letter from the editor

Dear *CPER* Readers:

Political pundits are saying that America is more polarized than ever. Bring up, say, the war in Iraq or gay marriage, and supporters and detractors alike are not shy about telling you what they think. A few weeks ago, hundreds of folks lined up in Berkeley to shake hands with President Clinton, but so many others vilify Bill — and Hillary even more so.

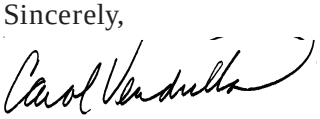
Michael Moore has become the darling of the left who, some hope, will help send George Bush packing. Others believe that Fahrenheit 9/11 is a pack of lies. Mention Ralph Nader at your next dinner party. People either ardently support his challenge to the "sell-outs" in the Democratic party or think he's the guy who is going to cost the Democrats the election. Again.

In California, politicians and citizens alike seem to face off over the notion of taxes. Since 1978, when voters enacted Proposition 13 and took a big bite out of property taxes, a massive divide has emerged. Some are calling for much-needed reform of state government, including the infusion of new taxes. How else, they argue, can we break free from the budgetary straight jacket we've crafted to protect funding for certain constituencies, like the schools. Others just as vociferously call for fewer assessments and cheered when Governor Schwarzenegger lowered the boom on the car tax, leaving local governments scrambling to pay salaries.

Within the labor and employment law community, we also have our differences. About the use of subcontractors or workers' compensation reform. We debate the pros and cons of binding interest arbitration and the fairness of card check elections. Lucrative contracts for certain state employees have caused some to question the sanctity of multi-year agreements — and have led others to characterize that view as the demise of collective bargaining as we know it.

Debate and divergent views. When they blind us to the middle ground or block compromise, not a good thing. When they stimulate our brain cells in search of better ideas and solutions, I'm all for it.

Sincerely,



Carol Vendrillo
CPER Director and Editor

It's about convenience...

It's about progress...

It's about TIME...

CPER is online!

And we hope you've got us bookmarked

This year, subscribers will continue to receive a **print copy** in the mail **and** will be able to access their subscription **online.** Online access is possible, however, only after your email address is registered with Berkeley Electronic Press (BePress).

BePress now handles *CPER* subscriptions. Contact them at info@bepress.com for subscription and email information, and for other subscription questions.

Online access to the journal now is available only to those who subscribe and register...so don't delay!

Do it today: info@bepress.com

Recent Developments in Fair Share Fee Law Affecting Public Sector Employers, Unions and Employees

Jeffrey B. Demain

Jeffrey Demain *is a partner in the San Francisco law firm of Altshuler, Berzon, Nussbaum, Rubin & Demain. He, along with other members of his firm, participated as counsel for the union defendants in* Wagner v. PECG, Cummings v. Connell, *and* Friedman v. CSEA.*; as counsel for the public employer defendants in* Harik v. CTA *and* Foster v. Mahdesian*; and as counsel for amicus curiae California School Boards Association's Education Legal Alliance in* Prescott v. County of El Dorado.

Fair Share Fees and the 'Tragedy of the Commons'

The duty of fair representation presents a challenge for labor organizations that serve as the exclusive representative of employees in a bargaining unit. California labor law requires them to represent fairly and without discrimination *all* such employees, even those who oppose the labor organization.[1] Since public sector labor organizations cannot require the employees they represent to become union members and pay union dues against their will,[2] this creates a financial disincentive to membership — why join and pay dues to an organization when you can enjoy for free the benefits of the representational services it provides (e.g., negotiation and administration of the collective bargaining agreement)? But if everyone follows his or her individual interest and no one pays, there will be no representational services provided and no benefits to enjoy. This is an example of the well-known "tragedy of the commons" problem from classical economics, referred to in labor jurisprudence as the "free rider" problem.

To solve this dilemma, various California public employment relations statutes permit the exclusive representative to enter into an agreement with the public employer that requires those bargaining unit members who choose not to join the union to pay a service fee — usually referred to as a "fair share" or "agency" fee — to the union. The fee defrays each non-member's *pro rata* share of the cost of providing the representational services. Thus, for example, the Dills Act, which governs the labor relations of California state government employees, provides that "[o]nce an employee organization is recognized as the exclusive representative of an appropriate unit, it may enter into an agreement with the state employer providing for organizational security in the form of…[a] fair share fee deduction."[3]

The United States Supreme Court has upheld against constitutional challenge the use of fair share fee agreements in the public sector to overcome the free-rider problem,[4] but it has imposed both substantive and procedural restrictions on such arrangements. Thus, as a substantive matter, a fee payer cannot be required over his or her objection to pay for expenditures unless (1) those expenditures are "germane" to the union's representational functions; (2) charging the fee payer his or her *pro rata* share of those expenditures is justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) charging the fee payer for such expenditures does not significantly add to the burdening of free speech inherent in the fair share fee.[5] An expenditure that meets these three criteria is referred to as "chargeable."[6]

As a procedural matter, under the Supreme Court's *Hudson* decision, the union must provide fair share fee payers with "an adequate explanation of the basis for the fee," including a statement of the union's major categories of expenditures, "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[7] As a practical matter, unions generally provide fee payers with this information through an annual notice, which has come to be known as a "*Hudson* notice."

In Harik, *the Ninth Circuit decided that an audit is not necessary in all circumstances.*

In the last few years, through a series of Ninth Circuit decisions, there have been significant developments in public sector agency fee law with regard to how *Hudson*'s procedural requirements must be implemented and the consequences of failing to properly do so.

Content of the Hudson Notice

As noted above, the Supreme Court held in *Hudson* that the union's fair share fee notice must "include an adequate explanation of the basis for the fee."[8] The court elaborated on this statement in a cryptic footnote, the meaning of which has sparked ongoing disagreement:

> We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." [Citations omitted.] Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor….[9]

The main points of debate following *Hudson* have been whether every union that seeks to collect fair share fees is obligated to obtain an independent audit of its expenditures regardless of its size and the complexity of its finances and, where an audit is required, what type of audit is required.[10] The Ninth Circuit has resolved these questions in two recent cases.

In *Harik v. California Teachers Assn.*,[11] the Ninth Circuit determined that an audit is not necessary in all circumstances. A prior Ninth Circuit decision interpreting *Hudson*, *Prescott v. County of El Dorado*,[12] had stated that fee payers "are entitled to" the "kind of assurance" that an audit provides, "even though it may prove somewhat costly to obtain it."[13] However, the court concluded, "We do not decide that each little unit in the [parent union's] firmament must necessarily be subjected to a separate verified audit of its expenditures, but we do decide that some auditor verifiable methodology which is more than a presumption is required."[14] The meaning of "some auditor verifiable methodology" was subsequently illuminated in *Harik*, which held that unions, and especially small unions with annual revenues of less than $50,000 (the size of the union defendant before the Ninth Circuit in *Harik*), can satisfy their financial disclosure obligations without incurring the cost of an independent audit:

> We are confident that smaller unions can devise flexible and creative "auditor verifiable

> methodolog[ies]," appropriately tailored to provide their nonmembers with a reasonable opportunity for meaningful verification [of the union's expenditures], without depleting the union coffers. [Citations omitted.] For the smallest affiliates, providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials may be more cost-efficient than an external review; we need not dictate the particular procedure as long as it is sufficiently reliable to ensure that a nonmember can independently verify that the union spent its money where it claimed that it did.[15]

Where an audit is required, or where the union chooses to satisfy its financial disclosure obligations by obtaining an audit, the question arises as to what type of audit is required under *Hudson*. Put another way, the question is what information must be audited? *Prescott I* made clear that, where an audit is required, it must consist of a "true audit" rather than a review or compilation.[16] But the court expressly refrained from expressing an "opinion on the exact type of audit required under *Hudson*."[17] The argument between fee payers and unions chiefly has centered around whether the audit must encompass not only the union's major categories of expenditures, but also the allocation of those major categories to chargeable expenses and non-chargeable classifications.

The Ninth Circuit resolved this question in *Cummings v. Connell*,[18] in which it held that an "allocation audit," i.e., verification by an auditor that "the Union has properly allocated its expenditures between chargeable and nonchargeable expenses,"[19] is not required. The Ninth Circuit disapproved of a Central District of California decision in a prior case, which had held that an "allocation audit" was required.[20] Instead, it agreed with "a number of other circuits [which] have expressly rejected the notion that *Hudson* requires an allocation audit."[21] Thus, under *Prescott I* and *Cummings*, where an audit is required, the auditor must verify that the union's expenditures actually were paid to the people or entities to whom the union claims they were paid (and, of course, whether the union actually received the good or service for which it claims it paid).[22] But the auditor need not verify whether the union's allocation of those expenditures between chargeable and non-chargeable categories was correct.

Appropriate Remedy for Hudson *Notice Violations*

Another question remaining after *Hudson* is the nature of the appropriate remedy for a *Hudson* violation. *Hudson* itself declined to prescribe a remedy, remanding that issue to the district court.[23] Since *Hudson* stated that "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending" are "constitutional requirements for the Union's collection of agency fees,"[24] fee payers have argued that the appropriate remedy for the improper collection of fair share fees should be the refund of all fees collected from all fee payers prior to compliance with *Hudson*. In *Prescott I*, the Ninth Circuit rejected this approach, calling it "extreme," "radical," and "punitive" because it improperly would deprive the union "of fees to which it was, doubtlessly, entitled."[25] Beyond rejecting the fee payers' demand for a full, across-the-board refund, however, *Prescott I* failed to specify the appropriate remedy and instead remanded the case to the district court.[26]

The question remains as to what is the appropriate remedy for a Hudson *violation.*

The next "remedial" case to reach the Ninth Circuit was *Local 1036, United Food & Commercial Workers v. NLRB*,[27] a private sector case arising under the National Labor Relations Act, in which the Ninth Circuit approved the so-called "reissuance" remedy imposed by the National Labor Relations Board in cases of defective fee notices. In such a remedy, the union is ordered to correct the notice, reissue it to the fee payers who received the earlier deficient notice, permit them to object to paying the non-chargeable portion of the fee and to challenge the union's calculation of the fee before an independent decisionmaker, and refund the non-

chargeable portion of the fee (with interest) to all fee payers who submit timely objections or challenges.[28] The Ninth Circuit generally affirmed the NLRB's reissuance remedy, although it held that the board had imposed the remedy too broadly by ordering the union to reissue the corrected notice to all employees in the bargaining unit, rather than merely to those employees who had received the original, defective notice.[29]

After *Local 1036*, another public sector "remedial" case — *Cummings* — came to the Ninth Circuit, albeit in an unusual posture. In *Cummings*, the district court had held on summary judgment that the union's *Hudson* notice was deficient because it failed to include a copy of the auditor's report. Prior to the entry of summary judgment, however, the union had prophylactically "remedied" the violation by voluntarily correcting and reissuing the notice, permitting fee payers to object and challenge, and giving refunds of the non-chargeable portion of the fee to those who did so.[30] Nonetheless, the district court ordered the union to refund the non-chargeable portion of the fee to all fee payers who had originally received the deficient notice, not merely those who had objected or filed challenges in response to the corrected, reissued notice.[31]

Finally, in Wagner, *the Ninth Circuit clarified that 'reissuance' is the appropriate remedy to be used in* any *public sector* Hudson *case.*

On appeal, the Ninth Circuit reversed the district court's award. Analogizing the case to *Local 1036*, the court held that those fee payers who had failed to object to or challenge the fee in response to the reissued notice had not incurred any compensatory damages and thus no further compensatory remedy was appropriate.[32] This was because the union already had refunded the non-chargeable portion of the fee to those fee payers who had received a corrected notice and had timely objected or challenged, and because objection to paying for non-chargeable expenditures cannot be presumed but must be affirmatively manifested by a fee payer, .

Finally, in its most recent fair share fee decision, *Wagner v. Professional Engineers in California Government*,[33] the Ninth Circuit clarified that "reissuance" is the appropriate remedy to be used in *any* public sector *Hudson* case, even where the union has not voluntarily reissued the *Hudson* notice prior to entry of judgment. In *Wagner*, as in *Cummings*, the district court had found the union's *Hudson* notice to be deficient and had ordered the union to refund to all fee payers the non-chargeable portion of the fee as compensatory damages. The Ninth Circuit reversed the damage award. The court agreed with the union that "the remedy for a bad notice is a good notice,"[34] and held that "an automatic refund to every fee payer would violate a fundamental principle announced by the Supreme Court: that dissent on the part of properly notified nonmembers is not to be presumed."[35] Reasoning that "because the injury that fee payers suffer from an inadequate *Hudson* notice is the lack of an informed *opportunity* to object, the proper remedy is for the union to issue proper notice and give another opportunity for objection."[36] Relying on its prior decisions in *Local 1036* and *Cummings*, the Ninth Circuit concluded that the "reissuance" remedy was the appropriate relief for *Hudson* notice violations.[37]

The significance for unions of these remedial decisions should not be underestimated. In *Cummings*, the remedy that the fee payers were seeking, the refund to all fee payers of all fees collected, was estimated to amount to approximately $14 million. The remedy that the district court had awarded, the refund to all fee payers of the non-chargeable portion of the fee collected, was estimated to amount to approximately $3 million. The Ninth Circuit's decision eliminated this $3 million liability, and instead only the small number of fee payers who had objected to, or challenged, the fee in response to the corrected, reissued *Hudson* notice received refunds.

Challenges to the Union's Chargeability Determinations

Wagner, along with the Ninth Circuit's prior decision in *Knight v. Kenai Peninsula Borough School Dist.*,[38] also is significant for its holding regarding the procedural limits to

challenges to the union's chargeability determinations. As noted above, the First Amendment places substantive restrictions on the nature of the expenditures for which a public sector union can charge a fee payer over his or her objection. Generally, the union's *Hudson* notice will set forth the union's determinations as to the expenditures it believes are "chargeable" versus "non-chargeable." The union must afford fee payers a reasonably prompt resolution by an impartial decisionmaker (such as an arbitrator) to any challenges to the union's chargeability determinations.[39] Fee payers need not use, or exhaust, the arbitral remedy; nor are they bound by the results of the arbitration if they invoke that remedy. Rather, they remain free to sue the union if they believe it is charging them for non-chargeable expenditures over their objection.[40]

However, unlike suits that challenge the sufficiency of the *Hudson* notice, which courts have certified as class actions on behalf of all fee payers (because all fee payers — objectors and non-objectors alike — have an interest in receiving a legally adequate *Hudson* notice),[41] legal challenges to the union's chargeability determinations can be brought only on behalf of those fee payers who affirmatively object to paying for so-called "non-chargeable" expenditures.[42] This is because, as noted above, a union does not violate the rights of fee payers by charging them for so-called "non-chargeable" expenditures unless they object thereto, and objection cannot be presumed from mere non-membership in the union.[43]

In *Wagner*, the question was whether a few fee payer plaintiffs could challenge the union's chargeability determinations on behalf of a class of all fee payers by bringing that challenge, not as a free-standing claim that the union had charged them for non-chargeable expenditures, but rather as a *Hudson* notice claim. According to the fee payers, the union's *Hudson* notice was defective because it represented as chargeable certain expenditures that were non-chargeable. That argument threatened to erode the "bright line" between *Hudson* notice challenges and chargeability challenges that had previously existed, and the Ninth Circuit rejected the fee payers' attempt to conflate the two. The court relied on its decision in *Knight*, which drew "a 'clear distinction between the adequacy of a union's notice, addressed by the Supreme Court in *Hudson*, and the propriety of a union's chargeability determinations, considered separately by the Supreme Court in *Lehnert*.'"[44] The majority in *Wagner* held that "there is no such thing as a '*Hudson* chargeability claim,'" and "[t]here is a procedure for challenging the amount of the fees, but this procedure is not encompassed in a *Hudson* notice challenge."[45]

Under Wagner, *a union's allegedly erroneous chargeability determinations cannot be challenged in the context of a* Hudson *notice violation.*

Thus, under *Wagner*, a union's allegedly erroneous chargeability determinations cannot be challenged in the context of a *Hudson* notice violation. They may be contested only in the context of a free-standing chargeability claim, which cannot be pursued as a class action on behalf of all fee payers. Like its remedial holding as to *Hudson* notice claims, *Wagner*'s ruling that chargeability challenges cannot be litigated as *Hudson* notice claims (and thus as class actions on behalf of all fee payers) substantially reduces the potential liability in such cases.

Public Employer Liability for Hudson *Violations*

If public sector employees have an obligation to pay fair share fees to their exclusive representative, the public employer generally is required to deduct those fees from their paychecks and forward them to the representative, even without the authorization of the fee payers.[46] If the public employer does so, but the union's notice does not satisfy *Hudson* and its progeny, is the public employer liable for having made the deductions? In other words, does the public employer have a legal duty to review the union's *Hudson* notice for legal sufficiency before deducting fair share fees? The Ninth Circuit has answered these questions in the negative.

In *Foster v. Mahdesian*,[47] eight fair share fee payers employed as public school teachers by different school districts alleged that the *Hudson* notices issued by the local unions

that served as their exclusive representatives were legally deficient. They sued not only the unions but also the superintendents of the districts that employed them.[48] The district court found the *Hudson* notices insufficient and held both the unions and school district defendants liable.[49] None of the defendants appealed the finding that the *Hudson* notices were insufficient or the imposition of liability on the union defendants, but the school district superintendents challenged the court's conclusion that they were liable.[50]

The argument in *Foster* revolved around the meaning of the Ninth Circuit's prior decision in *Knight*.[51] There, the Ninth Circuit had held that a public employer is not liable to a fee payer for a defective *Hudson* notice as long as it does not take "adverse action" against the fee payer.[52] The fee payers in *Foster* argued (and the district court held) that the deduction of fair share fees from their paychecks constituted "adverse action" within the meaning of *Knight*, thereby imposing a duty on the public employers to insure that the fee payers received a proper *Hudson* notice before fees were deducted.[53] The Ninth Circuit disagreed with this interpretation of *Knight*, however. The court held that "[t]he 'adverse action' contemplated by *Knight* must be more serious than the routine collection of fees despite a union's failure to provide a proper [*Hudson*] notice" in order for the public employer to incur liability for deficiencies in the notice: "[T]he routine collection of agency fees does not trigger a duty on the part of the employer to ensure that every employee has received a proper *Hudson* notice."[54]

The Ninth Circuit twice has reaffirmed *Foster* and amplified upon it. In *Harik*, the Ninth Circuit characterized *Foster* as holding that "an employer does not become liable for a union's breach of *Hudson*'s requirements unless and until that employer takes some adverse action against the feepayer, beyond the mere deduction of agency fees."[55] The *Harik* court also explained that "[s]uch adverse action would include discipline or termination for non-payment of agency fees."[56] *Harik* then reaffirmed *Foster*: "Under *Foster*, [public employers] have no responsibility to ensure the adequacy of the union's *Hudson* notice before withholding agency fees from nonmembers' pay."[57]

Subsequently, in *Cummings*, the fee payers attempted to distinguish *Foster* by arguing that one public official who was a defendant in that case (State Controller Kathleen Connell) should be held liable for the defective *Hudson* notice because she (or, more properly, her office) had mailed it out to fee payers. The Ninth Circuit, however, found this purported distinction to be "not significant" because mailing was "only a ministerial function" assigned to the state controller to accommodate employees' requests "that their home addresses not be disclosed outside of state government."[58] As the *Cummings* court found, "[T]here is no suggestion the Controller has any responsibility for the content of [*Hudson*] notices," and was well within the non-liability rule of *Foster*.[59]

The Ninth Circuit twice has reaffirmed Foster *and amplified upon it.*

It remains possible, however, for a public employer to incur legal liability if it takes "adverse action" against a fee payer beyond a mere routine payroll deduction for failure to pay fair share fees. To address that possibility, public employers often negotiate indemnification clauses that obligate the exclusive representative to indemnify and hold the public employer harmless for all liability and attorneys' fees incurred as a result of litigation over fair share fees. In the past few years, fee payers have challenged these clauses as contrary to public policy, hoping that by outlawing such clauses, public employers will be less willing to agree to enter into fair share fee agreements in the first place.[60] Two circuits have reached the merits of this issue. The Sixth Circuit has invalidated a fair share fee indemnification clause as contrary to public policy;[61] the Third Circuit has rejected such a challenge.[62] Neither decision, however, examined the standing of fee payers to bring such a challenge in the first place.

In *Prescott III*,[63] the Ninth Circuit held that fee payers lack standing to challenge the constitutionality of a fair share fee indemnification clause. Following Supreme Court precedent, the Ninth Circuit noted that "[i]n order to have standing, a plaintiff must establish an injury in fact, causation, and redressability."[64] The "injury" the fee payers alleged was the

union's failure to comply with *Hudson*'s requirements regarding the fee notice and escrow. But the Ninth Circuit held that they had failed to satisfy the causation element of the standing inquiry — how the existence of the indemnification clause had *caused* this injury. The fee payers had sought to establish causation by inferring that "because the *Hudson* notice requirement is triggered by the collective bargaining agreement, and because the employer has stipulated that it would not have entered into the collective bargaining agreement unless it contained the indemnification clause, the indemnification clause is the legal cause of the inadequate *Hudson* notice."[65] The Ninth Circuit rejected this Rube Goldberg-like analysis as "too remote." The court observed that the fee payers' injury was not caused by their employer's entry into the collective bargaining agreement, but rather from the independent action of the union in failing to comply with *Hudson*. It concluded that "[t]he challenged indemnification clause upon which the employer insisted caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice."[66]

Under Foster, *the responsibility for* Hudson *compliance rests squarely on the exclusive representative.*

Thus, under *Foster*, the responsibility for *Hudson* compliance rests squarely on the exclusive representative. The public employer can incur no liability unless it takes "adverse action" against fee payers beyond the mere routine deduction of their fees.[67] And, under *Prescott III*, fee payers lack standing to challenge fair share fee indemnification clauses. ❋

1 See, e.g., *Cumero v. Public Employment Relations Board* (1989) 49 Cal.3d 575, 589, 83 CPER 62.

2 See, e.g., *Cumero*, 49 Cal.3d at 587.

3 Gov. Code Sec. 3515.7(a); see also Gov. Code Sec. 3513(k) (defining "fair share fee" as "the fee deducted by the state employer from the salary or wages of a state employee in an appropriate unit who does not become a member of and financially support the recognized employee organization," and providing that the "fair share fee shall be used to defray the costs incurred by the recognized employee organization in fulfilling its duty to represent the employees in their employment relations with the state, and shall not exceed the standard initiation fee, membership dues, and general assessments of the recognized employee organization").

Some public sector collective bargaining statutes, such as the Dills Act, merely permit the exclusive representative and the public employer to enter into a fair share fee agreement if they both agree to do so. Other statutes provide that the exclusive representative may obtain fair share fees upon request. For example, this is authorized by the Higher Education Employer-Employee Relations Act, which governs employment relations at the University of California and the California State University. See Gov. Code Sec. 3583.5(a)(1). The latter provision was upheld against constitutional challenge in an unpublished summary judgment decision in *Friedman v. California State Employees Assn.*, E.D. Cal. Case No. CIV. S-00-0101 WBS DAD.

4 *Abood v. Detroit Board of Education* (1977) 431 U.S. 209, 221-23, 34 CPER 2. The constitutional challenge most frequently brought to public sector fair share fee agreements is that they violate the First Amendment. The necessary element of state action exists in the public sector context because the public employer is a party to the fair share fee agreement. See *id.* at 226.

5 See *Lehnert v. Ferris Faculty Assn.* (1991) 500 U.S. 507, 519, 89 CPER 12 (Blackmun, J., plurality opinion); *Id.* at 534 (Marshall, J., concurring in three-part test for chargeability of expenditures); see also *Abood*, 431 U.S. at 235-36.

6 Unions constitutionally may charge fee payers the full equivalent of union dues, unless a fee payer objects to paying for expenditures that do not meet the test articulated above in the text, which are loosely referred to as "non-chargeable" expenditures. Since these expenditures are chargeable unless the fee payer objects to paying for them, the term "non-chargeable" expenditures is somewhat misleading and should correctly be understood to mean that the expenditures are non-chargeable *over the fee payer's objection*. See *Wagner v. Professional Engineers in California Government* (9th Cir. 2004) 354 F.3d 1036, 1039, 164 CPER 52. Moreover, objection to paying for such "non-chargeable" expenditures cannot be presumed from the mere fact of the fee payer's non-membership in the union.

Rather, a fee payer must affirmatively object in order to be relieved of the obligation to pay for "non-chargeable" expenditures. See, e.g., *International Association of Machinists v. Street* (1961) 367 U.S. 740, 774; *Mitchell v. Los Angeles Unified School Dist.* (9th Cir.) 963 F.2d 258, 262-63, 94 CPER 32, cert. denied (1992) 506 U.S. 940.

7 *Chicago Teachers Union, Loc. No. 1 v. Hudson* (1986) 475 U.S. 292, 310, 68X CPER 1.

8 *Hudson*, 475 U.S. at 310.

9 *Id.* at 307, n.18.

10 The first question — whether an audit is required in all instances — arises from the observation that the union defendant in *Hudson* (to which the Supreme Court referred as the "Union," i.e., with a capital "U") was a huge labor organization with annual revenues in excess of $4.1 million (*Hudson*, 475 U.S. at 298, n. 4), which had failed to disclose to its members the basis for 95 percent of the fair share fee. *Id.* at 307. The textual argument against an across-the-board audit requirement is that, if the court had intended to impose such a sweeping requirement, it would not have done so in a footnote, much less in one that referred specifically to the large union before the court.

11 *Harik v. California Teachers Assn.* (9th Cir.) 326 F.3d 1042, 1049, 160 CPER 34, cert. denied (2003) ___ U.S. ___, 124 S.Ct. 429.

12 *Prescott v. County of El Dorado* (9th Cir. 1999) 177 F.3d 1102, 136 CPER 59 (hereinafter "*Prescott I*"). The subsequent history of *Prescott I* is somewhat convoluted. The Supreme Court vacated the decision and remanded it to the Ninth Circuit for reconsideration in light of a recent decision concerning standing to sue, *Friends of the Earth, Inc. v. Laidlaw Env. Svcs. (TOC), Inc.* (2000), 528 U.S. 167. *Prescott v. County of El Dorado* (2000) 528 U.S. 1111. On remand, the Ninth Circuit reinstated its *Prescott I* decision, with the exception of its holding that the fee payers lacked standing to challenge a contractual clause in which the union had agreed to indemnify the public employer with regard to fair share fee litigation; that question was remanded to the district court for reconsideration. *Prescott v. County of El Dorado* (9th Cir. 2000) 204 F.3d 984 (hereinafter "*Prescott II*"). The Ninth Circuit subsequently upheld the district court's decision on remand that the fee payers lacked standing to challenge the indemnification clause, and the Supreme Court denied certiorari. *Prescott v. County of El Dorado* (9th Cir. 2002) 298 F.3d 844 (hereinafter "*Prescott III*"), cert. denied (2003) 537 U.S. 1188.

13 *Prescott I*, 177 F.3d at 1107-08.

14 *Id.* at 1108.

15 *Harik*, 326 F.3d at 1049. *Harik* also rejected the fee payers' claim that, in the California Teachers Association's annual fair share fee arbitration for the statewide union and its local affiliates, each local union must separately prove up its expenditures. The court instead approved of the presentation of evidence of the expenditures of a representative sample of local unions, to prove up the "local presumption." Under that presumption, it is presumed that the local unions' chargeable percentage is higher than that of the state-wide union, where the local unions refrain from collecting their own higher chargeable percentage and limit themselves to the state-wide union's lower chargeable percentage. *Id.* at 1050-51. The Ninth Circuit upheld the district court's ruling that "'this is a question of the quality of the evidence presented, to be determined by the arbitrator, and does not raise issues of constitutional law,'" adding that fee payers could "seek[] review of the arbitrator's decision" if they "wish to challenge the arbitrator's reliance on the proffered evidence." *Id.* at 1051.

16 *Prescott I*, 177 F.3d at 1108. *Prescott I* discusses the differences between the levels of service provided by independent auditors: compilations, reviews, and audits. See *id.* at 1106-07. In a nutshell, and at the risk of oversimplification, a "compilation" consists of the preparation of financial statements as to which the auditor expresses no assurance of accuracy. A "review" consists of the auditor's examination of management's financial statements to determine whether they appear to be accurate on their face (but which does not include any "testing" of the statements against the underlying financial records from which they were derived). An "audit" consists of an examination of the financial statements to determine whether or not they contain material misstatements, based *inter alia* on "testing" of those statements against the underlying financial records. A compilation is said to provide the user with no assurance; a review provides "negative" assurance, and an audit provides "positive" assurance.

17 *Prescott I*, 177 F.3d at 1108, n. 5.

18 *Cummings v. Connell* (9th Cir.) 316 F.3d 886, cert. denied (2003) 539 U.S. 927, 158 CPER 56.

19 *Id.* at 892.

20 *Id.* at 892 (disapproving *Mitchell v. Los Angeles Unified School Dist.* [C.D. Cal. 1990] 739 F.Supp. 511, 514-15).

21 *Id.* at 893.

22 See, e.g., *Prescott I*, 177 F.3d at 1107 ("[W]hat is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way

that the union says they are. For example, was an amount supposedly directed to "x" for negotiation expenses really dispersed to him, or did it go to "y," who is a union lobbyist?"); see also *Cummings*, 316 F.3d at 892 (rejecting plaintiffs' demand for an allocation audit, and characterizing the above-quoted language from *Prescott* as "a concrete example of the role of independent verification, which further confirms that the auditor's role is more limited than plaintiffs urge").

23 *Hudson*, 475 U.S. at 310 ("The determination of the appropriate remedy in this case is a matter that should be addressed in the first instance by the District Court").

24 *Ibid*.

25 *Prescott I*, 177 F.3d at 1109.

26 *Id.*at 1113.

27 *Local 1036, United Food & Commercial Workers v. NLRB* (9th Cir.) 249 F.3d 1115, 1118, 1120, rehearing en banc granted and panel opinion vacated (9th Cir. 2001) 265 F.3d 1079, relevant portion of panel opinion reinstated (9th Cir.) 284 F.3d 1099, 1113 (en banc), cert. denied sub nom *Mulder v. NLRB* (2002) 537 U.S. 1024.

28 *Id.* at 1118, 1120.

29 *Id.* at 1120.

30 *Cummings*, 316 F.3d at 889-90.

31 *Id.* at 893.

32 *Cummings*, 316 F.3d at 894-95. On remand from the Ninth Circuit's decision, the fee payers sought an award of approximately $629,000 in "nominal" damages from the district court. The fee payers reached this startling figure by requesting $1 for each of the 37,000 class members for each of 17 allegedly unconstitutional acts (four fee notices and 13 monthly fee collections). The district court, however, awarded the class a total of $7, in the form of $1 to each named class representative in his or her representative capacity. *Cummings v. Connell* (E.D. Cal. 2003) 281 F.Supp.2d 1187, 1193. The fee payers since have appealed the district court's nominal damages award to the Ninth Circuit, where the issue is being briefed.

33 *Wagner*, 354 F.3d 1036.

34 *Id.* at 1040.

35 *Id.* at 1041.

36 *Id.* at 1042 (emphasis in original).

37 *Id.* at 1041-43.

38 *Knight v. Kenai Peninsula Borough School Dist.* (9th Cir. 1997) 131 F.3d 807, 128 CPER 21, cert. denied (1998) 524 U.S. 904.

39 See, e.g., *Hudson*, 475 U.S. at 310.

40 *Air Line Pilots Assn. v. Miller* (1998) 523 U.S. 866, 874-90, 131 CPER 83.

41 See, e.g., *Friedman v. California State Employees Assn.* (E.D. Cal. 2000) 163 LRRM 2924, 2928, 2000 WL 288468 at *5, 140 CPER 44.

42 See, e.g., *Street*, 367 U.S. at 774; *Railway Clerks v. Allen* (1963) 373 U.S. 113, 119 (chargeability challenge "is not and cannot be a class action"); *Seay v. McDonnell Douglas Corp.* (9th Cir. 1970) 427 F.2d 996, 1004 (only objectors can be included in a class for purposes of a chargeability challenge).

43 See, e.g., *Street*, 367 U.S. at 774; *Mitchell*, 963 F.2d at 262-63.

44 *Knight*, 131 F.3d at 813 (quoting *Jibson v. Michigan Education Assn.-NEA* [6th Cir. 1994] 30 F.3d 723, 730).

45 *Wagner*, 354 F.3d at 1046-47. Although Judge Clifton dissented in part in *Wagner*, he agreed with the majority on this point. See *id.* at 1054, n.2 (Clifton, J., concurring in part and dissenting in part).

46 See, e.g., Ed. Code Sec. 45061 (providing that school districts shall withhold from certificated employees' paychecks "the payment of service fees to the certified or recognized organization as required by an organizational security arrangement between the exclusive representative and a public school employer," unless the employee elects to pay the fair share fee directly to the exclusive representative him- or herself); see also *Cumero*, 49 Cal.3d at 605-06 (approving of such deductions even absent statutory authorization).

47 *Foster v. Mahdesian* (9th Cir. 2001) 268 F.3d 689, cert. denied (2002) 535 U.S. 1112.

48 For Eleventh Amendment purposes, the superintendents were sued in their official capacities, thus making the suit in essence one against the school districts as well as the unions.

49 *Foster*, 268 F.3d at 692-93.

50 *Id.* at 693.

51 *Knight*, 131 F.3d 807.

52 *Id.* at 817.

53 See *Foster*, 268 F.3d at 693.

54 *Ibid*. The *Foster* court's interpretation of *Knight* as requiring more in the way of "adverse action" than the "routine collection of fees" was based on its close examination of *Knight*. In that case, the Ninth Circuit had reversed summary judgment in favor of the fee payers and against the public employers notwithstanding that one of the fee payers' fees had continued to be deducted even after he had revoked his authorization for such a deduction. See *Id.* at 695, n.8. The *Foster* court

reasoned that if "adverse action" had meant merely the deduction of fees without consent, *Knight* would have upheld the summary judgment in favor of the fee payer who had revoked his authorization.

55 *Harik*, 326 F.3d at 1049.

56 *Id.* at 1049.

57 *Ibid.*

58 *Cummings*, 316 F.3d at 897.

59 *Ibid*.

60 This tactic is, of course, entirely ineffective under those statutory schemes that provide for agency fee obligations at the request of the exclusive representative. See, e.g., Gov. Code Sec. 3583.5(a)(1).

61 See *Weaver v. University of Cincinnati* (6th Cir. 1992) 970 F.2d 1523, 1536-38. *Weaver*'s conclusion was based on the premise that the public employer "had duties separate and apart from those of the union," which included the "responsibility to see that *Hudson*'s commands are followed." *Id.* at 1538. This premise was rejected by the Ninth Circuit in *Foster*.

62 See *Hohe v. Casey* (3d Cir. 1992) 956 F.2d 399, 411-12 (holding that such an indemnification clause does not violate public policy since it does not remove all disincentives to *Hudson* compliance; the exclusive representative still has powerful financial incentives to insure that its fee procedures comply with *Hudson*, in the form of the fees and costs of litigation and the potential of having to refund portions of the fee).

63 *Prescott III*, 298 F.3d 844. See the discussion of the previous history of this case in footnote 11, *supra.*

64 *Id.* at 846 (citing *Friends of the Earth v. Laidlaw*, 528 U.S. at 180-81).

65 *Id.* at 846.

66 *Ibid*. The *Prescott III* court also held that the fee payers had failed to satisfy the "redressability" element of the standing inquiry, since "[t]he remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson*, nor does it prevent future violations." *Ibid.* Thus, any argument that invalidating the indemnification clause would prevent future violations would be "merely speculative," rather than "likely." *Ibid*.

67 This result might be different if the union has *no* plan in place for *Hudson* compliance. See *Foster*, 268 F.3d at 694. Most recent fair share fee cases (including *Foster*), however, do not present that situation. Rather, the union indisputably has a *Hudson* compliance plan in place and the issue is whether the details of the union's implementation of that plan satisfy the law in all of its particulars.

Alternatives to Layoffs

Denyce Holsey

Denyce L. Holsey *is the employee relations manager for Alameda County, and is responsible for labor relations, salary administration, and benefit programs. She is a past-president and ex-officio board member of the California Public Employers Labor Relations Association and currently is vice president of the National Public Employers Labor Relations Association.*

In the late 1990s, Northern California reaped the benefits of a healthy economy. The "dot.com" industry was doing well, real estate prices were soaring, and the stock market reached all-time highs. But by 2000, the economy headed into a downward spiral, especially in the San Francisco Bay Area. Just like the California gold rush of the mid-19th century, the dot-com dream went bust! With declining federal and state revenues, local government officials faced the possibility of having to lay off significant numbers of employees to close the budget gap. Looking for alternatives, many public sector employers throughout the state began to explore creative ideas with their labor organizations, while trying to maintain high standards of service delivery to the public. Budget reduction strategies began taking shape.

A number of considerations become apparent when budget reduction is evaluated as an alternative to layoffs. First, of critical concern is the cost savings that will be realized as a result of implementing the strategy. Second, proponents need to assess whether the strategy will have a long- or short-term affect on the workforce. And, it is important to know what impact the strategy will have on service delivery as opposed to the impact of a reduction in force.

Other issues that arise include:

- Whether the budget reduction strategy will effect a change in wages, hours, and working conditions, and will trigger an obligation to meet and confer with the labor organizations.
- Whether the timeframe of the budget strategy is short-term, over 6 to 12 months, or long-term, over a number of years.
- The expiration dates of implicated memoranda of understanding may decide whether the budget reduction strategy should be proposed as part of contract negotiations or in a separate forum. Labor contracts' "zipper clauses" may dictate the timing of the strategy as well.

- Whether it is better to achieve staffing reductions through attrition and hiring freezes or by eliminating vacant positions.
- The need to approach the labor organizations early in the budget process.
- Arranging to meet periodically with labor representatives to share accurate, statistical information on the short- and long-term budget forecast.

Salary wage freeze. Each budget reduction strategy has its own impact on the agency's finances, the delivery of services, and collective bargaining. But, salary and benefits have the most significant financial impact on a local government budget, and a salary wage freeze has the most immediate financial effect.

With this strategy, cost savings are easily identifiable, and an agency can realize savings immediately. The impact on service to the public is minimal, but the decision to freeze wages is subject to bargaining. Labor is likely to resist this approach, especially if there is a contract in place with prenegotiated salary increases, because there typically is no obligation for either party to reopen the contract and bargain concessions concerning salary or other benefits.

Temporary closures. This strategy involves office closures during the holidays or, for example, on alternate Fridays for a specified period of time — six months, a fiscal year, or a series of fiscal years depending on the targeted degree of budget reduction. Although attractive to some employees, this alternative can have a negative effect on service delivery.

Temporary layoffs. Significant salary and benefit savings can be achieved through temporary layoffs. Depending on the terms of the plan, the employer achieves a reduction in employees' base salaries as well as in costs associated with medical, dental, and retirement benefits. While the *decision* to lay off employees is not subject to the meet and confer obligation, the *impact* of the decision is. Therefore, depending on the layoff rules, this strategy can be a cumbersome alternative. Also, it can have an adverse impact on service delivery to the public and may not be a practical alternative for employees who provide "essential" services, like law enforcement, fire protection, probation, and social services.

Retirement and health care reduction. Public employers that pay or "pick up" either all or a portion of the employee's retirement contribution can achieve significant savings by reducing or eliminating the practice. This option is subject to the bargaining obligation as well.

Health costs have spiraled upward in recent years due in part to an aging workforce and the increased costs of prescription drugs. Contract negotiations with several San Francisco Bay Area employers in both the public and private sector have reached a stalemate over this issue. However, depending on the health plan design, long-term savings can be achieved. While discussions concerning these changes often are contentious, a strategy that increases health plan prescription drug costs and office visit copayments can provide significant savings for the employer over the long term. Increasing employees' contributions to health and dental premiums, moving to a flexible-spending account, and eliminating dependent medical coverage are just a few strategies that could yield long-term cost reductions.

Any one of the aforementioned changes is subject to collective bargaining. And, while labor understands the importance of reducing health care costs, it is crucial to develop an ongoing dialog in order to illustrate how reducing these costs can benefit the employee and the agency in the long run.

Workers' compensation. Workers' compensation costs continue to spin out of control throughout the state. Some public employers offer a workers' compensation supplement to minimize the employee's financial impact while off work due to a work-related illness or injury. Supplements as high as 85 percent of salary have been negotiated over the years. However, the reduction or elimination of this benefit achieves minimal savings because of the proportionately small number of workers who are on workers' compensation leave. Changes to a compensation supplement are subject to bargaining.

Perk reductions. Certain benefits, labeled by some as "perks," include educational stipends, use of agency vehicles, free parking, training incentives, and paid administrative leave. Reduction or elimination of these benefits more often than not results in minimal cost savings. And some believe that this kind of budget-reduction strategy creates ill will that is seen as a morale "buster" by employees during difficult economic times.

Case Study: Alameda County's Success With METOP

Northern California's Alameda County, which includes the City of Oakland, employs approximately 9,000 workers who provide services to the public. It is an urban county with many rural areas, and is diverse in culture, climate, and geography. Approximately 90 percent of employees are represented by an employee organization, including clerical workers, paraprofessionals, attorneys, engineers, welfare fraud investigators, mid-level managers, probation officers, deputy sheriffs, group counselors, social workers, eligibility technicians, and crafts and trades. There are 18 memoranda of understanding and 37 bargaining units. All MOUs have different expiration dates.

In spring 2003, the county began informal budget-reduction strategy discussions with its labor organizations to minimize the adverse impact of budget shortfalls that the county anticipated for the next few fiscal years. In recognition of the county's financial situation, SEIU Locals 535 and 616, representing approximately 4,500 employees, agreed to extend their contracts for one year, and to forgo a salary increase in exchange for an opportunity to begin discussions on an enhanced retirement benefit for its members. (In addition to SEIU members, approximately 800 unrepresented managers did not receive a salary increase in 2004.)

Most of the other non-safety unions previously had negotiated salary increases to begin in 2003. Many memoranda of understanding do not expire until 2005 or 2006, and nearly all of the MOUs covering safety personnel expire in 2009. In spring 2003, therefore, there was no obligation for any group with agreements in place to bargain with the county. Nonetheless, the county met for close to a year with all of its labor organizations regarding a number of budget reduction strategies.

METOP. One plan that emerged from those talks is the Mandatory Employee Time Off Purchase (METOP), a paid-time-off program that requires employees to purchase 15 days of leave. METOP went into effect June 6, 2004, and the hope is that the program will mitigate layoffs.

Employees make payments via payroll deductions, on a pre-taxed basis, without loss of benefits, leave accruals, and/or retirement service credit. Payment is made in an amount comparable to the negotiated salary increase. Employees are required to purchase 5 days of time-off leave for the 2004 payroll tax year, and 10 days of leave for the 2005 payroll tax year. Those who are hired into a participating bargaining unit while METOP is in effect are required to participate on a pro-rata basis throughout the term of the program. To minimize the impact on operations, the 15 METOP leave days include designated and discretionary time off, subject to prior approval and mutual agreement between the agency/department head and the employee. Most of the designated METOP days are immediately before or after a county holiday. Five of the METOP days are designated during the workweek between the 2004 Christmas and New Year's holidays.

There are some limitations to the program. Employees are not allowed to carry over any unused METOP leave to the next calendar year, and METOP is not considered paid leave for purposes of determining overtime eligibility. Employees who promote or transfer to a non-participating bargaining unit must use their leave prior to transfer. There is an appeal process for employees who are denied discretionary METOP leave days. Representatives of a joint labor-management committee review appeals; its recommendations are submitted to the County Administrator's Office.

Collaboration. One group that opted into METOP is the Alameda County Management Employees Association (ACMEA), representing over 1,000 workers. ACMEA had negotiated salary increases up to the expiration of their contracts in 2005 and 2006.

In May 2004, ACMEA agreed to participate in METOP as part of the collaborative effort to address the county's anticipated budget shortfall for fiscal years 2004-05 and 2005-06. ACMEA also agreed to higher copayments on prescription drugs and office visits effective February 2005, and to delay their January 2005 salary increase until July 2005, subject to additional discussion. Overall, this strategy is designed to reduce county payroll costs until December 2005.

The key to this successful outcome, which can be applied to any budget reduction strategy, was to begin a dialog about the agency's financial forecast early in the budget process. Each step of the way, essential information was shared with those impacted, which fostered a good working relationship with labor. ❋

Disability Retirement Requires Statewide Incapacity

Carol Vendrillo, CPER Editor

Attorneys for injured workers are displeased with the high court's ruling, to the point of predicting 'bedlam.' On the other hand, there are those unwilling to assume that a whistlelower in this instance will be ostracized by every law enforcement agency in the state and who support the majority's heightened standard.

In a ruling that may have a far-reaching impact, a majority of the California Supreme Court has decided that a police officer is entitled to disability retirement benefits only if he can prove he is incapacitated from performing the usual duties of a patrol officer for all other California law enforcement agencies, not just from the local entity where he worked. The 5-2 ruling overturned the decision of an Orange County judge who found that Officer Steven Nolan was entitled to disability retirement because he was not able to work for the City of Anaheim. Nolan was subjected to threats and harassment by other Anaheim officers after he reported what he believed to be excessive force by his coworkers. The majority opinion authored by Justice Janice Brown largely rests on the language of the Public Employees' Retirement Law that speaks in terms of the incapacity to perform duties "in the state service."

Justices Joyce Kennard and Kathryn Werdegar dissented, reading the statutory language to authorize a disability retirement if the employee can show he is no longer able to perform the duties assigned by the employing agency.

Factual Summary

Steven Nolan began work as a police officer in Anaheim in 1984. He was number one in his class at the academy and received outstanding ratings early in his career. In 1991, he transferred to the gang unit and reported what he considered to be use of excessive force by other police officers. As an apparent consequence of his "whistle blowing," Nolan experienced strained relations with other members of the gang unit and voluntarily returned to patrol duty in 1992.

Five months later, after an internal affairs investigation failed to substantiate any misconduct on the part of the other officers, disciplinary charges were brought

against Nolan for violation of department rules, such as mishandling of evidence and misuse of sick time. Nolan was fired for this conduct but took his case to arbitration. Eventually, he was reinstated but was suspended for five days.

After the arbitration, Nolan received two threatening phone calls and numerous telephone "hang ups." He believed the calls were made by Anaheim police officers. One caller warned him to wear a vest and another told him, "Welcome back, you're fucking dead." Because of this conduct, Nolan filed for disability retirement. He also filed a whistleblower lawsuit seeking damages for wrongful termination. A jury awarded Nolan $350,000.

An administrative law judge found that Nolan had suffered no mental incapacity and recommended that his request for disability retirement be denied. The city adopted the ALJ's decision and Nolan filed suit, seeking to have the court compel the city to grant him disability retirement.

In superior court, Nolan prevailed. The court concluded that he was permanently incapacitated for the performance of his duties as a police officer in the City of Anaheim. In support of its findings, the court relied on the fact that Nolan was fearful of his personal safety and the likelihood that his fellow officers could not be counted on to back him up in time of need. The court also found that, given the result of the arbitration award and the whistleblower suit, the police department terminated him in retaliation for informing on his fellow officers.

The Court of Appeal reversed and sent the case back to the lower court to determine based on the administrative record whether Nolan is incapable of performing police services throughout the state. The Supreme Court granted review and affirmed the Fourth District's ruling. (For a discussion of the Court of Appeal ruling in *City of Anaheim v. Nolan*, see *CPER* No. 158, pp. 50-52.)

PERL's fundamental policies — to effect economy and efficiency in the public service — would be thwarted if Nolan were granted permanent disability.

Majority Opinion

Justice Brown looked first to the language of Sec. 21156 of the Public Employees' Retirement Law. It provides for disability retirement for a member who is incapacitated physically or mentally for the performance of his or her duties "in the state service." The question, said Justice Brown, is what is meant by the reference to state service in Sec. 21156. Siding with the Court of Appeal, the majority observed that Sec. 21156 does not refer to the employee's last employing department. It refers to state service, and Sec. 20069 defines state service as service rendered as an officer of the state, the university, a school employer, or a contracting agency. When Secs. 21156 and 20069 are read together, the court reasoned, "it becomes clear that state service, for purposes of section 21156, means *all forms* of public agency service that render an employee eligible for the benefits of section 21156."

Therefore, instructed the majority, for Nolan to qualify for disability retirement, "he will not only have to show he is incapacitated from continuing to perform his usual duties for Anaheim, but also that he is incapacitated from performing his usual duties of a patrol officer for other California law enforcement agencies covered by the PERL." The fundamental policies that lead to the enactment of the PERL — to effect economy and efficiency in the public service — would be thwarted if Nolan were granted permanent disability retirement benefits when other police departments in communities surrounding Anaheim were to offer him similar employment.

The majority was not persuaded by cases involving light-duty assignments where a police officer is not considered incapacitated if such an assignment is available within the department. Those cases involved construction of disability retirement provisions found in city charters, Justice Brown observed, so the question presented was whether the applicant was capable of filling a light-duty assignment in the

applicant's department. Noting that none of the cases cited addressed the relevance of the availability of a light-duty assignment in other cities, the court commented, "A decision, of course, does not stand for a proposition not considered by the court."

The majority also brushed aside a warning raised by the California Public Employees' Retirement System that the standard adopted by the court would not be administrable because it requires assumptions about what services are required at other departments or employers other than the City of Anaheim. "CalPERS has set up a straw man," wrote Justice Brown. Admittedly, the duties required of patrol officers are not uniform throughout the state. But "that is beside the point. The question is: What are the *usual* duties of a patrol officer?" "With all due respect to the expertise of CalPERS in administering the PERL," said the majority, "determining the usual duties of a patrol officer should not be that difficult. Every civil service employer must describe the usual duties of every position."

It would be unfair to deny Nolan disability retirement benefits if no other law enforcement agency will hire him because he has blown the whistle on his fellow officers

Mindful that the PERL must be administered without imposing hardship or prejudice on incapacitated employees, the court acknowledged it would be unfair to deny Nolan disability retirement benefits if, as he claims, no other law enforcement agency will hire him because he has blown the whistle on his fellow officers. Therefore, the court concluded, if Nolan shows not only that he is incapacitated from performing his usual duties for Anaheim, but also that he is incapacitated from performing the usual duties of a patrol officer for other California law enforcement agencies, the burden will shift to Anaheim to show not only that Nolan is capable of performing the usual duties of a patrol officer for other California law enforcement agencies, but also that similar positions with other law enforcement agencies are available to him. By "similar" positions, the court instructed it meant patrol officer positions with reasonably comparable pay, benefits, and promotional opportunities.

Justice Marvin Baxter filed a concurring and dissenting opinion, expressing agreement with the majority view that Nolan can claim disability retirement benefits if he can show that his job-related physical or psychological condition prevents him from performing the usual and customary duties of a police officer anywhere in the state and, once he does, the city must have the opportunity to rebut it. "But that is the end of the matter," Justice Baxter wrote. Whether or not there are other California law enforcement agencies ready to employ him is irrelevant, in Baxter's view. The majority's effort not to penalize Nolan for his whistleblowing activities is understandable, he said, "but it is an example of good intensions gone awry." "Unemployability is not the same thing as incapacity," Baxter stressed. "The disability retirement system is not an unemployment insurance system."

If entitlement to a disability pension depends on whether similar suitable employment is unavailable elsewhere, Baxter continued, numerous complications of proof will be presented. "If the issue is general unemployability, what evidence on that issue will suffice? If the issue is job availability, how broad an area must the search for other openings cover? At what moment, or over what period, must the unavailability exist? Such questions threaten to become the tail that wags the dog in proceedings to determine whether a locally, but not generally, incapacitated officer may retire for disability."

Dissenting View

Justice Kennard, joined by Justice Werdegar, dissented from the majority opinion, calling it an "unworkable test of disability." Citing what it described as clear and unambiguous statutory language, the dissent noted that the statute "speaks not of incapacity for a job in statewide public service, but more narrowly of incapacity to perform the employee's duties in *the* state service, that is, duties the employee performs for a particular public employer." There-

fore, the dissent reasoned, state service "pertains to the service for which the employee is paid by a particular agency."

Justice Kennard also took issue with the majority's dismissal of PERS' claim that its test is not administrable because of the multiplicity of public employers throughout the state and the problem of assuming that the duties of patrol officers are uniform. "Applying such a generalized and speculative standard will result in an administrative nightmare, and, according to PERS, will prevent it from administering its retirement system fairly," wrote Kennard.

She concluded:

> Today's decision is a serious matter for any law enforcement officer working for a local public agency in this state, or anyone considering a career in local law enforcement. It means that, to obtain a disability retirement, it is not enough that an officer is no longer able, because of physical or mental injury, to perform the duties assigned by the employing agency. Rather, a city or other local agency may deny a disability retirement if the officer *might* be able to perform the duties of a *roughly comparable* position for *some other* public agency *anywhere* in this large state. This result is not compelled by the governing statute, it is contrary to the statute's established administrative construction, and it imposes a heavy burden on injured employees. Our law enforcement officers deserve better.

Reaction

Attorneys for injured workers are not happy with the high court's ruling. Attorney Larry Minsky of Cerritos called the majority's opinion "ridiculous," asserting that it reverses precedent and "guts the nature of the statute" by requiring an employee to prove incapacity everywhere in the state. As a practical matter, Minsky predicts the decision will cause "bedlam" in terms of the presentation of evidence and burdens of proof.

Some observers have suggested that the court's ruling will make it difficult for public agencies to force medically incapacitated officers to retire. To substantiate a disability retirement, employers will have to demonstrate that the resistant employee is incapable of performing his duties at any law enforcement agency in the state.

Those who are unwilling to assume that a whistleblower, like Nolan, will be ostracized by every law enforcement agency in the state, support the majority's heightened standard. The purpose of the industrial disability retirement scheme, they contend, is not to compensate plaintiffs for their whistleblower causes of action. (*Nolan v. City of Anaheim* [7-1-04] Supreme Ct. No. S113359, ___Cal.4th___, 2004 DJDAR 8187.) ❋

It takes time and experience to understand the nuances of labor relations. Here's a start...

Pocket Guide to the Basics of Labor Relations

By Rhonda Albey

- Why we have public sector unions
- State laws that regulate labor relations
- The language of labor relations
- What is in the typical contract
- How to negotiate and administer labor agreements
- How to handle grievances
- What to do in arbitration and unfair practice hearings
- How to handle agency shop arrangements
- How to cope with extraordinary situations (including downsizing and/or restructuring, work actions, and organizing drives)

FOR INFORMATION ON ORDERING, SEE THE BACK COVER OF THIS ISSUE OF *CPER*