was pleased to represent CALPELRA at the National Public Employers Labor Relations Association (NPELRA) 30th Annual Training Conference in New Orleans in April. Nearly 300 members of PELRA’s from across the country enjoyed an excellent program with warm and friendly people.

Of special note was Kathy Cooper Franklin, who spoke on Future Trends in Employment Litigation. There was merit to her idea that in the future, coffee break rooms would become “serenity rooms” for employees!

Two of our outstanding members were recipients of NPELRA’s prestigious Excellence and Pacesetter Awards. John Liebert, Partner at Liebert Cassidy Whitmore, was honored with the Award of Excellence for his continuous contributions to the field of labor relations and for providing training through his Employment Relations Consortium. Kevin Boylan, Personnel Operations Manager for the City of Long Beach, received the Pacesetter Award for producing the fascinating CALPELRA perspective video showcased at our 25th Anniversary Conference. Congratulations to John and Kevin!
Registration will open this summer for Academy II, which will be held Tuesday, November 6, 2001, the day before our Annual Training Conference.

This is the chance for many of our members who have made a commitment to complete the three basic Academies, and write a research paper for a CALPELRA Master’s Certificate in Labor Relations (and top billing at our “Academy Awards” each year), to complete Academy II.

Briefly, Academy II is a varied program covering the legal and historical background for rights arbitration, tips for selecting an arbitrator, preparing an arbitration case, and a special workshop on the art of cross examination, using scenes from movies for dramatic illustration. An arbitrator’s perspective on what does, and does not, impress them rounds out the program.

As one of our “basic” Academies, we expect this session to fill up early. Registration is limited and we recommend registering as soon as possible so you don’t miss out!

### IMPORTANT DATES

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tr>
<td>November 6, 2001</td>
<td>CALPELRA Labor Relations Academy II “The Arbitration Process” DoubleTree Hotel Monterey, California</td>
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<tr>
<td>November 7-9, 2001</td>
<td>CALPELRA 26th Annual Training Conference DoubleTree Hotel Monterey, California</td>
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<tr>
<td>December 3-4, 2001</td>
<td>CALPELRA Advanced Labor Relations AcademyV “MMBA Under PERB Jurisdiction” Hyatt Regency Hotel Sacramento, California</td>
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**President’s Message (continued)**

The importance of public school issues became apparent to me in late April when I attended the Liebert Cassidy Whitmore Public Sector Employment Law Conference. The sessions were not only fascinating, but they sparked ideas for topics and presenters of value to our school members for our November Conference.

The CALPELRA Board put its enthusiastic stamp of approval on the 2001 Conference Program. Sam Penrod from the City of Vista, and his committee have outdone themselves! Thanks to all the hard-working committee members. The Conference theme is “Labor Relations - The Real California Adventure!” And “adventure” will be the topic of our keynote speaker, Jeff Salz, who will share fascinating tales about his version of life’s real adventures.

As we increase the choices for concurrent sessions on timely issues, we will use the “wood” titled rooms (look for easy directions in your conference notebook). Consider sending additional staff members from your agency to take advantage of these great training opportunities - all in one place!

A new “networking” concept, called “Dinners For Eight,” will bring you and your colleagues together for dinner Wednesday evening at one of the local restaurants. Sign-up sheets will be posted in the Community Room.

Look for your Conference favorites along with some new speakers and new sessions for school and court members, along with detailed program and registration information in our Special Conference Edition of this Newsletter coming to you this summer.
The Court’s Decision

The Ninth Circuit Court of Appeals recently held that officials in an Idaho fire department, including the department commissioners, the department chief, and the deputy chief, violated a shift captain’s free speech rights when they fired him for reporting that firefighters on his shift had been viewing pornographic Web sites at the station. The case of Hufford v. McEnaney¹ reminds public employers of the First Amendment protections they must afford “whistleblowers,” and also of the importance of having clear computer and Internet use policies.

The North Ada County Fire and Rescue District did not have a computer-specific policy in place, but department policy prohibited “displaying visuals of sexual content . . . i.e., nude pictures, videotapes, etc.” Shift captain Hufford discovered evidence that department employees had downloaded onto the station’s computers hundreds of hours of hard-core pornographic material, including photographs that appeared to be of children. Hufford reported his finding to the fire chief. The fire chief referred the matter to the police chief for investigation, but the police did not press charges because there was insufficient evidence that the materials were illegal.

The exposure of the pornography cache significantly disrupted work in the fire department, because so many employees were implicated. As the investigation was underway, many employees worried about being disciplined for their activities. The fire chief explained that the investigation was “tearing [the] fire department apart,” and that he “wanted to get it put back together.”²

Shortly after Hufford exposed the pornography cache, his standing in the department began to fall. Within a few months, Hufford received written reprimands for various actions, and finally was terminated. The defendants admitted that Hufford’s termination was in retaliation for

... continued on next page
Don’t Miss The Next Presentation Of Academy V – “MMBA Under PERB Jurisdiction”

In response to heavy demand for CALPELRA’s Advanced Labor Academy V, which presents a comprehensive program to prepare MMBA agencies for PERB jurisdiction, a two-day session has been scheduled for December 3-4, 2001, in Sacramento.

This Academy is also geared for school agencies who have been under PERB jurisdiction for many years. The Academy provides an up-to-date review of cases and procedures that labor relations professionals in schools who attended the May 3rd and 4th session rated as highly pertinent and valuable. (See accompanying article in this Newsletter.)

Registration information will be included with the Special Conference Edition of this Newsletter.

Firing Shift Captain For Reporting Internet Pornography Violated Captain’s First Amendment Rights (continued)

his report of the pornography cache and also that his speech was a matter of public concern. Nonetheless, the defendants argued that qualified immunity should protect them from liability for violating Hufford's free speech rights, because by exposing the pornography cache, Hufford “eroded close relationships premised on personal loyalty and confidentiality and obstructed routine office operations.”

The court disagreed with the defendants' arguments, and found that the interests served by allowing Hufford to speak and expose the downloading of pornographic material on the department’s computers outweighed the department's interest in promoting workplace efficiency and avoiding workplace disruption. The court explained:

“Neither the need for close working relationships nor the need for strong loyalty obviates the more pressing need for compliance with laws and prudential company policies.”

The Lessons

This case reminds public employers to respect the First Amendment rights of whistleblowers, even when the whistleblowers’ actions disrupt the workplace. This is particularly true where the employer’s own actions instigate or exacerbate the workplace disruption created by the whistleblower.

In addition, the case illustrates the need for clear rules and policies regarding allowable uses of technology in the workplace. If the fire department had a clear policy prohibiting access to pornographic materials on the department’s computers, employees would have been less likely to engage in the prohibited activities. Even if some employees violated the policy, the procedures for dealing with those employees would have been clear, and the department would have avoided the disruption in operations created by the ambiguous rules.

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1 Hufford v. McEnaney (9th Cir. 2001) 2001 U.S. App. LEXIS 10510.
3 Id., at p. *16.
“Encore!” Say PERB Academy V Attendees

ALPELRA’s Advanced Academy V – “MMBA Under PERB Jurisdiction,” brought over 120 professionals to Oakland on May 3 and 4 and requests to repeat this important training. Of special interest were discussions by three PERB officials, and the union perspective on PERB, past and present. Interactive exercises reinforced important points and a “Pre-Test” generated a lively dialogue with a few surprise answers. Registration will open this summer for another session of Academy V at the Hyatt Regency Sacramento on December 3 and 4, 2001, (Monday/Tuesday).

Let’s take a look at reactions to this event . . .

“I am looking forward to the next Advanced Academy. This is a must event on a periodic basis. How about next spring ‘MMBA and PERB at One Year’?”
Tim Loney, City of Oakland

“PERB representatives were very helpful.”
Farfalla Borah, University of California, Santa Barbara

“Establishes a key foundation and body of knowledge. Judge D’Orazio is very valuable.”
Shar Caldwell, University of California, Oakland

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Fred D’Orazio, PERB Administrative Law Judge

“An eye opener! This training fills gaps and gives a lot of information about subjects we have not had to deal with before.”
Ed Takach, El Dorado County

“The training was timely, informative and entertaining!”
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“PERB representatives were very helpful.”
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“Establishes a key foundation and body of knowledge. Judge D’Orazio is very valuable.”
Shar Caldwell, University of California, Oakland

“Invaluable. Great materials and stimulating discussions. Good to see this type of training happening now. It makes for a smooth transition. This did not occur when the previous legislation was enacted.”
Fred D’Orazio, PERB Administrative Law Judge

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circumstances of employment

In this case, Nolan v. City of Chicago, the city and a union representing the police officers had entered into a collective bargaining agreement (CBA) setting many of the terms of employment. In some instances, the CBA guaranteed overtime protections to the officers that were more generous than those offered by the FLSA. Specifically, the CBA provided the officers with at least time-and-one-half overtime for hours worked in excess of their regular "tour of duty" (ranging from 144 to 176 hours), in excess of eight hours a day, or in excess of five consecutive days between Sunday and Saturday. The officers also received premium overtime when they were called in for duty beyond their normally scheduled work hours, when they were required to appear in court, or when they worked on holidays or other scheduled days.

The plaintiffs, police officers working for the city of Chicago, alleged that their employer violated the FLSA by failing to pay them sufficient overtime. First, the officers argued that the city failed to include certain payments received by the plaintiffs, termed "duty availability payments," in their regular rates of pay, used to calculate overtime.

Besides claiming that their overtime rate was improperly calculated, the plaintiffs maintained that they also were not paid for all overtime hours they had worked. Specifically, they alleged that, in tracking their hours for overtime purposes, the city had not taken into account hours they worked on holidays, and hours they worked in special assignments for city agencies outside the police department.

The §207(k) Exemption

Under the FLSA, employers generally must pay their covered workers overtime compensation, at time and one-half their regular rates of pay, for all hours worked over 40 in a seven-day week. However, the Act provides a partial overtime exemption for qualifying law enforcement and fire protection workers, allowing employers to schedule them for more hours over a longer period of time, between seven and 28 days, before premium overtime is due (29 U.S.C. §207(k)). For instance, a police officer with a 14-day work period under §207(k) would have to work 86 hours in 14 days before receiving time-and-one-half overtime pay. In the case at hand, the employees worked on a 28-day schedule, meaning they were entitled to time-and-one-half overtime compensation only for hours worked over 171 in 28 days.

The city argued that, as a result of the extra payments made to the officers under the CBA, the employer had an FLSA "credit" sufficient to offset the underpayment.

The city that improperly calculated its employees' overtime pay under the Fair Labor Standards Act (FLSA) — but that also made certain overpayments not required by the Act — may credit the overpayments toward the overtime compensation due as a result of the flawed FLSA calculations, the U.S. District Court for Northern Illinois recently found. The plaintiffs, police officers working for the city of Chicago, alleged that their employer violated the FLSA by failing to pay them sufficient overtime. First, the officers argued that the city failed to include certain payments received by the plaintiffs, termed "duty availability payments," in their regular rates of pay, used to calculate overtime.

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Under the Act, a worker's regular rate must include all remuneration for employment given by an employer to an employee for work performed, with some exceptions, set forth at 29 U.S.C. §207(e). In Nolan, the city conceded that
the duty availability allowance did not fall under any of the exceptions and thus should have been included in the regular rate. However, the city argued that, as a result of the extra payments made to the officers under the CBA, the employer had an FLSA “credit” sufficient to offset the underpayment caused by improperly calculating the employee’s regular rate.

A Credit Toward Overtime

Considering the city's argument that it was entitled to the credit, the court examined the FLSA’s language. The Act (29 U.S.C. §207(h)(2)) states that certain types of “extra compensation” can be credited toward FLSA-mandated overtime pay including the following:

- extra compensation, paid at a premium rate, given for “hours worked in excess of eight in a day or in excess of the maximum workweek applicable” or in excess of the employee’s “regular working hours”; and
- extra compensation paid at a premium rate “for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth day or seventh day of the workweek,” where the premium rate is not less than time and one-half the employee’s established rate for similar work in non-overtime hours.

The city argued that it was entitled to credit under the above provisions for premium overtime payments — made pursuant to the CBA — given to the plaintiffs when they worked more than eight hours per day, worked on holidays or scheduled days off, worked outside their normal work hours, or worked for more than five consecutive days. The plaintiffs countered that the claimed credit was not applicable because they had not received sufficient FLSA overtime pay.

Considering the plaintiffs' claims, the court found that, under FLSA implementing regulations (29 C.F.R. §778.202), where extra payments are contingent on an employee working more than eight hours in a day or a specified number of hours in a week, those payments can be credited toward FLSA overtime obligations, whether they were made at a time and one-half or a lesser rate. The court found that payments the plaintiffs received under the CBA for extra hours worked met these criteria. The court added that even if the overpayments were made at a rate less than the FLSA overtime rate (because of the omission of the duty allowance), the city could still credit them against its FLSA overtime obligations.

Similarly, under FLSA rules (29 C.F.R. §778.203), an employer that awards premium pay to employees who work holidays can credit the overpayments toward the overtime pay due under the FLSA, as long as the premium rate totals at least time and one-half the regular rate.

In the case at hand, the CBA provided the plaintiffs with premium pay for holidays at a rate of two to three times their normal hourly rate. Therefore, the court found that unless excluding the duty availability allowance from the regular rate brought the overtime rate below time and one-half, the city was entitled to a credit. The court also noted that many other court opinions support these findings (for example, Alexander v. United States (Fed. Cir. 1994) 32 F.3d 1571; Kohlheim v. Glynn County (11th Cir. 1990) 915 F.2d 1473).

As noted, the city paid the officers a premium rate of two to three times their regular rate for holiday hours worked. But although they were paid for this time, the plaintiffs claimed that the city had failed to count the holiday hours they worked toward their 171-hour overtime threshold, meaning they were not paid for all overtime hours worked.

The court agreed with the plaintiffs, finding that the city’s failure to count the holiday work was “inconsistent with the FLSA.” However, the court noted that, “to the extent these holiday hours were paid at a premium rate pursuant to the CBA,” the city could claim a credit against the underpayments.

The court further found that any credits the employer claimed should be applied on a pay period basis, meaning that a specific overpayment could offset a specific underpayment only if the two occurred in the same pay period.
‘Special Detail Work’ Under the FLSA

The plaintiffs also argued that hours they worked in a “Voluntary Special Employment Program” providing services to other city agencies had not been counted toward their 171-hour overtime threshold. Under the program, officers provided law enforcement and patrol services, on a paid but voluntary basis, for the Chicago Transit Authority (CTA) and the Chicago Housing Authority (CHA). During the hours worked in the program, the officers wore their police uniforms and worked under police department rules. Although their pay for this time was issued by the city, the wages were paid from CTA and CHA funds.

The city argued that the hours worked in the special program constituted “special detail work” that need not be counted toward overtime hours under a special provision of the Act. This provision (29 U.S.C. §207(p)(1) applies to an employee who works at a public fire protection or law enforcement agency and who, at his or her option, “agrees to be employed on a special detail by a separate or independent employer in . . . law enforcement, or related activities” (emphasis added).

For such employees, the hours spent in special detail work need not be counted toward the overtime threshold, even where the public agency requires that employees perform the work, “facilities” the workers’ employment, or “otherwise affects the condition of employment of such employees.”

Considering the officers’ work in light of 29 U.S.C. §207(p)(1), the court found that the officers’ participation in the program was completely voluntary, as the Act requires.

Further, the agencies were “separate and independent” from the city under the meaning of the FLSA. The CTA and CHA were “statutorily created, independent” entities, which did not rely on the city for funding, the court found. Thus, the court found that the hours the officers worked for the CTA and CHA constituted “special detail work” that need not be counted toward the overtime threshold. (Nolan v. City of Chicago, (N.D. Ill., 2000) 125 F.Supp.2d 324. (Source: FLSA Handbook, March 2001).)

A Not-So-”Nobel” Prize

While reading Sugar Street, the third book of Nobel Prize Winner (1988) Naguib Mahfouz’s Cairo Trilogy, I came upon this quotation that brought a chuckle and the realization that we, in Personnel, Human Resources and Labor Relations, who often must make the tough decisions, are not universally loved.

“Ridwan said, ‘I’ll take care of any problems that might arise in the Personnel Office. I have many friends there, even though it’s said that employees of the Personnel Office don’t have a friend in the world.’”

“Ibrahim Shawkat sighed and observed, ‘Praise God who spared us from embarking on a career and from dealing with Personnel Officers.’”

— From the Editor
FLSA: Executive Secretary Not Exempt Administrator
Agency Finds Employee Did Not Exercise Enough ‘Discretion and Judgment’

An executive secretary did not qualify as an administrator exempt from the Fair Labor Standards Act (FLSA) because the employee did not exercise sufficient “discretion and independent judgment” under FLSA rules, the U.S. Department of Labor (DOL) concluded in a recent opinion letter.

In the letter, Barbara R. Releford, of the Office of Enforcement Policy, answered an inquiry about whether an executive secretary for a joint city/county police department’s director of law enforcement services would qualify as an administrative employee exempt from FLSA overtime protections.

Under the FLSA, employers generally must pay their employees time and one-half overtime compensation for each hour worked over 40 in a week. However, the Act provides an exemption from this requirement for workers who qualify as bona fide executive, administrative or professional employees by meeting certain duties, responsibility and salary requirements.

In considering whether the executive secretary position would be exempt, Releford considered the worker’s duties. According to a job description provided to DOL, the major job function of the executive secretary was to provide clerical support to executive command personnel within the police department.

The employee’s duties included analyzing departmental work flow and recommending procedural changes (such as the way certain letters were routed), as well as analyzing whether certain departmental procedures were effective (for instance, those involving tracking and distributing mail) and recommending changes as appropriate. The employee also reviewed proposed office equipment purchases and made recommendations based on those reviews. Further, he or she participated in new programs (such as blood drives) and evaluated their effectiveness.

The executive secretary also prepared and analyzed various contracts and memoranda of understanding, planned meetings and agendas for the department director, proposed action based on information gathered at meetings and published a bimonthly departmental newsletter. The worker also prepared monthly materials for meetings of a city/county “law board,” reviewed minutes for these meetings and prepared information packets for new law board members. Further, the position required the worker to maintain calendars and track deadlines associated with the work assignments of high-ranking personnel.

For this work, the executive secretary received pay of $472 per week.

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Binding Arbitration Struck Down By Superior Court

S. 402, which mandates binding interest arbitration for police and fire was struck down by a Santa Cruz County Superior Court judge on May 8. The judge ruled that the binding arbitration mandate in the bill is unconstitutional and denied the union’s petition to compel the Santa Cruz County Board of Supervisors to participate in the binding arbitration process. Additional litigation may be anticipated as this ruling applies only to the parties involved. We will be monitoring the appellate process on this matter and will report any new developments in future Newsletters.

A worker who ‘merely applies [his or her] knowledge in following prescribed procedures or determining which procedure to follow’ is not exercising the necessary discretion and judgment, FLSA rules state.

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The Administration Exemption

To qualify as an exempt administrator under the FLSA’s commonly used “short test,” an employee must receive a salary of at least $250 per week and must perform as his or her primary duty “office or nonmanual work directly related to management policies or general business operations” of the employer, which must require “the exercise of discretion and independent judgment” (29 C.F.R. §541.214).

Citing FLSA rules, Releford noted that duties considered to be “directly related to management policies or general business operations” are those related to the “administrative operations” of an organization, as opposed to the “basic tasks” — that is, the “production” work — of the organization (29 C.F.R. §541.205). The exemption applies to workers who “perform work of substantial importance” to the employer and “whose work affects policy or whose responsibility it is to execute or carry it out.”

Under the rules, exercising discretion and judgment involves comparing and evaluating “possible courses of conduct and acting or making a decision after the various possibilities have been considered” (29 C.F.R. §541.207). Also, the employee should have “the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.” A worker who “merely applies his knowledge in following prescribed procedures or determining which procedure to follow” is not exercising the necessary discretion and judgment, the rules state, even if the employee has “some leeway in reaching a conclusion.”

Weighing these factors, Releford found that the information provided to DOL about the executive secretary position indicated that the employee did not exercise sufficient discretion and independent judgment to be considered an exempt administrator. Thus, she concluded, employees working in that position would not be exempt from overtime protections and would be owed premium pay for hours worked over 40 in a week. (Wage and Hour Opinion Letter, July 17, 2000). (Source: Thompson's, June 2001)

... FLSA Rules Also Discuss ‘Executive Assistants’

Although the executive secretary discussed in the DOL opinion letter was found not to exercise enough discretion and judgment to qualify as exempt, FLSA rules state that certain “executive and administrative assistants” can qualify for the administrative (29 C.F.R. §541.201(a)).

The regulations state that “[i]n modern industrial practice there has been a steady and increasing use of persons who assist an executive in the performance of his duties without themselves having executive authority.” Generally, “such assistants are found in large establishments where the official assisted has duties of such scope and which required so much attention that the work of personal scrutiny, correspondence, and interviews must be delegated,” the rules say.

The rules add that titles of individuals falling into this category might include “executive secretary,” among other things. However, a job title alone “is of little or no assistance in determining” exempts status, the rules caution (29 C.F.R. §541.201(b)). For example, an employee termed an “executive secretary” may be exempt of nonexempt, depending on job duties.
ost Americans may not have heard of Antonio Villaraigosa, but he is likely to be on the cover of Time and Newsweek soon.

Although he lost the election, many experts predicted that Villaraigosa would become the first Latino mayor of Los Angeles. His rise is the fruit of a remarkable resurgence of the labor movement in L.A., based very substantially on organizing of immigrant and low-wage workers. His emergence is an emblem of the most interesting social movement since the civil rights era.

Villaraigosa himself, less than a decade ago, was a union organizer. He then was elected to the California Assembly, quickly rising to speaker by 1998. That this man may be mayor of the largest city in America's largest state is one of the few hopeful harbingers for liberals in an era that seems not only politically conservative but politically dead.

Both parties, in a sense, have become the party of Washington, and most voters don't seem to be paying attention. The Democrats, now in opposition, are having a hard time playing that role, because they still think of themselves as the party of government. And, indeed, they are doing a valiant job defending those aspects of government that most Americans value (when they bother to think about it): Social Security, Medicare, aid to education, environmental protections.

But this sort of institutional role doesn't rouse much popular energy. And while Senate Democratic leader Tom Daschle, D-S.D., and his House counterpart, Dick Gephardt, D-Mo., have done a pretty fair job of playing leader of the opposition, both men are necessarily focused on the mid-term elections of 2002, where the shift in a very few seats could catapult both of them into the much more consequential jobs of House speaker and Senate majority leader.

But that dramatic change depends on electing a handful more Democrats in a few swing middle of the road districts, a project that reinforces caution. This is why the grass roots are so important if America is ever to enjoy a resurgence of progressive politics and government.

And, indeed, there are two noteworthy things going on at America's grass roots — a revived labor movement focused on getting all Americans a living wage, and new energy of immigrant communities.

Both of these trends have come together in the Villaraigosa candidacy. In Los Angeles, unions worked together with progressive legislators to organize some 60,000 home-care workers and win legislation requiring Medicaid reimbursements to pay them a middle-class wage. The homecare campaign, in turn, built on the success of the Justice for Janitors campaign, nationally and in Los Angeles, which has resulted in middle-class wages for janitors.

Home care and janitorial work are both heavily Latino in Los Angeles. But the resurgent union movement there spans African-Americans and other immigrant groups as well. This new energy also reflects new priorities at the national AFL-CIO, whose leader John Sweeney, former president of the service employees union, has made the organizing of low-wage workers a priority. Under Sweeney, with prodding from the grass roots in places like Los Angeles, the AFL-CIO dramatically reversed its traditional position on immigrants, seeing them as potential allies to be organized rather than threats to American workers.

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By a fortuitous convergence, labor’s shift to a pro-immigrant stance coincided with the reign of California Governor Pete Wilson, whose flagrantly anti-immigrant position has wrecked the Republican Party’s hopes with Hispanics in California for at least a generation.

What almost killed the labor movement was the idea that union leaders should behave like “labor statesmen.” Sweeney, in contrast, has had the wit to recognize the power of grass-roots movements, and to provide them resources — and not just in Los Angeles.

Though the national media has not paid much attention, local living wage campaigns, built on local organizing, have succeeded in city after city. In Boston, Harvard University finds itself badly on the defensive because, despite its outsized wealth, Harvard is refusing to pay several hundred service workers the $10.25 an hour that the Cambridge City Council has determined to be a living wage there.

Just when grass-roots politics looks moribund, it revives in unexpected places. Isn’t that what democracy is about? (San Diego Union Tribune, May 6, 2001 - by Robert Kuttner)

Non-union workers should not be required to pay union organizing fees, a federal appeals court ruled on May 17, 2001, overturning a decision by the National Labor Relations Board.

“We hold that organizational activity is not necessary for the union’s performance of its duties as the exclusive representative of the employees,” the unanimous 3-judge panel of the 9th U.S. Circuit Court of Appeals said. “To require non-member employees to fund such activity is not authorized.”

Latinos Help Revive Labor Movement (continued)

A representative of the United Food and Commercial Workers said, “It’s an unfortunate decision. But it won’t have a great impact. There’s so few people who take this position because they recognize the value the union serves to them.”

The National Right to Work Legal Defense Foundation, which opposes compulsory dues, praised the court’s decision saying it would have an impact on 7.8 million workers across the country who are forced to pay union fees as a condition of their employment.

Thousands of labor contracts require workers who choose not to join the union representing them to pay fees similar to what union members pay in dues.

However, in a 1988 ruling the U. S. Supreme Court said that unions may not use money from non-union workers for any purpose other than collective bargaining.

In that case, 20 employees of AT&T in Maryland sued the Communications Workers of America, contesting they should have the right to withhold a portion of their non-member fees to avoid subsidizing union political goals they didn’t agree with.

In the latest case, three supermarket and meat processing workers in Michigan, Colorado, and California who quit the food workers union in 1989 complained they continued to be charged non-member fees that helped pay for union organizing activities.

The NLRB, which acts as an out-of-court referee of labor-management disputes, ruled in October 1999 they should have to pay, saying that recruiting new members indirectly bolsters a union’s bargaining clout to the benefit of members, as well as non-members.

But the appeals court took a dim view of that argument.

“The Board does not have a free hand to interpret a statute when the Supreme Court has already interpreted the statute,” the court said.

A representative of the United Food and Commercial Workers said, “It’s an unfortunate decision. But it won’t have a great impact. There’s so few people who take this position because they recognize the value the union serves to them.”

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Latest CPI Data

The Bureau of Labor Statistics (BLS) of the United States Department of Labor issued new Consumer Price Index data on June 16, 2001. The latest CPI increases are as follows:

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<thead>
<tr>
<th>AREA</th>
<th>CPI-U</th>
<th>CPI-W</th>
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<tbody>
<tr>
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<td>5.8</td>
<td>5.7</td>
</tr>
<tr>
<td>Los Angeles/Riverside/Orange**</td>
<td>3.75</td>
<td>3.74</td>
</tr>
<tr>
<td>Western Urban (50,000 – 1,500,000)**</td>
<td>3.5</td>
<td>3.51</td>
</tr>
<tr>
<td>U.S. City Average**</td>
<td>3.6</td>
<td>3.7</td>
</tr>
</tbody>
</table>

The BLS will release CPI data for June on July 18, 2001. See the CALPELRA Website at www.calpelra.org for this updated information.

* Increase from April 2000 – April 2001
** Increase from May 2000 – May 2001

NPTELRA AWARD OF EXCELLENCE: John Liebert Hailed for Contribution

John Liebert, our friend and popular speaker at our Annual Training Conferences, was presented with the NPTELRA Award of Excellence at NPTELRA’s 30th Annual Conference in New Orleans in April. John was hailed for 30 years of contributions as a leader and advocate in California, Arizona, and Nevada. His comprehensive workshops have trained thousands of managers, supervisors, and labor relations professionals. John emphasizes positive labor management relations and has been in the forefront of many innovations. Congratulations John, we always knew you were excellent!

NPTELRA Pacesetter Award Goes To Kavin Boylan

Kevin Boylan, Personnel Operations Manager, City of Long Beach, was singled out for special recognition as a Pacesetter at the NPTELRA Conference in April. Kevin was praised for developing a video commemorating CALPELRA’s 25th Anniversary. Kevin mastered the daunting task of assembling a cast of CALPELRA leaders. His determination to see the project through despite many obstacles resulted in an outstanding experience for all who were privileged to see his video at the opening of our 25th Anniversary Conference. The video dramatized labor relations over the years and CALPELRA’s role in its evolution. So, if you receive a call from Kevin about a future project, the appropriate answer is: “Yes, Mr. Boylan, I’m ready for my close-up.” Congratulations, Kevin and thanks from all of us!
On July 1, 2001, the Public Employment Relations Board (PERB) will gain jurisdiction over the Meyers-Milias-Brown Act (MMBA). PERB has adopted emergency regulations governing its jurisdiction over MMBA agencies, and the regulations also become effective on July 1, 2001. Under this new regime, local agencies covered by the MMBA face important choices regarding their local rules governing unit determinations, recognition, representation, and elections. Local agencies must decide between the following options regarding these local rules:

1. Adopt PERB’s model rules;
2. Retain existing local rules; or
3. Revise existing local rules.

Each local agency should consciously decide how to proceed based on the agency’s unique needs and circumstances. In order to make an informed decision, each agency, with its legal counsel’s advice, should do at least the following:

1. Review the agency’s existing local rules to ensure that they comply with current law. Many agencies have not revised their rules since they were originally adopted in the 1960s or 1970s, and those rules may contain provisions that courts have invalidated, or that PERB may find contrary to the MMBA’s purpose.
2. Review PERB’s model rules contained in subchapter 2 of Chapter 5 of the emergency regulations and assess whether these rules would be appropriate for the agency. PERB’s regulations provide that PERB will conduct representation proceedings only for agencies that adopt PERB’s rules.
3. Review and consider model rules proposed by other entities (including legal counsel) for ideas on possible revisions to local rules.
4. Remember that agencies must consult with any interested employee organizations regarding changes to local rules.

With input from PERB’s Deputy General Counsel, Robert Thompson, and PERB’s Sacramento Regional Director, Les Chisholm, participants in CALPELRA’s May 4, 2001, Labor Academy V discussed the choices facing local agencies, and identified advantages and disadvantages of adopting PERB’s rules, maintaining existing local rules, and revising existing local rules. In grappling with these choices, the participants listed the following advantages and disadvantages of adopting PERB’s rules:

### Advantages to Adopting PERB’s Model Rules

1. Avoid costs and hassles of conducting elections, and let PERB do it for you. PERB will conduct representation proceedings for the local agency only if the local agency adopts PERB’s regulations as its local rules.
2. Avoid costs and difficulties of independently developing and drafting comprehensive local rules.
3. Avoid unfair practices charges, because there will be fewer arguments about the legality and reasonableness of PERB’s rules.
4. PERB is familiar with its own rules, and its interpretation of the rules will be more straightforward and predictable.
5. Avoid the cost, difficulty, and potential duplication of local dispute resolution procedures and go straight to PERB for resolution of disputes. If local rules require local dispute resolution procedures (including binding arbitration), these local decisions may be appealed to PERB for final determination.

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6. By adopting PERB’s rules by reference, local rules can be continuously updated as PERB updates its rules.
7. PERB may offer training on implementation of its rules.

Disadvantages of Adopting PERB’s Rules
1. Loss of local control. Local rules can address particular needs of the local agency better than PERB’s generic rules. Giving up local control may have substantial political implications.
2. Local agencies understand their existing local rules. Adopting PERB rules may create confusion and uncertainty for all interested parties.
3. It may not be worth the effort to consult with unions regarding changing local rules to adopt PERB’s rules, especially since local agencies use unit determination and representation rules infrequently. It may be easier to maintain existing local rules or modify them only slightly.
4. PERB has no jurisdiction over disputes regarding peace officers and management employees. It may be cumbersome to have a different set of rules governing representation and unit determination disputes for these employees.
5. If a backlog develops, PERB may not be able to resolve disputes as quickly as local agencies could resolve disputes under local procedures.
6. PERB’s current rules are only emergency regulations and may change before they become permanent.

1 5 Cal. Code Regs. Section 61000, et seq.
2 California Government Code Section 3507.
Avoking Unfair Practices, Part One: Discrimination And Retaliation Based On Union Activities

By Alison A. Moller

Luta Jones is a crew leader in the Bliss City Streets Department. He is also the president of Local 2001 and a vocal advocate of the union. Shortly after a particularly difficult round of contract negotiations, Jones received a letter from his supervisor disciplining him for being rude to a Bliss City pedestrian who questioned the manner in which Jones was paving a portion of road. After he received the disciplinary letter, Jones filed an unfair practice charge with PERB alleging discrimination based on Jones’ union activities. As evidence of anti-union animus, Jones cited Bliss City’s failure to follow its progressive discipline policy, which required the City to provide verbal warnings before written reprimands for first offenses of this type. He also cited Bliss City’s cursory investigation of the issue (the City did not interview members of Jones’ crew who witnessed the incident). Bliss City responded that the written warning was appropriate and that a subsequent investigation showed that Jones made the statements at issue. What was the outcome of the charge?

As a result of revisions in the MMBA, effective July 1, 2001, the Public Employment Relations Board (“PERB”) will have initial, exclusive authority to resolve unfair labor practice charges such as the above for MMBA agencies. An unfair practice charge by a public agency is defined as “a complaint alleging any violation of this chapter [the MMBA] or of any rules and regulations adopted by a public agency pursuant to [the MMBA].” One type of unfair practice charge is a discrimination charge; that is, a charge that an employer “interfered[d] with, intimidate[d], restrain[ed], coerce[d], or discriminate[d] against” an employee because of the exercise of their rights under MMBA or any local rule guaranteeing their right to form, join, and be represented by an employee organization. We expect that discrimination charges such as the Bliss City charge described above will be one of the most common types of unfair practice charges.

Local agencies can also expect unfair practices charges brought for violation of the duty to bargain in good faith, violation of an employee organization’s right to represent its members and to have reasonable release time for bargaining, violation of local agency employer-employee relations rules, and violation of the new MMBA agency shop provisions.

This article discusses the first type of unfair practice charge – discrimination or retaliation for employees’ protected activity. Subsequent articles will discuss unfair practice charges involving the duty to bargain and other unfair practice charges.

How Do PERB’s Unfair Practice Charge Procedures Work? Who Can File An Unfair Practice Charge?

Unfair practice charges can be filed either by an individual, a union, or the employer. Once an unfair practice charge is filed with PERB, the Board’s regional attorney or agent will investigate and evaluate unfair practice charges to determine whether PERB should issue a formal complaint or inform the charging party of the complaint’s deficiencies so that the charge can be amended or dismissed. If PERB issues a formal complaint, it is assigned to an Administrative Law Judge (ALJ), who first attempts an informal settlement conference. If settlement efforts fail, an ALJ conducts a formal hearing. The ALJ issues a proposed decision after the hearing. Parties may appeal the ALJ’s proposed decision to the Board. The Board may affirm, modify, reverse, or remand the ALJ’s proposed decision.

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PERB Hasn’t Yet Adjudicated Any Unfair Practice Charges Involving MMBA Employers. Why Are PERB Decisions Relevant For Us?

The Board and PERB administrative law judges have issued more than a thousand decisions that answer the question of whether a particular set of facts constitute unfair practices under the other PERB-administered statutes. The anti-discrimination provisions of the MMBA are similar to those under the other PERB-administered statutes. PERB’s decisions will provide guidance about how an administrative law judge or the Board would rule in a similar situation.

What Is PERB’s Test For Proving An Unfair Practice Discrimination Charge Based On Union Activity?

PERB’s test for proving an unfair practice charge based on union activity requires the charging party to show:

1. the employee engaged in protected activity;
2. the employer was aware of the employee’s protected activity; and
3. the employer took some action adverse to the employee’s interests.

The charging party must also make a prima facie showing that the employer’s adverse action was motivated, at least in part, by the employee’s protected activity.

How Can Our Agency Prevent Union Discrimination Or Retaliation Charges When Making Employment Decisions?

1. Thoroughly Investigate The Matter Before Making A Decision

An inadequate investigation can be circumstantial evidence of unlawful motivation. Treat union discrimination claims like sex or race discrimination claims: conduct a prompt, thorough investigation and interview all relevant witnesses.

PERB recently found that a school district engaged in unlawful discrimination where the district based one of two letters of reprimand solely on a co-worker’s report that the employee, a union activist, was harassing and intimidating the co-worker. The district never interviewed the union activist herself or any other co-workers. A thorough investigation can defeat charges of anti-union animus, even where the timing of events may not favor the employer. In one case where the employer’s contested termination occurred shortly after the employee’s union activity, PERB nonetheless found that the employer had lawfully terminated the employee because the employer conducted a thorough investigation of the matter. The union alleged that anti-union animus motivated the employee’s termination because the employee had actively supported a rival union seeking to decertify the certified representative and the discharge occurred soon after the filing of the decertification petition. The union argued that the district’s decision was tainted by the recommendation of co-workers, who were officers of the certified representative. But the district administrators had viewed a film of the theft leading to the termination and independently identified the employee as the thief, which PERB found persuasive.

2. Follow Established Procedures In Making The Decision

Evidence that the employer failed to follow established procedures in disciplining or taking other adverse action against an employee also can be evidence of anti-union animus.

For example, PERB found that an employer refused to transfer an employee in retaliation for the employee’s contacts with the union where the employer, contrary to its usual practice of filling certain vacancies with transfers of existing employees, inexplicably chose to fill the vacancy at issue through competitive procedures. Similarly, an employer’s insistence on a procedure or policy that it failed to enforce in the past may be used as evidence of discrimination or retaliation. In one such case, PERB found that a school district refused to approve the teaching contracts of a union
official, not because the district was adhering to an established policy, but because the district was displeased with the official’s presentation protesting a district wage proposal. Although the district claimed that the teaching contracts were not approved because they were established as a result of a grievance settlement, and the district had a policy against so-called “backdoor contracts”, the evidence showed that the District had approved similar contracts in the past.

3. Treat Similarly-Situated Employees Similarly

Treating similarly-situated employees or situations differently without adequate justification can be evidence of anti-union animus. For example, PERB found anti-union animus where a supervisor ordered an employee to remove a union button from his uniform but did not require employees wearing non-union buttons to remove them from their uniforms. The supervisor claimed that the employee was breaking Department regulations concerning the appearance of employee uniforms, but PERB found this justification unpersuasive considering that the supervisor permitted employees to wear other types of buttons on their uniforms. The evidence showed that employees could drink coffee at their desks, and the groundskeeper’s job duties required regular use of a desk. No other employees except the groundskeeper received a written reprimand, even though other employees also violated the policy.

Attendance problems, because of their prevalence and potential for disparate treatment, often lead to claims of discrimination. PERB found discrimination in one case where, in “a work environment where attendance violations were legion,” the employer singled out a union activist for discipline. In another disparate treatment case involving attendance issues, PERB found discrimination when a school district issued a written reprimand to a teacher, the union’s chief negotiator, because she and other members of her carpool arrived late for work. Other members of the carpool did not receive any reprimand. The district explained the different treatment as a result of the fact that the union activist was the driver of the carpool and had been previously orally reprimanded for tardiness. But PERB held that the reprimand, which consisted of the superintendent speaking to the union activist about the lateness of all teachers, did not constitute a prior reprimand. PERB held that although the district may have been justified in orally reprimanding all carpool members, it was not justified in singling out the driver for discipline with a written reprimand.

4. Provide Consistent Reasons For The Decision

An employer’s failure to offer justification to the employee when it takes action against the employee or offering exaggerated or vague and ambiguous reasons can be evidence of improper motive. In one such example, PERB found discrimination where a school district transferred a teacher, the union’s president, from his position as a department chairperson. The District claimed that the teacher was transferred because of the many parent and student complaints regarding his grading and teaching style. But the District never explained to the employee why his employer was removing him from his former position until he requested an explanation. Also, his formal transfer notice did not offer a reason for the transfer. At the first step of the grievance after his transfer, the employee was told merely that he was being transferred for the good of the school. It was not until the
hearing that the employer explained the various reasons that motivated the transfer decision, including student complaints. But PERB found the reasons unpersuasive because the district had never informed teacher of these reasons.

What Remedies Does An Employee Now Have If The Employer Is Found To Have Discriminated Based On Union Activities?

PERB has the authority to determine “the appropriate remedy necessary to effectuate the purposes” of the MMBA. PERB remedies in discrimination and interference cases are those most likely to prevent future discrimination or interference and to make the employees whole.

For example, PERB may require employers to reinstate employees terminated or demoted as a result of their exercise of protected rights to the same or substantially equivalent position, with back pay, seniority, and other appropriate benefits. In appropriate cases, PERB has ordered employers to remove damaging materials from employees' personnel files. PERB can also require employers to cease and desist unlawful conduct such as rescinding policies or regulations that resulted in interference or discrimination.

Investigation of the issue and did not file a key witness. . . Next installment on unfair practices - when will PERB order a binding arbitration provision contained in a collective bargaining agreement?

How Can Our Agency Obtain Copies Of PERB Decisions?

ALJ and Board decisions are reported in the Public Employee Reporter for California (PERC) and are available at many law libraries or through PERB's Web site (www.perb.ca.gov) or regional offices.

What Happened With The Bliss City Unfair Practice Charge Described At The Beginning Of This Article?

The unfair practice charge is based on Alisal Union Elementary School District (2000) Docket No. SF-CE-2052, 24 PERC Par. 31052. An administrative law judge found that the school district discriminated against a teacher and union activist when the district gave the teacher a written reprimand based on parents' complaints of her treatment of a student. Three factors led to the finding of discrimination. First, the letter closely followed a series of confrontations between the teacher and the district over union issues. Second, in giving the written reprimand, the district departed from its progressive discipline policy, which required that oral warnings be given before written warnings in all appropriate circumstances. Third, the investigation of the issue and did not file a key witness.

1 This fact scenario is based on an unfair practice charge filed with PERB in March of 2000. Insert case cite and the administrative law judge’s ruling as part of the endnote.
2 Government Code Section 3509(b).
3 Government Code Section 3506.
4 Government Code Sections 3503, 3504, 3507.
5 Government Code Sections 3503, 3505.3.
6 Government Code Section 3507.
7 Government Code Sections 3502.5, 3508.5.
13 Santa Clara Unified School District (1979) PERB Decision No. 104, 3 PERC Par. 10124.
14 San Diego Community College District (1983) PERB Dec. No. 368, 8 PERC Par. 15099.
15 State of California (Department of Parks And Recreation) (1983) PERB Decision No. 329-S, 7 PERC Par. 14211.
16 State of California (Department of Parks And Recreation) (1983) PERB Decision No. 328-S, 7 PERC Par. 14211.
20 Government Code Section 3509(b). See also Government Code Sections 3509(a) and 3541.3(c).
Positions Available

The Superior Court, Alameda County has an exciting opportunity available. We are seeking to add an experienced professional to our team of dedicated professionals to develop creative and innovative programs and solutions allowing our internal customers to have the resources necessary to best serve our community.

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HR Bureau
1225 Fallon Street, Room 105
Oakland, California 94612

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