

Features

page

- Why Can't We Contract Out Half Our Workforce? 4
by Irma Rodriguez Moisa, Nate Kowalski and Lisa M. Carrillo
- It's After January 1, 2013...What Should We Do With Our Retired Annuitants? 15
Sabrina Thomas

Recent Developments

Local Government

- Application of AB 646 to Effects Bargaining Challenged 27
- Labor Code Whistleblower Provisions Do Not Protect Employee Who Refuses to Violate City Charter 29
- San Francisco's Pay Equity Proposals Said to Target Women and People of Color 32
- County May Be IHSS Provider's Employer for Purposes of Wage Claim 34
- Los Angeles ERB Has Exclusive Initial Jurisdiction to Decide DFR Claims 37

Public Schools

- 'Reformers' and Teachers Union Pull Out the Stops 40
- LAUSD and UTLA Agreement on Teacher Evaluations Looking Shaky 42
- Yet Another Run at NCLB Waiver 44
- Fremont Teachers Declare Impasse 47
- Teacher Credentialing Commission Activity 48

State Employment

- Litigation of Similar Claims Does Not Excuse Failure to File Whistleblower Claim With SPB 51

Higher Education

- Professors Prepare for Bargaining Online Education 53

Discrimination

- California Supreme Court Finds Liability, But Limits Remedies in Mixed-Motive Cases 55
- Employee's Discrimination Claims Barred Where Not Raised at Administrative Hearing 61
- Employer May Demote Peace Officer Who Cannot Perform Essential Duties 66
- No FEHA Violation for Terminating Manager on Leave Who Could Not Perform Essential Functions 70

General

- Legislation and Lawsuits Seek to Avoid Provisions of PEPRA 75
- Two More Retiree Health Benefits Cases Revived 77
- Union Representative-Member Privilege Legislation Introduced 81
- AG: Quo Warranto Action Appropriate Only for State-Law-Based Procedural Challenges 83

Arbitration

- Discharge Upheld for Personal Use of Law Enforcement Data and Harassment of Ex-Wife 85

Departments

- Letter From the Editor 3
- Public Sector Arbitration Log 87
- Public Employment Relations Board Decisions 96
- PERB Activity Reports 109

CPER Journal Online

Letter From the Editor

Dear *CPER* Readers,

It's a sign of the times that both feature articles in this issue look at the constraints on reducing labor costs. First, while retired annuitants are sometimes a great value — experience without the expense of benefit costs — Sabrina Thomas' article explains that new laws further restrict their employment. "It's After January 1, 2013....What Should We Do With Our Retired Annuitants?" is her answer to the questions she has been fielding.



Second, while replacing employees with contract workers is an option some employers are exploring, the notorious attempt of the City of Costa Mesa to contract out much of its workforce met with resistance from the union representing its employees and a preliminary injunction forbidding most of the contracts. Irma Rodriguez Moisa, Nate Kowalski, and Lisa Carillo lay out the differences in the laws governing charter cities and counties and general law entities like Costa Mesa. In addition to constitutional and statutory constraints, they warn, pay attention to collective bargaining agreements and the duty to bargain.

As the times have changed, our readers' needs have changed as well. That's the message from our recent survey of present and former subscribers, who want more focus on labor relations and best practices within the public sector labor and employment field. If you would like to write an article about recent successes or lessons learned, please send your ideas to [Managing Editor Stefanie Kalmin](#).

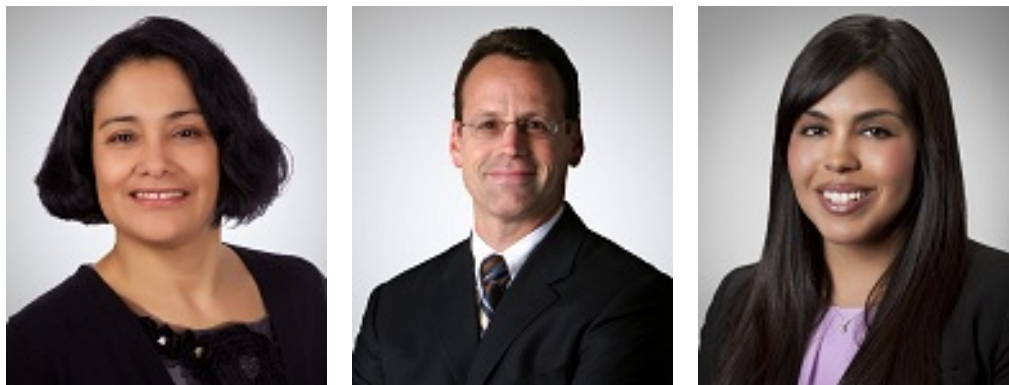
And, this is a time of personal transition as well. While I will remain involved in public sector labor relations as a full-time arbitrator, this will be my last issue as editor of *CPER Journal*. I have enjoyed passing along what I continue to learn about public sector labor relations and the ever-evolving legal developments in our field.

Sincerely,

Katherine J. Thomson
Editor, *CPER*

CPER Journal Online

Why Can't We Contract Out Half Our Workforce?



By [Irma Rodriguez Moisa](#), [Nate Kowalski](#), and [Lisa M. Carrillo](#)

In the wake of the economic recession that rocked the country over the past few years, cities and counties have searched for ways to trim their budgets. Because a significant proportion of a public entity's funds are dedicated to personnel costs, solutions have ranged from layoffs to furloughs to changes in retirement benefits. In addition, an increasingly popular option has been to contract with another public or private entity to provide public services that are currently performed by an agency's own civil service employees.

There are a number of advantages associated with contracting out public services. First and foremost, it is a way to achieve significant savings. For example, it eliminates costs associated with training. Second, it provides increased flexibility and greater control over the workload — if a public entity no longer needs a particular service, it is much easier to adjust the scope of a contract than to reduce hours or lay off employees. Finally, contracting out is a means to retain experts or specialists in a particular field.

On the other hand, there are potential disadvantages. The public entity loses a degree of control over the quality of the services being provided. Contractors may not have the same degree of loyalty to the public entity as civil service employees. And, there is the danger of lowered morale of regular employees, who may interpret contracting out as a sign of future layoffs. Labor unions often challenge the decision to contract out public services.

As critical as these personnel considerations are, it is equally as important to review the legal parameters associated with the decision to enter contracts for public services. The discussion below provides the legal framework a public agency must consider before making such a decision.

Charter Counties and Cities

California's Constitution provides for the creation of charter cities and counties.[1] Article XI, section 3, provides: "For its own government, a county or city may adopt a charter by majority vote of its electors voting on the question." [2] Under this constitutional authority, city and county charters supersede California's general laws with regards to local affairs, a concept also known as "home rule." Under this doctrine, citizens have the authority "to create and operate their own local government and define the powers of that government, within the limits set out by the Constitution." [3] The provisions of a duly adopted charter are the laws of the state and have the force and effect of legislative enactments. [4]

The home rule doctrine, however, does not provide a charter county or city with unfettered authority. In general, a charter county may exercise authority on matters of local or "municipal" affairs, as opposed to matters of statewide concern. [5] Similarly, charter cities are given broad legislative discretion over municipal affairs. Article XI, section 5, of the California Constitution provides cities with the authority to adopt charters that will govern the city and the ability to enact ordinances with respect to municipal affairs. [6]

With regards to contracting out, a county charter may provide for:

the fixing and regulation by governing bodies, by ordinance, of the appointment and number of assistants, deputies, clerks, attaches, and other persons to be employed, and for the prescribing and regulating by such bodies of the powers, duties, qualifications, and compensation of such persons, the times at which, and terms for which they shall be appointed, and the manner of their appointment and removal. [7]

Similarly, for a city charter:

[P]lenary authority is hereby granted, subject only to the restrictions of this article, to provide...the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, *and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.* [8]

While there is no case law specifically pertaining to a charter entity's ability to contract out, there have been many cases concerning a charter entity's authority over salaries. Courts have consistently held that charter entities, not the state, have the authority to provide for the compensation of their employees, which is a municipal affair. [9] "Autonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity." [10] Consequently, because contracting out concerns the expenditure of funds and the composition of the workforce, a court would likely find it relates to a "municipal affair," and a decision to contract out public services based on a provision in a county or city charter would likely be upheld as consistent with the "home rule"

doctrine.

General Law Counties and Cities

Unlike charter counties and cities, general law public entities are controlled by statute.^[11] Thus, any decision to contract out public services must be based on specific statutory authority granted by the legislature. California Government Code sections 31000 and 53060^[12] have been interpreted by the attorney general to limit a general law public entity's authority to enter into contracts to "special services," and "contractors who are specially trained, experienced, and competent to perform such services."^[13] Nothing in the statutes "suggests that a county may contract for services without regard to the 'special services' limitation, solely on the basis of costs savings."^[14] Moreover, the attorney general noted that when the legislature intended to grant authority to contract out services on the basis of cost savings, it did so explicitly.^[15] Therefore, a general law county cannot contract out public services currently performed by its civil service employees based solely on a desire to cut costs.

Determining whether a service is of a "special" nature is a fact-based inquiry. In *Darley v. Ward*, the Court of Appeal stated that "whether services are special requires a consideration of facts such as the nature of the services, the qualifications of the person furnishing them and their availability from public sources."^[16] The court held that management services provided at two county hospitals was a "special service" because it required expertise not possessed by county employees. In general, "special services" include financial, economic, accounting, engineering, legal,^[17] administrative, medical, therapeutic, architectural services,^[18] airport or building security, and laundry services.^[19]

In addition to the ability to enter contracts for "special services," there are several specific statutes that grant public entities the right to contract out for particular services. For example, a general law city may contract for financial, economic, accounting, engineering, legal, or administrative matters;^[20] collection or disposal of garbage;^[21] a ferry system;^[22] personnel selection and administration services;^[23] construction or maintenance of airports;^[24] and ambulance services.^[25] General law counties may contract out health care services;^[26] in-home supportive services;^[27] rescue and resuscitator services with the state;^[28] optometric services;^[29] joint operation of jails with other counties;^[30] and collection, disposal, or destruction of garbage and waste.^[31]

Duty to Bargain

Determining if an employer has a duty to bargain depends on how the employment action is characterized. As an initial matter, the decision to completely eliminate a public service is distinct from contracting out and is not subject to the duty to bargain.^[32] Moreover, a public entity has not contracted out work when it decides to discontinue a service and a second agency continues to provide the service at its own expense, without any involvement from the entity discontinuing the service.^[33] However, there is still a duty to bargain over the "effects" of a wholesale decision to eliminate a particular public service.^[34] Effects may include the timing of layoffs,^[35]

the number or identity of the affected employees,[36] seniority and bumping rights,[37] the reorganization of positions,[38] the work load and safety of remaining employees,[39] reemployment rights,[40] benefits for laid off employees,[41] and severance pay.[42]

“Transfer of work” occurs when an employer transfers unit work between bargaining units, or to unrepresented employees of the same employer. Transfers of work are mandatory subjects of bargaining. In *Building Material & Construction Teamsters’ Union, Loc. 216 v. Farrell*,[43] the court held that San Francisco’s decision to transfer the work of truck drivers to new positions at a lower pay outside the bargaining unit was a negotiable decision and the city had violated the meet and confer requirements of the Meyer-Milius-Brown Act. The decision was within the scope of bargaining because the transfer of work had a significant effect on the wages, hours, and working conditions of bargaining unit employees.[44]

While transfer of work is a mandatory subject of bargaining, contracting out decisions — also known as subcontracting — are not always within the scope of representation.[45] As discussed above, contracting out occurs when the employer contracts with either a private entity or another public employer for services. In *Ventura County Community College Dist.*, the Public Employee Relations Board noted that the “primary difference between the two concepts is whether the work is being transferred within the same employer or to another employer.”[46] A decision to contract out is not always within the scope of bargaining because “a decision to subcontract may constitute a managerial decision ‘at the core of entrepreneurial control’ and be based upon factors not amenable to negotiation.”[47] However, a decision to contract for services that is based purely on a public entity’s desire to cut costs is within the scope of representation and aptly suited to negotiation.[48]

A public agency must also consider whether there are any further limitations on contracting out by virtue of its labor agreements with unions representing its civil service employees. In a recent decision, PERB held that the parties to a collective bargaining agreement can agree to waive the right to bargain over the decision to contract out.[49] The collective bargaining agreement in that case contained a management rights clause giving the Long Beach Community College District the exclusive right to subcontract work. PERB found that the management rights clause constituted a waiver of the police association’s right to bargain over the decision to contract out; however, the parties were still required to bargain over the effects of contracting for police services.

In the absence of a waiver pursuant to an applicable management rights provision, a public entity must still consider whether the decision to enter contracts for services is subject to bargaining under the MMBA, or the public entity’s own ordinances, code sections, or charter provisions. Moreover, even if there is a management rights provisions that allows the public entity to contract out public services, it still must bargain with unions over the “effects” of contracting out.

In *Rialto Benefit Assn. v. City of Rialto*,[50] the court articulated a three-part test to determine if the decision to contract out was subject to the meet and confer requirements of the MMBA. In that case, a general law city wanted to contract out

police services to the sheriff's department. The city sent a letter to the police union offering to meet and confer over the *effects* of the decision, but the union claimed it was required to negotiate over the *decision* as well. Instead of addressing any contractual language between the two parties, the court fashioned the following test to determine if the meet and confer obligation applies to certain management decisions:

- (1) Does the decision have a significant and adverse effect on wages, hours, or working conditions? (If no, there is no obligation to meet and confer.)
- (2) Does the significant and adverse effect arise from the implementation of a fundamental managerial or policy decision? (If no, the city must meet and confer.)
- (3) If the answer to both questions is "yes," then the following balancing test is applied: the decision falls within the scope of bargaining only if the need for unencumbered bargaining is outweighed by the benefit to employer/employee relations by bargaining. The test is driven by the question of whether the employer's decision is motivated by labor costs or some other difficulty that can be overcome through collective bargaining.[\[51\]](#)

Applying this framework, the court held that the decision to contract out police services affected the wages, hours, and working conditions of city police officers. The court further found that the city's decision was primarily motivated by a desire to reduce costs, as well as issues involving employee morale, level of service, and management conflicts — all issues suitable for resolution through collective bargaining. Therefore, the city's decision to contract for police services was subject to the meet and confer requirement of MMBA.

Case Study: City of Costa Mesa

In 2010, the City of Costa Mesa — a general law city — sent out over 100 layoff notices to city employees whose jobs it intended to contract out to private entities. As discussed above, there must be specific statutory authority for a general law city to contract out any particular service. The city sought to contract for a variety of public services including street sweeping, graffiti abatement, animal control, jail operations, special event safety, information technology, graphic design, reprographics, telecommunications, payroll, employee benefit administration, building inspection, and park, fleet, street, and facility maintenance.[\[52\]](#)

The Orange County Employees Association sued on behalf of its members seeking injunctive and declaratory relief. In an opinion issued in August 2012, the appellate court upheld the trial court's issuance of a preliminary injunction and found that the city failed to negotiate with the union over the decision to contract out. The court based its decision on a provision in the parties' memorandum of understanding that required the city to discuss the decision to contract for services, not just the impact of the decision. Turning to the parties' state law arguments, the court found the city's

attempt to contract with private entities for the provision of “nonspecial services would be suspect as being violative of those particular statutes, as well as the state Constitution because...a city is not empowered to act in contravention of state law.”^[53] Further, the court held that there was statutory authority for the city to contract out only two of the services at issue — jail services and administration of the payroll.^[54]

Most recently, the city placed a ballot measure to approve a city charter in the November 2012 election.^[55] Ultimately, the ballot measure did not pass and layoff notices to its employees were rescinded.^[56] The city continues to explore the possibility of becoming a charter city and has backed away from the approach of mass layoffs and shifted to a comprehensive “attrition model,” replacing retiring workers with contractors as they retire.^[57] For the time being, a non-charter city in the same situation could escape the same result by considering the limitations placed on it by the general laws of the state and its labor agreements with its employees.

Conclusion

As the state continues its slow progress along the road to economic recovery, contracting out public services will remain an attractive option. Before doing so, however, there are a number of issues to consider:

- (1) Is the public entity governed by a charter or the general laws of the state?
- (2) If a city is governed by a charter, it will have more flexibility and control over contracting out decisions that relate to municipal affairs. If the charter includes the authority to contract out, that authority is likely valid. However, it is still likely that the charter city would have to meet and confer over the effects of the decision.
- (3) If the public entity is governed by the general laws of the state, it must have statutory authority authorizing contracts for the service at issue.
- (4) Finally, are the services at issue currently performed by bargaining unit employees? If yes, then a management rights clause may provide language constituting a waiver of the union’s right to bargain over the contracting out decision. If there is no such language, then the courts will apply a three-part analysis to determine if the decision to contract out is subject to the meet and confer obligations. Regardless, the *effects* of a decision to contract out public services will be subject to bargaining.

[Irma Rodríguez Moisa](#) is a partner with [Atkinson, Andelson, Loya, Ruud & Romo](#). She is an experienced litigator, labor negotiator, and trial attorney who offers unique insights and develops winning strategies for her public entity clients. She has numerous jury trials to her credit and has obtained defense verdicts in numerous cases, on claims including discrimination, sexual harassment, retaliation, and wrongful termination. [Nate Kowalski](#), a partner with Atkinson, Andelson, Loya, Ruud

& Romo, is an accomplished litigator who handles a wide array of labor, employment and wage and hour matters. [Lisa Carrillo](#), an associate with Atkinson, Andelson, Loya, Ruud & Romo, practices in the public entity labor and employment group, representing public sector employers in all aspects of labor and employment law including discrimination/harassment, retaliation, leaves of absence, privacy, and employee discipline.

[1] Cal. Const., art. XI, sec. 3.

[2] *Id.*

[3] *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1206, 110 CPER 38.

[4] Cal. Const., art. XI, sec. 3 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws”).

[5] *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1281, 192 CPER 38.

[6] Cal. Const., art. XI, sec. 5.

[7] Cal. Const., art. XI, sec. 4(f), emphasis added.

[8] Cal. Const., art. XI, sec. 5(b), emphasis added.

[9] See *State Building and Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th 547 (holding that the wages paid contract workers constructing locally funded projects is a matter of local concern); *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276 (holding that the home rule doctrine precludes application of statewide wage order); *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 8 CPER SRS (holding that salaries are a matter of local concern rather than statewide concern).

[10] *State Building and Construction Trades Council of California v. City of Vista* (2012) 54 Cal.4th at 562.

[11] Cal. Const., art. XI, sec. 7.

[12] Government Code section 31000, which applies to counties, states:

The board of supervisors may contract for special services on behalf of the following public entities: the county, any county officer or department, or any district or court in the county. Such contracts shall be with persons specially trained, experienced, expert and competent to perform the special services. The special services shall consist of services, advice, education or training for such public entities or the

employees thereof. The special services shall be in financial, economic, accounting (including the preparation and issuance of payroll checks or warrants), engineering, legal, medical, therapeutic, administrative, architectural, airport or building security matters, laundry services or linen services. They may include maintenance or custodial matters if the board finds that the site is remote from available county employee resources and that the county's economic interests are served by such a contract rather than by paying additional travel and subsistence expenses to existing county employees. The board may pay from any available funds such compensation as it deems proper for these special services. The board of supervisors may, by ordinance, direct the purchasing agent to enter into contracts authorized by this section within the monetary limit specified in Section 25502.5 of the Government Code.

Government Code section 53060, which applies to counties, cities, and other public entities, states:

The legislative body of any public or municipal corporation or district may contract with and employ any persons for the furnishing to the corporation or district special services and advice in financial, economic, accounting, engineering, legal, or administrative matters if such persons are specially trained and experienced and competent to perform the special services required.

The authority herein given to contract shall include the right of the legislative body of the corporation or district to contract for the issuance and preparation of payroll checks.

The legislative body of the corporation or district may pay from any available funds such compensation to such persons as it deems proper for the services rendered.

While not analyzed in the attorney general's opinion, Government Code section 37103 is the city analogue to section 31000. Section 37103 states in full: "The legislative body may contract with any specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal, or administrative matters. It may pay such compensation to these experts as it deems proper."

[13] (1993) 76 Ops. Cal. Atty. Gen. 86.

[14] *Id.*

[15] *Id.* Government Code section 19130, which pertains to contracts for state services, allows contracting out to achieve cost savings but only if a number of conditions are followed.

[16] *Darley v. Ward* (1982) 136 Cal.App.3d 614, 627-628 (internal citations omitted).

- [17] *Montgomery v. Superior Court, County of Solano* (1975) 46 Cal.App.2d 657 (holding that the prosecutorial functions performed by an attorney were “special services” because no one else employed by the city was qualified to perform them).
- [18] *Cobb v. Pasadena City Board of Education* (1955) 134 Cal.App.2d 93 (holding that an architect provides “special services” and is specially trained and experienced).
- [19] Gov. Code secs. 31000, 53060.
- [20] Gov. Code sec. 37103.
- [21] Pub. Resources Code sec. 49300.
- [22] Gov. Code sec. 39731.1.
- [23] Gov. Code sec. 45008.
- [24] Gov. Code sec. 50474.
- [25] Gov. Code sec. 38794.
- [26] Welf. & Inst. Code secs. 5775, 14088, 14087.9605; Health & Saf. Code section 1442.5.
- [27] Welf. & Inst. Code sec. 12301.6.
- [28] Gov. Code sec. 55640.
- [29] Gov. Code sec. 25208.3.
- [30] Pen. Code secs. 4050 et seq.
- [31] Pub. Resources Code secs. 49200 et seq.
- [32] *Stanislaus County Department of Education* (1985) PERB Dec. No. 556, 68 CPER 57.
- [33] *Trustees of the California State University (San Diego)* (2008) PERB Dec. No. 1955-H, 191, CPER 92. A state university decided to discontinue staffing remedial courses it co-taught with a local community college. The local community college decided to continue teaching the classes at its own expense. PERB found that the state university would have stopped teaching the classes and laid off instructors regardless of the decision of the local community college, and therefore, there was no contracting out.
- [34] *Newman-Crows Landing Unified School Dist.* (1982) PERB Dec. No. 223, 55 CPER 62.
- [35] *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 621, 23 CPER 95.

[36] *Id.*

[37] *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 7 CPER SRS.

[38] *Building Material & Construction Teamsters' Union, Local 216 v. Farrell* (1986) 41 Cal.3d 651, 69 CPER 23.

[39] *Fire Fighters Union*, 12 Cal.3d at 619-620.

[40] *San Mateo School Dist.* (1984) PERB Dec. No. 383, 61X CPER 14 (decided under the Educational Employment Relations Act ("EERA")).

[41] *Oakland Unified School Dist.* (1983) PERB Dec. No. 326, 59 CPER 23 (decided under EERA).

[42] *Mount Diablo Unified School Dist.* (1983) PERB Dec. No. 373, 60 CPER 56 (decided under EERA).

[43] *Building Material & Construction Teamsters' Union, Local 216*, 41 Cal.3d 651.

[44] *Id.* at 659-660.

[45] *Ventura County Community College Dist.* (2003) PERB Dec. No. 1547, 163 CPER 81.

[46] *Id.*

[47] *Id.* (quoting *Fibreboard Paper Products Corp. NLRB* (1964) 379 U.S. 203, 223 (concurring opinion of Justice Stewart)).

[48] *Id.* (noting that "subcontracting decisions motivated by an employer's enterprise costs are 'peculiarly suitable for resolution through the collective bargaining framework'" (quoting, *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 680)).

[49] *Long Beach Community College Dist.* (2008) PERB Dec. No. 1941, 189 CPER 116.

[50] *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 187 CPER 34.

[51] *Id.* at 1301.

[52] *Costa Mesa Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 302, [208 CPER online](#).

[53] *Id.* at 311.

[54] The statutory authority to contract out for these two services exists at Penal Code section 6031.6 and Government Code sections 37103 and 53060,

respectively.

[55] Laura Hautala, *Costa Mesa layoffs canceled, but outsourcing battle continues*, Daily Journal, Dec. 19, 2012.

[56] *Id.*

[57] *Id.*

CPER Journal Online

It's After January 1, 2013....What Should We Do With Our Retired Annuitants?



By [Sabrina Thomas](#)

Since the new year began, the phone has been ringing off the hook. Anxious clients are calling because they are not quite sure how to handle employment situations for retired annuitants. Given the continuing fiscal pressures on public agencies, many are being forced to consider rehiring these retirees — and part of the worry is the fear of running afoul of the newly enacted California Public Employees' Retirement System rules. In addition, public entities are being asked to defend this hiring practice in the face of civil servants still being furloughed, and in some cases, laid off.

Public employers should have questions and concerns related to the new rules. Since the recent enactment of Assembly Bill 1028, Senate Bill 1021, and the infamous Assembly Bill 340, also known as the Public Employees' Pension Reform Act of 2013 (PEPRA), there have been significant changes to the waiting period for, use of, and frequency of hiring retired annuitants.

In late summer 2012, state employee unions pressured Governor Jerry Brown for a policy mandating that state agency payrolls be purged of retired annuitants. The unions' argument was simple: it is unfair to furlough rank-and-file workers while retirees draw both a pension and a paycheck. The largest union, State Employees International Union, took steps to ensure the protection of its members by entering into a side agreement with the Brown administration to eliminate all retired annuitant positions. Specifically, the agreement stated: "The State shall eliminate all non-mission critical^[1] retired annuitants, who are performing SEIU bargaining unit work, by September 1, 2012. No retired annuitant shall be hired while the personal leave program...is in effect unless there is a mission critical need."^[2]

SEIU is so serious about enforcing the agreement that it has enlisted its members to serve as "whistleblowers" in their respective agencies. In a call to action letter, SEIU asked its members: "Are...non-mission critical annuitants still performing the

work of Local 1000 members in your office?”[3] Included is a link to a short form where members can provide information that will enable SEIU to investigate each situation.[4]

What Is a Retired Annuitant?

By definition, a retired annuitant is a temporary[5] appointment with a CalPERS-covered entity, for a limited appointment of a limited duration for someone with specialized skills, or it is employment required in an emergency to prevent stoppage of public business.[6] The Public Employment Retirement Law (PERL) generally prohibits CalPERS employers from hiring retirees unless they first are reinstated. However, existing law[7] authorizes a retired member of the Public Employees’ Retirement System to work for a state agency or any other employer in the system for up to 960 hours in a fiscal year without reinstatement from retirement[8] or loss or interruption of retirement benefits.[9] While the limitations for a retired annuitant are not extensive, they are definitive, with serious consequences for specific infractions.

At first glance, these criteria appear to be straightforward, with little room for misinterpretation or confusion, yet anything dealing with public retirement is rarely simple. One only needs to look at how some retired annuitants refer to themselves as “independent contractors”[10] to understand the potential for confusion and significant consequences. A retired annuitant who is an independent contractor is not subject to the 960-hour or other limit.

PERL does not define the term “independent contractor.”[11] Many contracts or employment agreements entered into by public agencies and retired persons give the retired person status as an independent contractor. However, if CalPERS determines an employment contract does not meet the criteria, CalPERS will deem the individual improperly hired. CalPERS will require that the individual — if he or she wishes to continue working — be reinstated from retirement and pay back any and all retirement benefits earned while employed, which could easily total tens, if not hundreds of thousands, of dollars.

For example, in 2012, the *Orange County Register* reported that a retiree for the City of Stockton[12] collected retirement benefits for 15 months while acting as — and being compensated for — the position of interim fire chief. CalPERS informed the interim fire chief that he would have to resign from his position or reinstate to regular employment and reimburse CalPERS for pension benefits received during his tenure in that position.[13] He was further told that his effort to cloak himself as an independent contractor was contradicted by the details of his job.[14] According to the *Register*, the retiree’s response to CalPERS’ ultimatum was to resign rather than reimburse approximately \$216,000 in pension benefits.[15]

For employers, the consequences are equally severe. If the employer is found at fault, it will be liable for contributions on the salary paid to the retiree, plus interest and administrative expenses.

Status of Retired Annuitant Post AB 1028

The purpose of AB 1028, according to CalPERS, was to clarify existing law. The bill^[16] amended Government Code sections 21221(h), 21224, and 21229.^[17] PERL authorizes two types of hiring options for retirees. The first is described under section 21221(h), which deals with vacant positions; and the second, described under section 21224, addresses temporary work engagements. Section 21221(h) authorizes appointments to existing yet vacant positions on an interim basis when (1) the vacant position requires “specialized skills” and the effort to recruit a permanent replacement is still pending, or (2) appointment to the vacant position is required on an emergency basis “to prevent a stoppage of public business.”^[18]

The second option, under section 21224, authorizes finite but potentially long-lasting work engagements required to address unplanned or irregular work needs when (1) there is an emergency to prevent a stoppage of public business, or (2) the services of a retiree possessing specialized skills are needed for a “limited duration.”^[19]

Government Code section 21221(h) applies to governing bodies of a CalPERS contracting agency.^[20] The five key changes to Government Code section 21221(h) are that (1) a retiree can be appointed to a governing body of a contracting agency as an interim appointment to a vacant position during recruitment for a permanent replacement; (2) the employing agency and retiree only get one “bite at the apple” in that the retiree may only work in an interim appointment one time; (3) the compensation for the interim appointments cannot exceed the maximum published and publicly available pay schedule for the vacant position;^[21] (4) the interim appointment, itself, is limited to 12 months from the appointment date, notwithstanding any extension to work more than 960 hours; and (5) the interim appointment cannot continue past the 12-month term under section 21224 or 21229.^[22]

CalPERS issued a circular letter^[23] to clarify the impact and significant changes under AB 1028. Most notably, the letter indicates that AB 1028 amended sections 21224 and 21229 to include the words “temporary,” “appointment,” “specialized,” and “skills.” The word “specialized” is meant to clarify that retirees must have “specialized skills” to perform the job, which is generally determined by the employer. CalPERS did not further clarify “specialized skills” in its circular letter, presumably because the necessary skills are unique to a particular agency and/or position.

The word “temporary” is meant to clarify that retired annuitants are to work as temporary “extra help”^[24] appointments during an emergency to prevent stoppage of business or to perform work of limited duration. ^[25] Still, the AB 1028 amendments to Government Code sections 21221(h), 21224, and 21229 were not without controversy. Public agencies needed clarity on some key questions the bill left unanswered. For instance, annuitants working prior to AB 1028 wanted to know if they were subject to the new changes. Others wanted to know what happens if

they become elected officials while serving as annuitants in a different capacity. And, everyone wanted to know the potential penalties to both the agency and the annuitant if found to be violating the new law. Several months later, the legislature introduced SB 1021 to “clean up” the confusion.

Clean-Up Bill and More Changes for Retired Annuitants

Senate Bill 1021. On June 27, 2012, Governor Brown enacted SB 1021. Hidden in the labyrinth of changes affecting the Department of Corrections and Rehabilitation and civil litigation were weighty alterations to Government Code section 21221(h).^[26] Importantly, the bill imposed three major shifts in the content of employment contracts entered into with retired annuitants hired under section 21221(h).

First, retired annuitants’ pay is based on an hourly rate subject to a codified formula. Purposely, section 21221(h) provides that the salary “shall not exceed the maximum monthly base salary paid to other employees performing comparable duties as listed on a published pay schedule for the vacant position divided by 173.333 to equal an hourly rate.”^[27]

Second, the law provides that a retired annuitant appointed pursuant to section 21221(h) “shall not receive any benefits, incentives, compensation in lieu of benefits, or any other forms of compensation in addition to the hourly rate.”^[28] The plain language of the section precludes a retired annuitant from receiving any benefits, which would include many that are commonly found in interim employment contracts, such as paid sick leave, cell phone stipends, and automobile allowances.

Finally, section 21221(h) previously permitted the governing body of an agency employing a retired annuitant to obtain from CalPERS an extension of temporary employment beyond the 960 hours in a fiscal year. SB 1021 removed that possibility. Section 21221(h) now provides that a retired annuitant appointed under that section shall not work more than a combined total of 960 hours in any fiscal year, regardless of whether he or she works for more than one agency.

Section 21221(h) still requires that appointments be on an “interim” basis while the agency is actively recruiting to permanently fill the vacant position, and the appointment may exceed one year; but again, in no event shall the appointment exceed 960 hours in each fiscal year.^[29] In other words, it appears that a retired annuitant may now serve for more than one year until a permanent appointment is made (not exceeding the 960 hours in the year), but the retiree only can be appointed once pursuant to section 21221(h).^[30]

Lastly, SB 1021 deleted the following sentence: “The governing body of a contracting agency shall appoint a retired person only once under this subdivision.” Now the sentence reads: “A retired person shall only be appointed once to this vacant position.” While the two sentences might appear to have little distinction, the appointment limitation under the new wording is tied to the number of times a

person can be appointed to the position rather than the number of times the person may be appointed under Section 21221(h). The new wording seems to give the employer the opportunity to appoint a retiree to fill a vacant position and then later appoint the same employee to fill another vacant position.[31]

Assembly Bill 340: California Public Employees' Pension Reform Bill (PEPRA). On September 12, 2012, Assembly Bill 340,[32] also known as PEPRA, was signed into law by Governor Brown. PEPRA applies to all public employers except the University of California, charter cities, and charter counties. The bill's author, Assembly Member Warren Furutani, explained that the bill's intent was to restore credibility to the public pension system and rid it of "the abusive practices engaged in by a few individuals...."[33] PEPRA generally forbids post-retirement employment, without reinstatement, for a period of 180 days after the employee's date of retirement from a public agency.[34]

A retiree now usually has a 180-day waiting period after retirement[35] before he or she can work as a retired annuitant. This applies only to retirees who seek employment as a retired annuitant after January 1, 2013. The 180-day waiting period is so vitally important that CalPERS issued a circular letter[36] to inform employers of the necessity of reporting permanent separation dates.[37] Specifically, the letter stated that with the implementation of PEPRA and PERL[38] amendments in AB 340, it is "extremely" important that the correct membership appointment details be maintained by employers in "myCalPERS." [39] Also, permanent separations should be reported once employment ends with an agency, especially for those employees nearing retirement.[40] Under CalPERS policies, reporting separation dates is not a new requirement. But now that retirees must wait 180 days before commencing work as a retired annuitant, the separation date becomes critically important for both retirees and the agency looking to hire them.[41]

Additionally, a retiree is limited to performing a cumulative 960 hours of work in a 12-month period for all employers in the same public retirement system.[42] If a retiree received any unemployment compensation, he or she is prohibited from working for the next 12-month period for any public employer.[43] PEPRA incorporates the requirement established for CalPERS agencies under AB 1028 that a retiree's rate of compensation may not exceed the maximum paid to current employees performing comparable duties. Retirees are ineligible under the section for another reappointment for the 12-month period following the end of the first appointment.[44]

For example, if Annuitant Alan retired on February 1, 2013, under PEPRA, he is not allowed to seek employment at another CalPERS or 1937 Act agency[45] until July 31, 2013 (180 days later). And if during 2013, Alan receives unemployment insurance compensation from an employer that provided retirement benefits under PERS, he is ineligible to work for a CalPERS or 1937 Act agency for a 12-month period prior to his appointment as a retired annuitant. So if Alan was appointed to a position on August 1, 2013, but received unemployment insurance benefits in June 2013, he would be ineligible to work for a CalPERS-covered employer until June or July 2014.[46]

Practice Pointers to Stay Off CalPERS' Radar

It may be helpful to analogize CalPERS to the Internal Revenue Service — as long as you pay what the IRS determines to be your fair share based on your income and qualified deductions, you are less likely to be subject to an audit. Correspondingly, if a CalPERS-covered public agency employer takes the initiative to show it is in compliance with the post-retirement employment rules for each of the retired annuitants in its employ, the public agency may be able stay off CalPERS' radar. Put differently, consider it a preemptive strike.

Again, other than school crossing guards, members of a board, commission, or advisory committee, or those in other specifically enumerated positions, a CalPERS retiree cannot work for a CalPERS agency without reinstatement, unless that post-retirement employment fits within specific statutory exceptions under Government Code sections 21221(h) and 21224. Thus, as an employing entity, it would be prudent to consider the following suggested guidelines before hiring a retiree annuitant.

(1) Self-auditing. Determine who on your payroll are retired annuitants, their positions, and the provisions under which they were hired.

(2) Advertising for new hires. CalPERS plans to start asking for recruitment flyers and other recruitment material related to new appointments under Government Code section 21221(h). It is prudent that materials for the appointments and the appointments themselves be executed for the stated purpose: the interim appointment pending the recruitment for and filling of the vacant position.

(3) New hires. Put the annuitant's employment arrangement in writing either in the form of a formal contract or as a signed memo that identifies information such as:

- Which section is being used for the appointment? If the position is an interim appointment to a regular, permanent position, the safest course is to assume section 21221(h) authorizes it. If the position is truly "extra help," use section 21224.
- Is there an emergency or are specialized skills needed for the appointment? If the appointment is under section 21224, identify the appointment as one of a temporary/limited duration and describe the duration as definitively as possible.
- A description of the hourly compensation to be paid.
- A statement that the public agency has compared the retiree's hourly compensation to the base salary (in hourly terms) paid to other employees performing comparable duties as listed on a publicly available pay schedule, and finds the retiree's compensation does not exceed such other employees' compensation.
- A statement that no other benefit, incentive, compensation in lieu of benefits, or other forms of compensation in addition to the hourly pay rate are being provided to the annuitant.
- A statement of the absolute 960-hour cap (for all PERS employers) for the

fiscal year and how it will be monitored.[47]

(4) CalPERS circular letters. Refer to CalPERS Circular Letter Number 200-070-11 if you are unclear about determining the separation date, as it is critical for determining when the 180-day waiting period commences, as discussed above.[48]

(5) Annuitants and agencies. Refer to the State of California's Boomerang website, which has current information for retirees interested in post-retirement employment.[49]

(6) CalPERS website. Refer to the CalPERS website for questions posted by retirees about the legislative changes affecting post-retirement employment. For example, one retired annuitant asked:

How does AB 1028 affect RAs that subsequently become elected officials? Can that person collect PERS pension and also the pay for the elected position? Any restrictions? If found to be out of compliance with AB 1028, what is the penalty and is the employee or employer at risk, or both?

CalPERS responded:

CalPERS Reply: @xxx, Retirees can be elected to an office after retirement and receive pension and pay for the office. The rules are explained in our publication [Employment after Retirement](#) on page 5.

Possible Penalties for Non-Compliance

Failure to comply with the changes to the law could result in unexpected expense and apprehension for the retiree and the employer. Under Government Code section 21220, a retiree found to be working unlawfully can face serious penalties including reinstatement from retirement dating back to the beginning of the employment; return of any retirement allowance received from CalPERS during the employment; payment of employee contributions owed during the period of employment, plus interest; and reimbursement to CalPERS for the costs of administering the reinstatement.[51]

For an employer, violation means payment of employer contributions owed during the period of employment, plus interest; and reimbursement to CalPERS for the cost of administering the reinstatement.[52] Consequently, getting it right is critical to both the public agency and the retiree.

Food For Thought

On October 27, 2011, Governor Brown issued his 12-point pension reform plan.[53] Item six, entitled "Limit Post-Retirement Employment: All Employees," forecast what was to come, and the governor made good on his promise with the recent legislative

changes to laws governing post-retirement with CalPERS-covered entities. One of the plan's goals was directly aimed at placing limits on employment after retirement with CalPERS member agencies. The plan purported to strike a balance between the invaluable benefit of institutional knowledge, expertise, and experience that a retiree brings to his or her position as a retired annuitant and those highly publicized abuses where retired annuitants return to full-time employment exceeding the 960-hour maximum.

Governor Brown's current budget proposal includes a provision that would eliminate retired annuitants from the state payroll.^[54] Even so, over the next few years, the use of retired annuitants in state and local government is bound to evolve as public agencies look at long-term solutions for delivering services under greater financial constraints. Whether eliminating all retired annuitants is fiscally sound^[55] or even feasible, given the "specialized" expertise they bring to their employers, remains to be seen. What is clear is that in the wake of public outcry and frustration with public pensions, at the least it appears that CalPERS is taking a closer look at retirees and employers who abuse the statutory exceptions for post-retirement employment. And, don't forget...your employees may be reporting you to their union.

Sabrina L. Thomas is an associate with Renne Sloan Holtzman Sakai LLP. She practices in the area of employment law. Her litigation practice includes representing clients in claims of sex, disability, race, reasonable accommodation, and retaliation. Thomas regularly conducts workplace investigations of allegations of discrimination, harassment, retaliation, theft, violations of company policies, and other forms of alleged workplace misconduct. She also has experience dealing with retirement benefits issues involving PERS agencies and formerly regularly represented CalPERS before administrative bodies.

[1] "Mission critical" is defined as a disruption in normal business, which may result in the failure of business operations.

[2] See Cal. Dept. of Human Resources, Memo to Personnel Management Liaisons (PML") 2012-034, *Student Assistants and Retired Annuitants* (Aug. 24, 2012), at 2-3.

[3] SEIU Side Letter Enforcement (Sept. 5, 2012), <http://seiu1000.org/2012/09/side-letter-enforcement.php#more>.

[4] The form asks the represented employee to describe the activities being performed by the retired annuitant, how the work possibly mirrors that of a represented bargaining unit member, and why the represented member believes the work being performed is not mission critical, <https://seiu1000.seiu.org/page/signup/ra-and-sa-positions>.

[5] The word "temporary" may be somewhat nebulous even with the revisions to Government Code sections 21224 and 21229, as these sections do not clarify or define the amount of time a retired person may work for a CalPERS-covered entity

post retirement.

[6] *CalPERS, A Guide to Reinstatement from Retirement*, p. 3,
<http://www.calpers.ca.gov>.

[7] Government Code sections 21221(h) and 21224 provide exceptions to this rule so long as key eligibility requirements are met.

[8] A retired member of the CalPERS retirement system may return to permanent employment with a CalPERS employer to earn additional service credit towards a subsequent retirement, known as reinstatement from retirement. A retired member who returns to active employment with a CalPERS employer no longer receives a retirement allowance. *CalPERS, A Guide to Reinstatement from Retirement*,
<http://www.calpers.ca.gov>.

[9] Government Code secs. 21224, 21229.

[10] An “independent contractor” is “someone who contracts to do a piece of work according to his or her own methods, and is subject to his or her employer’s control only as to the end product or final result of work, and not as to the means and manner in which the work is performed. CalPERS, Circular Letter No. 200-154-04, May 3, 2004; see also *CalPERS Procedure Manual*, p. 2.6,
<http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2004/200-154-04.pdf>.

[11] In *Metropolitan Water Dist. of Southern California v. Superior Court (Cargill)* (2004) 32 Cal.4th 491, the California Supreme Court explained that CalPERS looks to the common law definition of “employee” when determining whether an employer-employee relationship exists.

[12] The authors of this article represent the City of Stockton in labor and employment matters.

[13] Tony Saavedra, OC Watchdog, “To Remain Retired...Cease Employment Immediately,” *Orange County Register*, (Aug. 1, 2012),
<http://taxdollars.ocregister.com/2012/08/01/ex-orange-city-manager-accused-of-violating-pension-law/160085/>.

[14] Saavedra, *supra* note 13.

[15] *Ibid.*

[16] Assembly Bill 1028 came from PERS itself via the Committee on Public Employees, Retirement and Social Security. The bill made a number of changes to PERL including provisions “strengthening and clarifying rules regarding post-retirement employment” that were “identified by staff as necessary for the maintenance and good governance of CalPERS.” Cal. Assembly Comm. on Appropriations, Hearing Report at p.1 (April 13, 2011),
http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_138_cfa_20110412_152423_asm_comm.html.

[17] The bill summary presented at the first Senate hearing for AB 1028 stated that the requirements for employing annuitants “are not consistently spelled out in the statutes, creating potential for misinterpreting or abusing the requirements of the program,” and thus “this bill aligns various provisions governing retired workers to ensure that the program requirements are consistently applied.” Cal. Senate Comm. on Pub. Emp. & Ret., Bill Analysis at p.2 (June 27, 2011). PERS has taken the position that these changes are clarifications only and therefore declarative of existing law, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0301-0350/ab_340_cfa_20110629_170658_sen_comm.html.

[18] Richard Padilla and Joaquin Vazquez, “What You Should Know About Hiring CalPERS Retirees,” *Western City*, (August 2012), <http://www.westerncity.com/Western-City/August-2012/What-You-Should-Know-About-Hiring-CalPERS-Retirees>.

[19] *Id.*

[20] “Contracting agency” means any public agency that has elected to have all or any part of its employees become members of CalPERS and that has contracted with the board for that purpose. Government Code sec. 20022.

[21] The requirements for a publicly available pay schedule include the position title for every employee, the pay rate for each position, and time base for each pay rate (e.g. hourly); are posted at the office of the employer or immediately accessible and available for public review from the employer during normal business hours or posted on the employer’s internet website; indicate an effective date and date of any revisions, are retained by the employer and available for public inspection for not less than five years; and do not permit a reference to another document in lieu of disclosing the pay rate. Cal. Code Regs., tit. 2, section 570.5.

[22] CalPERS maintained that AB 1028 changes to sections 21221 and 21224 were simply clarifications to existing law. However, if it were this simple then why were so many agencies out of compliance with the law? The reality is that many state and contracting agencies were employing retired annuitants for multiple years, in various positions, including permanent ones, as long as they followed the general limitation of 960 hours per year. League of Cities, *Employment of CalPERS Annuitants*, Sept. 7, 2012 presented by Sheston, S.

[23] CalPERS, Circular Letter No. 200-002-12 (Jan. 12, 2012), <http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2012/200-002-12.pdf>.

[24] *Id.* (explaining that some examples of extra help are elimination of backlog, special projects, and work in excess of what the employer’s permanent employees can do.)

[25] See *Id.*

[26] http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1001-1050/sb_1021_bill_20120627_chaptered.html.

[27] Government Code sec. 21221(h).

[28] *Id.*

[29] See *Id.*

[30] Sheston, *supra* note 22.

[31] Padilla, *supra* note 18.

[32] Assembly Bill 340 (2011-12 Sess.), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0301-0350/ab_340_bill_20120912_chaptered.pdf.

[33] “California’s public pension systems were established to provide retirement security for those who give their lives to public service. Recently, the benefits provided by those systems have been tainted by a few individuals who have taken advantage of the system. The abusive practices engaged in by a few individual[s] have put retirement benefits at risk for the vast majority of honest, hard-working public servants. Additionally, the practice of having someone retire on Friday and come back to work on Monday, able to collect a full retirement benefit along with a full paycheck, is something the public simply will not tolerate any longer....” Senate Comm. on Public Employees, Retirement & Social Security Comm. Analysis of Assem. Bill 340 (2011-2012 Sess.), as amended on June 23, 2011, http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0301-0350/ab_340_cfa_20110629_170658_sen_comm.html.

[34] Cal. Assem. Bill 340 (2011-2012 Reg. Sess.), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0301-0350/ab_340_bill_20120912_chaptered.pdf.

[35] A retired annuitant may not be employed during the 180 days following retirement if the annuitant received a retirement incentive at the time of retirement. If an annuitant did not receive a retirement incentive, the 180-day waiting period would not apply if the retiree is a police officer or firefighter or if the employer certifies the employee is needed to fill a critically important position and the appointment has been approved by the governing board in a public meeting. Government Code sec. 7522.56 (f)(1), (4).

[36] CalPERS, Circular Letter No. 200-002-13, *Reporting Permanent Separation Dates and Validating Participant Appointment Details in MyCalPERS* (Jan. 4, 2013) (“Circular Letter No. 200-002-13”), <http://www.calpers.ca.gov/eip-docs/employer/circulars/2013/200-002-13.pdf>.

[37] Circular Letter, *supra* note 36.

[38] Public Employees’ Retirement Law, codified under the Government Code, beginning at section 2000.

[39] Circular Letter, *supra* note 36.

[40] *Ibid.*

[41] CalPERS, Circular Letter No. 200-070-11, *Permanent Separation Dates in MyCalPERS* (Oct. 28, 2011) (“Circular Letter No. 200-070-11”), <http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2011/200-070-11.pdf>.

[42] Government Code sec. 7522.56(d).

[43] Government Code sec. 7522.56(e)(1).

[44] Government Code sec. 7522.56(e)(2).

[45] County Employees Retirement Law of 1937.

[46] The actual date of eligibility to begin work as a retired annuitant would depend on when Alan received his last unemployment insurance check.

[47] Sheston, *supra* note 20.

[48] *Id.*

[49] State of California Retirees Job Connection FAQs, https://boomerang.ca.gov/faqs_sr.aspx.

[50] <http://www.calpersresponds.com/issues.php/ab-1028>.

[51] Government Code sec. 21220(b).

[52] Government Code sec. 21229(c).

[53] Brown, *Twelve Point Pension Reform Plan*, (October 27, 2011), http://gov.ca.gov/docs/Twelve_Point_Pension_Reform_10.27.11.pdf

[54] Jon Ortiz, “Jerry Brown moves to eliminate retiree workers,” *Sacramento Bee* (June 13, 2012), <http://www.sacbee.com/2012/06/13/v-print/4557862/jerry-brown-moves-to-eliminate.html> (explaining that approximately 5,800 annuitants collected \$110 million from the state in addition to their pensions.)

[55] *Id.* (explaining that approximately seven cents of every \$10 paid to workers during the 2011 calendar year went to returning retirees.)

CPER Journal Online

Application of AB 646 to Effects Bargaining Challenged

The Public Employment Relations Board's decision to initiate factfinding in the context of any local government bargaining impasse — not just full contract negotiations — has sparked a battle over the interpretation of the new mandatory factfinding provisions of the Meyers-Milias-Brown Act. The San Diego Housing Commission has taken the question to court, arguing that Government Code sections 3505.4, 3505.5, and 3505.7 do not apply to an impasse in negotiations over the effects of its decision to lay off employees. PERB contends that SDHC's narrow interpretation is incorrect and its legal action should be dismissed.

Effective on January 1, 2012, the provisions enacted in AB 646 allow an exclusive employee organization to demand that a local public employer enter factfinding once the parties reach impasse in collective bargaining. A neutral chairperson, together with a factfinder selected by each side, recommends to the parties how to settle their contract based on the evidence the parties present on factors such as the employer's ability to pay compensation and the compensation similar employees receive in other workplaces. The process has been used successfully in the educational labor relations context for decades.

In May 2012, SDHC notified SEIU Local 221 that it had decided to lay off several employees effective June 1. Local 221 demanded to bargain over the effects of the layoff. The parties were unable to reach agreement before June 1, when the layoff occurred, but continued to bargain into the fall. In October, SEIU claimed the parties were at impasse and sent a factfinding request to PERB. SDHC opposed the factfinding request on the grounds that the legislature intended mandatory factfinding procedures to apply only to impasses in bargaining a full memorandum of understanding, not other issues that might arise during the contract's term. It also raised issues related to the propriety of SEIU's request. PERB rejected the commission's objections and instructed the parties to select factfinding panelists. SDHC filed a petition requesting that a trial court prohibit PERB from ordering the commission into factfinding proceedings.

PERB has asked the court to dismiss the petition. The board contends that, in the context of the MMBA as a whole, the factfinding provisions apply to all impasses in bargaining over negotiable subjects. The statute refers to "disputes" and "differences" being submitted to a factfinding panel without any limitation on the types of disputes, the board argues. In the context of the act, the "differences" and "disputes" are those matters within the scope of bargaining on which the parties have a duty to bargain in good faith but cannot agree. If SDHC's interpretation were to prevail, the employer's duty to bargain in good faith before changing terms and conditions of employment would essentially be nullified, the board emphasized, citing to multiple court decisions where courts have found a local public employer's

unilateral change to violate the duty to bargain. PERB also pointed out that impasse provisions under the Educational Employment Relations Act and the Higher Education Employer-Employee Relations Act have been interpreted to apply to bargaining over the effects of managerial decisions and to impasses in negotiations of matters that arise at times other than during bargaining for a full contract.

SDHC points to the language of sections 3505, 3505.1, and 3505.7 in support of its interpretation, particularly the use of the phrase “memorandum of understanding” and the exhortation to reach agreement “prior to the adoption by the public agency of its final budget for the ensuing year.” It contends that this language shows that the legislature intended mandatory factfinding to apply only to negotiations leading to a written MOU before a public agency approves its final budget, not the layoff effects negotiations in its case. SDHC also lays out the repeated references in legislative analyses of AB 646 to the parties being unable to reach a “collective bargaining agreement.” The commission argues that cases applying the factfinding process to negotiations on isolated issues under EERA and HEERA are not relevant because the language in the two statutes is not similar to the MMBA and the factfinding regulations are dissimilar as well. It also notes that the criteria the factfinding panel “must” consider include the consumer price index and other information that is only relevant in the context of bargaining a full contract, not in layoff effects negotiations.

The trial court had scheduled a hearing on March 1, but SDHC decided to amend its petition instead. The court is now scheduled to hear the case in late April.

CPER Journal Online

Labor Code Whistleblower Provisions Do Not Protect Employee Who Refuses to Violate City Charter

A city administrator who claimed she was terminated for refusing to violate the city charter, ordinances, and regulations cannot sue under the Labor Code, the Court of Appeal held in *Edgerly v. City of Oakland*. Labor Code section 1102.5(c) protects employees from retaliation “for refusing to participate in an activity that would result in a violation of state or federal statute or a violation or noncompliance with a state or federal rule or regulation.” The court relied in part on the “home rule doctrine,” which allows a charter city to govern itself except on matters of statewide concern. The court also ruled that a claim based on refusing reimbursement requests could not prevail because reviewing such requests was part of the administrator’s job duties.

Refusing the Mayor’s Requests

Deborah Edgerly was the city administrator for the City of Oakland in 2007, when Ron Dellums was elected mayor. Under the city charter, she served at the pleasure of the mayor. Edgerly alleged that she questioned several of the mayor’s expense reimbursement requests because they related to services for his wife or security upgrades to his personal residence. She also asked the city attorney to explain to the mayor that his request to enter into a \$150,000 contract without the city council’s approval was improper. She complained that the mayor had usurped her authority by having department heads report directly to him instead of to her. She also claimed that he had asked her to terminate city employees when he wanted to place campaign supporters in their positions.

In June 2008, Edgerly’s nephew was involved in an incident with the police. She contacted the police to ask questions and identified herself. Her actions became public, and controversy ensued. Dellums then asked her to work only on a designated project to avoid a conflict of interest. He asked her to transfer her authority over the police department to another agency head, but she refused. She was terminated a few days later, after the mayor unsuccessfully attempted to reach her to place her on leave.

Edgerly filed a lawsuit alleging that she was terminated for refusing to violate the city charter, various municipal ordinances and regulations, and the city’s civil service rules in violation of Labor Code section 1102.5, among other claims. The city convinced the trial court that the Labor Code does not protect employees who blow the whistle on city law violations. Before trial, the court also decided that the evidence did not support Edgerly’s claims based on Government Code section 87100. Edgerly appealed.

Danger of Micromanagement

The court agreed with the city that Edgerly had not set out facts that would violate

the Labor Code because she had not alleged that she disclosed a violation of state or federal law. Edgerly argued that local laws have the force of state legislation. The city countered that local laws do not fall within the meaning of section 1102.5(c).

The plain language of the statute supports the city's interpretation, the court found, particularly since other whistleblower statutes — Education Code section 44112 and Government Code section 8547.2 — include references to local laws. The contention that municipal laws are state statutes contravenes the general rule that local governments cannot enact laws to govern activity beyond their borders, the court explained.

While there is no judicial precedent directly answering the question in this case, there is precedent rejecting protection of whistleblowers who internally disclose employee misconduct or violations of local personnel policies. For example, a firefighter who alleged retaliation for objecting to the transfer of two coworkers in violation of departmental policies was found not protected by Labor Code section 1102.5(c) in *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 2009 Cal.App. LEXIS 1335.

The actions that Edgerly characterized as refusals to violate city laws and regulations were part of her job duties, the court noted. "Taken to its logical conclusion, Edgerly's argument is that as she routinely acted on each city official's expense reimbursement requests, each rejection constituted a per se violation of section 1102.5(c), no matter how trivial or routine each rejection was," the court declared. To accept this contention could seriously affect city operations, it warned.

The court pointed to the home rule doctrine in the California Constitution, which provides that cities may make their own laws "in respect to municipal affairs," except that they are subject to general laws. This doctrine is the source of the Supreme Court's holding that charter city salaries are not a matter of statewide concern, even though they may have an effect on economic conditions outside the city's borders, in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 1979 Cal. LEXIS 201, 8 CPER SRS. If wages are municipal affairs, then the manner in which a city enforces its charter and local laws cannot be considered a matter of statewide concern, the court reasoned.

The allegations relating to requests for reimbursements for the mayor's wife's cell phone bill, chauffer's wages for driving her around, and utility bills for the security improvements to the mayor's home were based on Government Code section 87103, the court acknowledged, but reliance on this state statute did not win the case for Edgerly. The regulations interpreting the statute make an exception for expense reimbursement requests, the court pointed out. In addition, the evidence discovered prior to trial showed that she did not refuse the requests. She approved them with an admonishment to the mayor's office not to submit such reimbursement applications again or asked the city attorney to address the request.

To the extent Edgerly's reimbursement refusals were part of her job duties, the court ruled they were unprotected. While this holding was not based on California judicial precedent, the court adopted the reasoning of the federal court in *Muniz v. United*

Parcel Service, Inc. (N.D. Cal. 2010) 731 F.Supp.2d 961, 2010 U.S. Dist. LEXIS 84414, which held the Labor Code did not protect an employee who notified the company of suspected falsified employee timecards, because that was part of her duties. The court affirmed the trial court's dismissal of the case. (*Edgerly v. City of Oakland* [2013] 211 Cal.App.4th 1191, 2013 Cal.App. LEXIS 1258.)

CPER Journal Online

San Francisco's Pay Equity Proposals Said to Target Women and People of Color

When SEIU Local 1021 came to the bargaining table last year with a proposal to raise pay in classifications the union thought were paid less than in the surrounding labor market, the City and County of San Francisco agreed to set up a labor-management committee to study pay equity claims. But, the contract allows the committee to consider claims that a classification is paid more than the relevant market, as well as claims that city workers are underpaid. Now that the city is proposing wage cuts for new hires, SEIU is accusing the city of undermining years of efforts to implement comparable worth by reducing pay in positions held primarily by women and people of color.

Underpaid or Overpaid?

In committee sessions, the union proposed 15 percent raises across the board or longevity increases for legal secretaries at the top step. They are paid \$74,000, which SEIU points out is up to \$20,000 less than the starting salaries of legal secretaries in the private sector and \$10,000 less than the highest paid legal secretaries at the County of Santa Clara and the East Bay Municipal Utility District. The city disputes the EBMUD comparison. It lists 18 Bay Area cities and counties that pay legal secretaries less, by an average of nearly \$10,000. Its proposal — a 7.5 percent lower salary for newly hired legal secretaries, starting July 1, 2014.

Legal secretaries are not the only classification the city proposed to compensate less. It also demanded 7.5 percent wage cuts for new hires in psychiatric technician, psychiatric social worker, legal process worker, and child support worker positions. The city contended that the wages of new payroll and personnel clerks, nurse assistants, and eligibility workers should be slashed 10 percent, and that the pay for pharmacists, diagnostic imaging technicians, health workers, medical social workers, custodians, protective service workers, and employment and training specialists should be shaved 5 percent.

All are classifications where the city's workers are paid at least 15 percent higher than the public sector labor market, according to the city. The union disagrees. For example, it contends that diagnostic imaging technicians should be paid 5 percent more, have three steps added to the top of the wage scale, and allow faster progression through the current top two steps.

Comparable Worth

Local 1021 held a rally at city hall in early March, protesting the disproportionate impact of the city's demands on women and people of color. Nearly 90 percent of nursing assistants are people of color and 80 percent are women, the union points out. Custodians are 97 percent non-white, and eligibility workers consist of 90

percent people of color and 77 percent women. SEIU charges that the city is reversing course on comparable-worth pay adjustments made in the 1980s to compensate equivalently jobs requiring similar education, skills, and training.

In a presentation to the board of supervisors, Human Resources Director Micki Callahan acknowledged the efforts the city made beginning in 1987 to implement comparable worth, but emphasized that SEIU agreed in 1997 to close out the study of comparable worth, and replace it with market factors and recruitment and retention considerations. The city has implemented numerous practices to improve access to good city jobs, the human resources department asserts, such as eliminating unnecessary minimum qualifications for jobs, changing the review of applicants' conviction history, promoting apprenticeship programs, and reaching out to the city's human services agency to recruit residents to apply for clerical and custodial jobs, and to match minimum qualifications to job training they receive.

Wage-Setting Under the Charter

The human resources department emphasizes that it uses criteria listed in the city charter when it bargains compensation. The charter sets out the factors an interest arbitrator must consider when deciding bargaining impasses on compensation, a provision enacted in 1994 that is applicable to every bargaining unit. Those include the cost of living, wages paid to comparable employees in the public and private sectors, and the city's ability to pay. It would be irresponsible to consider market rates only when they support wage increases, not downward adjustments, Callahan told the board of supervisors.

Callahan pointed out to *CPER* that the city does not believe it is rolling back comparable worth gains. Many of the classifications for which it is proposing lower starting salaries are in occupations that were not subject to comparable worth adjustments. When the public health department is running a deficit, it makes no sense to pay wages 48 percent above market for nursing assistants, she maintained.

The city agrees that some of its workers are underpaid. It proposed a 5 percent raise for laboratory technician I and II classifications, while SEIU asked for at least a 34 percent increase to reach parity with the city's water quality technicians. The city is also willing to boost the pay for some investigator classifications and sheriff's cadets, although not by the double-digit increases the union is demanding.

As this issue of *CPER* was being published, the parties had unsuccessfully attempted to mediate the dispute. The matter was heard in arbitration on March 11, and the parties are submitting their last, best offers to the arbitrator at the end of the month.

CPER Journal Online

County May Be IHSS Provider's Employer for Purposes of Wage Claim

When an in-home services support worker received no pay for more than two months, she sued Sonoma County and the public authority it set up for collective bargaining purposes, in addition to the woman she cared for. In *Guerrero v. Superior Court of Sonoma County*, the Court of Appeal found factors that indicated the county and its public authority were joint employers. The court also rejected the contention that the county was not subject to state minimum wage laws and Industrial Welfare Commission Wage Order 15-2001.

588 Unpaid Hours

Adeline Guerrero started working for a recipient of in-home supportive services, Alejandra Buenrostro, in November 2008. She claimed she worked seven hours a day for seven days a week, and performed general household work more than 20 percent of the time. She continued working until late January 2009, even though she had not been paid.

When Guerrero sued Buenrostro, the county, and the Sonoma County In-Home Support Services Public Authority for her wages, the county and its public authority claimed they were not her employers under the Fair Labor Standards Act or the California Labor Code. They also contended her job was exempt from the FLSA, and that the Labor Code did not apply to the county and the public authority.

A trial court agreed that her complaint did not state viable wage and hour claims, and dismissed them, leaving only a breach of contract cause of action. Guerrero petitioned the appellate court to review the trial court's ruling.

Sonoma County's IHSS Program

In 1973, state law established a program to provide care to incapacitated persons in their homes so that they would not be forced into institutions. Sonoma County created the public authority to carry out the operations of the program; the county board of supervisors governed the authority. Under the Meyers-Milias-Brown Act, the authority is the employer for purposes of bargaining terms and conditions of employment of the providers. However, state law gives the recipient of services the authority to hire, fire, and supervise the work of the providers. The county itself is responsible for authorizing the level of services for a recipient whom it has determined is eligible. The county also monitors and accounts for the provider's time in a database maintained by the state. Sonoma County provides for direct payment to the provider, although the state issues the paychecks.

In a 1983 case, the federal appellate court held that the state and counties were employers of IHSS providers under the FLSA. The county and public authority

argued that recent amendments to state law superseded the case, *Bonnette v. California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1983 U.S.App. LEXIS 28228, 58 CPER 58. The *Guerrero* court rejected this contention, finding that the powers of the various parties had changed little when evaluated using the factors that the *Bonnette* court used to analyze employment status.

While it never has had the power directly to hire and fire providers, the county still has control over the employment relationship due to its authority to determine the services for which it will pay. Although the provider's paycheck comes from the state, the public authority is responsible for bargaining over wages, and the county board of supervisors must approve the wage agreement. The county maintains the time records of providers, monitors services to detect fraud, and authorizes the state to disburse providers' paychecks.

The court found that the county exercised control over employee work schedules and conditions of employment. While the county and public authority acknowledged that the county determines the eligibility of the recipient and the level and type of services it will compensate, they argued that they do not regulate how and when a provider actually works. The court, however, pointed out that the county caps the hours worked by the provider and the rate paid to the provider and will not pay for services it did not authorize. The court concluded that the "economic reality" is that the county and public authority exercised such control over the conditions of employment that they may be joint employers with Buenrostro for purposes of the FLSA.

Turning to California law, the court rejected the contention that the county and the public authority were not employers under the Labor Code because they could not have prevented overtime work or have interfered with Buenrostro's right to hire, supervise, and fire her. In addition to the factors considered under the FLSA, the court found that "through their 'power of the purse' and quality control authority, [the county and the public authority] have the ability to prevent recipients and providers from abusing IHSS authorizations both as to the type of services performed and the hours worked....They can investigate instances of suspected fraud or abuse of the program and can terminate payments where fraud is demonstrated."

The court agreed that it would be inappropriate to hold the county and public authority liable for overtime work that it did not authorize and could not monitor and prevent, but the appellate court had no knowledge at this stage of the case about what the county knew or could have known about Guerrero's services. Therefore, it sent those questions of fact back to the trial court.

Public Agency Exemption

The county and the public authority contended that state wage and hour law, and particularly IWC Wage Order 15-2001, which applies to household occupations, does not apply to public entities. The appellate court disagreed, relying on *Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 2010 Cal.App. LEXIS 2156, which ruled that Wage Order 4-2001 applied to the regional occupational program of a school district. In that case, the court held that

because the wage order applied to “all persons” employed in specified occupations, and because it made provisions other than minimum wage requirements inapplicable to public entities, the wage order’s minimum wage mandates applied to the district.

The IWC’s wage orders apply to “all persons,” and order 15-2001 does not contain any exceptions for public employees, unlike 14 other IWC wage orders. Based on this difference in language, the court held that the IWC did not intend to exempt public agencies from the provisions of order 15-2001.

The court also turned aside the argument that the order could not apply to IHSS workers because it only mentions private household employment. That contention ignores the joint employer doctrine, the court pointed out. Merely because Guerrero rendered services to Buenrostro does not preclude her from being a dual employee of both the recipient and the county and its public authority, the court instructed.

The court explained that, at this stage of Guerrero’s case, there was a dispute of fact whether her job was exempt from FLSA protections because she provided companionship services. She alleged that more than 20 percent of her duties were general housework, and therefore, her job was not governed by the personal companionship exemption. For similar reasons, the court found the trial court should not have ruled that she was a personal attendant exempt from California wage and hour laws.

The court found the trial court had erred in dismissing the wage and hour claims in the pleading stage of the lawsuit, and remanded the case to the trial court for further proceedings. (*Guerrero v. Superior Court of Sonoma County* [2013] 213 Cal.App.4th 912, 2013 Cal.App. LEXIS 108.)

CPER Journal Online

Los Angeles ERB Has Exclusive Initial Jurisdiction to Decide DFR Claims

Employees of the City of Los Angeles must take unfair practice claims to the city's Employee Relations Board, rather than filing a complaint in court, the Court of Appeal held in *Singletary v. Local 18 of the International Brotherhood of Electrical Workers*. If they disagree with ERB's decision, they can challenge it in court only by a petition at the appellate level, the court advised.

Overtime Provisions Unenforced

Richard Singletary, Randall Baker, and James Butts, three security guards employed by the city's Department of Water and Power, complained to their union, IBEW Local 18, about its alleged failure to enforce their contractual rights to voluntary overtime work. They pointed out that the city assigned them much less overtime work than other employees, even though the memorandum of understanding between the parties called for equal distribution of overtime opportunities.

Local 18 and the city had a Joint Labor/Management Committee for addressing grievances about terms and conditions of employment. Union members, including Baker, complained that the committee rarely met and accomplished nothing. The union representative responded to the claim by threatening to remove Baker from the committee.

The three employees filed a charge with the California Public Employment Relations Board against both the city and Local 18, alleging a violation of the Meyers-Milias-Brown Act. They also filed a claim with the city Employment Relations Board. The executive director advised them that the facts they alleged did not constitute a prima facie violation of the ordinance administered by ERB, although they might have a valid claim for a grievance under the MOU. He also advised them orally that ERB would not have jurisdiction over a claim that the union failed to enforce the MOU.

The plaintiff employees then filed a complaint in court against the union and the city for violation of the duty of fair representation and for breach of contract. The court granted a motion to dismiss the lawsuit on the grounds that the court did not have subject matter jurisdiction, but allowed the plaintiffs to amend their complaint. In the amended complaint, the employees claimed they had exhausted administrative remedies at ERB. This time the trial court allowed the case to proceed.

Before trial, however, the union again moved to dismiss the lawsuit based on lack of subject matter jurisdiction. The trial court agreed with Local 18 that the matter was within the exclusive initial jurisdiction of ERB. The employees appealed.

The MMBA and PERB

The question before the appellate court was whether ERB's jurisdiction over unfair practice charges prevented the trial court from adjudicating the employees' claims. The employees acknowledged that Government Code section 3509(d) allows the city's ERB to take action on unfair practice charges, but they contended that the statute did not make ERB's jurisdiction exclusive, and they could go to court with the same claims. The court gave an abbreviated history of the MMBA, its enforcement by the courts prior to 2001, and the decision of the legislature in 2000 to give PERB jurisdiction over most unfair practice charges in local government.

Section 3509(b), noted the court, transferred from the courts to PERB exclusive initial jurisdiction over unfair practice complaints under the MMBA, subject to review in the appellate courts. The reasons for the legislation, the court related, are explained in an Assembly committee's analysis: "One of the basic principles of an effective collective bargaining law should be to provide for enforcement by an administrative agency with expertise in labor relations. The appropriate role for the courts is to serve as an appellate body." Section 3509(d), however, carves out an exception to PERB's exclusive jurisdiction and allows unfair practice claims within the city and the County of Los Angeles to be handled by the employment relations boards of those governments "consistent with and pursuant to the policies of this chapter."

ERB's Exclusive Jurisdiction

From the beginning, the MMBA has authorized local public agencies to adopt employee relations ordinances that implement the provisions of the MMBA. The city's employee relations ordinance provides that ERB's executive director shall investigate unfair practice charges and report on the investigations to ERB, which will then dismiss the claims, accept a settlement, enter an order, or issue a notice of hearing. "When remedies are available before an administrative body, a party must in general exhaust those remedies before seeking judicial relief," instructed the court, citing *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 2010 Cal. LEXIS 6015, 200 CPER 33.

The employees argued section 3509(d) did not make ERB's jurisdiction exclusive, as it does not contain the "exclusive jurisdiction" phrase that appears in section 3509(b), which describes PERB's jurisdiction. But the court found this interpretation of the statute "would nullify the stated legislative purpose of providing primary jurisdiction in personnel boards for review of violations of the MMBA." Because ERB was established before PERB, subdivision (d) was enacted to maintain ERB's autonomy, the court explained, not to exempt ERB from the provisions of the statute limiting judicial review of unfair practice matters. This interpretation is reinforced by the clause which provides that ERB may "issue determinations and orders as the employee relations commissions deem necessary, consistent with and pursuant to the policies of this chapter." Even if the employees had exhausted their remedies before ERB, they should have challenged ERB's ruling in the appellate court, not filed a complaint at the trial court level, the court advised. (*Singletary v. Local 18 of the International Brotherhood of Electrical Workers* [11-21-12; certified for publication 12-18-12] 212 Cal.App.4th 34, 2012 Cal.App. LEXIS 1281.)

CPER Journal Online

‘Reformers’ and Teachers Union Pull Out the Stops

The tension between those who call themselves “education reformers” and organizations that represent teachers that has been building for years broke out into an expensive, hard-fought fight in the Los Angeles Unified School District’s board election earlier this month. Big money came pouring in from as far away as New York City in an attempt to capture the board for forces, represented by LAUSD Superintendent John Deasy, who favor parental choice, more charter schools, the use of student test scores to evaluate teachers, and layoffs based on evaluations rather than seniority. Unions also contributed a lesser, but still large, amount of money in the battle to control the future of the second-largest school district in the nation.

Three seats on the seven-member board were up for grabs. Two-term incumbent Monica Garcia in District 2, Kate Anderson in District 4, and Antonio Sanchez in District 6 received a huge influx of money from outside interests who support Deasy’s policies. The candidates received donations from the Coalition for School Reform, a political action committee headed by Los Angeles Mayor Antonio Villaraigosa, totaling between \$3.6 and \$3.9 million. The Coalition’s war chest included \$1 million from New York Mayor Michael Bloomberg, \$300,000 from the California Charter Schools Association, \$250,000 from a subsidiary of Rupert Murdoch’s News Corporation, and \$250,000 from StudentsFirst, headed by former District of Columbia Public Schools Chancellor Michelle Rhee. Their campaigns were also funded by \$250,000 from local donors Eli Broad and A. Jerrold Perenchio, \$100,000 from businesswoman Lynda Resnick, and \$50,000 each from DreamWorks CEO Jeffrey Katzenberg and Monica Horan Rosenthal, an actress.

Candidates opposing Garcia, Anderson, and Sanchez received support from independent campaign committees representing United Teachers Los Angeles, which spent approximately \$1 million.

An estimated \$2.5 million in outside funds was spent in the District 4 race, where incumbent Steve Zimmer, targeted by the Coalition, defeated Anderson. Zimmer, a former teacher and counselor, described himself as an independent voice on the board who would not vote to fire Deasy. However, his opposition to new charter school approvals, refusal to support Deasy’s plan to decimate the adult education division, and disapproval of Deasy’s now-abandoned proposal for teacher evaluations, known as “Academic Growth Over Time,” drew the fury of the “reformers.” Zimmer was supported by UTLA and SEIU Local 99.

Garcia, who also received support from Local 99, retained her seat. Antonio Sanchez, Local 99’s choice for District 6, will be in a runoff election against Monica Ratliff to be held on May 21. Sanchez received 43 percent of the vote, and Ratliff garnered 34 percent. UTLA sat out the District 6 election and took an “anybody but Monica” stand in District 2, providing support to three of Garcia’s opponents.

If Sanchez ultimately defeats Ratliff, Deasy will retain a bare majority of support on the seven-member board. At least two, and possibly three, current members, not including Zimmer, have called for Deasy to be fired.

CPER Journal Online

LAUSD and UTLA Agreement on Teacher Evaluations Looking Shaky

As reported in the [last issue](#) of *CPER*, the Los Angeles Unified School District and its teachers union, United Teachers Los Angeles, came to a tentative agreement last November regarding teacher evaluations. On January 19, 66 percent of the 16,892 union members who voted ratified the agreement, and the school board approved it on February 12. However, recent events have brought the terms of that agreement into question.

The framework outlined by the district and the union provided that, for the first time, raw state test scores could play a part in evaluating individual teachers, along with other factors such as observation of classroom practices, student and parent feedback, student attendance, and suspensions. However, the exact weight that would be given to the test scores in a teacher's final rating was never agreed on. The failure to reach specificity on that issue has now given rise to new tensions between the two sides.

On February 15, LAUSD Superintendent John Deasy issued a directive to all principals in which he instructed them to expressly include pupil progress data during the initial goal-setting phase with teachers and when rating the overall performance in the final evaluation. Further, he specified that "student progress and other student-data driven results will carry a weight limited to 30% of the total evaluation determination."

Later that day, UTLA President Warren Fletcher sent a letter to union members, reacting to Deasy's directive. "Mr. Deasy is attempting to unilaterally establish a percentage value for the use of test scores in every teacher's evaluation," he wrote. "The Evaluation Agreement does not set a specific percentage for how much weight student test data is given in a teacher's evaluation. While he is free to express his opinion on percentages, he is not free to implement a specific percentage, or a specific range of percentages," he continued, insisting that the percentage must be bargained.

In the same letter, Fletcher explained that Deasy had proposed a 30 percent figure during bargaining over the agreement the previous summer, which the union immediately rejected. The district eventually pulled the fixed percentage proposal, which was a pre-condition for the union's agreement, he claimed. "No Superintendent, and no School Board, has the right to sign binding agreements and then pretend they're not binding," he wrote.

Fletcher called for a unified response from the union to "Deasy's overreach." He indicated that the legal staff was preparing response templates and legal disclaimer statements for teachers to use to preserve their rights and to ensure that "no

individual teacher will have to ‘face the bully alone.’” The full text of Fletcher’s response can be found at <http://www.utla.net/node/3983>.

Within days, the union posted a link to a “[Teachers Evaluation Rights Toolkit](#)” on its website that contains instructions and documents for members to use to assert their evaluation rights, and “to defeat Deasy’s attempted end-run around the contract.”

The issue of Deasy and his plan for teacher evaluations played a prominent role in the recent hotly contested Los Angeles Unified school board election. Three candidates came out in support of Deasy’s teacher evaluation proposals, including the 30 percent calculation for student test scores. However, despite their strong financial backing from pro-Deasy forces, only one was able to win her seat outright. Another candidate lost to an incumbent who opposes Deasy’s plan, and the third will face a runoff in May. (See story in [this edition](#) of *CPER*.)

Even if the Deasy supporter wins the runoff election, Deasy will retain a bare majority support on the seven-member board. At least two, and possibly three, current members, not including any who were running in this most recent election, have called for him to be fired. Thus, this election has not helped bolster Deasy’s plan.

It is unclear how the issue of quantifying the role student test scores should play in teacher evaluations will be resolved. The agreement provides for a joint committee to oversee implementation of the agreement, although the committee does not have decisionmaking power. It may be that, if the parties cannot agree, the matter will fall to Judge Chalfant to decide in *Doe v. Deasy*.

CPER Journal Online

Yet Another Run at NCLB Waiver

In the wake of the federal government's rejection of California's application for a waiver of the No Child Left Behind act, and more local agencies being designated as failing under the act, a coalition of nine districts representing more than one million students is submitting a new proposal to the U.S. Department of Education in the hope that, this time, they will meet with success.

State's Effort Fails

The NCLB, signed into law by President George W. Bush in 2001, sets 2014 as the year that every student in the country should be proficient in English and math. Recognizing that this goal is not achievable, and with efforts to revise the law stalled, the Obama administration set up a process by which states could apply for exemption from the 100-percent proficiency requirement if they agreed to certain reforms. Thirty-four states and the District of Columbia have been granted waivers to date, while 10 more states have applications pending.

One of the requirements for the waiver is that states agree to use student test scores in teacher and principal evaluations. Another is that they identify new categories of schools that are either struggling or excelling. California was not willing to agree to those requirements and submitted an application for waiver under another provision of the act in June 2012. In a December 2012 letter to State Board of Education President Michael Kirst denying the waiver, U.S. Department of Education Secretary Arne Duncan wrote, "I believe that a state must agree and be prepared to take on the rigorous reforms required by all the principles of [NCLB] flexibility in exchange for the waiver. Because California's request did not indicate that California intended to meet that high bar, I am declining to exercise my authority to approve your request."

The rejection of California's application leaves the state's districts subject to harsh penalties for failure to meet the act's mandate that test scores show yearly improvement. Failing schools are subject to "Program Improvement," an escalating series of steps that include setting aside part of their federal Title 1 funds for tutoring and professional development, notifying parents of the school's PI status, and allowing parents to transfer their children to schools that are meeting the standards. At this point, about 4,400, or 80 percent, of the state's Title I schools are already in PI status.

California is not expected to reapply for a waiver any time soon. State Superintendent of Public Instruction Tom Torlakson and Kirst sent a joint letter to county and district school superintendents and charter school administrators explaining that California would continue to use its own Academic Performance Index to measure academic success. Under that system, 53 percent of California schools scored at or above the state's target of 800 on the API.

Districts Come Together for Another Try

Hoping to accomplish what the state could not, the Los Angeles, Long Beach, Fresno, San Francisco, Oakland, Sacramento City, Santa Ana, Sanger, and Clovis unified school districts have united in a consortium called the California Office of Reform Education to apply for the waiver on behalf of their districts. If the waiver is approved, CORE will extend it to all other districts who agree to abide by its conditions.

Prior to filing the application, superintendents of five of the districts flew to Washington, D.C., to discuss their proposal with Duncan. Although Duncan has made clear that his immediate focus is on state waivers rather than those from specific districts, the superintendents reported that Duncan was encouraging of their efforts.

Under federal law, while CORE is required to submit its application to the State Board of Education for review, the board can only comment on it, not block it. CORE plans to submit the application to the U.S. Department of Education in time to be considered this spring, with implementation in the 2013-14 school year.

The 126-page waiver application commits the participating districts to the same requirements that the federal government has set out for the states. The districts agree to implement Common Core or other standards designed to prepare students for college and careers, to develop and implement a teacher evaluation system that incorporates student test results, and to create an accountability system that recognizes student success is measured by more than test scores. The proposed accountability system gives significant weight to a school's culture and climate. Factors reflecting social and emotional learning, such as suspension rates, absenteeism, and measures of non-cognitive skills will be included.

If these commitments are met, the districts ask that they be allowed to regain use of the \$110 million in Title I money which they have had to earmark for tutoring, professional development, and transportation for students who have transferred to schools meeting federal targets. The districts argue that a low percentage of eligible students takes advantage of these supplemental educational services and that there is minimal oversight of the program or evaluation of its effectiveness. They would like to use the money for other purposes, such as summer school and professional development for Common Core.

Most of the teachers unions in the CORE districts have objected to using student test scores as a significant factor in teacher evaluations. They rejected a CORE proposal for a Race to the Top grant proposal last year because of the requirement that test scores be included. (See story at [CPER No. 208 online](#).) However, unlike the grant proposal, an application for a waiver of NCLB does not require a union's consent.

The superintendents of the participating districts have said that they plan to work with their respective unions to develop evaluation systems and are confident that

teachers will come around. John Deasy, superintendent of the Los Angeles Unified School District, claims that the recent agreement reached between the district and its teachers union, which incorporates student test scores, complies with the waiver requirements.

There are other difficulties that may hamper the districts' efforts. Data necessary to measure the non-academic factors for each school, such as graduation and dropout rates, attendance, and expulsions and suspensions, is not being collected by the state. CORE will have to retain a third-party data collection service to gather the information. In addition, a waiver for CORE could set a precedent for hundreds of other districts in states without waivers, including California, a situation that the federal government might view as unmanageable.

Invigorated by their meeting with Duncan, however, the CORE superintendents are proceeding full-speed ahead.

CPER Journal Online

Fremont Teachers Declare Impasse

On March 5, 2013, the Fremont Unified District Teachers Association declared impasse in its year-long negotiations with the Fremont Unified School District over its contract that expired June 30, 2012. There are approximately 32,000 students in the district.

The main issues of disagreement involve compensation and class size. The 1,600-member union is seeking a 2 percent raise on the salary scale effective July 1, 2012, and a one-time 1 percent payment for 2012-13, along with some contribution towards the cost of dental benefits. The district is offering a 1 percent salary increase effective July 1, 2012, a one-time bonus of 1.75 percent for 2012-13, and no dental benefit cost relief.

Regarding class size, the union proposes reducing K-3 class size to 24, effective July 1, 2013, and reducing the middle and high school ratio to 27:1, effective the same date. It is also seeking to restrict speech pathologists' caseloads to 55, and counselors' caseloads to 500. The district is offering to cap kindergarten at 29, and grades 1-3 at 30, with no cap for the other grades. Class sizes now are limited to a maximum of 30 for grades K-6, but there is only a "goal" of 30 for all other grades.

The district estimates that the union's proposals would cost \$28.8 million over the three years of the contract, whereas its proposals would cost \$6.7 million. The district argues that, while it projects its reserves to be 5.37 percent for 2013-14, they will drop to 0.81 percent for 2014-15, well below the state mandated 2 percent, requiring it to make cuts before then. The union points out that educators have taken 12 unpaid furlough days since 2009, at a loss of \$7.2 million in pay, while the district has in excess of \$30 million in reserves currently, or about five times the reserves required by the state. Union members also argue that the district will benefit from their hard work in getting a parcel tax passed in 2010, which brings the district about \$3 million annually, and in support of Proposition 30, the tax measure that will benefit all schools, including FUSD.

CPER Journal Online

Teacher Credentialing Commission Activity

CTC Will Increase Requirements for Interns

At a contentious meeting held on March 8, 2013, the California Commission on Teacher Credentialing signaled its intention to require more training for intern teachers before they are allowed to enter the classroom to teach English learners. After hearing from almost 60 speakers, the commission voted to create a panel to advise its staff on ways it can ensure that interns, including Teach for America teachers, are held to the same standards as fully certified teachers for teaching English learners, thereby diverting or at least delaying further action by two opposing vocal factions on the issue.

Current intern programs allow teachers to earn a preliminary credential by attending class a night and on weekends while teaching full-time. They are required by state law to complete 120-hours of pre-service training before they may become a lead teacher in a classroom. Many interns teach English learners and bilingual classes.

Prior to the meeting, the CTC released a controversial draft proposal that would allow interns to earn their English learner authorization by passing the California Teachers of English Learners exam. They would have to be supervised by fully credentialed teachers while they completed their training, and districts and charter schools would be required to obtain emergency waivers or restricted English learner authorization until the intern is certified.

In the days leading up to the meeting, the CTC received letters from different groups both opposing and supporting its draft proposal, some of which included the threat of litigation. Teach for America, Los Angeles Unified Superintendent John Deasy, Sacramento Mayor Kevin Johnson, a number of charter school operators and supporters, and school administrators signed a letter in which they claim that the legislature has authorized interns to teach English learner students and to teach in bilingual classrooms, and that the CTC has no authority to change the regulations. "To change current practice would be contrary to prevailing law and will produce unwanted and unfavorable consequences for districts, schools and students," they said and warned that "hastily adopting regulations which do not align with a longstanding understanding of the law regarding Intern Credentials is both unwarranted and invites unnecessary future action."

Those opposed to the proposal expressed strong displeasure with the proposed emergency EL waiver requirement. Under current law, parents would have to be notified if their child's teacher has an emergency credential. No such notification is necessary for interns because they are designated as "highly qualified" teachers under the No Child Left Behind Act. Requiring a waiver "does nothing to improve the quality of teachers serving students in EL classrooms" and "would undermine the Legislature's explicit decision to preference the Intern Credential above teachers

who obtain waivers,” they wrote. “The practical effect of requiring waivers would be to water down the Intern Credential, entangle this issue with federal matters which would further complicate the ability of districts and schools to hire intern teachers, and add an unnecessary layer of bureaucracy that would impede the ability of intern teachers to teach,” they argued. The entire letter can be read at <http://www.edsource.org/today/wp-content/uploads/CCTC-Letter-with-Signatures-Update-2.pdf>.

Civil rights groups, parent organizations, and the California Federation of Teachers, claiming to “represent and partner with low-income parents and students throughout California, including English learner...students, immigrants, and students with disabilities,” wrote in support of the CTC proposal. This group claimed that the CTC’s “current practice of labeling interns as fully authorized to teach ELs before they have completed the specialized training required to earn their EL authorization is both unlawful and detrimental to this at-risk population.” They asserted that under California law, “any teacher assigned to teach an EL student must have an authorization to teach ELs,” pointing to the settlement agreement in the case of *Williams v. California*, litigated by Public Advocates, one of the groups that signed the letter. They cited studies that have shown that teachers with specific training in English as a second language are more effective than those without, and that fully trained novice teachers are better than other teachers in training. Further, they argued, research has shown “that English learners — like other high-need students — are disproportionately taught by interns in California.” They also argued that “[l]abeling interns as fully authorized to teach ELs before they have actually completed their training deceives parents and the public,” and that “[i]nterns should be an option of last resort.” The full letter can be read at http://www.edsource.org/today/wp-content/uploads/Coalition-Letter-of-Support-For-Item3A_03-04-131.pdf.

The Commission hopes to receive the panel’s recommendations by June.

New Test for School Administrators

The CTC voted in December to require those hoping to become a school or district administrator to pass a “performance-based assessment” in place of the current primarily multiple-choice exam. Commencing in October 2014, the change will affect only those who choose to take the exam for a preliminary administrative credential, rather than those who attend a university program over several years. However, the Commission has asked its staff to consider having the performance assessment test extend to university-based administrator training programs as well.

The new test will focus on how future administrators would handle complex situations that they will face on the job, such as designing a school improvement plan or evaluating teachers. The CTC has expressed its determination to make sure that school administrators are better prepared for the job and that more rigorous threshold requirements will increase rates of retention. It may develop the new test on its own, or hire an outside contractor to do so.

CTC Considers New Regulations for Emergency Permits

The Commission has issued proposed amendments to Title 5 of the California Code of Regulations regarding the issuance of emergency teaching permits. The amendments, if adopted, would reduce the number of reissuances available on an emergency teaching or services permit from four to two, effective January 1, 2014. Other changes, as summarized by the Commission, would be to remove the one-time Provisional Internship Permit (PIP) reissuance, repeal five sections related to emergency permits no longer initially issued or reissued by the Commission, and clean up sections related to teaching and services permits to align with previous statutory and regulatory changes.

The period for written comment on the proposed amendments closes at 5 p.m. on April 15, 2013. A public hearing on the proposed actions will be held on April 19, 2013, at 8:30 a.m. at the CTC offices.

CPER Journal Online

Litigation of Similar Claims Does Not Excuse Failure to File Whistleblower Claim With SPB

Initiating a retaliation lawsuit does not toll the deadline for filing an administrative whistleblower claim with the State Personnel Board, the Court of Appeal ruled in *Bjorndal v. Superior Court*. The employee had sued in both state and federal courts under various statutes before filing an SPB complaint and amending his state court action to seek relief under the California Whistleblower Protection Act.

Lawsuits Filed

In 2002, Van Pena sued the State of California and several state officials, including Judith Bjorndal, the medical director of the Sonoma Developmental Center. He claimed Bjorndal terminated him in violation of the Labor Code, several other state statutes, and title 42 United States Code section 1983 because he reported negligent and abusive treatment of patients. None of these statutes require prior filing of a whistleblower complaint with the SPB.

After years of litigation, during which most of the defendants were dismissed from the federal lawsuit, Pena filed a complaint with the SPB alleging whistleblower retaliation, and then amended his state court action to include only a claim under the whistleblower act, Government Code section 8547.8. The act states that “any action for damages shall not be available to the injured party unless the injured party has first filed a complaint with the State Personnel Board.” It also provides that an employee must file the complaint within 12 months of the latest retaliatory action.

There was no dispute that Pena had waited nearly 10 years to file the SPB complaint. When Bjorndal and the other defendants filed a motion to dismiss the state court case, Pena argued that his lawsuit in federal court tolled the deadline for filing the administrative complaint. The trial court agreed, and Bjorndal appealed.

Administrative Exhaustion Required

When a state employee files a whistleblower complaint, the SPB investigates the allegations and issues findings within 60 days. If it finds a violation of the act, it can order reinstatement, back pay, and other remedies. Once the findings are issued, the employee’s administrative remedies are considered exhausted for purposes of filing a claim in court.

Pena argued that the time he spent litigating the termination in federal court stopped the clock on filing the administrative claim. He invoked the doctrine of equitable tolling, which is designed to prevent dismissal of lawsuits on technical grounds when defendants have already been notified of the claims against them within the statute of limitations.

The court did not agree with Pena. It explained that the doctrine had been used to toll the statute of limitations for a lawsuit while a plaintiff exhausted administrative remedies, or to excuse the late filing of an administrative complaint while the claimant pursued other administrative claims. But, the court found no precedent for applying the doctrine to a case where a plaintiff went to court first and filed the administrative claim late.

The court pointed out that there was a reason for the difference in application of the doctrine. Administrative procedures are generally intended to allow an agency to investigate and settle a matter before it becomes necessary to go to court. “Allowing a plaintiff to toll the time for complying with an administrative claim procedure while pursuing a lawsuit...would render the administrative remedy pointless,” the court said. By the time the administrative claim was filed, the goal of avoiding the costs of litigation would be “entirely frustrated,” it emphasized.

In addition, the court found the legislature’s intent that an employee file first with SPB precluded application of the doctrine of equitable tolling. Equitable tolling has not been allowed when it would be inconsistent with the language of the statute or go against legislative policy, the court pointed out. The text of the act providing that an action for damages “shall not be available...unless” the employee has filed an SPB complaint made it clear to the court that the legislature intended the SPB administrative procedure to be “a mandatory prerequisite to a suit for damages under the Act.”

The court directed the trial court to issue a new order dismissing the complaint. (*Bjorndal v. Superior Court of Sonoma County* [2012] 211 Cal.App.4th 1100, 2012 Cal. App. LEXIS 1252.)

CPER Journal Online

Professors Prepare for Bargaining Online Education

Online education is the newest thing in higher ed, as colleges and universities try to teach more students with less state financial support. Governor Brown's budget proposes \$10 million in state funding to both the University of California and the California State University to expand online course offerings. The state legislative analyst thinks the expenditure is unnecessary, and faculty unions are wary.

New Funding Proposed

Governor Brown, who has started attending meetings of UC's board of regents and CSU's board of trustees, insists that student fees should not rise while the state's universities continue instruction in the "high-cost traditional model." While his budget would increase the universities' coffers by 5 percent in 2013-14 and 2014-15, he is expecting UC and CSU to use the new funding to implement reforms that enable students to complete college efficiently, particularly to make courses more available. He suggests using technology "to deliver quality education to greater numbers of students in high-demand courses."

Robert Samuels, president of UC-AFT, which represents non-tenured or tenure-track faculty at UC, thinks that online education will not reduce the cost of educating college students. He told the Little Hoover Commission in February that the lower-division courses expected to be offered online are often taught by lecturers already. He estimates that, at UC, the cost for a class of 250 students taught by a non-tenured faculty member is \$40 a student. Since the university still has to pay someone to design the courses, interact with students, grade student work, and administer the online program, he believes that a push toward online education will result in administrative bloat, which he believes is the real reason that UC's costs have escalated rapidly in recent years. Samuels warned that the cost of developing new online programs is often higher than predicted. So is the cost of the technology, such as software licenses, equipment, and network maintenance, he said. UC Online, the university's pilot program, has already spent nearly \$5 million in two years, but has attracted few students. The Little Hoover Commission is studying the impact of declining funding on the state's higher education system and how the universities and colleges can produce the educated workers the state needs.

The Legislative Analyst's Office, however, believes the additional funding for online class development is not justified because the universities are already using state funding for online education. Between the two state universities and the California Community Colleges, the LAO estimates that approximately 20,000 courses were offered online in 2011-12. Its suggestion is for the three institutions to share their online classes and offer grants to faculty to create or modify online courses that will be shared, while maintaining intellectual property rights.

Collective Bargaining Proposals

In their 2011-14 contract, UC-AFT and UC agreed to meet this academic year to discuss workload and other concerns arising from UC's online education pilot. The union states that it intends to address compensation for professional development in online course preparation, preparation time, course revision, supervision of the graduate student teaching assistants UC is planning to use to help with student questions and grading, and enrollment. UC-AFT is also concerned with how performance will be evaluated for online educators. The union is demanding to bargain over intellectual property rights and royalties for each semester a course is given. UC-AFT expects that there will be layoffs when departments decide to offer course selections online instead of in the classroom. In addition, lecturers are concerned about the relationship between the online course pilot and extension courses offered to non-matriculated students for higher fees.

UC views online education as just another method of teaching. It proposes that the current contractual provisions on workload and other conditions of employment apply to lecturers involved in online teaching.

CSU is conducting its own pilot program, teaming up with a commercial provider, Udacity, to develop courses. The California Faculty Association's bargaining chair, Andrew Merrifield, told *CPER* that the association made proposals on workload, rights to teach the course in subsequent semesters, and intellectual property rights in 2011, when the university was pushing to move many courses currently taught with state-funded support to the extended education arm of the university. Faculty are paid less to teach the same courses in extended education, and there are differences in entitlements to health benefits, retirement service credit, and, for lecturers, rights to teach more classes. But the proposals were "parked" when the university withdrew its demands relating to extended education. Currently, professors at CSU have not been denied workload credit for giving an online course the second time, Merrifield said, because they still grade papers and interact with students, who email faculty "24 hours a day."

CFA does not oppose online education as long as faculty members develop the curriculum, intellectual property rights are protected, and workload issues are studied. The faculty union is still uncertain whether online course development will take longer than preparation for face-to-face classes. Merrifield described online education as a "moving target," and points out the term includes courses that are partially taught online but also have in-person discussion sessions. For, example, the new project with Udacity raises the issue of who owns the course when a private entity assists in its development. Bargaining for CFA's next contract will begin next year.

CPER Journal Online

California Supreme Court Finds Liability, but Limits Remedies in Mixed-Motive Cases

Where unlawful discrimination is shown to be a substantial motivating factor in a decision to terminate an employee, but the employer proves it would have made the same decision absent the discrimination, the employer, while liable under California's Fair Employment and Housing Act, cannot be made to pay damages or be ordered to reinstate the employee, according to a unanimous decision of the California Supreme Court. In *Harris v. City of Santa Monica*, the court held that declaratory or injunctive relief is an available remedy in such a mixed-motive case where appropriate, and that attorney's fees and costs could be awarded.

The court's decision is the first to address whether the mixed-motive defense is available at all under the FEHA. While ruling in the affirmative, the court specified that the defense is only available if the employer can show, by a preponderance of the evidence, that it would have made the same decision for a non-discriminatory reason at the time it made its actual decision, not at some later date.

Regarding remedies, the court concluded that economic damages in the form of back pay, reinstatement, or other economic loss would result in an unfair windfall for the employee whose discharge was in part for a legitimate reason. While finding that the issue regarding non-economic damages for emotional distress "is closer," it came down on the side of rejecting those damages as well. However, because declaratory and injunctive relief and attorney's fees and costs are remedies that go to the underlying purpose of the FEHA to deter and eradicate discriminatory conduct, the court reasoned that they are available even where the defendant establishes a mixed-motive defense.

Two Reasons for Discharge

While working as a bus driver trainee for a city-owned bus service, Wynona Harris had what her employer determined to be a "preventable" accident. During her probationary period, Harris had another preventable accident and was late to work on two occasions without timely notifying her supervisor. She was evaluated as "needing further development." Harris was informed that she had not passed probation and was terminated six days after notifying her supervisor that she was pregnant.

Harris sued the city, claiming that she was terminated in violation of the FEHA because she was pregnant. The city claimed that it had legitimate, non-discriminatory reasons for firing her. The city asked the trial judge to give a jury instruction regarding a mixed-motive defense, specifying that if the jury found that the decision was motivated by both a discriminatory and a non-discriminatory reason, but would have made the same decision based only on the non-

discriminatory reason, it must find the employer not liable. The judge refused, and instead instructed the jury that it must rule in favor of Harris if it found that Harris had proved that her pregnancy was a motivating factor for the discharge, even though other matters may have contributed. The jury found, by a vote of nine to three, that Harris's pregnancy was a motivating factor and awarded her \$177,905 in damages, of which \$150,000 was for emotional distress. Harris was also awarded \$401,187 in attorney's fees and costs.

The city appealed, and the Court of Appeal found that the trial court's refusal to give the jury instruction requested by the city was prejudicial error. It also found sufficient evidence supporting the jury's verdict and sent the case back for a new trial. (For a full discussion of the facts and the Court of Appeal's decision, see article in [CPER No 198](#), pp. 61-63.)

The Supreme Court granted Harris' petition for review to determine the validity of the mixed-motive jury instruction.

The Mixed-Motive Defense

Interpreting 'because of'. The court began its analysis by focusing on the meaning of the words "because of" in Government Code section 12940(a) of the FEHA, which prohibits an employer from taking an adverse employment action against an employee "because of" a protected characteristic such as sex or race. The court noted that "there are at least three plausible meanings of the phrase," including, "(1) discrimination was a 'but for' cause of the employment decision, (2) discrimination was a 'substantial factor' in the decision, and (3) discrimination was simply a 'motivating factor'"

The city contended that "because of" means that the employer's consideration of the protected characteristic was "necessary" to its decision. The court equated this to a "but for" position on causation, "that is, the employer would not have taken the action *but for* its consideration of a protected characteristic." Harris argued that the phrase merely means the protected characteristic was "a motivating factor" in the employer's decision, even if only one of many.

The court, finding no clear answer in either California precedent or in the legislative history, turned to the federal judicial interpretation of the phrase as it appears in Title VII of the Civil Rights Act of 1964. In *Price Waterhouse v. Hopkins* (1989) 940 U.S. 288, 1989 U.S. LEXIS 2230, 81 CPER 72, the United States Supreme Court held that, once the plaintiff had proved that the protected characteristic was a motivating factor in an employment decision, the employer could avoid liability if it could show that it would have made the same decision even if it had not taken the characteristic into account. Thus, the high court recognized a mixed motive as a complete defense to Title VII liability.

However, the *Price Waterhouse* holding was "short-lived," noted the *Harris* court. Two years later, Congress passed the Civil Rights Restoration Act of 1991, which amended Title VII to provide that where a plaintiff proves that a protected characteristic was a motivating factor in an adverse employment decision, and the

employer shows that it would have taken the same action absent that factor, a court can “grant declaratory relief, injunctive relief,...and attorney’s fees and costs” but “shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment...” (42 U.S.C. sections 2000e-5(2) (B).)

The city contended that the 1991 amendments to Title VII were not relevant because the California legislature had not enacted any similar amendments to the FEHA, and that, therefore, it should follow the *Price Waterhouse* interpretation. The court rejected the city’s argument, saying, “There is no reason to suppose...that the Legislature that enacted section 12940(a) in 1980...intended to adopt *Price Waterhouse*’s meaning of ‘because of.’ Nor is it accurate to say that Congress’s 1991 amendments to Title VII were intended to *change* the original, commonly understood meaning of ‘because of’ in Title VII.” The 1991 amendments were enacted to overrule *Price Waterhouse* and to make explicit what Congress had always intended by the phrase “because of” in Title VII, “not to create an entirely new or separate standard of causation.”

The court also rejected the city’s claim that it should interpret the phrase as having the same meaning as it does in the federal Age Discrimination in Employment Act. According to the United States Supreme Court’s decision in *Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. 167, 2009 U.S. LEXIS 4535, [196 CPER 63](#), the phrase, as used in the ADEA, does not include either the “motivating factor” language added by Congress to Title VII, or the burden-shifting framework set out in *Price Waterhouse*. To the contrary, said the court, the high court in *Gross* made clear that “the words ‘because of’ standing alone, do not have a fixed or default meaning in legislative usage,” and that “the same phrase can have different meanings in different antidiscrimination statutes.”

The *Harris* court concluded that its review of federal precedent did not clear up the ambiguity that exists by the use of the phrase “because of” in the FEHA and that its only recourse was to look at the legislature’s stated purpose in enacting the FEHA. Section 12920 states that it is the public policy of the State of California “to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment” on account of a protected characteristic and that discriminating in employment for these reasons “foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general.” A further purpose is “to provide effective remedies” that will prevent, deter, and eliminate these discriminatory practices. Section 12921(a) specifies that “[t]he opportunity to seek, obtain, and hold employment without discrimination” on the basis of protected characteristics “is hereby recognized as and declared to be a civil right.”

Not a complete defense. Keeping in mind the purposes underlying the FEHA, the court held that “a same-decision showing by an employer is not a complete defense to liability when the plaintiff has proven that discrimination on the basis of a protected characteristic was a substantial factor motivating the employment action.” To relieve the employer of all liability in this situation “would tend to defeat the preventative and

deterrent purposes of the FEHA,” said the court.

In coming to this conclusion, the court pointed to the fact that the Fair Employment and Housing Commission, the agency that was charged until recently with interpreting the provisions of the act, interpreted the phrase “because of” as used in the FEHA in the same way as Congress did for Title VII in its 1991 amendments. It also emphasized that it has held in prior decisions that the public policy against employment discrimination “inures to the benefit of the *public at large* rather than to a particular employer or employee,” quoting from *Rojo v. Kliger* (1990) 52 Cal.3d 65, 1990 Cal. LEXIS 5487, 88 CPER 49. Allowing a same-decision finding to excuse the discriminatory conduct “would breed discord and resentment in the workplace,” said the court. “[A] declaration of its illegality serves to prevent that discriminatory practice from becoming a ‘but for’ cause of some other employment action going forward,” it declared, thereby furthering the act’s purpose of deterring and preventing employment discrimination.

Discrimination must be a ‘substantial’ factor. The court made clear that not every discriminatory remark or act will give rise to liability. Racist or sexist comments, thoughts, or beliefs unconnected to employment decisionmaking do not support a claim of discrimination under section 12940(a), the court instructed. In order to ensure that liability will not be imposed for “mere thoughts or passing statements unrelated to the disputed employment decision,” the court held that the plaintiff must prove that discrimination was a *substantial* motivating factor in the decision, not just a motivating factor, adopting the reasoning of Justice Sandra Day O’Connor in her concurring opinion in *Price Waterhouse*.

Remedies

Reinstatement, back pay, economic loss not available. To award a plaintiff economic damages, including back pay and front pay, or reinstatement, would result in an unjustified windfall to an employee who would have been terminated for a legitimate reason absent the discrimination, the court concluded. Further, it would limit an employer’s ability to make legitimate employment decisions. Employers would be forced to retain employees who should be terminated, causing inefficiency, which would “deprive the state of the fullest utilization of its capacities for development and advancement,” one of the FEHA’s stated purposes, the court noted.

No non-economic damages. The court struggled with the question of awarding damages for emotional distress in the mixed-motive situation, recognizing that discrimination can cause such harm. However, it concluded, where someone is terminated for both discriminatory and legitimate reasons, “it is a fair supposition that the primary reason for the discharged employee’s emotional distress is the discharge itself.” Therefore, awarding non-economic damages in this situation would again result in an unjustified windfall to the plaintiff and should not be allowed, it held.

Declaratory and injunctive relief and attorney’s fees and costs available. A judicial declaration of employer wrongdoing does not unjustifiably reward the plaintiff

and serves the FEHA's purposes by condemning discriminatory employment practices. Where appropriate, injunctive relief can stop discriminatory practices and prevent them from recurring, also in furtherance of FEHA's goals, reasoned the court.

Unlike damages, an award of attorney's fees and costs to a plaintiff in a mixed-motive case does not result in an unfair advantage, the court instructed. "Instead, it compensates the plaintiff and her counsel for bringing a meritorious claim of unlawful discrimination." Further, the employer should have to pay the costs of litigation resulting from its own wrongdoing. Such a result furthers the FEHA's goals of deterring and preventing discrimination and redressing its social costs.

Other Issues

The court was not persuaded by Harris' argument that the employer should have to prove the mixed-motive defense by clear and convincing evidence, holding that a showing by a preponderance of the evidence was the correct standard of proof. It noted that the preponderance of the evidence standard is the default standard of proof in civil matters, and that employment discrimination cases do not resemble the kinds of cases where the higher clear and convincing evidence standard has been applied in the past.

Harris' argument that the mixed-motive instruction should not be given in this case because the city did not plead the affirmative defense in its answer was also rejected. While an employer should plead any defense on which it has the burden of proof, in this case, the failure to plead a mixed-motive defense did not prejudice Harris. She had actual notice from the city's answer that it intended to defend itself on the basis that it had a legitimate reason for terminating her. Therefore, Harris' substantial rights were not adversely affected, the court concluded.

Holding

The court summarized its holding as follows: "When a plaintiff has shown by a preponderance of the evidence that his or her termination was a substantial factor motivating his or her termination, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time. If the employer proves by a preponderance of the evidence that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded damages, backpay, or an order of reinstatement. However, where appropriate, the plaintiff may be entitled to declaratory or injunctive relief. The plaintiff also may be eligible for an award of reasonable attorney's fees and costs under section 12965, subdivision (b)."

The court remanded the case to the trial court for further proceedings consistent with its opinion. (*Harris v. City of Santa Monica* [2013] 56 Cal.4th 203, 2013 Cal. LEXIS 941.)

CPER Journal Online

Employee's Discrimination Claims Barred Where Not Raised at Administrative Hearing

The Fourth District Court of Appeal ruled that an employee's claims of age and race discrimination and wrongful termination were barred by a prior adverse administrative decision that he was terminated for cause. The employee had the opportunity to raise his claims at the administrative hearing and failed to do so, said the court in *Basurto v. Imperial Irrigation District*. The employee was afforded due process at the administrative hearing, and his claim of bias was unsubstantiated.

Background

Salvador Basurto was employed by the district for over 30 years, delivering water to farmers. One morning at approximately 8 a.m., he was involved in an auto accident while driving a district vehicle. He admitted to the responding police officer that he had consumed alcohol the night before. An alcohol screening test showed a blood alcohol level of .031 at the time of the accident. The police concluded that Basurto caused the accident but was not under the influence at the time.

The district fired Basurto, then 55 years old. Basurto appealed his termination through all levels of the district's internal procedure, claiming that discharge was too severe a penalty and that other similarly situated employees had not been discharged. After a hearing, during which evidence and testimony were presented, the district board issued a decision upholding the discharge. It found that Basurto had violated district policies and procedures by reporting to work while under the influence of alcohol and that he had negligently operated the district's vehicle.

Basurto filed a lawsuit against the district, alleging age and race discrimination in violation of California's Fair Employment and Housing Act and wrongful termination. He also filed a writ of mandate claiming that he was denied due process in the administrative hearing. The trial court issued a tentative decision denying the writ, finding that the district did not have to follow the requirements of the Administrative Procedure Act, as it does not apply to irrigation districts, and that substantial evidence supported the board's findings. However, the tentative order was vacated because of confusion over what evidence was in the record. A different trial court later issued the writ because it was unclear whether Basurto had received documents presented to the board. It ordered the district to conduct another hearing.

The second hearing was held before the district board, made up of almost entirely new members. Each member denied having a financial or personal interest in the matter or having discussions with district attorneys that would influence their decision. Although he had requested that an administrative law judge conduct the hearing, Basurto declined the district's offer to have the hearing held before a state-certified neutral. Both parties were represented by counsel. Basurto did not present

any evidence regarding his discrimination or wrongful termination claims during the hearing. The board denied Basurto's grievance and affirmed his discharge.

Basurto filed a second writ petition and an amended complaint. In support of his writ petition, Basurto said that he was not asking the court to set aside the board's decision to terminate him but rather for a ruling that the board's decision should not be given collateral estoppel or res judicata effect on his civil discrimination claims. He argued that the board's hearing violated due process because it was not held before a neutral hearing examiner and because it had no procedure whereby he could raise his discrimination claims. The trial court denied the petition, finding that Basurto had waived his due process objections and bias issues by not raising them at the hearing. Basurto's petition for writ of mandate to the Court of Appeal was summarily denied on the basis that Basurto had an adequate remedy by way of appeal.

The trial court granted the district's motion for summary judgment on Basurto's civil case, finding that his claims of race and age discrimination were barred by collateral estoppel and res judicata. Basurto appealed.

Collateral Estoppel

The doctrine of collateral estoppel "precludes relitigation of issues argued and decided in prior proceedings," explained the Court of Appeal. In order to apply collateral estoppel, the issue sought to be precluded must be identical to that decided in a prior proceeding, must actually have been litigated, and must have necessarily been decided in the prior proceeding, the court instructed. Further, "the decision in the former proceeding must be final and on the merits," and "the party against whom the preclusion is sought must be the same as, or in privity with, the party to the former proceeding." If these requirements are met, the court must also determine that application of the doctrine "in a particular circumstance would be fair to the parties and constitutes sound judicial policy," said the court, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 1990 Cal. LEXIS 4026.

Collateral estoppel may apply to an administrative decision if the court is satisfied that the administrative agency acted in a judicial capacity and resolved disputed issues of fact which the parties had an adequate opportunity to litigate, the court instructed.

Basurto did not contest that the threshold requirements were met in his case. Rather, he asserted that the district's board hearing was not sufficiently "judicial" to allow for collateral estoppel because it did not comply with the requirements of the Administrative Procedure Act and the board was inherently biased against him.

Sufficiently 'Judicial'

The court noted, preliminarily, that precedent makes clear an individual who claims employment discrimination in violation of the FEHA need not exhaust his employer's internal administrative remedies prior to filing suit, citing *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 2003 Cal. LEXIS 9268, 164 CPER 44. If, however,

the employee chooses to pursue those internal procedures, he must fully exhaust them, including all judicial remedies, and “failure to set aside an agency’s quasi-judicial decision will render that decision final and binding on a plaintiff’s later FEHA claims,” it said, pointing to *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 2000 Cal. LEXIS 6119, 144 CPER 33.

The court found that Basurto could not avoid the *Johnson* precedent. It concluded that the APA does not apply to irrigation districts because the APA specifically excludes local districts from its coverage unless made applicable by statute. There is no statute that would include local irrigation districts.

It also found that the procedures actually employed by the district at the second hearing *did* afford Basurto due process. Basurto was given actual notice of the charges against him and the subject of the hearing. Substantial discovery was conducted by both parties on relevant issues, including the discrimination allegations, and the district complied with Basurto’s requests that it retain new outside counsel, provide a court reporter, and provide him with documents and a list of witnesses.

At the hearing, both parties were represented by counsel who gave opening and closing statements, noted the court. Evidence was presented and objections ruled upon, witnesses testified and were cross-examined, and an official transcript was prepared. The board issued a six-page written decision, which set forth the evidence, factual findings, and conclusions.

The court found that these procedures qualified the second hearing as sufficiently “judicial” to allow collateral estoppel to attach, noting that they were “virtually identical” to those considered sufficient by the California Supreme Court in *People v. Sims* (1982) 32 Cal.3d 468, 1982 Cal. LEXIS 230.

Basurto claimed that the board was inherently biased because a ruling in his favor would have resulted in a substantial financial penalty to the district. The court rejected this argument as speculative and unsupported by law. If Basurto’s argument were to prevail, said the court, then no administrative agency would be able to adjudicate an employee dispute that might result in financial compensation to the employee. However, statutory and case law recognizes agencies’ power to internally decide such matters. And, the court said, Basurto failed to introduce any evidence of actual bias on the part of the board.

Threshold Requirements Met

Even though Basurto did not dispute that the threshold requirements for application of collateral estoppel were met, the court reviewed the evidence as it applied to each and found it to be sufficient.

Identical issue. Identical factual issues must be at stake in both proceedings, said the court, citing *Lucido*. “At the heart of both Basurto’s administrative proceeding and his civil lawsuit is the issue of the wrongfulness of his discharge,” said the court. It concluded that the “identical issue” requirement was met, even though the

question of whether other employees with alcohol violations were disciplined similarly was not presented in the context of race or age discrimination.

Actually litigated, necessarily decided. It also found that the “actually litigated” and “necessarily decided” requirements were met in this case. An issue is “actually litigated” when it is raised by the pleadings, or otherwise is submitted for decision and is determined. “A determination may be based on a *failure of...proof*,” said the court, quoting from *Sims*. “The issue is considered to have been ‘necessarily decided’ if it was not ‘entirely unnecessary’ to the judgment in the prior proceeding,” the court instructed, citing *Lucido*. Evidence was presented at the board hearing regarding Basurto’s disparate treatment claim, including testimony by witnesses whom Basurto’s attorney was able to cross-examine. The board heard evidence that, although the district does enter last-chance agreements with employees charged with misusing drugs or alcohol, it had discharged the only other employee who had an accident with alcohol in his system. The board, after hearing all the evidence, concluded that Basurto’s discharge was justified, “and explicitly concluded that he had not been treated differently from other similarly situated employees,” the court said.

For purposes of the application of collateral estoppel, it did not matter that Basurto never raised his discrimination allegations at the hearing. “A party cannot circumvent the doctrine simply by cherry-picking which facts and theories to raise at his administrative hearing and which to reserve for a civil suit if all speak to the same issue — which in this case was the wrongfulness of Basurto’s discharge — and if the party has a full and fair opportunity to present all those facts for determination (which, as we explained previously, Basurto was given here),” the court explained.

The court pointed to *Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 2001 Cal.App. LEXIS 747, 150 CPER 64, and *Takahashi v. Board of Education of Livingston Union School Dist.* (1988) 202 Cal.App.3d 1464, 1988 Cal.App. LEXIS 675, as two cases where collateral estoppel and res judicata were imposed even though the plaintiffs failed to present discrimination claims when challenging their terminations during administrative hearings. The court concluded that “it was incumbent” upon Basurto “to present at his hearing any facts or theories supporting his contention that he had been unfairly or disparately punished, including any evidence of age or race discrimination,” and that nothing prevented him from doing so.

Final and on the merits. Basurto, in his opening brief on appeal, failed to challenge the trial court’s denial of his second writ petition, which sought to overturn the district board’s decision. He did not contest the trial court’s decision that he had waived his right to challenge the board’s decision on due process and bias grounds until his reply brief. Legal arguments that are first raised in a reply brief generally will not be considered, the court instructed.

“Because Basurto failed to properly appeal the trial court’s denial of his second writ petition, the District Board’s decision is now final,” the court held. The decision was also “on the merits” because it followed a full hearing in which the basis of the claim was tried and decided.

Policies of Collateral Estoppel Furthered

Applying collateral estoppel effect to the board's decision in this case furthers the policy considerations underlying the doctrine because it "accords a proper respect" to the board's internal procedures, said the court. Those procedures enable the agency to quickly determine if it has made a mistake. Giving conclusive effect to the board's decision promotes judicial economy, the court explained.

The court summarized its reasoning as follows: "Basurto chose to avail himself of the District's internal grievance procedure, and he was provided with an adequate opportunity to present evidence at his hearing of every fact or theory he believed supported his contention that his discharge was wrongful. Had he taken full advantage of that opportunity, the District would have been required to consider his age and race discrimination claims. Instead, Basurto sat on his rights...."

Accordingly, the court determined that the board's decision that Basurto's discharge was for nondiscriminatory reasons and for good cause was final and conclusive as to his FEHA and breach of contract claims. It affirmed the trial court's grant of summary judgment to the district. (*Basurto v. Imperial Irrigation Dist.* [2012] 211 Cal.App.4th 866, 2012 Cal.App. LEXIS 1240.)

CPER Journal Online

Employer May Demote Peace Officer Who Cannot Perform Essential Duties

The California Fair Employment and Housing Act does not prohibit an employer from demoting a disabled correctional officer who could no longer perform the essential duties of his position even with reasonable accommodation, according to the Fourth District Court of Appeal in *Furtado v. State Personnel Board*.

Bruce Furtado was a correctional lieutenant employed by the California Department of Corrections and Rehabilitation. He suffered injuries to his left shoulder, forearm, elbow, and hand during an off-duty automobile accident, resulting in an overall loss of grip strength, diminished range of motion, difficulty in forming a fist, and decreased functioning in his left arm and elbow.

Upon his return to work, Furtado was medically demoted to a non-peace officer position based on a letter from his doctor stating that he could no longer perform the duties of correctional lieutenant. He was later reinstated to the position of correctional lieutenant after he received a medical release from his physician. However, after a few days, he was again demoted because department staff believed that he could not meet the physical requirements of a peace officer.

When Furtado was tested on his weapon proficiency, his instructor determined that he failed to qualify with a side-handle baton because of his physical limitations. He was later given training in the use of the baton, but again failed the certification test.

Furtado requested that he be relieved of the baton certification requirement as an accommodation to his physical disabilities, which had been found to be permanent. He indicated that he would be willing to be assigned to some kind of administrative lieutenant position.

The department arranged a fitness-for-duty examination for Furtado by an orthopedic surgeon. The doctor concluded that Furtado was severely limited as a result of his injuries and that he was unable to perform a number of duties required by correctional lieutenants, including the ability to disarm or subdue an inmate. He knew of no way to accommodate Furtado's physical limitations to allow him to perform those duties. Furtado would be "profoundly compromised" in a physical confrontation with an armed inmate, said the doctor.

The department determined that Furtado was unable to perform the essential functions of a correctional lieutenant. It also took the position that to waive an essential function of the position, such as baton certification, would violate Government Code section 1031(f), which requires all employees classified as police officers to be free of any physical condition that might adversely affect the exercise of their powers. It denied Furtado's request that he be assigned to work as an administrative correctional lieutenant for the same reason.

Ultimately, the department medically demoted Furtado to a non-peace officer position. Furtado appealed to the State Personnel Board, claiming that the department had discriminated against him by denying him reasonable accommodation and demoting him. The SPB denied his appeal. Furtado filed a petition for writ of mandate challenging the SPB's decision, which was denied by the trial court.

Court of Appeal Decision

The Fourth Circuit noted that the main issue central to both his reasonable accommodation and discriminatory demotion claims was "whether Furtado was able to perform the essential functions of the peace officer position with or without reasonable accommodation." Because of its quasi-judicial status and powers, the SPB's decision must be upheld if supported by substantial evidence.

Essential Functions

While the FEHA forbids discriminating against a person because of his physical disability, it does not prohibit an employer from discharging or demoting an employee who "is unable to perform his or her essential duties even with reasonable accommodations or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodation," said the court, quoting Government Code section 12940(a)(1).

Under section 12926(f) of the act, the essential functions of a position are the "fundamental job duties." The same section lists evidence that may be considered in determining the essential functions of a job, including the employer's judgment, written job descriptions, the amount of time spent performing the functions, the consequences of not requiring the employee to perform the function, the terms of the collective bargaining agreement, and work experiences of past and current employees.

The court found substantial evidence to support the SPB's finding "that being able to disarm, subdue, and apply restraints to an inmate, and being able to defend one's self against an armed inmate, are essential functions of the correctional lieutenant position." Written job analyses of the position and testimonial evidence supported the conclusion that the department views these as essential functions of the position.

Furtado contended that being able to use a baton was not an essential function of the correctional lieutenant position. The court disagreed, pointing to testimony from departmental employees that correctional lieutenants, like all other peace officers working in prisons, "must be able to use the side handle baton, a nonlethal weapon, to disarm or subdue inmates and/or defend themselves against armed inmates." The associate warden testified that having all peace officers trained and certified in the use of a baton and carrying a baton deters inmate violence.

Inability to Perform Essential Functions

The court concluded that there was also substantial evidence to support the SPB's finding that Furtado could not perform all of the essential functions of the correctional lieutenant position with or without reasonable accommodation.

Evidence from the medical providers showed that Furtado had permanent limited functioning of his left arm and hand, including limited motion, strength, and grip strength. He twice failed to qualify with the baton. The instructors testified that he was unable to raise it over his head or swing it with any force with his left hand. The evidence also showed that Furtado, aside from his inability to use the baton, was not able to disarm, subdue, or restrain an inmate because of his limited motion and impaired grip strength.

No one, including Furtado, could propose an accommodation that would enable Furtado to satisfactorily use the baton or otherwise subdue an inmate.

Reassignment and Waiver Are Not Reasonable Accommodations

Furtado requested that he be placed in the position of administrative correctional lieutenant, asserting that baton use would not be an important function in such a position. The court did not agree, again noting the testimony of department employees that *all* peace officers working in prisons must be able to use a baton, as “the nature of police officer work in a prison setting is such that each and every correctional lieutenant may at some point be called upon to have to use a baton to defend himself or to restrain an inmate.” Correctional lieutenants may be called on to fill a vacancy or for someone who is sick, or respond to another area because of a lockdown or uncooperative inmates — situations where one may have to defend oneself or others. A correctional lieutenant's inability to perform those tasks would place a burden on others or would place the safety of himself and others at risk, said the court.

The court likened Furtado's proposal to that requested by the plaintiff in *Raine v. City of Burbank* (2006) 135 Cal.App.4th 1215, 2006 Cal.App. LEXIS 70, 177 CPER 60. In that case, a police officer who was injured and could no longer perform the essential functions of the job argued that the department was required to accommodate him by placing him in a front-desk position. The *Raine* court concluded that the officer was, in essence, asking that the department reclassify the front-desk position from a civilian one to a sworn-officer position. The court ruled that the department was not required to create a new position for Raine.

Similarly, the department did not have to create a new position for Furtado in order to meet its obligation to reasonably accommodate his disability under the FEHA. Nor did it have to waive the baton requirement. “Furtado's request that the Department essentially waive an essential function of a position is not a ‘reasonable accommodation,’” said the court.

Furtado also argued that the trial court mistakenly relied on *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 2000 Cal.App. LEXIS 827, 145 CPER 41, when

it denied his petition for writ of mandate. *Quinn* involved a police officer applicant who was not qualified for the job because he could not perform its essential functions due to a disability. Furtado maintained that there is a distinction between an applicant meeting the initial qualifications for a job and a current employee being able to perform its essential functions. The court disabused him of this position, stating flatly that under the FEHA both disabled applicants and employees who become disabled after being hired must establish that they can perform the essential duties of the position with or without reasonable accommodation.

Medical Demotion Was Proper

Government Code section 19253.5 authorizes a state agency to medically demote an employee who is unable to perform the essential functions of his current position but can perform the essential functions of a different position.

The court found substantial evidence to support the SPB's determination that the department's decision to medically demote Furtado to the position of associate government program analyst was proper, again pointing to the fitness-for-duty examination results.

The court affirmed the judgment of the trial court. (*Furtado v. State Personnel Board* [2013] 212 Cal.App.4th 729, 2013 Cal.App. LEXIS 8.)

CPER Journal Online

No FEHA Violation for Terminating Manager on Leave Who Could Not Perform Essential Functions

In *Lawler v. Montblanc North America, Inc.*, the Ninth Circuit Court of Appeals held that where an employer discharged a store manager because she could not come to work for five months due to a physical condition, there was no violation of the California Fair Employment and Housing Act's prohibition against disability discrimination. The court found that the manager could not establish a prima facie case of discrimination because she could not perform the essential functions of her position with or without reasonable accommodation.

Cynthia Lawler, the full-time manager of one of the employer's boutique retail stores, was diagnosed with psoriatic arthritis, a chronic condition. Her doctor, Neelakshi Patel, recommended that she work a reduced workweek. She broke some toes a few days later and Dr. Patel recommended she stay off work for approximately a month. Lawler notified the human resources director, Mary Gorman, that she would need temporary disability leave. Gorman asked Lawler to fax her documentation of the injury in order to notify the company's disability carrier.

Lawler went to the store to use the fax machine. While she was there, the company's president and chief executive officer, Jan-Patrick Schmitz, came in. Schmitz asked why Lawler was not in work clothes, and she told him that she was off on disability. According to Lawler, Schmitz was "gruff," "intimidating," and "abrupt." She was afraid to leave and accompanied him on an inspection of the store, during which time Schmitz got very angry about the way in which some products were displayed. Schmitz ordered Lawler to provide him with some specific information by the following Monday. When Lawler replied that she was not working and could not do it, he told her to do it "or else."

Lawler sent a letter to Gorman complaining about Schmitz's treatment of her during the store visit. Although Gorman told Lawler that she did not want to show the letter to Schmitz, Lawler insisted she process the complaint.

On the day that Lawler was to return to work, Dr. Patel wrote a letter, which Lawler emailed to Gorman, recommending that she stay off work for another four months "to avoid further flare-ups" associated with her arthritis. Gorman wrote to Patel listing Lawler's job duties and asking whether there were any reasonable accommodations that the company could provide to enable Lawler to be present in the store on a regular basis. Patel responded by reiterating that Lawler should stay off work and that his recommendation had not changed.

The company terminated Lawler, stating that "it is essential for a boutique manager to be in regular attendance" and that it would need to replace her.

Lawler's lawsuit alleging disability discrimination, retaliation, and harassment in

violation of the FEHA, and intentional infliction of emotional distress was dismissed by the trial court, and Lawler appealed.

No Disability Discrimination

The Ninth Circuit determined that while Lawler was a member of a protected class, and suffered an adverse employment action, she could not establish another element of a *prima facie* case of discrimination — that she could perform the essential functions of her position with or without reasonable accommodation. The essential duties of the manager position were not in dispute, said the court. “Lawler testified that a manager is responsible for hiring, training, and supervising the sales staff; overseeing and developing customer relations; administering stocking and inventory; cleaning; creating store displays; and preparing sales reports.” She also testified that these duties can only be performed in the store, the court noted.

Lawler’s argument that the company was required to accommodate her disability by allowing her to work reduced hours and providing her with a five-month leave of absence ignores FEHA precedent, said the court. As the California Supreme Court held in *Green v. State of California* (2007) 42 Cal.4th 254, 2007 Cal. LEXIS 8910, 186 CPER 62, “in order to establish that a defendant employer has discriminated on the basis of disability in violation of the FEHA, the plaintiff employee bears the burden of proving he or she was able to do the job, with or without reasonable accommodation.”

No Retaliation

Lawler charged that Montblanc fired her in retaliation for her complaint about Schmitz. Montblanc countered that it terminated Lawler for a legitimate, nondiscriminatory reason, which was that she could not perform the essential duties of her position with or without reasonable accommodation. The court concluded that Montblanc’s stated reason was “facially unrelated to prohibited bias” because it was related to business concerns and was, therefore, legitimate, citing *Department of Fair Employment and Housing v. Lucent Technologies, Inc.* (9th Cir. 2011) 642 F.3d 728, 2011 U.S.App. LEXIS 8484. In that case, the court found that the employer’s reason for terminating a cable installer — because he could not perform the essential functions of the position — was legitimate and nondiscriminatory.

The burden then shifted to Lawler to show that the stated reason was pretext. Lawler argued that the proximity of time between the filing of her complaint and her termination two and one-half months later and the fact that her replacement was not hired until seven months after her termination revealed Montblanc’s true discriminatory intent. The court held that this evidence was not sufficiently substantial to overcome Montblanc’s legitimate, nondiscriminatory reason.

No Harassment or Intentional Infliction of Emotional Distress

The court found that Schmitz’s alleged conduct during his store visit was connected to the operation of the business and the way in which Lawler performed her job, and did not, therefore, constitute harassment. Further, a single incident of the behavior

alleged by Lawler, even if not business-related, “is not sufficiently severe to constitute a hostile working environment,” said the court, citing *Aguilar v. Avis Rent A Car Sys. Inc.* (1999) 21 Cal.4th 121, 1999 Cal. LEXIS 4850, 138 CPER 54, and *Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 2006 Cal. LEXIS 4719, 178 CPER 56.

Nor did Schmitz’s alleged conduct rise to the level of intentional infliction of emotional distress. His “‘gruff,’ ‘abrupt,’ and ‘intimidating’ conduct cannot be characterized as exceeding all bounds of that tolerated in a civilized community,” said the court. Further, Lawler’s alleged emotional injuries, consisting of anxiety, loss of sleep, upset stomach, and occasional muscle twitches, were not severe, the court concluded. They were not of such substantial or enduring quality “‘that no reasonable person in civilized society should be expected to endure it,’” the court explained, quoting from *Hughes v. Pair* (2009) 46 Cal.4th 1035, 2009 Cal. LEXIS 6019.

The court affirmed the trial court’s order granting summary judgment to defendants. (*Lawler v. Montblanc North America LLC* [9th Cir. 2013] 704 F.3d.1235, 2013 U.S.App. LEXIS 761.)

CPER Journal Online

Legislation and Lawsuits Seek to Avoid Provisions of PEPR

The inevitable fights over the scope and legality of the Public Employees' Pension Reform Act are breaking out all over California. Some unions and affected employees have gone to court. Others are trying to gain the sympathy of legislators or the federal government.

Transit Union Legislation

PEPRA improperly restricts pension bargaining rights, say California transit unions, and could result in reduced federal funding for transit systems. They have complained to the Department of Labor that the act substantially impedes their right to collectively bargain retirement compensation. That prompted Assembly Member Luis Alejo (D-Salinas) to introduce AB 160, which would exempt the retirement plans of transit workers and multi-employer plans regulated by the Employee Retirement Income Security Act of 1974 from all provisions of PEPRA. The Brown administration, however, is trying to convince the Department of Labor that the claim is unfounded.

Section 13(c) of the Federal Transit Act protects "rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise" and "the continuation of collective bargaining rights" of transit workers by requiring that the Department of Labor certify the transit employer's "protection arrangements" before federal funding for mass transit is released to the transit provider. Transit unions are claiming that anti-spiking measures, the requirement that employees contribute half the normal cost of their benefits, limits on pensionable income, and new formulas for new employees, among other aspects of PEPRA, impair collective bargaining rights and discontinue some retirement benefits.

In a letter to Acting Secretary of Labor Seth Harris, the Brown administration asserted that collective bargaining rights are not impeded by PEPRA. "PEPRA merely modifies, prospectively, certain aspects of the defined benefit pension plan that can be offered by a public employer," wrote Marty Morgenstern, secretary of California's Labor and Workforce Development Agency. He pointed out that nothing in the act prevents the parties from negotiating other retirement benefits or compensation to offset the changes in defined benefit pension plans that apply to future workers under the act. In an attached legal memo, the LWDA's general counsel, Mark Woo-Sam, stressed that California law has limited the kinds of pension plans that public employers may offer since the County Employees Retirement Law of 1937, and that PEPRA's new limitations were mere "refinements" designed to ensure fiscal solvency of pension systems. While acknowledging that the law does affect some aspects of current employees'

benefits, he explained that current contracts are exempt from those provisions until their expiration. After that, employers must continue to bargain over various aspects of retirement benefits and cannot unilaterally impose them, he noted.

Vested Rights Lawsuits

The assertion that PEPRA does not alter vested rights is vociferously denied by employees in several counties. At least five county retirement boards are facing challenges to their attempts to implement PEPRA's anti-spiking provisions in Government Code section 7522.34, which exclude from an employees' final compensation any pay for unused vacation or other leave, bonuses, overtime pay, allowances and reimbursements for uniforms or vehicles, and other one-time or extra compensation. Final compensation, typically averaged over three years, is one factor in a retiree's benefit calculation formula, along with years of service and a percentage of pay.

Employees represented by AFSCME and the Merced County Sheriffs' Employees Association obtained a preliminary injunction in December prohibiting the Merced County Employees Retirement Association from refusing to include payouts for unused vacation leave in the computation of final compensation of current employees who retire after January 1, 2013.

Unions in Alameda and Contra Costa counties also filed suit on the leave pay-out issue and other pay that the Alameda County and Contra Costa County employee retirement systems had stated would be excluded from the calculation of final average compensation due to PEPRA requirements. ACERS and CCCERS both asked the court to impose stays on implementing the changes while the lawsuit is pending. Some employees in each county had decided to retire before the end of December to avoid the new limits on pensionable compensation, but have been allowed to rescind those decisions. Retiring employees will receive benefits based on the prior methods of calculating final compensation during the stays.

Employees nearing retirement in Marin County are not so fortunate. Four unions filed suit in January, challenging the Marin County Employees Retirement Association's decision to exclude from final compensation stand-by pay, administrative response pay, call-back pay, and several cash conversion benefits that had been negotiated for employees who waived health insurance or other fringe benefits. The board of MCERA has stood its ground.

The California Public Employees Retirement System issued [Circular 200-062-12](#) in late December implying that items of pensionable compensation for current members would not change. It also advised public agencies and school districts with retirement plans in its system that pensionable compensation for new members hired after January 1, 2013, continues to include holiday pay, incentive pay, special assignment pay, and education pay, at least until CalPERS finalizes regulations implementing PEPRA.

Unexpired Contracts

PEPRA contains a provision delaying its effects for employees covered by a collective bargaining agreement in effect before January 2013, in order to avoid impairing contracts, which is prohibited by both the state and federal constitutions. The concept sounds simple, but a thorny issue has emerged. Are new employees hired after January 1, 2013, subject to the PEPRA limitations, or are they entitled to the benefits promised in the contracts? In San Diego County, the Deputy Sheriffs Association has sued to enforce a memorandum of understanding it reached two years before PEPRA, in which it agreed to less lucrative benefits — from 3 percent at 50 to 3 percent at 55 — and a lower county retirement pick-up of employee contributions for new hires after June 2011. The new contract, which will be in effect until July 2014, should govern the benefits of employees hired between July 2011 and July 2014, the association says. The county, however, is insistent that those hired beginning January 2013 are only eligible for the 2.7 percent at 57 formula and should pay the full 12.5 percent employee contribution toward pensions. The DSA filed its lawsuit in January 2013.

Paying for Another's Pension Enhancements

The Sonoma County Law Enforcement Association has sued Sonoma County and the Sonoma County Employees Retirement Association for requiring new members hired after December 2012 to make employee contributions for enhanced pension formulas approved in 2003. At that time, the parties agreed that peace officers in the unit of investigators and correctional staff would be retroactively eligible for a 3 percent at 55 formula; the others would be eligible for 3 percent at 60. In return, the employees would be required to make higher contributions to their retirement benefits — 3 percent for peace officers and 3.03 percent for non-safety members. The contract explains that these new employee contributions are to “defray the cost of the unfunded accrued actuarial liability for any past service due to the enhanced retirement programs.” Of course, in 2003, no one knew that PEPRA would be enacted and would prohibit such formulas for employees hired in 2013.

After PEPRA was enacted, SCERA approved a rate of contribution for new members that included the extra unfunded liability contribution for the retroactive enhancements, in addition to an amount equal to 50 percent of the normal cost of their pension. As SCLEA and the county are still in bargaining for a successor to the contract that expired in 2012, there was no new agreement with SCLEA on employee contributions. In fact, SCLEA charges, there was only one bargaining session discussing employee contributions of new employees.

The union has filed a complaint with the Public Employment Relations Board alleging a unilateral change on behalf of the county's new non-peace officer employees. SCLEA's complaint and petition in court contends that the county has imposed contributions greater than 50 percent of normal cost on new members without its agreement. PEPRA prohibits imposition of such costs, even after impasse procedures have been exhausted. The union alleges violations of Labor Code sections 221 and 222, the Fair Labor Standards Act, the Equal Protection Clauses of the state and federal constitutions, and, for peace officers, a unilateral change in retirement benefits.

SCERA has indicated that it will change the required contributions if the county and SCLEA reach a different agreement. The county says it merely adopted SCERA's rates, but has stressed it continues to be open to negotiations on the issue. At the request of all parties, the litigation has been stayed for several months while the parties attempt to reach agreement during collective bargaining.

CPER Journal Online

Two More Retiree Health Benefits Cases Revived

Retired workers of Sonoma County and those at a University of California laboratory have been given a second chance to show that they have vested rights to retirement health benefits promised by their former employers. In *Requa v. The Regents of the University of California* and *Sonoma County Association of Retired Employees v. Sonoma County*, appellate courts found that trial courts erred when they dismissed the retirees' claims at the initial pleading stage of the case. Both courts relied on the California Supreme Court's decision in *Retired Employees Association of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 2011 Cal.LEXIS 12109, [204 CPER 57](#), which held that vested benefits may arise from an implied term of a contract.

Sonoma County

In 1964, Sonoma County began providing retiree health benefits. The retirees association alleged that, in 1985, the county promised to pay the same for retirees' health care benefits as it paid for active management employees. The retirees claimed that the county's promises in exchange for their performance of services created a legally binding contract. They alleged that the parties intended that the benefits would continue.

In 2008, the county passed a resolution limiting the retiree healthcare benefit contribution to \$500 a month, phased in over five years. The retirees sued for breach of express and implied contract, violations of the state and federal constitutional contract clauses, and promissory estoppel, among other claims. The federal district court dismissed the retirees' complaint on the grounds that the county could not be bound by oral promises, that there was no allegation of an express contract, and that the retirees could not reasonably have relied on implied promises. The court did allow the retirees to amend their complaint to try to state a viable legal claim.

The amended complaint added new allegations and attached copies of 68 resolutions, memoranda of understanding, and ordinances. It also claimed that various county administrators and a board member would testify about the board of supervisor's promises and intent. Yet again, the district court dismissed the complaint because none of the documents showed an express agreement to provide health benefits throughout the retirees' lives. This time, the court did not grant the association another chance to amend its complaint.

The retirees appealed. Before the Ninth Circuit Court of Appeals acted on the case, the California Supreme Court issued its decision in *REAOC*. It held that an additional implied term can be read into a written contract as long as it does not conflict with express terms of the contract, and that a county could be bound by an implied contract. An implied contract could be based on legislative actions, the court

said, as long as there was clearly an “element of exchange” of something valuable between the county and the other party. The court agreed with the county that Government Code section 25300 requires the county to set employee compensation by resolution or ordinance, but instructed that a court could find implied terms if it found the county clearly intended to make a contract rather than mere policy. The court concluded that, “under California law, even a vested right to health benefits for retired county employees can be implied under certain circumstances from a county ordinance or resolution.”

The court deduced from *REAOC* that the association was required to allege in its complaint the existence of a contract that contained implied terms promising retiree healthcare benefits “that vested for perpetuity,” and that the contract was created by ordinance or resolution. The retirees met the first requirement by alleging that Sonoma County had conveyed promises to continuously provide retiree health benefits in MOUs and other documents, attaching to the amended complaint MOUs that included statements supporting the retirees’ claims, and alleging that county employees involved in drafting the policy would provide evidence of the county’s intent concerning vesting.

The association’s complaint failed, however, to include enough facts to identify any ordinance or resolution that created the implied contractual right to vested benefits. The complaint contained only bare allegations that the MOUs had been ratified by the board of supervisors, without stating that it was approved through resolution or enactment of an ordinance or attaching copies of such ordinances or resolutions.

Because the amended complaint was still deficient, the appellate court agreed with the district court that it failed to state a legal claim, but the court overturned the decision to deny the retirees another chance to amend their complaint. The court cautioned, however, that the association would bear a heavy burden to prove the county intended to create a contract for compensation through resolution or ordinance and that it intended to convey vested benefits. (*Sonoma County Association of Retired Employees v. Sonoma County* [9th Cir. 2-25-13] No. 10-17873, ___ F.3d ___, 2013 U.S.App. LEXIS 3856, 2013 DJDAR 2421.)

UC’s Lawrence Livermore Lab

Joe Requa retired from the Lawrence Livermore National Laboratory while it was still being operated by the University of California. Like other university retirees, Requa received health benefits sponsored by the university. In 2007, the federal Department of Energy transferred operation of the lab from UC to a private consortium of companies. (See story in [CPER No. 187](#), pp. 51-53.) On January 1, 2008, responsibility for the retirees’ health benefits was transferred to the consortium.

The retirees filed a lawsuit claiming that the university had impaired their express or implied right to university-sponsored group health insurance in violation of the state constitution, and that the university should be estopped from terminating the benefits. They alleged that, in 1961, the regents authorized UC to provide health care benefits to eligible retirees. It did not reserve the authority to modify the

benefits. In various retirement system booklets through the years, the university advised employees that they would be able to continue their university-sponsored group health plan in retirement with the same employer contribution that they enjoyed when employed. The only caveats were that the employee be eligible for retirement benefits, enrolled in a health plan at the time of retirement, and begin receiving retirement benefits within four months after employment with UC ended.

In 1998, the university began inserting in the retirement handbook a statement reserving its right to change the benefits. "Health and welfare benefits are not accrued or vested benefit entitlements. UC's contribution toward the monthly cost... may change or stop altogether...."

Requa and the other plaintiffs retired between 1996 and 2006. They asserted they had remained for decades at the Livermore lab, in part based on the promised retirement health benefits. UC continued the same health benefits for retirees as for active employees until 2008, when its contract to run the Lawrence Livermore lab expired. UC represented to the employees that their health benefits would remain substantially the same when responsibility for the retiree benefits was transferred to the private consortium. Instead, the retirees claimed, the health care benefits have been much more expensive and inferior to the benefits they received from UC.

When UC challenged the lawsuit, the trial court agreed with the university that the complaint was insufficient, and allowed the retirees to amend it. After finding the first amended complaint also was not legally viable, the lower court dismissed the case on the grounds that the university had reserved its right to change the retiree health benefits it was providing, that the retirees had not shown how the law authorized UC to grant such benefits, and that case law did not support the theory of implied rights to vested benefits. Requa and three other retirees appealed.

In the appellate court, the university urged the retirees had not pled enough facts or attached documents that would rebut the presumption a public employer's legislative acts are not intended to create private contractual rights or vested health insurance benefits. These contentions were somewhat different than those UC made in the trial court because *REAO*C was issued while the *Requa* case was on appeal.

Having the benefit of the California Supreme Court's opinion in *REAO*C, the appellate court sided with the retirees. It found many of UC's arguments were not proper at the pleading stage of the case, when the allegations of the plaintiffs are accepted as true and before the plaintiffs have had a chance to conduct discovery to find evidence. It rejected UC's contention that it did not delegate its authority to contract with employees for lifetime health benefits, noting that the plaintiffs pointed to a 1961 resolution of the regents as the initial authorizing act. The court acknowledged that there may be differences of interpretation of the language in the various handbooks, but as long as the retirees' interpretation of the language was reasonable, the dispute over interpretation is one that the lower court should not have decided so early in the case.

At this initial stage, the court turned aside the university's arguments that

publications in 1988 and 1998 ruled out the possibility that UC intended the retiree health benefits to vest. In particular, the court noted that the language in later handbooks seemed to say the university might change or stop the benefits only because they were “subject to legislative appropriation.” Since UC did not discontinue Requa’s benefits due to lack of budgetary appropriations, it found the lab retirees might still be able to show they had vested rights.

In unpublished portions of the opinion, the court also held the complaint was sufficient to state a claim for promissory estoppel, in which the plaintiffs must show that they relied on the defendant’s clear promise to their detriment. The retirees alleged that they had remained employed at the lab rather than finding jobs in private employment, where retirement health benefits are less frequently available, and that their benefits are not substantially equivalent to those of other UC retirees. Their transfer out of the UC risk pool, they claimed, had put them into an older and sicker pool, causing their benefit costs to increase more rapidly than the costs of other retirees. The court rejected the claim that application of promissory estoppel would undermine public policy, since the university did not identify the public policy on which it was relying.

The university claimed the retirees’ lawsuit was untimely, to no avail. The court found that a three-year statute of limitations applied. Even if the retirees should have sued in 1998, when UC began to claim that retiree health benefits are not vested, the right to the benefit accrued each time the benefit was not paid, it stated. In addition, a breach of contract is generally held to occur when the promisor does not follow through on the promise. Therefore, the retirees were not required to sue when the university first stated that the benefits were not vested, but could wait until UC ended their university-sponsored group coverage. (*Requa v. The Regents of the University of California* [2012; cert’d. for publication 1-29-13] 213 Cal.App.4th 213, 2012 Cal.App. LEXIS 1340.)

CPER Journal Online

Union Representative-Member Privilege Legislation Introduced

Assembly Member Roger Hernandez (D-West Covina) introduced a bill in February that would protect communications between a union representative and a represented employee, similarly to the way attorney-client communications are privileged. AB 729 would define a union agent as a person “employed or elected by a labor organization and whose duties include the representation of employees in a bargaining unit in a grievance procedure or in negotiations.” It would also include the labor organization itself. The union agent would have the privilege to refuse to testify in a court, arbitration, or administrative hearing about confidential information “acquired in attending to his or her professional duties or while acting in his or her representative capacity.” Unlike the attorney-client privilege, the holders of the privilege in this legislation are both the employee and the union agent in disciplinary matters, but only the labor organization in other representative matters. The privilege would be subject to many of the same exceptions and could be waived in the same way as other privileges.

While sometimes accepted in arbitrations, there has not been a recognized union agent-member privilege in California. A few other states and the National Labor Relations Board have allowed the privilege under some circumstances.

In a recent case, *Peterson v. Alaska* (2012) 280 P.3d 559, 2012 Alas. LEXIS 104, the Alaska Supreme Court ruled that the privilege was implied in the Alaska Public Employment Relations Act from the statutory rights to join a labor organization and engage in concerted activities, and the prohibitions against interfering in the exercise of employee rights and interfering with the administration of a union. As the Alaskan court said, “Implicit in Alaska’s public union statutory rights is the right of the union and its members to function free of harassment and undue interference from the State.” It also found a “strong interest in confidential union-related communications.” The court limited the privilege to communications made in confidence, in connection with representation relating to disciplinary or grievance proceedings, between an employee or the employee’s attorney and union representatives “acting in official representative capacity.”

The NLRB has protected communications in narrow circumstances where an employer has been found to interfere with the employee’s right to union representation, such as when the employer threatens a union steward with discipline if the steward does not disclose communications between an employee being disciplined and his or her union representative. In *City of Newburg v. Newman* (1979) 70 A.D.2d 362, 1979 N.Y.App. Div. LEXIS 12723, a New York appellate court followed the NLRB’s reasoning to recognize a privilege for communications between a union member and a union officer in the performance of union duties relating to a matter on which the member had a right to representation. The court only protected

them from the public employer.

In California, the privilege has been rejected by the Court of Appeal in *American Airlines, Inc. v. Superior Court* (2003) 114 Cal.App.4th 881, 2003 Cal.App. LEXIS 1923. The court in *American Airlines* did not consider the substance of any of California's public sector relations laws, only Labor Code section 923 and the federal Railway Labor Act. It also involved a case in which the union representative was a witness to the alleged harassment against the employee and who had received relevant information from other union members. For that reason, it has not been found persuasive when a representative tries to protect communications from a member whom he or she is representing.

In an unpublished opinion appealing a State Personnel Board decision last year, the majority of the Court of Appeal did not decide whether a union representative-member privilege exists because the employee did not show that excluding the testimony of his union representative would have changed the outcome of his case. However, a dissenting justice in the case, *Rye v. State Personnel Board*, 2012 Cal.App. Unpub. LEXIS 6520, laid out a theory supporting implication of the privilege from Government Code sections 19574.1 and 19579, which authorize a non-attorney to represent an employee at an SPB hearing.

AB 729 faces many legislative hurdles and may not be enacted, but unions and their representatives are likely to keep on pushing for the privilege.

CPER Journal Online

AG: Quo Warranto Action Appropriate Only For State-Law-Based Procedural Challenges

Protect Our Benefits, an organization representing retired employees of the City and County of San Francisco, may sue the city directly without requesting the attorney general's permission, the AG has decided. One of POB's claims challenges the substance of charter amendments that limit supplemental cost-of-living adjustments. The other allegation relates to the failure to obtain an actuarial report required by the charter, not state law, before amending the charter. The AG found neither legal ground was appropriate for a quo warranto action.

The city's pension system provides a cost-of-living adjustment pegged to the Consumer Price Index, subject to a 2 percent maximum increase. In 1996, the voters enacted a supplemental COLA to be paid from a reserve account that held investment earnings in excess of the expected amount. Originally, the supplemental COLA was designed to provide another 3 percent potential COLA, but the voters amended the charter to increase the maximum supplemental COLA to 3.5 percent. They also passed an amendment prohibiting reductions in the supplemental COLA paid to a member.

In 2011, the city placed on the ballot a pension reform measure, Measure C, that it had negotiated with the unions representing its employees to deal with the underfunded status of its pension fund and its dwindling revenues. In addition to reducing the retirement benefits of new employees, it changed the contribution requirements of existing employees. (See story in [CPER No. 203](#).) The measure also provided that supplemental COLAs would be paid only when the retirement system was "fully funded based on the market value of the assets for the previous year."

Measure C passed. POB claimed that the charter amendment effectively eliminated the supplemental COLA in violation of vested contractual rights of city retirees. It also pointed out that the city charter required an actuarial analysis of the change before the charter could be amended. It challenged the city's action under Code of Civil Procedure section 803, which allows a party to sue a person who unlawfully usurps or exercises the power of any public office in a quo warranto action if the party receives permission from the attorney general.

The AG explained the purpose of the quo warranto provision is to allow the state in its sovereign capacity to protect the public interest and welfare. Since the state delegates power to cities and other public entities, it has a sovereign interest in enforcing state laws that govern how they perform governmental functions.

Although POB's vested rights claim was based on both the state and federal constitutions, the AG did not find it necessary or appropriate to use a quo warranto

action to enforce substantive rights of the retirees. The AG explained, “The state’s sovereign interest, and the general public interest, are uniquely implicated where a local agency has enacted or amended charter provisions in violation of state laws governing the lawmaking process.” In prior cases, the AG had granted leave to sue because cities had failed to bargain with employees in violation of state law before enacting ordinances, or had enacted charters without following state constitution provisions. Except to review the processes of an enactment or charter amendment, the state does not have an interest in litigation of the substantive rights of individuals or groups, it decided. The AG emphasized that she was not deciding whether POB’s vested rights claims were meritorious, and that the retirees were free to file their challenge in court.

While based on procedural irregularities, POB’s second contention also was not appropriate for a quo warranto action. The city had argued the actuarial report requirement in its charter was preempted by state law, but the AG did not examine that issue. Because POB’s claim was based on the city charter’s mandate, rather than state law, the state has no interest in enforcing it, the AG decided. The opinion did not, however, state whether such a claim could be brought without the AG’s permission. (Opinion by AG Kamala Harris, Ops.Cal.Atty.Gen No. 12-203 [12-14-12] 2012 DJDAR 16883.)

CPER Journal Online

Discharge Upheld for Personal Use of Law Enforcement Data and Harassment of Ex-Wife

A police officer's misconduct during his separation and divorce harmed the public service and justified his termination, arbitrator Ernest Gould found. The turmoil of his personal life did not mitigate against his discharge.

In 2009, the officer's wife asked him to move out. They split custody of their two children. The officer asserted they were attempting reconciliation over the summer of 2010, but the wife insisted she just wanted to remain friends for the sake of the children.

In September 2010, while on patrol, the officer accessed the California Law Enforcement Telecommunications System (CLETS) to obtain information about a man that his estranged wife had dated but no longer was seeing. It is against police department policy and state law to access CLETS for personal reasons. Officers are warned that they can be terminated for CLETS misuse. The officer claimed he improperly accessed the system because he was fearful that his wife had become involved with someone who might have a criminal record. There was no evidence, however, that the man was involved with the family at the time.

In October, the officer again accessed CLETS to look up information on his wife's new boyfriend, although he knew that using CLETS for personal purposes was illegal and against department policy. Again, his excuse was that he feared for his family's personal safety. During the period leading up to his divorce, he sent his wife angry text messages containing profanity. In one text, which stated, "You deserve a shorty life," he claimed he had misspelled a swear word.

At some point, his wife learned of the CLETS misuse and filed a complaint with the police department. The department verified the improper access. When a police department knows of CLETS misuse, it must report the misconduct to the state Department of Justice. An individual's access can be restricted for CLETS violations. In extreme cases, an entire department's access can be blocked. Since the system is used to research criminal histories and missing persons, look for restraining orders, and obtain information from the Department of Motor Vehicles, lack of access cripples an officer's ability to do his job.

Criminal charges were filed against the officer for both the CLETS violations and the telephone harassment of his wife. He pleaded no contest to the harassment charges, and the CLETS charges were dropped. However, the police department had to notify the district attorney of the conviction. The officer's name was placed on the department's *Brady* list, which alerts criminal lawyers to his conviction and limits his usefulness as a witness in court. The department terminated his employment.

The officer was well liked and had no disciplinary record. Although it was known

throughout the office — and even in the neighboring law enforcement community — that he had misused CLETS, many coworkers signed a petition for his reinstatement. This did not persuade either the department or arbitrator Gould to reverse the termination.

The officer did not dispute either the CLETS misconduct or the harassing texts to his wife. Therefore, the only issue before the arbitrator was whether there was just cause for the penalty.

The officer argued that his violations were not serious, but arbitrator Gould did not agree. The police chief had testified that the CLETS violations could have had serious ramifications for the department and that those charges by themselves warranted discharge. The arbitrator did not accept the officer's assertions that he had accessed the information in the heat of the moment out of concern for his family's safety. The first violation occurred when the subject of the search was no longer involved with his wife, and a second one happened weeks later. The officer could have checked public records under Megan's Law or filed a complaint with a protective agency if he truly had concerns, the arbitrator noted.

Nor were the harassing texts minor misconduct. Although the police chief acknowledged that he might not have terminated the officer for the texts alone, the arbitrator pointed out they were so numerous and abusive that the officer was charged criminally. He also agreed with the chief that they raised questions about the officer's ability to act ethically under pressure.

The arbitrator rejected the contention that his misconduct did not harm the public service. The officer's conviction was a matter of public record. Neighboring law enforcement agencies knew of the CLETS violations. In addition, his placement on the *Brady* list limited his usefulness as an officer, since the district attorney might decline to file charges in some cases.

There was no guarantee that he would not misuse CLETS again, and it is not possible for the police department to monitor an officer's use. Progressive discipline short of termination was not required in this case, said the arbitrator. The officer intentionally used CLETS for personal reasons twice, knowing that he could be terminated. As the chief testified, his inclusion on the *Brady* list makes it difficult for the police department to function at full capacity. The arbitrator denied the disciplinary appeal. (*City of X and X Police Officers Assn.*, 4-12-12.

Representatives: Ronald Scholar [Kronick, Moskovitz, Tiedemann & Girard] for the city; Steven W. Welty [Mastagni, Holstedt, Amick, Miller & Johnsen] for the appellant. Arbitrator: Ernest S. Gould [CSMCS # ARB-10-0463].)

CPER Journal Online

Public Sector Arbitration Log

ATTENTION ATTORNEYS AND UNION REPS

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

- Contract interpretation
- Involuntary transfer
- Seniority

Sacramento County Superior Court and United Public Employees Union Local No. 1 (1-7-13; 7 pp.) *Representatives:* Steven Crooks (Legal Services, Administrative Office of the Courts) for the employer; Cedric Porter (Business Agent, UPE Local 1) for the union. *Arbitrator:* C. Allen Pool.

Issue: Did the court violate the negotiated policy by involuntarily transferring the grievant to another division?

Union's position: (1) The court violated the transfer policy when it involuntarily transferred the grievant from the pool of alternate courtroom clerks in the family law/probate division to another division in another location.

(2) The policy requires the court to select an employee for involuntary transfer based on business needs of the court, and then, if all other factors are equal, to use volunteers and/or seniority to determine the employee subject to transfer.

(3) The court did not establish a business need to transfer the grievant. The grievant had greater seniority than three other clerks who were not transferred.

(4) The transfer should be set aside and the grievant made whole for work-related expenses.

Employer's position: (1) The court did not violate the transfer policy. The transfer was based on the legitimate business need to maintain efficiency. The primary function the grievant had solely performed for six years had been eliminated.

(2) The grievant was transferred to another division in compliance with the policy because no alternate courtroom clerks volunteered and she had less experience than the others.

Arbitrator's holding: The grievance is sustained.

Arbitrator's reasons: (1) The grievant's involuntary transfer occurred prior to the negotiated transfer policy's adoption, but the parties agreed the arbitrator was to apply that policy to the present grievance.

(2) The policy requires the court to make involuntary transfers first because of business necessity and then by seniority among alternate courtroom clerks, if none volunteers for the transfer.

(3) In selecting the grievant for involuntary transfer when no clerks volunteered, the court asserted that her greater seniority was not controlling because she lacked sufficient skills, abilities, and knowledge of family law/probate court procedures and practices.

(4) The court presented no evidence to support that contention, nor any evidence to show she was transferred for legitimate business reasons. There is evidence that the grievant had a variety of court experience and training, so the decision not to consider her knowledge and abilities and to ignore her seniority was arbitrary.

(5) The grievant is to be reinstated to her former position.

(Binding Grievance Arbitration)

- Progressive discipline
- Insubordination
- Neglect of duty
- *Weingarten* right to representation
- Disability discrimination

County of Sacramento and Teamsters Loc. 150 (9-24-12; 22 pp.)

Representatives: Catherine Spinelli (Office of the County Counsel) for the county; John Provost (Beeson Tayer & Bodine), for the union. *Arbitrator:* Katherine J. Thomson.

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

Employer's position: (1) The grievant was suspended for five days for inexcusable neglect of duty and insubordination when she refused to perform, did not timely comply with, or made excuses about not performing assigned duties as a code enforcement supervisor. She repeatedly failed to respond to her manager's written requests and phone calls.

(2) After returning from a health-related leave, her third in three years, she was given a new assignment, but also required to complete duties relating to her former assignment. The workload was heavy but reasonable for an experienced code enforcement officer.

(3) The suspension was an appropriate step in progressive discipline. In the preceding year, she received a counseling memo for inappropriate and unprofessional communications. She also received a written reprimand for poor time management, failure to follow directions, and poor judgment that resulted in her working in unsafe conditions.

(4) The grievant's disability rights were not violated. She did not ask for the accommodation of a reduced workload in February 2011, as the union asserts, and did not claim prior to her suspension in April that a disability was interfering with her job performance, but merely said her workload was too high. The grievant did not present any evidence of her ADA condition, only that she had a certification for FMLA leave, which she was given.

Union's position: (1) The suspension is without good cause. The grievant did not neglect her duties. Her work assignment was unreasonable, as she oversaw twice as many employees as other supervisors.

(2) Her supervisor unreasonably expected her to respond to her emails when others had already supplied the requested information. It was unreasonable to expect her to answer the phone immediately, since her duties took her out of the office, but she returned calls within 30 minutes.

(3) The county has not proved insubordination. She did not willfully disregard instructions, nor refuse to perform duties; rather she performed most duties in a timely manner and requested clerical support. Delays were caused by her unreasonable workload.

(4) Work stress exacerbated her disability, and the employer did not provide reasonable accommodation until shortly before the arbitration hearing. Her request for a transfer or reduced workload was not accepted as a request for accommodation. Legally, she was not required to use particular words because the employer knew of her disability. Her requests for more clerical support and fewer emails were met with more demanding deadlines, instead of the interactive process.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasons: (1) The grievant had a heavy workload, heavier than her prior assignment. The issue is whether the department unfairly assigned work and whether her response to the workload was adequate or whether her responses to her supervisor constituted insubordination.

(2) The evidence about her performance of each duty cited as grounds for discipline shows that the county has borne its burden of proving some, but not all, of the allegations of failure to perform duties in a timely manner and inexcusable neglect of duty.

(3) The evidence does not support the charge of insubordination, but rather shows she responded at least partially to her supervisor's demands, with one exception — her outright refusal to provide information about an assignment without the presence

of a union representative

(4) The grievant's *Weingarten* right to union representation was not violated. Although discussion of progress on her assignment was the source of potential discipline, the supervisor's request for work status was in an email and not a meeting. Even if the request was investigatory to a limited degree, it is an employer's prerogative to ask whether work assignments have been completed. Had the supervisor then taken the next step of inquiring about any circumstances related to the failure to complete tasks, that would have been investigatory and the request for representation justified, but that was not the case.

(5) In this discipline case, the arbitrator lacks jurisdiction to determine whether the employer should have granted a disability accommodation, or whether it discriminated against her for taking disability leave, unless there is evidence of discrimination that constitutes a lack of good cause for the suspension.

(6) Evidence regarding her medical leaves and her disability is insufficient to establish disability discrimination. After the suspension, she presented a document indicating there had been prior disabling conditions and requests for accommodation, but it does not state when or whether they were made while this supervisor supervised the grievant and issued the suspension. It is not clear whether the health conditions then identified were for the same disability that affected her ability to handle her heavy workload.

(7) The county did not abuse its discretion in issuing the suspension. The single proven instance of insubordination, plus her failure in several other instances to perform her duties as directed, justify a five-day suspension as the next step in progressive discipline. As to whether discipline should have been postponed once a question of disability was raised in the weeks prior to the suspension, the grievant did not request any disability accommodation relating to her inability to handle her workload.

(Binding Grievance Arbitration)

- Contract interpretation
- Collective bargaining
- Parity clause
- Furloughs

International Union of Operating Engineers, Stationary Engineers, Loc. 39 and County of Yolo (7-27-12; 10 pp.) *Representatives:* Daniel C. Cederborg (assistant county counsel) for the county; Stewart Weinberg (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* Paul Staudohar (CSMCS Case No. ARB-11-0278).

Issue: Did the employer violate the section of the agreement that requires equivalent concessions in other units if furloughs are imposed?

Union's position: (1) The employer violated the MOU. The union agreed in concession bargaining to an 88-hour furlough for the General Unit for 2011-12, but only if equivalent concessions (not just furloughs) were applied to all other employees, as required by another provision in the same article.

(2) Because equity adjustments were made for supervisors based on a two-year comparison, in response to their complaint regarding parity with other units, and the General Unit's MOU contemplates only a one-year comparison with regard to furloughs, concessions for General Unit employees exceeded concessions for supervisors in 2011-12. Even if both years are considered, there was no equivalency.

(3) The supervisors made a 4.43 percent concession in 2011-2012, which is 3.8 percent less than concessions extracted from the General Unit. The General Unit conceded 8.23 percent (a 4 percent increase in pension contributions and 4.23 percent increase in furloughs). The supervisors contributed 6 percent in pension contributions but did not have any furloughs and also received a 1.5 percent pay increase, due to a claimed lack of equivalency in the prior year.

Employer's position: (1) The union focuses on section 5.19.6, which allows furloughs only if an equivalent measure is to be applied to all other employees, but it ignores section 5.19.7, which states that an 88-hour furlough is to be applied in 2011-2012 to the General Unit.

(2) Section 5.19.6 limits the county's right to impose furloughs without further negotiations or agreement of the union; however, section 5.19.7 is a stand-alone agreement not limited by section 5.19.6. Therefore, the county did not violate the MOU by implementing the 88-hour furlough.

(3) Settlement of the supervisors' parity complaint did not violate the General Unit MOU because the county accurately calculated the concessions of the two units. The union included a supervisory wage increase for the prior year when calculating comparative concessions, but that increase was previously agreed to and would have gone into effect whether or not any concessions were negotiated in 2011-12.

(4) The union's position, if adopted, would spark another complaint from the Supervisors Unit and subject the county to an endless succession of grievances over its good faith efforts to settle a complaint short of arbitration.

Arbitrator's holding: The grievance is granted.

Arbitrator's reasons: (1) Both parties focus on section 5.19.6, which allows furloughs only if an equivalent measure is to be applied to all other county employees.

(2) While section 5.19.7 calls for 88 furlough hours in 2011-12, and can be considered as a separate commitment, it is not sealed in a vacuum. A contract provision must be interpreted in light of other provisions in the "four corners of the agreement."

(3) Section 5.19.6 states that the furloughs will only be instituted if an equivalent measure is applied to all other employees. In 2011-12, supervisors had no furloughs, having been granted a reduction of furlough hours from the prior year. Therefore, the county violated the MOU.

(4) The county is between a “rock and a hard place,” as the reduction in furloughs for supervisors in 2011-12 was a result of a side letter intended to resolve their parity complaint by providing an adjustment spread over two years that included no furloughs in 2011-12. However, since the General Unit’s provision for 88 furlough hours applies only to 2011-12, the equivalency clause requires that concessions for that year be equal across all units.

(5) Accordingly, the General Unit is entitled to a 3.8 percent reduction in furlough hours in order to be equal to the total concessions granted to the Supervisors Unit in 2011-12. Employees are to be made whole, either by reducing untaken furloughs or paying employees who have already taken all of their furloughs.

(Binding Grievance Arbitration)

- Contract interpretation
- Past practice
- Out-of-class pay

Port of Oakland and SEIU Loc. 1021 (7-17-12; 5 pp.) *Representatives:* Daniel S. Connolly (deputy port attorney) for the employer; Anne I. Yen (Weinberg Roger & Rosenfeld) for the union. *Arbitrator:* Philip Tamoush.

Issue: Did the employer violate the contract by denying semi-skilled laborers acting pay for out-of-class work?

Union’s position: (1) The employer violated the agreement when it denied semi-skilled laborers (grievants) out-of-class pay for operating vehicles other than one-ton trucks and three-wheeled trucks, which are the only two vehicles listed in their job description.

(2) Grievants have been paid the differential when operating specialized gear such as aerial-lift trucks and large forklifts, but the employer has not been paying the differential to grievants for operating such extra equipment if they do not have a commercial driver’s license.

Employer’s position: (1) Grievants generally operate motorized equipment, including automobiles and “pickup trucks,” some of which contain specialized equipment such as sweeping equipment. They continue to operate such trucks without incurring higher-class pay.

(2) The employer has consistently refused to give acting pay, even when requested, for driving small dump trucks.

(3) The union claims a small dump truck can exceed one-ton capacity, so driving it justifies acting pay; however, the contract does not require the employer to pay the out-of-class differential, and payment would be contrary to past practice.

(4) The semi-skilled laborer class specification contemplates some duties related to those listed. Because the skills at issue here do not require the Class A commercial license, they are not of the higher classification that would require out-of-class pay.

(5) The union is attempting to break past practice and establish a new requirement not mandated by the agreement's acting pay requirement or by the class specifications.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasons: (1) The grievants claim they should receive acting pay when driving even small dump trucks, but that would be contrary to past practice.

(2) The class specification includes "light trucks up to and including one-ton rated capacity." The small dump trucks are rated as one-ton capacity. Although on occasion they may have over one-ton capacity, semi-skilled laborers have operated them without receiving out-of-class pay for as long as they have been used by the port.

(3) The employer agrees that when grievants operate specialized equipment on an extended basis, as the agreement contemplates, they will be paid the differential, but they must hold a commercial driver's license to qualify.

(4) Past practice in this case does prevail, so the grievance is denied.

(Binding Grievance Arbitration)

- Contract interpretation
- Binding past practice
- Pay — mileage reimbursement

City of San Jose and AFSCME Local 101 (5-19-11; 16 pp.) *Representatives:* Colleen Winchester (senior deputy city attorney) for the employer; Andrew H. Baker (Beeson, Tayer & Bodine) for the union. *Arbitrator:* Alonzo M. Fields, Jr. (CSMCS Case No. ARB-10-0336).

Issue: Did the employer violate the contract by discontinuing mileage reimbursement to school crossing guards for commuting to and from home?

Union's position: (1) The employer had an established past practice of reimbursing crossing guards for mileage to and from their homes; discontinuing the practice violated the MOU.

(2) The practice is binding as a contractual obligation because it has been

unequivocal, clearly enunciated and acted upon, and occurred over a long period of time as a fixed and established practice.

(3) The employer was aware of the practice, as crossing guards were trained to submit reimbursement claims, which were regularly approved and paid over several years.

(4) The employer failed to negotiate any change in the established practice, which has the effect of a contract term governing a working condition.

Employer's position: (1) The MOU authorizes mileage reimbursement for use of personal vehicles only if required for performance of employees' duties. A written city policy expressly states mileage reimbursement is not paid for travel to and from work.

(2) Payment of commuting mileage to crossing guards was a mistake, and not practiced in any other classification governed by the same MOU.

(3) The complete agreement clause states that the MOU's terms supersede or terminate any prior or existing practices or agreements.

(4) A repeated mistake cannot modify the MOU or city policy, under PERB case law.

(5) The employer's failure to enforce the express written policy does not preclude it from beginning to enforce it.

(6) A supervisor, charged with ensuring compliance with city policy, does not have authority to modify that policy.

Arbitrator's holding: The grievance is denied.

Arbitrator's reasons: (1) The practice of reimbursing crossing guards for commute mileage had continued for years, only discovered when budget concerns prompted a review of expenditures.

(2) It is generally recognized that established past practice stands on the same footing as written provisions in the contract, becoming an implied term of that contract; however, this case is distinguishable because of the culpability of the supervisor who wrongly approved the mileage claims but who should have known that it was against city policy.

(3) It is difficult to believe that the supervisor did not know that reimbursement was improper, as the policy is stated in several written documents. She testified that she had not reviewed written policy, and that when she was employed in 1987, guards were instructed to claim mileage to and from home. Her understanding is most likely due to miscomprehension, and does not show that the employer instructed guards to violate the clear written policy.

(4) Had the employer knowingly allowed the practice to continue, then it would be binding as the union claims; however, it assumed crossing guards were being paid

according to policy, which requires the supervisor to certify compliance with mileage policy, and it corrected the mistake when it was discovered.

(Binding Grievance Arbitration)

CPER Journal Online

Public Employment Relations Board Cases

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

Request to negotiate effects is essential part of prima facie case: Dept. of Corrections & Rehabilitation.

(California Correctional Peace Officers Assn. v. State of California [Department of Corrections & Rehabilitation, Avenal State Prison], No. 2196-S, 8-12-11. By Member Dowdin Calvillo, with Member McKeag; Member Huguenin dissenting.)

Holding: The union's failure to request to negotiate over the effects of the department's unannounced decision resulted in dismissal of the charge.

Case summary: The union alleged that the department unilaterally changed its policy concerning unannounced random searches entering the secured perimeter at the prison without providing it with prior notice and an opportunity to bargain over the effects of the change such as overtime work and late relief. A board agent dismissed the charge.

The board affirmed the dismissal based on the union's failure to request to negotiate over the effects of the decision. Having failed to do so, said the board, it cannot establish a prima facie case. In addition, the board found that the union failed to identify any negotiable effects arising out of the decision. Once the union is aware of the change, the employer's failure to give formal prior notice is of no legal import. The union still must make a valid request to negotiate.

Member Huguenin dissented. When, as here, an employer fails to provide pre-implementation notice of changes foreseeably impacting employment conditions, a union does not waive its impact bargaining rights by failing to request impact bargaining.

A petition for review of this decision was denied by the Court of Appeal.

Charge fails to allege factual basis for violation: Dept. of Mental Health and Dept. of Developmental Services.

(*Xu v. State of California [Department of Mental Health, Department of Developmental Services]*, No. 2305-S, 12-31-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party failed to allege a clear and concise statement of facts to support a charge that the departments violated the Dills Act.

Case summary: The charging party submitted as her unfair practice charge a document referencing material she sent to the California State Auditor's Office and the Governor's Office. A board agent dismissed the charge, finding that none of the documents pertained to conduct within PERB's jurisdiction. He informed the charging party that she failed to provide any facts for PERB to make a determination as to whether the state violated her rights under the Dills Act.

On appeal, the board found the amended charge failed to contain a clear and concise statement of conduct alleged to constitute an unfair practice within PERB's jurisdiction as required by PERB Reg. 32615(a)(5). The charging party's appeal restated the facts alleged in the charge and did not reference any portion of the dismissal letter or issues of procedure, fact, law, or rationale to which the appeal was taken.

The board affirmed the dismissal of the charge and adopted and incorporated as part of its own decision the reasoning set forth in the board agent's warning letter.

Representation Rulings

Retired annuitants not in state bargaining unit 8 absent unit modification: Dept. of Forestry and Fire Protection.

(*California Department of Forestry Firefighters v. State of California [Department of Forestry and Fire Protection]*, No. 2162-S, 2-10-11. By Member McKeag, with Chair Dowdin Calvillo; Member Wesley concurring and dissenting.)

Holding: Retired annuitants are not automatically part of state bargaining unit 8, and the department was not obligated to withhold fair share fees from their paychecks.

Case summary: An unfair practice alleged that the department failed to withhold fair share fees for retired annuitants employed in the bargaining unit represented by the charging party.

An administrative law judge determined that retired annuitants working as firefighters were included in bargaining unit 8 as a result of the board's original unit determinations for state employees, and concluded that the state unlawfully unilaterally changed a matter within scope when it refused to withhold fair share fee deductions from their paychecks.

On appeal, the board reversed the ALJ's proposed decision. Relying on *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Dec. No. 2154-S, 201 CPER 72, the board noted that retired annuitants as a class of employees were not considered by the board when it formulated the original state bargaining units. In addition, the board observed that the retired annuitants do not accrue vacation, annual leave, sick leave, or compensatory time off. They do not receive healthcare insurance, accrue retirement benefits, or get promotional opportunities. These differences must be analyzed using the unit determination criteria, but have not been. Accordingly, the board found that retired annuitants are not automatically placed in existing state bargaining units.

PERB also held that to add retired annuitants to the bargaining unit, the union must use the unit modification process.

The board noted that, despite notice from the State Controller's Office, the union failed to submit appropriate forms to the SCO in order for fair share fees to be collected. This provides further evidence that the department's decision not to deduct fair share fees from retired annuitants was not an unlawful unilateral change. Member Wesley dissented from the opinion that the retired annuitants were not part of the bargaining unit, citing several PERB decisions. A petition for review in the Court of Appeal was denied.

EERA CASES

Unfair Practice Rulings

PERB's jurisdiction does not extend to claim that district improperly withheld wages: LAUSD.

(Mnyandu v. Los Angeles Unified School District, [No. 2299](#), 12-20-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The wage claim raised in the charge is outside the board's jurisdiction, and the doctrine of equitable estoppel did not apply to the untimely filing.

Case summary: The charging party alleged that the district unlawfully withheld her wages, misreported her wages on tax documents, failed to provide relevant information, and failed to remedy the wage withholding problem. A board agent

dismissed the charge for lack of jurisdiction and failure to state a prima facie case.

On appeal, the board affirmed the B.A.'s conclusion that the claim asserting improper withholding of wages occurred more than six months prior to the filing of the charge. The doctrine of equitable estoppel does not apply, the board said, because the factual allegations do not support the charging party's claim that she was induced to delay the filing of the charge based on the district's misrepresentation or concealment of material facts.

Notwithstanding the district's failure to comply with PERB regulation 32132(b), the board agent found good cause to grant the district's request for an extension of time to respond to the charge.

The board also affirmed the B.A.'s conclusion that the charging party's pay dispute with the district was outside PERB's jurisdiction. That deficiency was not cured by characterizing her complaint as interference or retaliation.

Duty of Fair Representation Rulings

District denied the association information necessary to its bargaining role: Santa Monica CCD.

(*Santa Monica College Faculty Assn. v. Santa Monica Community College Dist.*, No. 2303, 12-21-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The district failed to provide the association with information relevant and necessary to carry out its representational duties.

Case summary: The association alleged that the district failed to provide relevant and necessary information pertaining to a provision in the collective bargaining agreement. An administrative law judge determined that the district breached its duty to bargain in good faith when it refused to provide the association with a list of part-time faculty who did not have a retirement election form in their personnel file. The ALJ rejected the district's claim that providing the list would infringe on employee privacy rights.

On appeal, the board affirmed the ALJ's proposed decision. However, it did not adopt the ALJ's comment that there was no evidence the association was seeking to influence the operation of the California State Teachers Retirement System or to represent its members before that body. Because the information is necessary and relevant to the discharge of the association's representational duties, the board noted, the fact that a union may or may not also use that information to represent employees in other forums does not negate its right to obtain the information to which it is entitled under EERA.

No DFR breach alleged in charge: CSEA

(*Williams v. California School Employees Assn. and its Chap. 500*, [No. 2304](#), 12-28-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party did not allege facts showing the association breached its duty of fair representation in the manner in which it handled the charging party's disputes with her employer.

Case summary: The charging party alleged that the association breached its duty of fair representation by failing to communicate with her about various disputes with her employer, the Los Angeles Unified School District. The disputes were over reassignment from a high school to a middle school, pay discrepancy, and layoff. A board agent determined that the charge failed to state a prima facie violation of the duty of representation and dismissed the charge.

On appeal, the board affirmed the B.A.'s dismissal. It adopted the B.A.'s determination that the manner in which the association handled her grievances and pay discrepancy dispute was not arbitrary, discriminatory, or in bad faith. Nor did the association breach its duty of fair representation when it decided not to proceed to arbitration on a grievance it filed contesting her reassignment or when it did not file grievances regarding the pay dispute or the layoff.

HEERA CASES

Unfair Practice Rulings

Good cause for late filing demonstrated: U.C.

(*Estes v. Regents of the University of California*, [Ad-396-H](#), 11-27-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The university demonstrated good cause under PERB regulations for the board to accept its late-filed response to the charging party's statement of exceptions to an ALJ's proposed decision.

Case summary: The board's appeals assistant found the university filed a timely response to the charging party's exceptions to a proposed decision of an administrative law judge. The university appealed that determination and the board found good cause to accept the university's filing.

The board noted that the university prepared and intended to send PERB its response to the exceptions by facsimile on the day they were due. However, the fax was placed in the United States mail with proof of service in accordance with PERB Reg. 32135(c). Based on these facts, the board found the university had provided a reasonable and credible explanation for its late filing. In addition, PERB found no indication the late filing prejudiced the charging party in any way, since the response was served on the due date and PERB regulations do not provide for a party to file a

reply to another party's response to a statement of exceptions.

Withdrawal of appeal granted: CSU (Sacramento).

(*California State University Employees Union v. Trustees of the California State University [Sacramento]*, [No. 2293-H](#), 11-29-12. By Member Huguenin, with Members Dowdin Calvillo and Chair Martinez.)

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

Case summary: The union alleged that the university interfered with the exercise of an individual's rights granted by HEERA. A board agent dismissed the charge, and the union appealed. The union then filed a request to withdraw its appeal, which the board granted as being in the best interests of the parties and consistent with the purposes of the act.

No showing that protected activity was "but for" cause of employee's dismissal: U.C.

(*Estes v. Regents of the University of California*, [No. 2302-H](#), 12-21-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: In this mixed-motive case, the evidence failed to prove that the university would not have terminated the charging party but for his protected activity.

Case summary: The charging party alleged that the university suspended and terminated his employment in retaliation for having engaged in numerous protected activities. An administrative law judge determined that his suspension was based in part on the charging party's contractual challenge to the university's demand for a doctor's note for an absence. The ALJ found the discipline would have occurred even in the absence of any protected activity.

On appeal, the board explained that in a mixed-motive case, where the employer's adverse action was motivated by both lawful and unlawful reasons, the question is whether the adverse action would not have occurred but for the protected activity. The board's task is to determine whether the employer's true motivation for taking the adverse action was the employee's protected activity.

Here, the board affirmed the ALJ's finding that, although there was direct evidence that the university was motivated in part by the employee's protected activity, the university established it would have taken the same action even if he had not engaged in protected activity. The board also agreed that the evidence failed to demonstrate the university's true motivation in deciding to suspend and terminate him was based on protected activity rather than on its expressed concerns over his workplace behavior.

MMBA CASES

Unfair Practice Rulings

Request to withdraw unfair practice charge granted: El Camino Hospital Dist.

(*SEIU United Healthcare Workers West v. El Camino Hospital Dist.*, [No. 2291-M](#), 11-19-12. By Chair Martinez, with Members Huguenin and Dowdin Calvillo.)

Holding: The union's request to withdraw its unfair practice charge was in the best interest of the parties and consistent with the purposes of the MMBA.

Case summary: SEIU filed an unfair practice charge alleging that the hospital district accepted deficient proof of support in a decertification petition and merged three bargaining units without following local representation rules. An administrative law judge concluded that the district had violated its local rules and ordered that the decertification petitions be administered separately in the three units.

The union filed exceptions to the ALJ's proposed decision.

Thereafter, the union notified PERB that it wished to withdraw the unfair practice charge because the parties had reached a global settlement of their dispute.

The board found that withdrawal of the charge was in the best interests of the parties and consistent with the purposes of the MMBA, and granted the union's request.

Withdrawal of appeal granted: County of Santa Clara.

(*Jones v. County of Santa Clara*, [No. 2292-M](#), 11-27-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

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

Case summary: The charging party alleged that the county unilaterally changed the memorandum of understanding between the county and his exclusive representative. A board agent dismissed the charge, and he appealed. He then filed a request to withdraw his appeal, which the board granted as being in the best interests of the parties and consistent with the purposes of the act.

Denial of deficient unit modification request upheld: County of Orange.

(*Orange County Medical and Dental Assn. v. County of Orange*, [No. 2294-M](#), 11-30-

12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The manner by which the county processed the association's unit modification request under its local rules did not violate the act.

Case summary: The association alleged that the county refused to process its request for modification of the healthcare professional unit, refused to allow an appeal by the association to be heard by the board of supervisors, and violated the physicians' and dentists' rights as professional employees to a separate bargaining unit. Because the association filed a request for verification of its employee representation status on the same day as its unit modification request, a board agent determined that a sufficient unit modification request had not been filed during the 30-day window period as established by the county's local representation rules and dismissed the charge.

On appeal, the association argued that the local rule, which permits a 30-day window period for filing a unit modification request but does not allow a unit modification request to be filed after the expiration of the contract, is illegal on its face. The board noted that in its charge, the association asserted it had filed a timely request for unit modification, but owing to the county's delay in affirming the association's status as a verified employee organization, the county determined the request was filed outside the window period. Based on this assertion, the board said, it would not opine about the reasonableness of the rule as it applied to circumstances that were not involved in this charge.

The board also declined to permit the association to allege for the first time on appeal that its unit modification request was filed after expiration of the contract and before execution of a successor agreement. The association had an opportunity to amend its charge in a pre-dismissal warning letter, the board said.

Finally, the association argued that it should not be penalized for the county's delay in processing its requests for verification and modification. However, the board found that the timing of the association's filings left the county with insufficient time to act before the window period closed. Had the association filed its request for verification at the beginning of the window period, it would have had sufficient time within the 30-day period to file its request for unit modification under local rules. Moreover, the board added, there is no window period for filing a request for verification under the county's local rules. Therefore, the board reasoned, the assertion that the county's delay in processing its requests caused prejudice to the association is not supported by the allegations in the charge.

The board upheld the determination that the board of supervisors' failure to hear the appeal was permitted by its local rules, and that the county was not required to grant the physicians and dentists a separate bargaining unit in absence of a sufficient request.

Dispute about collection of agency fees is with union, not employer: City and

County of San Francisco.

(*Michael v. City and County of San Francisco [Department of Aging and Adult Services; San Francisco In-Home Supportive Services Public Authority; joined party*, No. 2295-M, 11-30-12. By Chair Martinez, with Members Dowdin Calvillo and Huguenin.)

Holding: The charging party failed to file the charge concerning the collection of agency fees against his exclusive representative; the charge against his employer is dismissed.

Case summary: The charging party alleged that the department withheld agency fees without his knowledge or permission. A board agent allowed the charging party to join the public authority as a respondent employer, but dismissed the charge because the charging party named the wrong respondent.

On appeal, the charging party argued that the department falsely represented that union membership is mandatory for homecare workers who work more than 20 hours, and that it coerced him into paying union membership fees. He also argued that the department, not the public authority, is his employer.

It is an unfair practice for an exclusive representative to collect agency fees in violation of PERB regulations, the board explained. Therefore, the charging party's dispute is with SEIU, Local 250, Health Care Workers Union, not with his employer. The board therefore affirmed the dismissal of the charge.

Complaint to issue over failure to negotiate implementation and effects of layoff decision: Salinas Valley Memorial Healthcare System.

(*National Union of Healthcare Workers v. Salinas Valley Memorial Healthcare System*, No. 2298-M, 12-20-12. By Member Huguenin, with Chair Martinez; Member Dowdin Calvillo concurring and dissenting.)

Holding: The union's allegations are sufficient to state a prima facie case that the hospital failed to meet and confer in good faith over the implementation and effects of its layoff decision.

Case summary: The union alleged that the hospital failed to meet and confer in good faith over a decision to lay off employees, the implementation of the layoff, and the impacts and effects of the layoff on remaining employees that the union requested to bargain. The union also charged that the hospital failed to provide it with requested information regarding the layoff, its implementation, and its negotiable effects. The general counsel dismissed the charge for failure to state a prima facie case.

The board first affirmed that, under PERB precedent, the hospital was under no obligation to meet and confer regarding the managerial decision to lay off employees. It also found that a provision in an expired MOU that arguably required

the hospital to meet and confer over the decision to lay off employees did not render the decision itself negotiable. The board explained that the obligation to maintain the status quo on matters within the scope of representation attaches only to those matters that are mandatory subjects of bargaining. Including an agreement on a non-mandatory subject within an MOU does not convert the non-mandatory subject to a mandatory one, the board explained.

Once an employer makes a layoff decision driven by labor cost considerations, the board continued, it is obligated to notify the organization representing employees of that decision and meet and confer in good faith, upon request, regarding the implementation and the reasonably foreseeable effects of the layoff decision on remaining employees. Only under certain circumstances may an employer implement a non-negotiable layoff decision prior to completing the meet and confer process.

Here, while the hospital changed its position during talks with the union about the timing of the layoffs and the number of positions affected, those changes did not immunize it against the union's bad faith bargaining charges because it continued to assert that the timing and the number and identity of employees to be laid off were managerial prerogatives and did not meet and confer on the impact of the layoff on safety or workload of the remaining employees. Where an employer believes a matter to be outside the scope of mandatory meeting and conferring, the board explained, it is obligated to explore the matter in meet and confer discussions. The hospital's position on safety and workload issues was absolute and unlawful.

The board also found that the union alleged a prima facie case that the hospital prematurely declared impasse and implemented the layoff before negotiations over implementation and effects were complete. PERB noted that end-of-the-year anticipated reimbursement reductions from the insurer did not necessarily create an immutable externally established deadline which mandated that the layoffs be implemented by a certain time. The board underscored that, at the pleading stage of an unfair practice case, conflicting allegations of fact are left to be determined by an administrative law judge after a full evidentiary hearing.

The board affirmed the dismissal of the union's charge that the hospital failed to provide information regarding the layoff. The hospital gave the union information as it became available, and the union did not claim that its response was insufficient or that the hospital should have provided the information with greater alacrity or in greater detail.

Member Dowdin Calvillo issued both a concurring and dissenting opinion. Although the union alleged it repeatedly made demands to bargain over the timing of the layoffs and the number and identities of the targeted employees, as well as safety and workload effects, she found the charge failed to allege that the union made any specific substantive proposals over perceived effects of the layoff decision until the day before the layoffs were to be implemented. She noted that the hospital invited the union to do so, but the union continued to take the erroneous position that the hospital was required to bargain over the non-negotiable layoff decision.

No showing of support required under local rules: County of Riverside.

(*Service Employees Intl. Union, Loc. 721 v. County of Riverside*, No. 2163-M, 2-18-11. By Chair Dowdin Calvillo, with Members McKeag and Wesley.)

Holding: The county may not require a showing of support from employees sought to be added to existing bargaining units under its local unit-modification rules.

Case summary: The union alleged that the county violated the MMBA when it denied its petitions to add unrepresented per diem employees to three bargaining units represented by SEIU. The county denied the petitions because they were not accompanied by proof that a majority of employees to be added to the units desired to be represented by SEIU. An administrative law judge ruled that it was unreasonable for the county to impose a majority support requirement.

On appeal, the board affirmed the ALJ's proposed decision. First, it noted that the county's employee relations resolution is silent regarding proof of support. And, PERB rejected the county's argument that proof of support should be implied from the local rule. The board noted that under its regulations that apply when an entity has not adopted a local rule, a showing of majority support is required only when the added requested employees would increase the size of the established unit by 10 percent or more.

Here, the board noted, the county has adopted a local rule governing unit modification, and PERB's rules do not apply.

The county can amend its unit modification rules to include a reasonable employee support requirement after consultation in good faith with the recognized employee organization, the board said. Until it does so, PERB ruled, the county may not lawfully require a showing of majority support to add employees to an existing bargaining unit. A petition for review in the Court of Appeal was denied.

Duty of Fair Representation Rulings

Union acted within its 'wide latitude' in representation of member: Inlandboatmans Union of the Pacific.

(*Park v. Inlandboatmans Union of the Pacific*, No. 2297-M, 12-12-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: An administrative law judge properly concluded that the charging party failed to allege the union breached its duty of fair representation when it did not pursue his grievance.

Case summary: The charging party alleged that the union breached its duty of fair representation by failing to pursue a grievance filed on his behalf against his former

employer, the Golden Gate Bridge, Highway, and Transportation District. The grievance concerned the district's decision to remove him from a dispatch list based on allegations of insubordination and sexual harassment.

An ALJ determined that the union did not breach its fair representation duty in handling the grievance or withdrawing from representation after it determined that the charging party's conduct made success unlikely.

On appeal, the charging party asserted that the ALJ should have recused himself, per the charging party's request, because he had presided over a related case involving an unfair practice charge filed against the district employer. The board first noted that the charging party did not file an appeal under PERB Reg. 32155, challenging the ALJ's refusal to recuse himself. Nor did the charging party present any facts indicating that, by reason of prejudice, the ALJ was unable to give fair and impartial consideration to the merits of the instant case.

The charging party also alleged that the ALJ failed to give full consideration to an email sent by the attorney retained by the union, in which he asserted that he exclusively represented the union and not the charging party. This does not establish a violation of the duty of fair representation, the board said. The fact that the attorney represented the union in the charge filed against it by the charging party in this case has no bearing on whether the union previously violated its duty of fair representation in its handling of the charging party's grievance, the board explained.

Moreover, the fact that the union chose to have another representative handle the charging party's dispute with the district did not violate the duty. The duty of fair representation does not require the union to provide a representative of the grievant's choice.

The board also rejected the charging party's contention that the ALJ gave insufficient weight to a union newsletter which contained an article about an internal union disciplinary matter brought against the charging party. Publication of the newsletter has no bearing on the issue of whether the union breached its duty of fair representation in the handling of the charging party's grievance.

Finally, the board upheld the ALJ's conclusion that the charging party failed to establish that the union's conduct in handling his grievance was arbitrary, discriminatory, or in bad faith. The union actively participated in an attempt to resolve the dispute on behalf of the charging party. The union had a rational basis for its decision to withdraw its representation based on its belief that the charging party's post-discharge conduct made further success unlikely.

TRIAL COURT ACT CASES

Unfair Practice Rulings

Dismissal of charge for failure to provide valid proof of service upheld: Los

Angeles Superior Court.

(*Woods v. Los Angeles Superior Court*, No. 2301-C, 12-21-12. By Member Dowdin Calvillo, with Chair Martinez and Member Huguenin.)

Holding: The charging party's failure to provide the board with proof that a copy of her unfair practice charge was served on the respondent supports dismissal of the charge.

Case summary: The charging party filed an unfair practice charge asserting that her employer unlawfully issued her a notice of suspension. Upon receipt of the charge, a board agent issued the charging party a notice informing her that the charge could not be investigated because she had not provided PERB with proof that the charge had been served on the respondent as required by PERB Reg. 32140. The charging party was advised that a board agent had called her on two occasions, however, she had not responded to those calls. The charging party was advised that the charge would be dismissed before September 27, 2011. On October 3, 2011, having received neither a return phone call nor a proper proof of service, the board agent dismissed the charge.

On appeal, the board explained that the requirement to provide proof of service is not "ritualistic." Its purpose is to protect a respondent from stale claims or to prevent prejudice because a respondent was unable to defend itself due to late service.

Reviewing the board agent's repeated attempts to contact the charging party concerning her failure to provide a valid proof of service, the board affirmed the dismissal. She provided no explanation for her failure to respond, the board noted. And, her assertion on appeal that she did submit documents showing proof of service was not made to the board agent before the charge was dismissed. The documents submitted in support of her appeal contain two different versions of a proof of service.

While the board may excuse defective service in some circumstances, PERB said, there is no showing that the charging party ever provided the board agent with any proof of service prior to dismissal of the charge. Sufficient grounds to overturn the board agent's dismissal for failure to comply with PERB regulations were not found.

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

No final decisions were issued during the period of December 1, 2012-February 28, 2013.

Oakland Regional Office — Final Decisions

American Federation of State, County and Municipal Employees, Loc. 3299 v. Regents of the University of California (Santa Cruz), Case No. SF-CE-996-H. ALJ Ginoza. (Issued 12-10-12; final 1-7-13, HO-U-1080-H.) The union represents a systemwide unit and a campus unit. The campus unit's contract had a me-too clause permitting UC to unilaterally change health and welfare benefits to conform to the terms of the systemwide unit. The parties prepared to negotiate a successor agreement for the campus unit while reopener negotiations were continuing for the systemwide unit. Both by phone and email, the UC negotiator requested of the union negotiator an extension of the terms of the campus unit, anticipating protracted systemwide negotiations whose economics would affect the scope of its authority in the campus negotiations. The union negotiator emailed back that the union would agree to the extension in exchange for assurances that successor agreement negotiations would commence promptly and that it would be given the ability to bargain over all subjects, adding that if these terms were acceptable, the union negotiator would prepare a side letter agreement for execution by the parties. The UC negotiator assented to the offer. The campus contract required that extension agreements be in writing. Thereafter, the systemwide negotiations concluded prior to the campus unit's original contract expiration date. The union negotiator never prepared the side letter, and once bargaining commenced informed the UC negotiator that the union would not abide by the prior agreement because the original reason for the side letter had ceased to exist. UC then implemented increases in deductions for health insurance premiums and retirement contributions consistent with the systemwide unit's newly negotiated terms and pursuant to the campus unit's me-too clause, within the time period of the extension. The union alleged a unilateral change. The union's claim was rejected because the parties had reached agreement on all material terms for the extension. Traditional rules of contract formation, including the principle of objective manifestation of intent, controlled.

Execution of a document memorializing the agreement was not a condition of enforceability. The parties' existing practice of executing all tentative agreements and grievance settlements was not determinative. Statutory law providing that email communications constitute writings for purposes of contract formation satisfied the campus contract's requirement that an extension be in writing.

Sonoma County Library and SEIU Loc. 1021, Case No. SF-UM-714-M. Hearing Officer Clement. (Issued 1-8-13; final 2-22-13, HO-R-185-M.) SEIU Local 1021 petitioned for unit modification to include unrepresented library employees in the general bargaining unit. The petition was opposed on the grounds that the employees were confidential. In applying the library's definition of confidential employees, PERB considered decisions interpreting similar statutes or definitions of confidential employees. In doing so, PERB applied both a quantitative and a qualitative test to the employee's interaction with confidential information. In such decisions, PERB must consider the actual nature of the work performed by the incumbents and does not make a determination regarding the appropriate placement of a classification with no incumbent. The petition was denied as to the vacant administrative aide positions, but granted as to the remaining five disputed classifications. These classifications, although having access to raw data that could be used by the library in formulating its policies and bargaining strategy, did not participate in the formulation of those policies, and their access to raw data did not provide them with any insight into the library's bargaining strategy.

Teamsters Local 856 v. City & County of San Francisco (Animal Care & Control), Case No. SF-CE-867-M. ALJ Cloughesy. (Issued 12-20-12; final 2-12-13, HO-U-1082-M.) The City and County of San Francisco Municipal Transit Authority decided it could no longer allow employees at Animal Care and Control to park for free at the SFMTA's Scott Street garage. The change was made without meeting and conferring with Teamsters Local 586. The change was found to be within the scope of representation, and there was no waiver of the right to meet and confer with Local 856. A violation was found.

Los Angeles Regional Office — Final Decisions

Kroopkin v. County of San Diego, Case No. LA-CE-588-M. ALJ Allen. (Issued 12-7-12; final 1-3-13, HO-U-1079-M.) No interference was found where a steward was denied released time for grievance handling, which was not a statutory right under the MMBA. No retaliation was found where the steward's conference memorandum and evaluation were not adverse actions.

SEIU Loc. 620 v. City of Santa Barbara, Case No. LA-CE-745-M. ALJ Cloughesy. (Issued 1-28-13; final 2-26-13, HO-U-1083-M.) A job steward alleged he was not selected for promotion because of his protected activities. The city was able to show that it would have hired the candidate it hired even in the absence of those protected activities.

Ventura and Duran v. State Employees Trades Council United, Case No. LA-CO-

511-H. ALJ Allen. (Issued 12-10-12; final 1-16-13, HO-U-1081-H.) Retaliation was found where the union sent intimidating letters purporting to terminate apprenticeship agreements for employees who had filed earlier unfair practice charges, participated in severance petitions, and sought to withdraw from union membership.

Sacramento Regional Office — Decisions Not Final

Selma Firefighters Assn., IAFF, Loc. 3716 v. City of Selma, Case No. SA-CE-747-M. ALJ Wesley. (Issued 1-8-13; exceptions filed 2-1-13.) After participating in two bargaining sessions, the city called the union to an “emergency” meeting and presented its LBFO. One week later, the union mailed a counteroffer to the city that accepted the city’s proposed terms and added a contingent wage increase proposal. In a letter, the city rejected the “package-proposal” and declared the parties were at impasse, but stated the city would consider other union proposals. Despite two requests for further negotiations, the city had no time to meet before the city council adopted the LBFO. A violation was found. The parties held only two face-to-face bargaining sessions, communicated primarily in writing, did not have an opportunity to discuss or clarify proposals, and ultimately differed on only one economic proposal. Based on the totality of the bargaining circumstances, the city prematurely declared impasse.

IUOE Loc. 39 v. City of Fresno, Case No. SA-CE-752-M. ALJ Cloughesy. (Issued 1-9-13; exceptions filed 2-19-13.) International Union of Operating Engineers, Stationary Loc. 39, and the City of Fresno had a memorandum of understanding with a general management rights clause that allowed the city to “relieve its employees from duty because of lack of work or for other legitimate reasons.” Local 39 did not have furloughs in fiscal year 2009-10 because it negotiated a deferral in its salary increase and agreed to freeze cash-outs to its holiday pay. In fiscal year 2010-11, Local 39 and the city negotiated a 40-hour furlough program. For fiscal year 2011-12, the city implemented a 40-hour furlough program and did not negotiate with Local 39 until after July 1, 2012. A unilateral change was found. The furloughs were found to be within the scope of representation, and the fiscal year 2011-12 furlough program was found not to be a continuation of the fiscal year 2010-11 program. The waiver defense based on the management rights clause was rejected.

SEIU Loc. 1021 v. County of Amador and Amador County Employees Assn., Case No. SA-CE-809-M. ALJ Cloughesy. (Issued 1-31-13; filed 2-14-13) SEIU Local 1021 and the County of Amador were in a CBA until September 2013 for the general unit. On September 21, 2012, the Amador County Employees Association filed a petition to decertify Local 1021 as the exclusive representative of the general unit and to certify ACEA as the new exclusive representative. The local rule section for filing decertification/certification directly conflicted with MMBA section 3507(b). Instead of applying the PERB regulations to “fill the gap,” which would have included a contract bar, the county decided to process the petition for election, as that petition did not conflict with MMBA section 3507(b). A violation was found.

Los Angeles Regional Office — Decisions Not Final

Brewington v. County of Riverside, Case No. LA-CE-261-M, Compliance, ALJ Shawn Cloughesy. (Issued 1-30-13, exceptions due 3-18-13.) Brewington, an associate civil engineer with the county, was terminated on August 23, 2006. On December 31, 2009, the board issued its order in *County of Riverside* (2009) PERB Dec. No. 2090-M, finding the county to have retaliated against Brewington. It ordered the county to “[o]ffer Brewington immediate reinstatement to his former position of employment or, if that position no longer exists, then to a substantially similar position....” All of the associate civil engineers in Brewington’s division were laid off on February 13, 2008. Rather than comply with the order, the county argued it had no obligation to offer Brewington employment because of the intervening layoff in which he also would have been laid off. The board held the county still had an obligation to offer Brewington employment to his former position or a substantially similar position.

Coast Community College Assn. v. Coast Community College Dist., Case No. LA-CE-5436-E. ALJ Racho (Issued 1-31-13; exceptions filed 2-25-13.) An employee in the part-time instructors unit was informed by her department chair that students had complained about the grades they received in her class. The department chair was critical of the instructor’s grading criteria and expectations for the students’ final projects. Later, the instructor complained to the department chair that the students involved in the grade dispute were harassing her and that she was frightened. She threatened to seek help from the union. Shortly thereafter, the department chair informed the instructor that she would not be assigned to teach a class during the Spring 2010 semester because the department wanted to hire someone else to teach her class. She also received a negative performance evaluation. When going over the evaluation, the department chair mentioned that he had been contacted by the union and was not happy about it. The instructor complained to the administration about the evaluation, but the instructor was not interviewed when the investigation was conducted. The community college refused to remove the negative evaluation from her personnel file. The board has found that an instructor’s communications over a grade dispute were an attempt to individually enforce provisions of the collective bargaining agreement and were therefore protected self-representation under *Jurupa Unified School Dist.* (2012) PERB Dec. No. 2283. The department chair’s comments during the evaluation meeting showed animus toward union activity, and the community college’s defense was not proven due to inadequate investigation. Further, the decision not to assign the instructor a course for Spring 2010 was found to be in retaliation for protected conduct. Ample evidence of nexus was present because the employee was given multiple inconsistent justifications for the decision.

REPORT OF THE OFFICE OF THE GENERAL COUNSEL

Injunctive Relief Cases

No requests for injunctive relief were filed during the period December 1, 2012, through February 28, 2013.

Litigation Activity

Three new cases were opened during this period.

San Diego Housing Commission v. PERB; SEIU Loc. 221, San Diego County Superior Court, Case No. 37-2012-00087278-CU-WM-CTL (UPC No. LA-IM-116-M). On December 10, 2012, the commission filed a petition for writ of mandate and complaint for declaratory relief, alleging that PERB erred by interpreting the new MMBA factfinding procedures created by AB 646 as being applicable to an impasse in the parties' negotiations over the effects of a layoff. The case is pending.

City of Long Beach v. PERB; International Association of Machinists & Aerospace Workers, Local Lodge 1930, District 947, Second District Court of Appeal, Division One, Case No. B245981, (UPC No. LA-CE-537-M). On January 3, 2013, the city filed a petition for writ of extraordinary relief, alleging that the board clearly erred in Dec. No. 2296-M by affirming a proposed decision in which the ALJ found the city violated the MMBA by unilaterally imposing a five-day furlough on employees represented by the union. The city was directed to make whole the affected employees. The case is pending.

Regents of the University of California v. PERB; AFSCME, Loc. 3299, First District Court of Appeal, Division One, Case No. A137635 (UPC Nos. SF-CE-858-H and SF-CE-862-H). On January 18, 2013, the regents filed a petition for writ of extraordinary relief, alleging that the board clearly erred in PERB Dec. No. 2300-H by holding the regents violated HEERA when they unilaterally changed rules regarding the leafleting activities of AFSCME Local 3299 on sidewalks adjacent to entrances to the acute care hospital at the University of California, San Francisco Medical Center. The case is pending.

STAFF CHANGES

There are no staff changes to report.