Regional Employees Association of Professionals September 2015 News

"BUT IT'S NOT MY JOB":

What to do about 'Out of Classification' and Understaffing Problems

Public employees often find themselves "wearing more than one hat," especially in small departments or small agencies. Before the Recession, this problem was common. Today it is rampant. ***The most obvious long-term impact of the Recession on public agencies is widespread understaffing.*** *People who used to work on four-person crews now work with one partner. An office that used to have seven employees now has three…. Most agencies coped with huge, temporary financial problems in the most direct manner available: they eliminated jobs. No one expected this change to be permanent; but, although most cities and counties have recovered financially, they have NOT recovered full employment.*

On top of this, there are frequent "normal" reasons for staff shortages: a co-worker takes time off to have a baby, someone leaves for a better job, a supervisor unexpectedly retires – and the remaining employees must pick up the work. ***All too often, you, the long-term competent, stable employee, are the one left "holding the bag."***

It may be true that you are <u>able</u> to do the work of several jobs. But the question is: do you really WANT to? And, even more importantly: do you really HAVE to? Yes, you ***might*** *consider this situation a training opportunity. (Your management certainly does….) Or, maybe it's a chance to demonstrate your skills, as a prelude to promotion.* ***But the truth is that many employers are consciously and deliberately understaffing. The common term is "underfilling." Promotions are not common. Overwork is still much more common…***

Many people who "wear multiple hats" enjoy the challenge. People often enjoy being busy. ***What's unfair, though, is that they are generally not paid at the level of the "highest paid hat."*** *<u>The word for this is exploitation</u>, and all too often it goes on for years. At some point even the most cheerful and devoted employee wakes up and realizes she isn't being compensated for the job she is performing. When that happens, often to management's surprise, is that this long-term stable, cheerful employee becomes angry and embittered – especially when she learns that retroactive pay for the out-of-class work will not be forthcoming.*

The core of the problem is this: good employees pitch in and help out. They don't "make waves" or file grievances. Good employees do what they are told, and assume that their hard work will pay off. But today a HUGE number of good employees have been "pitching in" a LOT, with little reward, for a very long time. And today, a LOT of them are fed up!

If you or a co-worker find yourself in a situation where you are clearly performing the work of a higher paid position -- or performing the work of multiple positions – there are some steps you may take. ***You deserve to be paid for the work you do, and not to be run ragged because your department doesn't want to fill positions****. Here is a summary of strategies for dealing with out-of-class and understaffed situations.*

"MOVE UP," "HIGHER CLASS" OR "ACTING" PAY

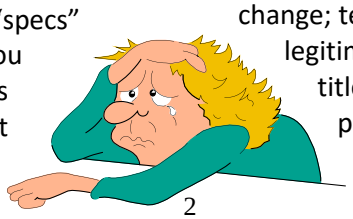
All public agencies have Classification Systems which serve as the framework for determining how work is divided and how jobs should be paid. Your job classification is defined by written duties or "job specifications." If you're doing work that is not on your job spec, then it must be the work of *another* job spec. If you're performing the duties which belong to a higher-paid job, then, at minimum, you should be receiving "higher class pay."

Most union contracts have some provision for "Acting," "Out of Class" or "Move Up" Pay. This is, very simply, a pay bonus to acknowledge that you are doing the work of a higher class. If you are performing the work of a higher class but NOT receiving Acting Pay, *your first step is to ask for it.* Start with your supervisor, and be prepared to show that at least 50% of your time or 50% of your duties belong to the higher-paid job.

If your request is denied, you might want to call your Board or Professional Staff, because the next step would be to file a formal grievance. Without taking some action, the situation is not likely to change**. Just because "everyone knows" that you are doing the work of a higher paid job, doesn't mean that anyone really cares about the situation but you.**

Not "Acting" - Just Overworked?

What if you are doing SEVERAL jobs, but NONE are recognized as a single, higher paid position? What if there's no vacancy and you're not "ACTING" for anyone? What if your job duties have changed so markedly over time, that the title and the "specs" no longer reflect the actual job? What if you DO get Acting Pay, but that bonus is far less than the normal pay for the position? What if your office has downsized and you are doing three people's jobs?



These are all widespread problems. Jobs change, people leave and positions remain unfilled. When Management is trying hard to save money, it is inevitable that fewer and fewer people will take on more (and more complex) work. These situations are all grievable. **In fact**, c**lassification problems are the most common bases for grievances in public agencies today.**

THE FIRST STEP

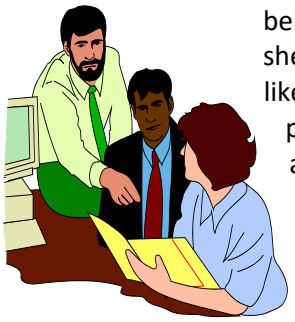
The first step in resolving any workplace problem starts with a discussion with your supervisor. You need to provide evidence that your rights have been violated and request a remedy. That remedy could reclassification to the higher position or removal of the excess duties.

Although you may be completely fed up or exhausted, this meeting should be businesslike; not "stressed out" and emotional. You shouldn't threaten not to do any particular work, nor to file a workers comp claim, nor to quit. They might just call your bluff.

If you have been doing the work of a higher class, you want to bring a copy of the "job spec" for this position, circle those duties that you perform and focus management's attention on the most important and difficult of these. This is your chance to educate and impress. Most people assume that their supervisors know what work they perform during the day; but often this isn't the case. ***No one knows (or cares) exactly what you do, but you,,,***

If there is no existing job class which incorporates all of your duties, then make one up. *Really.* Jobs change; technology changes. New duties emerge. It's legitimate to ask the County to give you a new title, based on the new duties you're performing. Make a list of these and give the job a name! You can look to other cities for

examples. You aren't the only person doing this work.



Your request, at this informal meeting, is that the County simply reclassify you to the position which best fits the duties you're performing. However, they have a variety of options. They *can, (*and particularly if you're complaining about workload) often *do,* take away some of the duties. This is perfectly legal, and you will probably NOT be compensated for all the time you did this out-of-class work. At least not without a fight.

Desk Audits – Watch Out!

They can also decide to "study the problem," which usually means conducting a "desk audit." This is an in-depth analysis of your job, which can go on for days or weeks or months. Desk audits can be a rabbit hole. Often, they are the way an agency avoids a legitimate grievance by never coming to closure, or by making the problem so complicated that there is no simple solution. It's fine to agree to desk audit, but **don't put your grievance on hold while the County conducts it…**

Once you present your case, informally, to your supervisor, you should give her a few weeks to respond. If you're a good employee, clearly deserving some compensation, she may very well go to bat for you. It's worth a try.

On the other hand, even if your supervisor truly believes you're deserving of an upgrade, it's likely that she has no authority to accomplish this. (It's also likely that she believes you'll forget or give up after a period of time.) So, if you don't receive resolution in a short time period, you should consider calling your union staff and filing a formal grievance.

A Formal grievance

The biggest difference between an informal meeting with your supervisor and a formal grievance is that grievances can't be ignored. They involve "outsiders," like legal staff. They have time limits, and require written responses. Your professional rep can help you bring your grievance to your Department Head or Human Resources Director, and up the "chain of command." *Somewhere* in the County's administration there is a person who has the authority to resolve your complaint.

Even when they disagree with the content of your grievance, Management has no choice but to hear it and answer it. If they agree that you are performing considerable work of a different job class, the County will either have to reclassify you OR remove those duties. If they DON'T agree, you and your Association may keep pushing. Ultimately, you may file a claim before Public Employment Relations Board.

Employers Must Accommodate Employees' Night-Driving Problems

Several years ago the Rite Aid Corporation terminated an employee who became blind in one eye and unable to drive in the dark. The employee had requested to move from the night shift to the day shift, but Rite Aid refused on the grounds that this would be "unfair" to other workers. When the employee then lost her job and sued, the company tried to argue the "duty to accommodate" disabled workers didn't extend to "commuting problems."

The Court of Appeals decided this was wrong. It held that "changing an employee's hours to prevent disability-related transportation issues is exactly the type of accommodation contemplated by the Americans with Disabilities Act." In fact, the ADA specifically cites "modified work schedules" as an example of a reasonable accommodation. The facts are unique in each case, but there is now no doubt that "disability-related transportation issues" must be considered in an employee's request for accommodation to be able to keep her job.

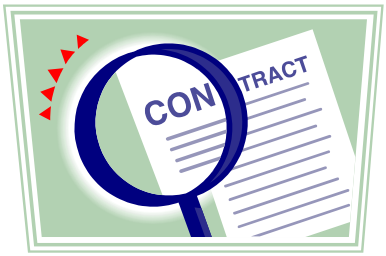
Employees Can't Be Fired for Reporting Workplace Violence

A California Court of Appeal has ordered the reinstatement of an employee who was terminated after calling the police to his workplace when a co-worker tried to stab him with a screwdriver. The termination took place at a private company, which had no appeals rights for the fired employees.

The Court agreed that California is an "at will" state (which means that private employees can be fired "without cause") but clarified that employees DO have the right to file wrongful termination cases. An employee, who can show that he was fired in retaliation for calling the police to a dangerous situation, may well have grounds for a wrongful termination claim.

In this case, the "legal right" was the California Labor Code, which states "Every employer shall furnish … a place of employment that is safe and healthful for the employees therein." The Court also referenced the Workplace Safety Violence Act, which requires employers to protect employees against "unlawful violence or credible threat of violence" by an employee against co-workers.

This case is significant because the Courts, in general, are reluctant to tell employers that they don't have the unrestrained right to terminate workers. In this case, however, they wanted to send a message: employees cannot be punished for reporting violence on the job.



Your "MOU"…. Your Union Contract

Most Association members know that they are covered by an MOU (Memorandum of Understanding). This means that they elect leaders who "go to the table" to bargain every few years, at the end of which everyone votes on a ***new*** MOU.

When people think of "bargaining," they often think of a "pay raise," and maybe a better medical allowance or work schedule. They usually aren't thinking about the MOU as an enforceable contract which requires the County to bargain with your Association before it can make ANY change in "wages, hours, or conditions of employment." In other words, ***your MOU is the only legal reason that your employer cannot take a wide variety of damaging actions*** -- from changing your job description to altering your medical plan to replacing you with 'part-time' labor. You and your Association DO have the right to "just say no…"

Before 2001, city, county and "special district" employees' groups rarely exercised the full power of their MOU's because enforcement was so difficult: if the County decided to ignore your Contract, or didn't agree with your interpretation, the only recourse was through the Court system. In 2001, however, local government came under the jurisdiction of the Public Employment Relations Board (PERB). PERB hears unions' claims over contract violations. Thanks to PERB, even small groups can bring their "unfair labor practice" complaints before a state hearing officer, at no cost, within a reasonable period of time.

So… given that you DO have a truly *enforceable* union contract, it might be useful to consider what this really means. What follows is a summary of major components of *most* public sector MOU's. Please keep in mind, however, that Contracts may vary a great deal from place to place. If you have specific questions, feel free to call your professional staff at 562-433-6983 or cea@cityemployees.net.

Your right to 'bargain collectively' (to negotiate a MOU) was established in 1968 with the Meyers-Milias-Brown Act. Over the years, lawsuits have fleshed out the meaning of this law, so there is now general agreement on 1) which employees can be covered by a contract; 2) how those employees may be grouped into "bargaining units;" 3) how unions establish the right to represent them; 4) what subjects are within the "scope" of bargaining; and 5) how a contract can be negotiated and enforced (including what happens when it expires or when bargaining breaks down).

The Courts have established some basic rules:

1. Any public employee can be represented by a union, even confidential employees, even managers, even "temps."

2. The MOU has higher authority than *other* County rules, except a Charter. In the case of a conflict between documents, the most recently negotiated one prevails.

3. The MOU is a CONTRACT. It can't be overturned by a vote of the public. It must be honored, even if the employer has financial crisis.

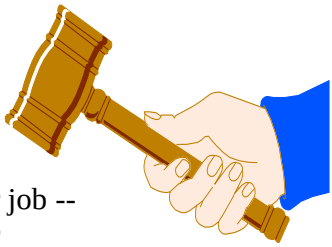
4. If/when the MOU expires, it "terms and conditions" remain in force until a new agreement is reached – or new terms and conditions, imposed.

The right to bargain extends to all rules affecting personnel matters -- even departmental rules….Even rules which are not written down. (These are called "past practices.") As long as your MOU has a "zipper clause" (a provision saying that the MOU is a "total agreement" between the parties and that neither can be forced to bargain on any subject until it expires) the County cannot change any aspect of "wages, hours, or conditions of employment" unless your Association agrees to this.

The MMBA does not dictate what subjects are covered in an MOU, **but it does say that almost any aspect of employees' jobs – or their relationship with their workplace -- is negotiable**. The subject could be as big as your retirement plan or a small as your own job description, but it is still negotiable. (In fact, it is negotiable even if the County tells you that it is a "Management Right" to change it!)

The "Management Rights" clause of your MOU usually says something to the effect that "the County can do whatever it wants, in order to provide for the needs of the public." Some Managements try to use this clause to bully the Association into giving up its right to bargain on a particular topic, or to stop the Association from objecting when the County is about to take an action which is damaging to its members. *In truth, the phrase "It's a Management Right" doesn't mean anything at all, if there are other places in the MOU (or in the law) where that particular subject is addressed.* There are NOT very many TRUE management rights…

Bargaining "Above the Law"



The County may also tell you that you cannot bargain on matters covered by other employment laws. This is false. Even if there *are* existing laws pertaining to your job -- and even if these laws change, your Association may negotiate benefits or conditions BEYOND these laws.

For example, even if the state-mandated payment to injured workers is about 2/3 of their pay, you may be able to negotiate full pay for injured workers. Or, even if the law says that you may use up to 48 hours of sick leave to care for sick family members, your union may be able to negotiate the full use of ALL sick leave for this purpose.

Further, when the state or federal laws change, and the County tells you that it must change your job in order to comply with the law, the County STILL has to negotiate with you**.** For example, if the Department of Transportation changes its drug testing policies for heavy vehicle drivers, the County must *still* negotiate with your association before it can implement these changes.

Unfair Bargaining… The *right* to bargain and the *power* to accomplish your goals at the bargaining table (in the form of an enforceable contract) are two different things. Public employee unions are truly only as strong as: 1) their membership, 2) their legal staff and 3) their political connections. Anyone who believes that Labor and Management are equals at the bargaining table is a

bit out of touch with reality.

However, the fact that you HAVE a union contract and are authorized to negotiate under state law means that your employer must bargain fairly. If your Management is NOT bargaining fairly (e.g. refusing to come to the table, refusing to engage in meaningful exchanges of proposals, threatening the bargaining team, implementing change in your contract *without* bargaining) you have the ability to STOP these behaviors by going to PERB.

"Recognition." The Meyers-Milias-Brown Act protects your right to join a labor organization -- without fear of retaliation. It requires the County to allow time off the job for "a reasonable number of representatives" to participate in labor-related activities. It grants your union the right to use County facilities for meetings, bulletin boards and thanks to PERB cases, the County e-mail. If you have an MOU, the law requires the County to cooperate with dues deductions, and (if your members wish) to enforce your Agency Shop (provision that requires all members to pay dues).

More importantly, the MMBA allows your association to be *recognized* as the "exclusive legal representative" of all of the job classes covered by the MOU. You MUST bargain "collectively;" employees cannot bargain on their own.

In the early days, the "recognition" clause of a Contract was called the "union security" clause. It literally *secured* the benefits of those who were *inside* the union – and tried to make sure that these were NOT extended to people on "the outside." The "Union Security" clause was how members protected their organization from "being busted," which meant giving bargaining unit work to non-union employees. The job classes listed in the MOU *belong to the union.* The duties of these classes can't be given to "outsiders" – unless you agree to this. As financial times become difficult, this section of your contract may need enforcement, as employers attempt to fill jobs with cheap, at-will or part-time labor. Your contract CAN be enforced!

Enforcement

Speaking of enforcement, most MOU's have a Grievance Procedure which is your in-house tool for making sure that employees' rights under that contract aren't violated. People tend to think of a "grievance" as something an individual employee files – often because she's a complainer**.** But a grievance is also a written statement to your Management that you have identified a violation of your contract -- and you want it corrected. It's your mechanism for making sure that your rights are not ignored or eroded.

An organization that fails to grieve violations of members' rights is in danger of allowing those rights to be "waived." This is the reason that the association's right to file grievances "in its own name" is protected, under the MMBA, as a "mandatory subject of bargaining."

A good grievance process will allow you, or your organization, to go 'up the chain of command,' to resolve members' problems. Most managers understand that respect for the grievance procedure is essential for healthy labor relations; but if <u>your</u> County is <u>not</u> respectful, then you may take your contract violations to PERB. (PERB does not require that you exhaust your grievance procedure before filing an "unilateral change" complaint by the way…)

A "unilateral change" is simply a change Management has made without bargaining. It's a violation of the Contract, or some other County rule. It could be as simple as an unnegotiated change in your job description without bargaining or as sweeping as an un-negotiated furlough program.

Finally, in case you haven't asked this question yet, here it is: WHO GETS TO DECIDE what items you'll take to the bargaining table or whether you will file a grievance or PERB claim? **This decision lies entirely in the hands of your elected Association leadership.** Today, more than ever, employees are realizing that their Associations aren't social groups; they hold the responsibility for negotiating and enforcing the conditions that affect standard of living for hundreds of members.

Nowadays, while we are all focused on democracy, please consider that participating in your Association may be among the most important actions you can take, for the sake of yourself, your co-workers, and the rights and benefits of your MOU for years to come…

Department of Labor Plugs Loopholes in the Family Medical Leave Act

The Family Medical Leave Act, passed in 1994, is essentially a "job protection law." If you have been employed for a year, it protects you against termination for taking up to twelve weeks off the job for your own serious illness, or an immediate family member's. It also requires that your benefits continue for this time period, and that you are returned to the same job when the leave is over.

You may use FMLA time intermittently: hours, days or weeks at a time. You may use ANY accrued leave: sick leave, vacation or comp time. If your accruals run out, you may go into unpaid status (or use your employers disability plan) until the leave is exhausted. (If they have negotiated this, employers **can** require the employee to use time that is on the books first, even if the employee wants to go on unpaid status initially

If you use up your twelve weeks of FMLA time, but are still unable to return to work, you CAN be terminated. However, as a public employee, you do have the right to appeal and, quite possibly, request accommodation under the Americans with Disabilities Act. If you're ABLE to return to work, but decide not to (after childbirth, for example) your employer can require you to repay the cost of the insurance provided while you were off.

That's the basic law. It's v*ery* basic. So, as often happens after a basic law is implemented, there a many special circumstances, unanswered questions and issues open to "interpretation." This leaves the law open to a lot of challenges – and also open to abuse. This is where the Department of Labor comes in; it renders guidelines which resolve disputes and "interpret" the law. New guidelines for the FMLA went into effect a few years ago, and answered the following questions, amongst others. If you have specific questions about your rights under the FMLA, feel free to call staff at the CEA office: 562-433-6983 or cea@cityemployees.net.

Are part-time employees or people who don't work continuously covered by the FMLA?

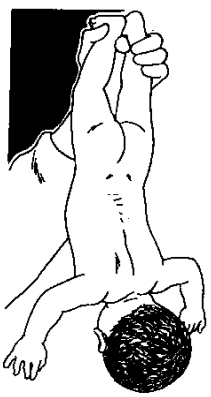
Yes, you can establish eligibility (12 months' time on the job) by working intermittently for the same employer, for up a period as long as seven years. Once you have a year's time on the job you also must have worked 1,250 hours in a rolling 12-month period.

What IS a "serious medical condition"?

This has been a subject of great contention. Not all medical conditions are "serious." At minimum, the person with the condition must have three full days of "incapacity," and have met at least twice with a health care provider within the last 30 days before going on leave. In order for an employee to use FMLA time *intermittently,* the person must see a doctor at least twice a year for a "chronic, serious medical condition."

Can a husband use FMLA time to care for his pregnant wife?

Yes, but only if the wife has a "serious medical condition" due to the pregnancy.



Can my employer force me to transfer to a different job because of my use of FMLA time?

No! Employees are expected to make a "reasonable effort" to schedule time off to minimize impact on the employer's operations; but employers cannot ***force*** an employee to transfer because of their use of leave. (On the other hand, an employee may *voluntarily* transfer to another job, or take "light duty" for a period of time, without jeopardizing his right to return to his regular job, when he is healthier.)

Can employees be required to provide PROOF of their illness? How does this impact medical privacy?

Yes, employers can require employees to provide medical "proof" that they (or the affected family member) have a serious condition. In fact, they can require "recertification" every six months. The proof may be in the form of information from the doctor, which does not violate HIPAA (the medical confidentiality law).

If an employee doesn't want to provide medical

information, employers now have the right to deny the FMLA claim.

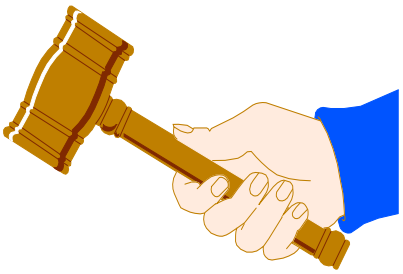
In order to address the conflict between the employer's "right to know" and your "right to privacy," the law now enables the employer to select one representative, who will be allowed to review the medical information. That representative must be a health care professional or human resources professional, and the information must be kept confidential. (Your supervisor **won't** have access to this information.)

Can the County force you to see their doctor before allowing you to return to work after FMLA leave?

Yes, but only if there is a legitimate question about your ability to do the work safely. In this circumstance, the County must provide the doctor conducting the "fitness for duty exam" a list of your "essential job functions," to see if you are capable of performing them. Absent these stated safety concerns, you can't be required to submit to a back-to-work exam.

Finally, you should know that California's law, the California Family Rights Act (CFRA) is patterned after the FMLA, but with a higher level of benefits, especially in the area of pregnancy leave. You may benefit from protection under BOTH laws.

Major Legal Decisions



The following are significant legal decisions that further the rights of public employees in California. Please keep in mind that each case is unique. If you have a *specific* problem, call your Board Rep or Professional Staff at (562) 433-6983 .

County Can't Refuse to Process Tuition Reimbursement Pursuant to Terms of Expired MOU

The Santa Clara County Correctional Peace Officers and the County of Santa Clara were parties to an MOU which expired in June 2013, and they were at impasse. In August 2013, one of the members paid $45 to take a class called Outlaw Motorcycle Gag Intelligence Update, and applied for reimbursement per the Tuition Reimbursement section of the MOU. The County informed him that it had "no authority" to reimburse him "because the MOU had expired." In response, the Association filed a PERB charge claiming the County had unilaterally changed the terms and conditions of employment.

To prove a unilateral change, a union must demonstrate that (1) the employer took action to change policy; (2) the change in policy concerns a matter "within the scope of representation" (affecting the conditions of employment); (3) the action was taken without giving the union notice or the opportunity to bargain; and (4) the action had a generalized effect or continuing impact on the terms and conditions of employment.

PERB determined that the change in policy definitely affected conditions of employment, that the County had not gotten the union's agreement to discontinue the reimbursement program, and that the County's refusal to reimburse tuition DID constitute an illegal change. This is because the terms of an expired contract remain in effect in public agencies in California until either a new MOU is ratified or impasse procedures are exhausted. The County was ordered to reimburse the employee $45.

State of Washington Did Not Violate Discrimination Law By Reserving 110 Jobs for Female Employees

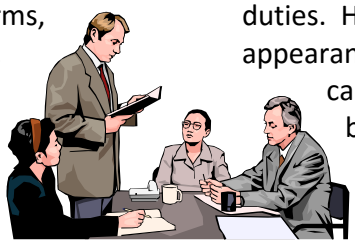
The Washington Department of Corrections runs two women's prisons. In 2003, the state investigated claims of sexual misconduct by male prison guards, which resulted in a law requiring that all non-emergency body searches of female inmates be performed by female guards. Around 2003, the Department received a $1 million grant of federal

funding to investigate allegations of sexual misconduct in prisons.

In January 2008, the Washington Human Rights Commission approved the state's creation of 110 assignments for female officers only. In September 2011, the Teamsters Union, which represented the state's 6,000 correctional workers, filed suit against the Department alleging that the sex-based staffing policy violated the civil rights of male prison guards.

The District Court denied the Teamsters claim. The Teamsters appealed, and the Court of Appeals denied their claim, also. The reason? Federal law (Title VII) prohibits employment discrimination based on race, religion, sex, or national origin. However sex-based hiring practices may be legal if sex is a bona fide occupational qualification (BFOQ). BFOQs are rare, but the Courts have upheld sex-based correctional officer assignments in women's prisons.

In order to prevail in a case like this, the employer must have an objective basis for its belief that gender discrimination is necessary for business operations. In this case, before the Department introduced sex-based staffing, it hired experts, consulted with other states, and documented more than 76 cases of sexual misconduct by male officers. It also implemented other reforms, including applicant psychological testing, sex-awareness training, and security cameras. Therefore, the Court of Appeals held that the Department's "reasoned decision making" was entitled to deference.



Political Activist Was Speaking as a Private Citizen, Not a Public Employee, When He Posted Negative Information About an Employee on His Personal Blog

A criminal prosecutor for Los Angeles County maintains a blog on which he writes about conservative politics and criminal law. Although he references his position as a Deputy District Attorney his blog contains the following message: "The statements made on this web site reflect the personal opinions of the author. They are not made in any official capacity, and do not represent the opinions of the author's employer."

The prosecutor wrote threatening and harassing statements about a former co-worker, insinuating that she had violated "criminal statutes." He also posted to his blog over 200 pages of a deposition between his ex-coworker and her department. It included her social security number and mother's maiden name, and after the posting, she discovered that someone had made changes to her credit report and was fraudulently using her social security number.

His ex-coworker filed suit against the prosecutor and the County. She alleged that he had abused his position as a Deputy District Attorney when he harassed her and printed her private information on social media.

Her claim against the County was rejected by the Court. She appealed and lost again. Why? In order to prove that someone's *employer* is responsible for an illegal act, the plaintiff must prove that the employee was acting "under the color of state law." When a public employee is off duty, the question about whether he acted as a representative of his employer revolves around the nature of his conduct, and the connection between the conduct and the performance of his official duties. He acts under "color of law" if the appearance that he is acting in his professional capacity has the effect of influencing the behavior of others, and if the inflicted harm relates to the employee's governmental status or performance of official duties.

In this case, the Court found that the employee's duties as a county prosecutor did not include publicly commenting about current events and politics. While county prosecutors sometimes speak on behalf of their employers, there was no evidence that the County authorized or supported his public commentary. In fact, his blog specifically contained a disclaimer, stating that he was NOT representing his employer. None of this prevented the victim from suing the prosecutor as an individual, but the County of Los Angeles was not held responsible.

The significance of this case is that it helps clarify the question about whether employers can discipline employees for comments they make on off-duty social media postings. As a general rule, the answer is NO. Unless the employee "holds himself out" to be a representative of the employer, there must be a "nexus" between the employee's off-duty conduct and the ability to carry out his or her job.

An Employer Can't Refuse to Allow Union Member to be on Bargaining Team

In a recent decision, PERB found that an Employer (Anaheim School District) did not have the right to refuse to negotiate with the union's choice of bargaining team members. In this case, the team member was in the process of being terminated by the District and allegations against him included harassment of other employees. The District asserted that his presence on the bargaining team would intimidate or cause fear for members of the ***employer's*** team. So the employer refused to bargain with the union if this particular employee was on the team.

The PERB judge found the employer's conduct to be an unfair practice because state law "gives the parties the right to appoint their own negotiators and forbids either side from dictating who their opposing representatives may be." However, PERB also agreed that there may be an exception to this general rule where there is "persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible." Here, the Board held that the mere fact the employee was being terminated for harassment does not establish that bargaining with that individual would be impossible.

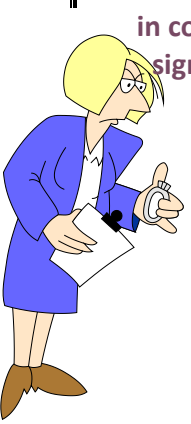
So, what kind of behavior on a team member's part would be considered so difficult as to make bargaining impossible? The short answer: violent behavior. The Court referred to a decision by the NLRB which found that management could legitimately refuse to meet with a union representative who had previously grabbed and threatened to punch a member of the management bargaining team….

YES! Salaried Employees Are Considered "Hourly" When Furloughed!

Most professionals and managers in public agencies in California are considered "FLSA exempt." This means they are "salaried," rather than hourly, and are *not* eligible for overtime after working 40 hours in a week. Technically, it is illegal for an employer to deduct pay from an exempt employee's check for less than a full pay period.

So, what happens if/when an Association of exempt employees agrees to a furlough? Do the employees become hourly employees? The answer is YES. According to the DLSE, salaried employees on furlough are considered hourly, although *this is only for the pay period in which the partial week's loss – the furlough -- occurs.* In other words, a salaried employee does become eligible for overtime in any week that he works more than 40 hours when he is also on furlough.

DLSE has also warned employers that, in order to avoid jeopardizing their employees' exempt status on a permanent basis, the employer must restore affected employees to full work schedules and salaries "as soon as business conditions permit." It doesn't provide guidance as to how we would know when this change in conditions had occurred, but advises that it should be "based upon the employer having experienced significant economic difficulties due to the present severe economic downturn."



A good many public employees have been furloughed for so long that this appears to be a permanent state of affairs. You, or your legal staff, may want to remind the County about the DLSE's warning. Keep in mind also, that the DLSE's rulings only involve wages and hours. Our State labor law (the Meyers-Milias-Brown Act) prohibits employers from implementing furloughs without bargaining (as long as the employees are organized and covered by an in-force labor contract.)

Questions and 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 specific problem, feel free to talk to your Board Rep or Association Staff at (562) 433-6983.

Question I've been a Police Dispatcher for 22 years and have filed workers comp claim for stress. I've developed chronic sleeplessness, depression and anxiety – and I am leaving this job and moving out of the state. I would like to know 1) what will happen with my claim when I am no longer working here and 2) could my workers comp claim interfere with my getting a Dispatch job in another community?

Answer: When you file a workers comp case you are filing a claim for benefits (disability pay, medical treatment, lifetime care, and possible compensation for loss of your livelihood). Your claim will continue to be processed even if you resign or retire. In fact, if a medical condition arises out of your employment, you can even file a claim AFTER you are no longer working.

As for this interfering with a new dispatcher job, the answer is *possibly.* First of all, if this kind of work has made you seriously ill, you may want to consider *another* line of work as a matter of mental health. Further, if you have been diagnosed with a permanent medical condition, a new employer may ask about this before they actually award a job to you. You must answer honestly, although you may also request "accommodations" for your condition under the ADA.

It is illegal for an employer to rescind an employment offer only because you filed a workers comp claim; however, if your condition could interfere with the performance of your new job, the employer retains the right not hire you.

Question: My new manager appears to be taking notes and setting up private files on each person in our department. I am wondering whether it is legal for her to keep these, outside of our actual personnel files kept in the Human Resources Department.

Answer: It's normal for managers to keep "files" on their subordinates. After all, it's her legitimate job to track your performance; taking notes is a normal way to do this. *You have the right to keep your own notes about your interaction with your manager as well.*

Having said this, your "real" personnel file is the one found in the Human Resources Department. You have the right to go through it periodically, there should be nothing in the file that you have not had the opportunity to review and appeal. Materials in your "real" file may be used against you in disciplinary proceedings. Your manager may keep records in her personal files, but they cannot be used as "prior discipline" in any disciplinary action.

Question: Our Human Resources Department hired a consultant to conduct a salary survey, which is being used at the bargaining table to determine which job classes will receive pay increases. It's clear to our negotiating team that the survey has a lot of errors. We are asking to see the information that the consultant is basing his figures on, but HR has refused to provide this. *Don't we have a right to see this data?* Should we file a public information act request in order to get it?

Answer: Management has no obligation to give you their "private notes" which are used as the basis for their bargaining positions. So, this leaves your team in the position that it must challenge the County's salary survey, rather than endorse it. This is unfortunate. If management doesn't want to work with your team to correct the survey, then, from the union's perspective, the survey needs to be considered irrelevant.

Your team is, ultimately, left with two choices: 1) try to gather correct data *yourselves,* to construct an honest survey, or 2) simply try to negotiate for a reasonable pay increase for your members, across the board.

Question: Is our supervisor allowed to address sick time on a performance review? Although I do have plenty of time in my bank, I used 16 sick days last year. My supervisor says that this is "excessive," and put this in my review. I DON'T think it's excessive. I'm a single parent with two kids, and have also had to take time off for my *own* appointments. I think I should be able to use my sick leave without being threatened. What can I do about this?

Answer: First of all, if you used 16 days last year, it's likely that someone in your family has a serious medical condition. If this is the case, you should have an FMLA (Family Medical Leave) letter on file with the County. This will enable you to use up to 12 weeks of leave to care for yourself or sick family member, *without loss of employment or "adverse action."* People who are protected by the FMLA can't be "written up" for excess sick leave usage, or bothered about bringing doctor's slips after each absence.

If you don't have an ongoing medical condition in the family, or did not file for FMLA, then be advised that 16 days is a lot sick leave in one year – and that management retains the right to question this. After all, there ARE people who abuse sick leave. It's your right to use it, but it's the County's right to investigate and ensure legitimate use. If the "investigation" moves in the direction of unjustified discipline or harassment, YOU have the right to appeal. Negative comments in your performance review can be considered a form of discipline; you may grieve, appeal, or rebut the review, depending on the options listed in your MOU. Feel free to call your union rep for help.

Question: I was in a vehicle accident more than a year ago, and I agree that I was partly at fault. I was not disciplined at that time, but now I'm being called before the County's "safety committee" about it. I want to know: can they discipline me *now*? Could I be fired?

Answer: There isn't really a "statute of limitations" for most public employees on how long the County can take to punish you for an infraction. The problem, of course, with investigating, or questioning you, about an accident that occurred more than a year ago is that most of the "evidence" is old, and most of the witnesses have forgotten what occurred. In theory, the County can discipline you. If you were impaired or reckless in the accident they may discipline you severely. However, you ALSO have the legal right to appeal, and the passage of time (with no further accidents, presumably) is part of the consideration.

Also, you should know that this "safety committee" is considered an investigative body. You do have the right to representation when you go before the committee.

Question: I hurt myself on the job and have to go to therapy three times a week. I want to know if I can be reimbursed for my mileage to and from the doctor's office?

Answer: Yes, you are entitled to be reimbursed for mileage in this case. You should use the distance actually driven as the basis for your reimbursement request.

Question: I am resigning from my County job and was just told I'll be receiving my final paycheck "within a few weeks." I looked on the website for the State Labor Commission and it says that employers must provide final checks within 72-hours….What can I do?

Answer: You're not going to like this answer. Many sections of the State Labor Code do not apply to public employees – and this is one of them. Public employers have the right to provide last paychecks on the basis of their "normal pay schedule."

Melting Down?

Your staff at the CEA Office are available by email:

cea@cityemployees.net

Association Members Are Eligible for Free Legal Services

As part of our arrangement with our professional staff, members now have access to an attorney for all types of legal advice. If you are a current Association member, you may call our "external attorneys" at for assistance in <u>any</u> of the following areas:

1. **Small Claims Court**
2. **Family Law (divorce, child custody, etc.)**
4. **Estate Planning (Wills and Trusts)**
5. **Taxation problems**
6. **Personal Injury**
7. **Real Property (interests in land)**
8. **Department of Motor Vehicle hearings**
9. **Unemployment Insurance hearings**
10. **Criminal Law**

This service does NOT include representation in Court, but does include evaluating your case and assistance in resolving it. There is no limit to the number of cases you may bring forward & all conversations are confidential.

John Stanton has advised us that very often, people don't need to *retain* a lawyer; they just need simple advice and perhaps, a little help. If you do need formal representation, they will refer you to a reputable attorney in that field.

Brian J. Ramsey (562) 923-0971 www.tldlaw.com
John Stanton (714) 974-8941 or John@johnjstanton.com

This is a service for Association members ONLY, Please…