEA's representatives meeting with their attorney. The department had no legitimate business justification to issue such a threat. It would have initiated investigation against the two union activists but for their protected activities especially on the allegation that a union activist told the member that her father's "good ole boys" were going to be retiring and she would no longer have protection. The department had legitimate business justification to retrieve the custodial officer's investigative file pursuant to Penal Code sections 832.7 and 832.8, and Evidence Code sections 1043 and 1045.

Service Employees International Union (SEIU) United Health Workers West (UHWW) v. Fresno County In-Home Supportive Services (IHSS) Public Authority, Case No. SA-CE-671-M. ALJ Bologna. (Issued 11-28-12; exceptions due 12-24-12.) UHWW is the exclusive representative for approximately 10,000 IHSS providers in Fresno County. Fresno County IHSS Public Authority is a county department and separate legal entity with its own labor relations ordinance. The ordinance prohibits strikes and work stoppages; mediation is voluntary. The Authority contracts with the county's Office of Labor Relations for representation. The September 2006-September 2009 memorandum of understanding between UHWW and the Authority established wages of \$9.05/hour and \$.75 for benefits October 1, 2006; \$9.65/\$.80 October 1, 2007; and \$10.25/\$.85 October 1, 2008. Wages and benefits were

subject to a contingency article; if federal or state funding were reduced, IHSS providers' wages/benefits would be reduced in proportion. Factfinding would resolve disputes. The contract included separability of provisions/savings and no strike/no lockout clauses for the term of the agreement. In September 2008, the Authority proposed to reduce wages because of reduced state realignment funds, triggering the contingency article. UHWW disagreed. Two factfinding reports in April and June 2009 concluded that the Authority was entitled to invoke the contingency article due to reduced realignment funding in the last two fiscal years; factfinding was advisory; and no reductions in wage and benefits should occur because successor contract negotiations would soon start and federal stimulus money was available to meet contractual obligations. In late-June 2009, a federal district court issued a preliminary injunction preventing the state from implementing legislation and reducing the cap on its participation in wages and benefits. In late-June 2009, the Authority requested negotiations over a successor agreement. On July 1, UHWW notified the Authority of its intent to amend the contract. UHWW made four requests for information to which the Authority timely responded and provided information by October 23. The parties met 11 times from August 12, 2009, through April 14, 2010. The Authority scheduled numerous bargaining sessions and sought to meet more often; presented numerous proposals before contract expiration and afterwards, separately, and as packages; reached tentative agreement on 18 articles; and participated in mediation in May 2010. The Authority consistently proposed economic concessions and reduction in wages and benefits, based on data and documentation demonstrating that money was not available to maintain obligations under the expired contract. But it accompanied these with extended MOU terms, withdrawal of proposals for advisory arbitration, stronger contingency language, and delayed wage decreases. UHWW never wavered from its desire to maintain the status quo on benefits and proposed 8 new paid benefits and 3 wage increases despite data and documentation demonstrating that money was not available to fund current contract obligations. No violation was found. No regressive bargaining was found; although the Authority's last, best, and final offer was less than its prior package wage and benefit proposal, it was accompanied with withdrawal of proposals and delayed wage reductions. No premature impasse was found because the parties were clearly at impasse in economics with a difference of \$2.50/hour in each side's last proposal. No waiver of statutory rights was found because the separability of provisions/savings and no strike/no lockout clauses were part of the tentative agreement and both parties agreed to include all TAs as part of their final proposals. The union failed to meet its burden of proof that the Authority unlawfully refused to bargain in good faith over the decision and/or the effects of reduced wages and benefit contributions for IHSS providers and other implemented terms.

Oakland Regional Office — Decisions Not Final

SEIU Loc. 521 v. Santa Clara County Superior Court, Case No. SF-CE-15-C. ALJ Racho. (Issued 10-12-12, exceptions filed 11-19-12.) After the legislature enacted Government Code section 68106 in June 2009, authorizing court closures for one

day a month to offset a projected \$360 million funding shortfall due to the ongoing state fiscal crisis, the Santa Clara County Court notified SEIU that employees would be furloughed without pay one day a month. Section 68106(b)(3) stated that the impact of the court closures would be subject to bargaining under section 71634 of the Trial Court Act, and that any reduction in earnings that resulted because of court closures would not constitute a reduction in salary or service for the purpose of calculation of retirement or other employment-related benefits for court employees. The court and SEIU met once over the issue in July 2009. A follow-up meeting over the issue was cancelled by SEIU, and the court later wrote to SEIU attempting to reschedule an effects bargaining session. The union did not attempt to reschedule negotiations or make any demand to bargain over the negotiable effects of court closures. The court ultimately imposed 10 furlough days between September 2009 and June 2010. No violation was found because there was a clear legislative intent in section 68106 to limit the scope of bargaining over court closures solely to impacts on matters within the scope of representation under the Trial Court Act. Section 68106 relieved the court of the duty to bargain over the decision to close courts for the transaction of judicial business, which necessarily included that employees would not report to work when courts were closed. The court stood ready to bargain over the effects of its non-negotiable decision, but SEIU never demanded to bargain over effects.

Torres v. Regents of the University of California, Case No. SF-CE-939-H. ALJ Ginoza. (Issued 10-4-12, exceptions filed 11-13-12.) From the university's internal temporary pool, a temporary clerical employee accepted an assignment in the hospital's pediatrics department. Under the terms of her collective bargaining agreement, she was entitled to convert to a career appointment if she exceeded 1,500 hours in the same assignment. The university directed her to an outside temporary agency just prior to the 1,500 hour limit so that she could return to complete the remainder of her assignment. The employee filed a grievance seeking conversion to career status. After agreeing that the transfer did not achieve a valid break in service, the university proposed a remedy of career status but in a funded position in another unit of the department. The employee objected because she believed she did not have the skills necessary to succeed in that position. The university proposed to close the grievance. The employee responded with a second grievance. Again the university responded by proposing a career position in a different unit. Again the employee rejected the offer, contending the position's responsibility were more onerous than her temporary assignment. The claim that the university retaliated against the employee for grievance prosecution was rejected. The claim that the two offered positions constituted a constructive discharge was rejected because the employee merely anticipated the negative conditions; she never experienced them. The university's offering of two positions with arguably more onerous working conditions did not constitute an adverse action under the unique facts of this case because the university acted consistent with its practice of converting the employee to a roughly equivalent position that was vacant and funded. There was no permanently funded position associated with the original temporary assignment; to have placed her in such a position would have defeated the purpose of the career appointment. In addition, even if the offers were adverse actions, there was insufficient evidence of animus toward protected activity.

Calistoga Police Officers Assn. v. City of Calistoga, Case No. SF-CE-889-M. ALJ Ginoza. (Issued: 11-26-12; exceptions due 12-21-12.) The city was found not to have engaged in bad faith bargaining by seeking similar concessions from its three bargaining units. Facing severe budget constraints, the city proposed proportional concessions in negotiations with each of the unions representing the three units. All employees were asked to contribute 100 percent of the city's PERS contribution and increase their contribution for health premiums from 10 percent to 45 percent of the cost. Each union negotiated separately. Two unions reached agreement, one of them accepting a plan similar to the city's original proposal. The city invited the association to consider alternatives much as the other union had. No agreement was reached. The association alleged the city engaged in unlawful coordinated bargaining. No violation was found because the city did not demand that the three unions negotiate together, nor did it condition an agreement with the association on the acceptance of the same or similar contracts by the other unions.

Lewis v. City of Oakland, Case No. SF-CE-808-M. ALJ Cu. (Issued 11-01-12, exceptions filed 11-21-12.) The allegation charged that the city retaliated against the employee for union activity. No violation was found. Undisputed facts show that the employee was an active union representative and that the city knew about such activity. The record further shows that her layoff was an adverse employment action. There is sufficient evidence of nexus given that her layoff occurred during negotiations over a minimum billable hours provision and the city attorney took the negotiations personally. However, the city attorney's personal animus toward the union did not have a significant effect on the city's layoff decisions. Prior layoffs did not disproportionately affect union representatives. Furthermore, the record shows that the charging party's position was selected in an effort to distribute layoffs equitably and to eliminate the most expendable position. The retaliation allegation was dismissed. A previously unalleged separate interference allegation based on the same facts was not appropriate for consideration because the city did not have sufficient opportunity to address this claim, and because interference claims arising out of adverse personnel actions are more appropriately considered under PERB's retaliation analysis.

Los Angeles Regional Office — Decisions Not Final

Pasadena Management Assn. v. City of Pasadena, Case No. LA-CE-574-M. Hearing Officer Mary Weiss. (Issued 09-10-12, exceptions filed 10-05-12.) In a prior decision, the ALJ concluded that the City of Pasadena had violated the MMBA by unilaterally implementing a stand-by call-out procedure for bargaining unit employees when responding to electrical emergencies. The ALJ ordered the city to compensate bargaining unit employees for financial losses, if any, that occurred as a direct result of the city's unlawful unilateral action. The city contended there were no financial losses and, even if there were, any back pay would be too speculative. The association contended the bargaining unit members were entitled to back pay at their overtime rate, their regular rate, or at the rate paid for stand-by work to employees in other bargaining units under other MOUs in Pasadena, Burbank, or Glendale. The hearing officer determined the bargaining unit employees suffered financial losses and ordered the city to provide back pay at the same rate provided

to the Pasadena IBEW-represented bargaining unit because the work and other conditions of employment were comparable. In addition, the use of the formula was reasonable and was a non-arbitrary solution to the problem that no level of compensation was ever negotiated between the parties.

University Council-AFT v. Regents of the University of California, Case No. LA-CE-1103-H. ALJ Allen. (Issued 9-20-12; exceptions filed 11-5-12.) The unilateral change allegation was dismissed as untimely, despite equitable tolling, where the union failed to prove the parties were still using the grievance process six months before the charge was filed. Failure to provide information was found where the university did not respond to a clear and specific request as to what non-teaching duties were assigned to employees in that academic year.

California School Employees Assn. & its Chap. 224 v. Capistrano Unified School Dist., Case No. LA-CE-5621-E. ALJ Cu. (Issued 10-10-12, exceptions filed 11-05-12.) The allegation charged that the district denied the right to representation during an investigatory meeting. A violation was found. The meeting was an investigatory interview and the employee requested representation. The supervisor was not merely trying to give corrective action, but was questioning the employee to determine her understanding of new policies he created. The employee had a reasonable expectation of discipline because of her acrimonious relationship with her supervisor. In the past, the two have yelled at each other, and she recently hung up the telephone on him twice. The meeting itself was tense. The employee was denied representation because the supervisor continued questioning immediately after she requested representation. The remedy is to cease and desist and notice posting. Written reprimand should also be removed because it was based, at least in part, on the meeting where the employee was denied representation.

California School Employees Assn. and its Chapter 32 v. Bellflower Unified School Dist., Case No. LA-CE-5508-E. ALJ Cu. (Issued 10-12-12, exceptions filed 10-30-12.) The allegation charged that the district failed to bargain in good faith over layoffs and reductions in hours. A violation was found on the layoff claim. Districts are obligated to bargain over the effects of a layoff once a firm decision is made, even though the full extent of implementation remains speculative. Here, the evidence showed that the district was proposing layoffs and the union demanded to bargain over specific effects. The totality of the district's conduct, namely the failure to either schedule meetings or offer counterproposals, demonstrated a subjective lack of intent to bargain in good faith. The remedy was to cease and desist and bargain upon request. There was no evidence that a layoff or reduction in hours actually occurred, so those allegations were dismissed.

Armantrout v. California Statewide Law Enforcement Assn., Case No. LA-CO-132-S. ALJ Allen. (Issued 10-15-12; exceptions filed 11-28-12.) The allegation that the union failed to follow reasonable procedures in suspending the employee's union membership was dismissed, where the employee failed to exhaust internal union appeal procedures, as required by the union's reasonable standing rules.

Raines et al., v. United Teachers Los Angeles, Case No. LA-CO-1394-E. ALJ Allen. (Issued 11-01-12; exceptions due 12-24-12.) Violation of the duty of fair

representation was found where the union president signed a side letter potentially costing substitute teachers millions of dollars without notice and an opportunity to be heard. The remedy is to be determined in further proceedings.

Crespo, Bautista, and Fox v. Rio Teachers Assn., Case No. LA-CO-1437-E. ALJ Cu. (Issued 11-15-12, exceptions due 12-10-12.) The union began deducting agency fees from nonmember charging parties on December 9, 2009, without providing written notice beforehand as required by PERB Reg. 32992. No notice was provided at any point from December 2009 through July 2010. This amounts to a violation. The remedy was a cease-and-desist order and an order to reimburse the charging parties for all fees collected during the 2009-10 annual notice period. Notice posting was ordered as well. Reimbursement of litigation fees was not appropriate because there was no showing that the union was attempting to abuse the process or act in bad faith. To the contrary, its admission of wrongdoing expedited the process. Remedies concerning future annual notice periods are also inappropriate as outside the scope of the PERB complaint.

Inglewood Management Employees Assn. and Inglewood Police Civilian Management Assn. v. City of Inglewood, Case No. LA-CE-662-M. ALJ Cu. (Issued 11-20-12; exceptions due 12-17-12.) The allegation charged that the city unilaterally changed its policy regarding offering unit members reassignment to vacant positions during a layoff. The city's civil service rule (CSR) VIII, section 2(b), states that an employee cannot be laid off "before he has been made a reasonable offer of reassignment, if such offer is immediately available." This rule has been applied in the past to mean that employees subjected to layoff are given offers of reassignment to vacant positions when they are qualified and when the city has decided to fill the vacancy. CSR Rule VIII, section 2(d), gives the city administrator discretionary authority to "approve the appointment of an employee who is to be laid off to an existing vacancy in a lower or equal class for which he is qualified," without going through the promotional process. The fact that the city did not make reassignments during a layoff in 2010 is not sufficient to demonstrate a violation of the policy set forth in CSR Rule VIII, section 2(b). The charging parties did not offer evidence indicating that any of its laid-off members were qualified to fill available vacancies or that any of the vacancies they identified were available. Nor was evidence presented that CSR Rule VIII, section 2(d), created a mandatory obligation to fill vacancies with laid-off unit members. Just because the city exercised its discretionary authority in the past, does not mean it was required to continue doing so.

REPORT OF THE OFFICE OF THE GENERAL COUNSEL

Injunctive Relief Cases

Eight requests for injunctive relief (IR) were filed during the period August 1 through November 30, 2012. All were denied.

Requests denied

Jones v. County of Santa Clara (IR Request No. 622, Case No. SF-CE-988-M.) On August 9, 2012, Jones filed his third request for injunctive relief, claiming that he was suffering irreparable harm (primarily because of a loss of health benefits) as a result of his discharge in 2009, allegedly in retaliation for filing grievances. The board denied the request on August 20.

Hamidi v. SEIU Loc. 1000 (IR Request No. 623, Case No. SA-CO-463-S.) On August 22, 2012, Hamidi filed a request for injunctive relief, alleging that SEIU Local 1000 had arbitrarily changed the chargeable expenditure rate identified in its annual "Notice to Fee Payers" without proper notification, and had refused to provide detailed financial information requested by charging party. The board denied the request on August 30.

IBEW Loc. 465 v. Imperial Irrigation Dist. (IR Request No. 624, Case No. LA-CE-761-M.) On August 27, 2012, IBEW Local 465 filed a request for injunctive relief, alleging that the district violated the MMBA, Gov. Code sections 3502, 3506, and 3506.5, by encouraging its employees in the rank-and-file unit to support a rival employee organization during a decertification campaign with respect to a decertification election that was then scheduled for September 6. The board denied the request on August 30, but directed that the administrative proceedings on the underlying charge be expedited, and that the decertification election, which was to be conducted by SMCS, be stayed pending completion of the administrative proceedings. The matter was settled with the assistance of a PERB regional attorney at an informal conference on September 5.

Jones v. County of Santa Clara (IR Request No. 625, Case No. SF-CE-988-M.) On October 2, 2012, Jones filed his fourth request for injunctive relief, claiming that he was suffering irreparable harm (primarily because of a loss of health benefits) as a result of his discharge in 2009, allegedly in retaliation for filing grievances. The board denied the request on October 9.

Liu v. Trustees of the California State University (East Bay) (IR Request No. 626, Case No. SF-CE-995-H.) On October 3, 2012, Liu filed his second request seeking injunctive relief that would require the university to continue his employment and reverse its decision to deny him tenure as a professor at CSU East Bay, pending completion of binding arbitration and related administrative proceedings on his claims that the university retaliated against him 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 October 10.

International Association of Machinists & Aerospace Workers, Local Lodge 1930, District 947 v. City of Long Beach (IR Request No. 627, Case No. LA-CE-812-M.) On November 7, 2012, IAMAW filed this request for injunctive relief, alleging that city violated HEERA by unilaterally reclassifying eight public health nurses, causing them irreparable harm in the form of lost wages and/or benefits under the parties' MOU. The board denied the request on November 15.

Edwards v. Lake Elsinore Teachers Assn. (IR Request No. 628, Case No. LA-CO-

1551-E.) On November 19, 2012, Edwards filed this request for injunctive relief, alleging that the association violated her rights under EERA by refusing to hold an election to fill an alleged vacancy on its executive board. The board denied the request on November 26.

Liu v. Trustees of the California State University (East Bay) (IR Request No. 629, Case No. SF-CE-995-H.) On November 20, 2012, Liu filed his third request seeking injunctive relief that would require the university to continue his employment and reverse its decision to deny him tenure as a professor at CSU East Bay, pending completion of binding arbitration and related administrative proceedings on his claims that the university retaliated against him 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 November 30.

Litigation Activity

Two new cases were opened between August 1 and November 30, 2012.

IBEW Loc. 18 v. City of Pasadena et al.; *Los Angeles County Superior Court*, Case No. BC487469, filed June 29, 2012. In August 2012, PERB was asked to intervene in this matter, but declined to do so, instead providing the parties with a declaration regarding its exclusive initial jurisdiction and the pending administrative proceedings as to UPC No. LA-CE-748-M.

Woods v. PERB; (*CDCR*), California Supreme Court, Case No. S205697, filed October 1, 2012. On October 1, 2012, the petitioner filed a petition for review with the Supreme Court. The petition was denied on November 14.