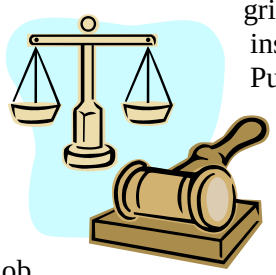
Regional Employees Association of Professionals

August 2015 News

"But it's Not Fair!" (The BIG Difference between Law and Justice in the Workplace)

Robin Nahin, Association Staff

If something is really UNFAIR happens to you on the job, it's reasonable to think ***there must be a law against it.*** However, almost on a daily basis, staff at the CEA office must tell members, "Sorry, but the law really doesn't address that subject." **The law doesn't address MOST subjects.**



This doesn't mean there are no *rules at all* about "fairness" in the workplace. And it doesn't mean that you can't ask the County to resolve an injustice. But it does mean that in the majority of instances "the law" just isn't concerned with the details of your job.

The purpose of this article is to explore the difference between what's "unfair," what's "illegal;" -- and what may be a violation of your Union Contract. The goal: helping you and your Association maximize your potential for "justice in the workplace."

NUMBER 1: THERE ARE SOME LAWS!

First, rest assured: there ARE a lot of good labor and employment laws. There are laws covering wages and hours, equal pay, workers compensation, safety, PERS (and other) retirement, discrimination, medical leave (and recently a *paid* sick leave,) disability and pregnancy, veterans rights, privacy, whistleblowers rights, vacation protection, and even the right to form unions and bargain collectively. For public employees, there are also due process laws in the case of major discipline.

If you have an MOU (Union Contract), most of these laws are considered incorporated into that Contract, which means that your Union can represent you in a grievance if your legal rights are violated. In certain instances, you and your Association may go to Public Employment Relations Board if your rights under the MOU are violated.

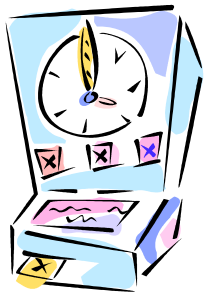
THE LAW IS BASICALLY "A FLOOR"

Labor and employment laws are broad and basic. They establish a floor, or the bare minimum of rights and benefits you are guaranteed. Through contract negotiations, your Association builds upon this foundation and enhances this bare minimum. The floor (like the minimum wage or the "right to safe working conditions") is painfully low. Everything else -- from your pay rate, to your medical plan, to your grievance procedure -- is the product of negotiations. (There is no law, for example, requiring the County to provide holiday pay, or to conduct performance reviews, or even to provide a retirement plan. These are all the fruits of negotiations.)

The primary function of your Association is to bargain for the best possible MOU, encompassing wages and benefits ***and fair working conditions*** for all of its members. After this, its function is to **enforce** that MOU. It's a real CONTRACT, with same legal standing as other County documents. (In fact, in the case of a conflict with other County rules, your MOU

has *superior* standing.)

BUT THE MOU WON'T COVER ALL "INJUSTICE"



Bargaining really can result in contract language to address "differential treatment." But, even if you negotiate a great contract, there will always be "inequities" and "injustices" in your workplace. The truth is, people *differ*, and jobs differ, and it is legal for the County to treat people *differently* (unless this is based on discrimination against a protected class or retaliation).

For example, unless you have MOU language about "equal distribution of overtime," it's legal for Management to give overtime work to some people, but not others. The same is the case with all kinds of pay premiums: acting pay, stand-by pay, bilingual pay, etc. It's also legal for a supervisor to give different assignments to different people in the same job class, even going so far as to give the "worst" jobs to the "worst" employees, in his estimation. *There is no requirement that the boss like everyone -- or view everyone -- equally.*

Of course, unfair situations are grievable. When the Union represents members who believe they have been treated unfairly, we use the term "disparate treatment," (i.e. "treating people differently.") Although this *sounds* illegal, and it can certainly "get you into the room" for discussion, it has no legal meaning at all.

Grievances over "disparate treatment" might work. Or they might not. The value of the grievance procedure is that it gets the parties communicating. Managers don't like being accused of "being unfair," so they may take the matter seriously and resolve the problem. Or they might not.

The truth is that absent written rules about specific "injustices," managers are under no obligation to correct them. Such circumstances could include:

- **Being "unfairly" passed over for promotion, when you are clearly in line for the job**
- **Having your request for vacation denied, so that *someone else* can go on vacation**
- **Being denied overtime (or acting pay or bilingual pay) opportunities because your boss "doesn't like your attitude"**
- **Being assigned to work weekends or nights, when others get Mondays through Fridays, or day shifts.**
- **Being forced to keep a time log of your work (or clock in and out) when "no one else" does**
- **Being denied access to special training when "everyone else" gets this.**
- **Being denied a transfer to another department when others get to transfer.**

ANY OF THESE EXAMPLES OF "TREATING PEOPLE DIFFERENTLY" CAN BE THE SUBJECT OF NEGOTIATIONS, if your leadership knows about them. The basic thrust of such negotiations is to say, "Everyone who is eligible for a certain workplace benefit shall receive it." For example, "Everyone who speaks Spanish will receive Bilingual Pay," or "Everyone who has the proper license will rotate into the standby crew."

Of course, the devil is in the details… The employer's answer might be: "We need the people at the customer service counter to speak Spanish, but why do we need people who do street repair to be bilingual?" Or, "We are NOT willing to put people on standby if they live more than 15 miles from the yard." As you can see, "equity issues" may require quite a bit of haggling.

"EQUAL TREATMENT" FLIES IN THE FACE OF CONTROL

Inevitably, policies about treating people the same fly in the face of "management rights." A Union's most common solution to disparate treatment issues will be a seniority or rotational system. For example, "shift bidding shall be on the basis of seniority," or "overtime opportunities shall be rotated, with most senior employees selecting first." Management's biggest reason for opposing such language is that they DON'T want to give up their ability to select the recipients of these "perks."

Here's the crux of the problem. It's clearly a supervisor's job to "pick the right person for the job." But it's clearly a Union goal to stop Management's use of these perks "reward friends and punish enemies." The conflict is real, and some agencies are much more tight-fisted about this "right to control the workplace" than others. Your ability to change this culture at the bargaining table (or with a grievance) may require a lot of patience and tenacity. However, the "Right to Equal Treatment" is a legitimate goal. Over time, the County's culture CAN BE changed…

LIFE ISN'T FAIR... No matter how many systems are set up for rotating the "perks" in your workplace, people will always be treated differently. They have different skills, talents and energy levels.

They also have different levels of "enthusiasm" for the job, and Management knows this, and must try to work with it. "Management has the right to manage," and employees have the right to grieve if they believe they've been treated unfairly. Your Union has the job of representing its members AND trying to negotiate and *enforce* equality in the workplace.

SURPRISE! CONTRACT BARGAINING ISN'T "FAIR" EITHER…..

Anyone who has ever sat on a Union bargaining team knows that "the table" is *not* a *fair* playing table. Your Union enters the process with the goal of making improvement in members' pay, and in their daily work conditions. Most employers enter the process with a plan to spend a small, *fixed* amount of money, and change little else. The Union pushes; the employer resists. And the employer holds most (but not all) of the cards.

Amazingly, most negotiations come to satisfactory agreement. Why? Because a reasonable team and a skilled negotiator can do a good job of focusing their efforts on the most important items -- and then pressing, *consistently,* to achieve them. The most difficult part of bargaining on the "Union side of the table" is staying focused on a limited number of goals, and maintaining a realistic attitude about money.

Management, also, has the desire to "close the deal." Management's most important goals are recruitment and retention. They need to pay wages and benefits that are roughly similar to the surrounding area, if they are going to keep skilled staff in key positions. Also, smart managers really do care about employee morale, if nothing else, because this affects productivity. **Smart managers know that cooperating on "justice issues" can buy them a lot of good will, without costing the County a penny.**

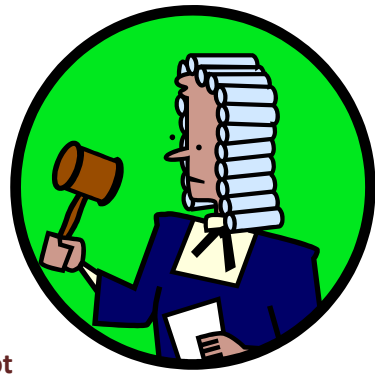
Although the playing table isn't even, Associations are not without tools. Especially in environments where Management does not intend to spend as much as employees are asking for (i.e. *most* environments) the Union is in a good position to push for "justice issues." If Management understands that it is a **very** big deal to work out the process for sharing overtime, or for insuring in-house promotions, *and you address these items long before the two sides run into conflict on monetary issues,* you should be able to accomplish your goals.

The really difficult (and unfair) part about bargaining is that the entire process is controlled by a political climate, and political leaders, who don't know (and don't much care) about the everyday reality of your jobs. Today, even when many cities are doing quite well financially, most elected officials have no intention of providing the pay increases necessary for employees to maintain a decent standard of living. **All too many political leaders have been brainwashed by the media into thinking that their employees earn much higher pay and benefits than they really do**.

There are only two ways around this core "injustice." One: simply document the genuine decline in services when the Board doesn't provide fair pay or benefits: the County loses good workers to other agencies, and the morale of the entire County goes down-hill. Eventually, County managers have such a difficult time conducting necessary business that they *must* improve the compensation package.

Second, your Association leaders can expand their effort *beyond* management's bargaining team, and to try to "educate" the County governing board, themselves. Such political activity is not only legal, but often essential. It's the reason that so many budgets are gobbled up by Police and Firefighters salaries… *Their* unions have active political action committees.

Ultimately, bargaining for "wages, benefits and working conditions" in the public sector is a painfully "unequal" activity. Public employees have the right to strike, but are unlikely to exercise it. They have the right to go to the media, but most of the public have been turned against them. However, they DO have the right to "bargain hard," to declare impasse, to go to fact-finding, and to communicate with County leadership both publicly and privately. As the song says *"you can't always get what you want… but if you try sometimes… you get what you need…"*



Courts Finally Recognize that "Not all Retaliation Is One Swift Blow"

In a case involving a junior high school principal who "blew the whistle" on her District's mis-spending, the California Supreme Court recognized that an "adverse employment action" – in this case, the forced transfer from the school where she had worked for many years – does not always come in the form of monetary loss.

The legal system is finally beginning to acknowledge that employers may use subtle forms of retaliation to "punish" employees who are "complainers." These might range from assigning unattractive duties or changing work schedules to negative performance reviews, deprecating remarks, harassment over the use of sick leave, difficulty scheduling time off or, as in the recent case, an involuntary transfer.

The Supreme Court's recent decision focused on the close "nexus" in time between the school principal's disclosures of what she believed to be improper, if not fraudulent, use of District funds and the District's decision to transfer her to another school. She had made her suspicions known not only to the District School Board, but also to her state legislator. On other occasions, she had also reported a male teacher who she had seen peering into the girls' locker room, and another male teacher who made off-color, sexual remarks.

When she was transferred, she filed suit, claiming that she was being retaliated against for whistleblowing. The lower court found against her because her wages, benefits and duties had not been "adversely affected." The traditional "test" that the Courts have used to determine whether or not an employee is the victim of retaliation had to do with whether the employer's action "materially affected the terms and conditions of employment."

On appeal, however, the Supreme Court said judges should consider the "entire spectrum of employment actions that are likely to adversely affect an employee's job performance or opportunity for advancement in his or her career…" The Court went on to say "there is no requirement that an employer's retaliatory acts constitute one swift blow, rather may include a series of subtle, yet damaging, injuries." It ordered the District to re-assign the principal to her original school, and to cease and desist further retaliation.

Did You Know…

FAIR LABOR STANDARDS ACT APPLIES TO NURSING MOTHERS

Did you know that August is National Breastfeeding Month and that the right to express milk for a new baby is now covered by federal law? The FLSA requires employers to provide nursing mothers "a reasonable amount of break time, as well as a space, to express milk as frequently as needed" for up to one year after the birth of her child. Here are some of the other requirements:

- ***The space must be shielded from view and free from intrusion by coworkers or the public.***
- ***The use of a bathroom is not an acceptable space to provide to nursing mothers expressing milk.***
- ***Nursing employees must have access to this space each time they need to express milk.***

- ***The frequency of breaks needed to express breast milk as well as the duration of each break depends on several factors and may vary.***

The Fair Labor Standards Act is celebrating its 75th anniversary this year. One of the original goals of the FLSA was to end child labor and to establish minimum standards for "wages and hours" for all Americans. The "nursing mothers" provision is a prime example of the FLSA's evolution, as the vast majority of women have entered the workplace.

Wage and Hour Division's website has a Nursing Mother's section, which includes information on how an employee may file a complaint if her employer fails to honor the law.

DUI…Driving Under the Influence …

What Impact Would An Arrest Have Upon Your Job?

Unfortunately it happens. You are driving home from a party. You have had a drink (or two or three), and you are stopped for erratic driving. If you are arrested or charged with "driving under the influence," you will probably have to hire an attorney. The courts take drinking and driving seriously. This is a criminal charge which will result in a fine, some loss of the use of your driver's license, and possibly, some community service or jail time. Your auto insurance will skyrocket… and will remain that way for several years.

The impact on your job will depend on the duties you perform. Whether you drive your car on the job or not, almost all job descriptions require that you carry a valid California driver's license. At minimum, your license will be suspended for 30 days. If you are **not** required to carry a special (Class A or B license,) and are NOT required to drive as an essential job duty, the DMV ***may*** allow you a "restricted license," so you can drive back and forth to work.

Even if you are allowed a restricted license, you should know that your employer is very likely to find out about the arrest. ***You want to be the one who tells them.*** You have been charged with a felony. You'll probably be compelled to go through a disciplinary hearing and/or asked to sign a "Last Chance Agreement." Your union rep can help with this – a lot.

If You DO Drive on the Job…

If driving is a central component of your job, *but you are **not** required to hold a commercial driver's license*, it is essential that you tell your supervisor about the DUI. This is because you will need to ask the County for an accommodation until your license is completely restored. You'll need to ride along with a co-worker or ask the County to relieve you of these duties.

Driving between worksites on County time IS driving on the job. In most cases, employers accommodate employees with these short-term difficulties; but they are not <u>required</u> to. If the County refuses to accommodate you, you may be suspended, or even terminated – because you cannot perform essential duties. If this happens, you should call your Association staff for help.

If You Are Required to Hold a Class A or B License…

If your job requires you to hold a commercial license, and you are found guilty of DUI, your job is at risk. This license <u>will be</u> suspended for at least a year. If there is a second conviction, you are likely to lose it permanently.

A commercial vehicle driver without a license is subject to termination. If/when you receive a disciplinary notice, call your Union rep. If your employer likes you *a lot*, they may accommodate you (find you a non-driving job) until the license is restored. If you're fired, you have full appeal rights. Your Association would certainly represent you, but if it's clear you won't be able to perform "the

essential duties of the position" for a year, you are likely to lose your job.

What determines whether or not an employer is willing to reassign a truck driver who loses his driver's license for a year? First, whether there IS other work available, which you can perform; and second, ***your attitude during the entire process.*** A good, hard-working employee, who is honest, apologetic and has demonstrated his value to the organization, stands a good chance of being accommodated.

Each case is handled on its own merit; there is very little "law" in this arena. People who drink and drive don't "have to" lose their jobs – but they very often do. There are consequences to our behavior, and the "bar" is very high for public employees. The lobbying of groups such as MADD (Mothers Against Drunk Driving) has increased public focus on this behavior. The public, in generally, supports this increased criminalization -- and employers are becoming less and less lenient.

On the good side, of course, drunk driving has been reduced, and many more people are alive today because of this….

CAN THE COUNTY REQUIRE YOU TO TAKE A PERSONALITY TEST?

Psychological and aptitude testing are often used by employers when they are trying to find the best candidate for a job, or trying to unravel interpersonal problems in the workplace. It's a legitimate question, though, about whether these tests "cross the line" into invasion of privacy, or violation of employees' HIPAA rights (the right to confidentiality of your medical records.) The answer is a bit complicated:

As long as the questions on a personality test are limited to legitimate topics, employees can be compelled to answer them. So… what is a "legitimate topic?" What Personality Tests Are Legal?

First of all, an employer must have a sound, work-related reason to require a current employee to submit to a personality test. An employee has the right to ask for the reason and, if he believes it ISN'T legitimate, to refuse to participate. The burden then rests with the employer to threaten disciplinary action if he doesn't cooperate. Then the employer would have to PROVE that the employee's (or County's) continued effective performance was in jeopardy because of possible problems with the employee's behavior.

Second, it is illegal for the employer to ask questions about personal matters, which invade employees' privacy. Unfortunately there is no simple definition of "improper, personal questions." The courts deal with these issues on a case-by-case basis by looking at the totality of facts and circumstances.
As a rule of thumb, common sense can help people assess whether a question is inappropriate: if it makes the recipient very uncomfortable or seems unrelated to the job, an employee is within his rights to refuse to answer the question. If an employer inquires into an employee's sex life, or asks about religious or political beliefs, he/she is probably also protected against discipline for refusing to answer.

Executive Order to Update the FLSA will make 430,000 California Employees Eligible for Overtime

For the first time in decades, the federal overtime rules are going to change – to *employees'* advantage. In June, the President asked the Labor Department to raise the salary "cut-off" for employees who may be denied overtime on grounds that they may be managers, administrators or professionals. Although the new Guidelines won't be in effect for several months, the end result will be that many more workers will become eligible for time-and-a-half when they work over 40 hours in a week.

The law applies to public employees, as well as the private sector. Here are the details…

Right now, employees in jobs designated by their employer as "executive, administrative, or professional" can be denied overtime, if they are making over $23,660 a year. This figure hasn't gone up in many years. In fact, $23,660 is BELOW the federal poverty line for a family of 4! When the new rules come into effect, the "salary floor" will more than double, to $47, 892 and will rise periodically, as the cost of living rises. This means that many people who are currently labeled "exempt" will now be able to collect overtime pay.

You probably thought that managers, supervisors and professionals already make well over $47,892, but this isn't entirely true. The restaurant and retail industries are rife with "managers" who have been (often improperly) labeled "exempt" under the FLSA. In public agencies the same phenomenon shows up, particularly in recreation departments (i.e. "Community Service Supervisors") and among 1st line supervisors, across-the-board.

The DOL estimates that about 430,000 in California will either make more money or work fewer hours as a result of this change in the law.

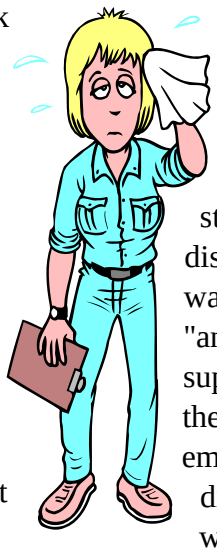
Court Says "Working for a Jerk" is Not a Disability

Most people have had to work for a "jerk" of a boss at one time or another. It's rare, but sometimes this relationship is so bad that the subordinate employee is rendered ill. The question recently addressed by the California courts is whether being subject to direction by a difficult supervisor can be the basis for a disability claim. According to a recent Court of Appeal case (*Higgins-Williams v. Sutter Medical Foundation*) the answer is, generally, NO.

In this case, the employee's doctor diagnosed her with "adjustment disorder with anxiety" after she reported stress due to interactions with human resources and her manager. Her employer granted her a stress-related leave under the Family Medical Leave Act ("FMLA"). When she returned to work, she reported that her manager was "curt and abrupt" with her, while being friendly with other employees. She submitted a request to be transferred, as an accommodation to

this stress-related disability, and for a further leave of absence, based on her doctor's recommendation.

After several more months of leave (exhausting all time under the FMLA) the employee's doctor said she could return to work, but should not work under the current manager. The company terminated her, and she filed suit for failure to provide reasonable accommodations and disability discrimination.

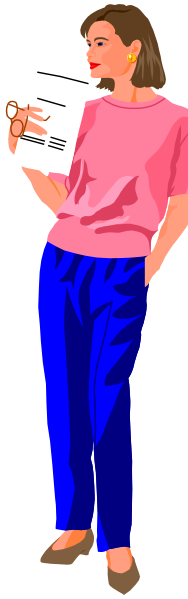


The trial court dismissed the suit on the basis that the employee did not have a "qualifying disability" under the Americans with Disabilities Act. The Court of Appeals agreed.

Under the Fair Employment and Housing Act ("FEHA"), if an employer becomes aware that an employee has a physical or mental disability, the employer must engage in what is referred to as "a timely, good faith interactive process" to determine "effective reasonable accommodations." Under California law, suffering from anxiety at work **can be** a disability depending on how it affects the employee, and it is unlawful to discriminate against disabled individuals.

In this particular case, the court agreed that stress and anxiety could be qualifying disabilities, but did NOT agree that the supervisor was the ***cause*** of the stress. The Court stated that "an employee's inability to work with a particular supervisor because of anxiety and stress related to the supervisor's standard oversight of the employee's performance does not constitute a disability." The Court said that the inability to work under a particular supervisor did not rise to the level of "limiting a major life activity."

Study Finds That Children of Working Mothers are "Better Off and Better Balanced"



A Harvard Business School study completed last month found that daughters of working mothers grow up to be more successful in the workplace than their peers. They earn more and are more likely to become supervisors and managers. The study also found that sons of working mothers are more likely, as adults, to participate in childcare and household responsibilities.

Specifically, says Harvard professor Kathleen McGinn, children under 14 whose mothers worked for at least a year during their childhoods "grow up to hold more egalitarian views about gender as adults."

The study finds that, in the U.S., daughters of working mothers earn 23% more than daughters of stay-at-home mothers. Men who grew up with working mothers spent 7.5 hours more on childcare per week. They also are considerably more likely to have wives who work. (Interestingly, though, the number of mothers in the workforce has declined in the last two decades from 29% in 1999 to 23% in 2012. McGinn attributes the drop-off to the recession – and not to any conscious reversion to traditional roles on the parts of mothers and fathers.)

"This research doesn't say that children of employed moms are happier or better people and it doesn't say employed moms are better," says McGinn. "What it does say is that their daughters are likely to make more money and to hold supervisory roles, and the sons spend more time in the home."

California Supreme Court Reinforces the "Grand Bargain" in Workers' Compensation

Sherry Grant, Workers Compensation Attorney

For nearly 100 years, the premise of Workers' Compensation law in California has been a compromise between employers and employees. In exchange for protection against potentially crippling lawsuits, employers must provide prompt medical treatment for employees with workplace injuries, as well as compensation if they miss work due to the injuries, or sustain permanent disabilities.

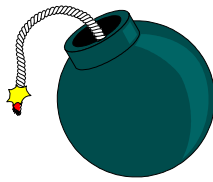
In addition, anyone dependent on the support of an employee who dies as a result of a work injury may receive a "death benefit." This was the issue in the recent California Supreme Court *South Coast Framing, INC. vs. Workers' Compensation Appeals Board, Joselyn Clark et al.* In that case, a carpenter suffered injuries to his neck and back as the result of a fall. Several months after the fall, in March 2009, he died. At the time of his death, the employee had several legally prescribed medications in his system, including Elavil, Neurontin, Xanax and Ambien. These medications had been prescribed by his workers compensation physician and his family doctor. An autopsy determined that the cause of death was "attributed to the combined toxic effects of the four sedating drugs detected in his blood."

The family applied for the Death Benefit, and a Workers' Compensation judge awarded this, on grounds that the medications were prescribed *because of his injury*. The Court of Appeals reversed this, finding that the medications were only a "contributing factor" in the death, not a central factor. In other words, the Appeals Court said that the employer was not primarily responsible for this employee's death.

The case went to the State Supreme Court, which overturned the Appeals Court decision – and set a precedent for other, similar cases. Recognizing the "Grand Bargain" of the Workers' Compensation system, the Supreme Court explained that in California, an injured worker need only show "that the employment was one of the contributing causes without which the injury [or death] would not have occurred." The California Supreme Court did the right thing. This employee was seriously injured at work, and died as a result. His family was entitled to his Death Benefit through the Workers' Compensation system. Without this decision, the rights of employees to be compensated for death or injury would have been substantially limited, with no other legal right to sue in the California Civil Court.

Ms. Grant's office is available to Association members. For a free consultation, call 213 739 7000

What if I'm Accused of Doing Something Illegal?

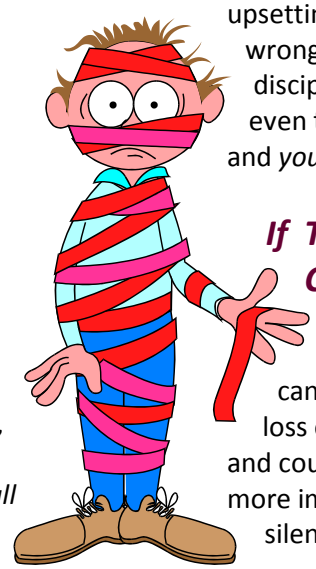


People who work for public agencies do *work with the public.* They go into people's homes and yards, pick up their trash, transport them, rescue them, arrest them, treat their medical conditions, watch their children, entertain them, and tell them to do all kinds of things they would rather not do. It's a LOT of interaction.

So… with all this interaction, there is occasional friction. Sometimes there's a disgruntled customer, and, sometimes, there are real sparks. Occasionally an employee is accused of doing something improper or wrong or even illegal. Here is an example:

QUESTION: I am a recreation supervisor and have been falsely accused of molesting a child at the park I oversee. I have been pulled off the job, brought in for questioning, threatened with termination – and am now being told that the child's parents are going to sue me!

I am completely innocent! I've worked for the County for 15 years, with good reviews and never a problem. In my opinion, not only should I NOT be threatened but also the County should be defending me! What can I do?



What if this was you? What consideration would you expect from your Employer? A LOT. The most important thing to do when you are questioned about a complaint from the public, even a serious one like this, is *not* to panic. *Neither your job nor your freedom can be taken from you without a full hearing.*

Public employers, who are often guided by lawyers, routinely take "accused" employees out of the workplace. Even when accusations are completely false, and "everyone knows this," you are likely to be put on administrative leave pending an investigation. You may FEEL as if you've been fired, or charged with wrong-doing. But, In truth, you haven't. You are on paid leave, awaiting either an interview or a return to work.

"Charges" come in formal disciplinary letters, and may be appealed. You have simply been treated very rudely and provided little information.

When you are called in for questioning, whether by Human Resources, the Police Department or an outside investigator, you have the right to bring a representative. **You ALSO have the right to know the subject matter and whether the discussion could lead to criminal prosecution**. Unless there is a potential criminal charge, your Association staff or Board member may sit in with you. Or you may bring the attorney of your choice.

What to Say in an Investigation…

If you are asked about doing something wrong on the job, you should tell the complete truth. This might include an explanation, an apology, or a completely disavowal of any information about the matter. **You should assume that the investigator already knows a LOT about this matter.**

In most cases, these investigations lead nowhere. Nothing will happen -- and no one will apologize for upsetting you. However, if you DID do something wrong, you might *later r*eceive some sort of discipline: a letter of reprimand, or a suspension or even termination. The discipline will be in writing and *your Association representative will defend you*.

If There Are Potential Criminal Charges…

If you suspect there **may** be criminal charges, you should consult an attorney. The County can compel you to answer questions or face the loss of your job. If you are facing criminal charges and could be found guilty, you need to decide what is more important: your job or your "right to remain silent."

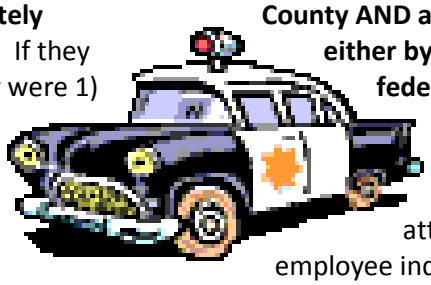
In this circumstance, your employer is supposed to provide you with a "Lybarger Admonition." This is a statement that you are required to participate in this *administrative* investigation, but no information from the interview will be provided to criminal authorities. Your employer can threaten you with discipline for failing to participate, but they cannot threaten to send you to jail. So, you have no "Miranda Rights" or 4th Amendment "protection against incrimination."

If The Charges Are False

If you are charged with committing a criminal act on the job, your employer is obligated to defend you UNLESS there's a question about whether the activity

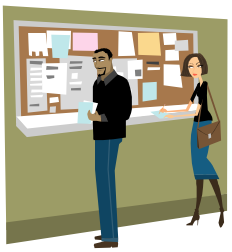
was "outside the scope of the job." So, if you are accused of running a prostitution service while working at the Police Department, *and this turns out to be true,* the County is relieved of its responsibility to defend you. However, *if the accusations are completely false,* they ARE obligated to defend you.

Public employees are occasionally accused of doing something wrong when they are completely innocent. Sometimes they are even sued. If they would not have been accused unless they were 1) on the job and 2) performing in their capacity as an employee, the employer is obligated to defend them.



In the case of our Parks employee who was accused of child molestation the County could initially say that such conduct was "outside the scope" of his job duties -- and rightfully refuse to pay for his defense. However, once he is found innocent (and has spent thousands of dollars on an attorney) he has every right to insist that the County to pay for his defense, and for any time he lost on the job.

Finally…one more twist: what happens if both the County AND an employee are sued for wrongdoing, either by a citizen or by an arm of the state or federal government? In this case, because there is a potential conflict of interest, the employer must represent the member – and provide a ***different*** attorney from its own, to represent the employee independently.



Questions & Answers: Your Rights on the Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a work-related problem, feel free to talk to your Board Rep or Association Staff at (562) 433-6983 or cea@cityemployees.net

Question: I have an ongoing medical condition that is somewhat serious. Last year I used about 8 weeks of leave and I currently have only 24 hours of sick leave on the books. My supervisor just told me that if I "go into negative" on my sick leave, she will write me up. Is this legal? I do have an FMLA letter on file.

Answer: If your medical condition is the one covered by the FMLA letter you have on file, and your management knows that this is why you're taking the time off, you should not be threatened with any discipline. It is illegal for employers to "adversely impact" employees (with discipline, reprimands, or negative evaluations) for the legitimate use of time under the FMLA. If this happens, you should call your Union staff.

Question: I would like to know if I can have a document expunged from my personnel file. Two years ago I was given a written reprimand for "failure to follow departmental procedures. " I disagreed, but was told I was not allowed to challenge this. Now I'm concerned that this letter could interfere with my promotional opportunities. Is there a law enabling me to have this document removed?

Answer: There isn't any law on this subject, but the right to "expunge" old disciplinary material is completely negotiable. This can be worked out when your Association bargains a new Contract, OR it *could possibly have been* negotiated if you had appealed the discipline originally. At this point, you should look at your MOU to see if it has any provision enabling members to request "expunging" of old discipline. If there is not, you may want to bring your idea to your Association leadership.

Question: I'm a city clerk and have been hearing on the news about city clerks in others states who are refusing to process licenses for gay marriages. I'm curious: Does an employee have the right to refuse to perform certain parts of her job because they are against her morals?

Answer. Actually, NO. Your workplace isn't a church. An employee refuses to perform her job she may be disciplined for insubordination. She can also cause legal action to be brought against the workplace if it

refuses to act on a resident's constitutional rights. The only time an employee should refuse an order is when there is a "clear and present physical danger" to him/herself, his co-workers or a member of the public.

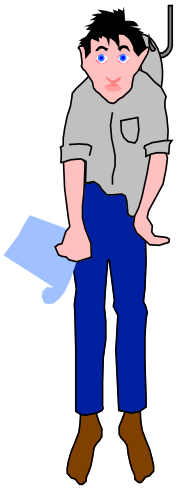
Question: Our department is going through a reorganization which is going to have some negative effects on myself and my co-workers. Our supervisor met with us and told us that these changes were 'non-negotiable.' How do we know whether this is true?

Answer: If the negative effects constitute significant changes to the "terms and conditions" of your employment, then you (your union) can demand to negotiate, or you can file a grievance to stop (or undo) these "unilateral changes." A significant change could be a change in job class or job description, assignment to duties that belong to different class, or a reduction in pay or work hours, etc.

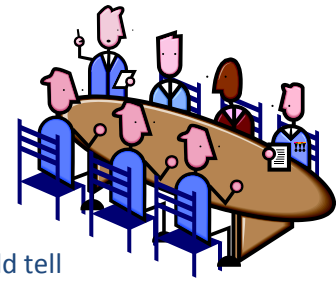
Items that are NOT negotiable include transfers to other supervisors or departments, assignment of different duties which ARE on your current job spec, departmental mergers, etc.

Question: Our Management seems to create policies which they never tell us about. Then, possibly years down the line, they tell people that they are breaking these policies! This seems ridiculous. Is there anything we can do about this?

Answer. Absolutely. Policies that affect employees' "conditions of work" are negotiable. If the County creates policies without bargaining, the union can stop this, ultimately by filing at PERB. **If the County "discovers" old policies *which it suddenly wants to apply to people who have never seen them before,* the union has the right to ask for proof that the policy was negotiated.** Absent proof, the "old" policy is treated as NEW policy, and must be negotiated or rescinded.



Question: I'm on our Association Board and would like to know whether a single meeting with management can be considered negotiations. Our Human Resources manager sometimes calls meetings with us to discuss changes in rules or procedures, and we mostly just listen or ask a few questions. Recently, though, he wanted to talk about a policy change we really didn't like – and we told him this. A few weeks later, he sent the "new policy" to everyone in our Association. When we objected, he said we had already "negotiated!" at the meeting. What should we do about this?



Answer. Meet and confer efforts can't be illusory. Management should tell you*, in advance of any meeting,* that they want to negotiate a policy change. If you know the subject matter, and have complete information, then your Association can decide whether it DOES want to bargain – or does not. You DO have the right to "just say no…"

Without complete information, your Board should be reluctant to agree to open negotiations. You can politely avoid the meeting or send an email that says "We're happy to talk to you, but we won't be authorized to negotiate today."

The meeting you attended wasn't a bargaining session. If Management has made a "change in terms and conditions" without bargaining, your Association should file a grievance, or go to PERB, over this "unilateral change."

Question: I work and live in a small City where many of my relatives also work. I've just been promoted to a position which makes me the supervisor of my brother and cousin. The City is now saying that they must be terminated! I've suggested that they simply be assigned to another supervisor, but our department head says he can't do that. This seems ridiculous. Is there anything I can do?

Answer: There's probably not a lot YOU, personally, can do; but if your relatives are permanent employees, they can't be terminated without good cause. They (and their representative) need to look at the City's Nepotism Policy. It probably says that a supervisor cannot directly supervise an immediate family member. It probably *doesn't* say that they cannot work in the same department.

If your cousin and brother are actually terminated, they should contact union staff, request a hearing, and request that the City find some way for them to work under someone else's supervision. Family members often work at the same agencies. There are all sorts of possible "workarounds" to these kinds of problems.