

Torrance Professionals & Supervisors Association April 2018 News

Good News! There's Still Life Outside of Work for California Public Sector Workers

In the last ten years, we have seen the nature of work – and more specifically, work time – become blurred. “Exempt” employees handling emails on nights and weekends. Hourly employees subject to “call-outs” restricted from traveling or using alcohol, often during the holiday seasons. Social media policies that overreach into what you can share with friends and relatives regarding your private affairs. Overly-harsh GPS policies that allow discipline for excessive idling (e.g., waiting in line in a fast-food drive-through). Workloads that pile up and follow you home. Management saying you’re always under the microscope even for how you decide to spend your time away from work.

But the good news is that recent legal developments confirm that you really can have a life outside of work! Last month, the U.S. Ninth Circuit Court of Appeal - the federal appellate court that decides federal lawsuits that are filed in California – held that a police officer could pursue her federal civil rights claims against the City of Roseville, who fired her after an internal affairs investigation discovered her romantic relationship with a fellow police officer. The case is *Perez v. City of Roseville*, No. 15-16430 (9th Cir. 2018).

Janelle Perez was a probationary police officer who sued claiming the City violated her rights to privacy and intimate association under the First, Fourth, and Fourteenth Amendments to the U.S Constitution, and deprived her of her liberty without due process of law in violation of the Fourteenth Amendment. She claimed her privacy rights were violated because the City impermissibly based her termination, in part, on disapproval of her private, off-duty sexual conduct – specifically her extramarital affair. The Ninth Circuit remanded the case to the lower court to allow her claims to proceed, stating “[w]e have long held that the constitutional guarantees of privacy and free association prohibit the

State from taking adverse employment action on the basis of private sexual conduct unless it demonstrates that such conduct negatively affects on-the-job performance or violates a constitutionally permissible, narrowly tailored regulation.”

Just last month, state legislators introduced AB 2069 to prohibit employers from engaging in employment discrimination against medical marijuana patients and those who test positive for cannabis (if they hold a medical marijuana ID card). Employers could still fire employees who show up to work impaired, and the bill wouldn't apply to employers who must comply with federal drug laws – for example, due to federal funding or licensing requirements. But the bill's legislative counsel digest recognizes that many employers prohibit workers from using medical marijuana but permit other more dangerous and addictive drugs, such as opiates, if prescribed by their physicians. Eleven states already have similar laws protecting medical cannabis patients from employment discrimination. But don't light up just yet! The bill still must be enacted into law.

These recent developments really do reinforce the fact that you have the right to a life outside of work, especially if it doesn't affect your job performance. If your Agency is too intrusive into your non-work time and activities or is not respecting your privacy rights away from work, it's wise to contact staff for help before it becomes a bigger issue.

News Release - CPI Increases!

Each month the U.S. Department of Labor, Bureau of Labor Statistics publishes monthly consumer price index (“CPI”) figures. The data looks back over a rolling 12-month period at how much goods and services have increased from a year ago.

2.2% - CPI for All Urban Consumers (CPI-U) Nationally
3.1% - CPI-U for the West Region
3.6% - CPI-U for the Los Angeles Area
3.6% - CPI-U for San Francisco Bay Area
2.8% - CPI-U for San Diego Area (6 months ending December 2017)

These numbers are important! They're a rough measure of inflation, and elected officials and agency management often look to these numbers in determining “Cost of Living” raises. Here are the important figures you need to know:

CalPERS VP Sets Record Straight on Pension Funding! PERB General Counsel Discusses Unfair Bargaining!

Last month, CEA held a public employees leadership conference in Long Beach CA. The event was well attended with Association Board leaders from a variety of different types of public agencies in California – Counties, Cities, Water Districts, Vector Districts, etc. The leaders represented a wide cross section of employees, from part timers and mid-managers, to office employees and field staff. The leaders came from as far north as Alameda and San Mateo, as far east as the Coachella Valley, and as far south as Chula Vista and El Cajon.

Guest speakers included the former President and current VP of the CalPERS Board, who set the record straight on pension funding issues. His presentation was in stark contrast to the ominous narrative many agencies present at the bargaining table. It served as welcome news not just for members of CalPERS, but for members of other pension systems too, such as the County systems. The General Counsel for the Public Employment Relations Board also spoke. He discussed how PERB can serve as a valuable resource when agencies engage in unfair tactics during negotiations.

If you want more information about the conference, please contact CEA at (562) 433-6983.

Legal Updates

Federal Appellate Court Holds Employers Violated Federal Labor Law by Unilaterally Stopping Union Dues Deduction; Orders “Make-Whole” Remedy

A recent private sector case might turn out to be an important precedent for California public sector workers considering the U.S. Supreme Court’s review of the legality of Agency Fees in the case of *Janus v. AFSCME*. The Ninth Circuit Court of Appeal held that an employer must make the union “whole” for the employer’s unilateral stoppage of dues deduction. Although this is a dispute under federal labor law, which governs the private sector, the California Public Employment Relations Board (PERB) looks to federal decisions to decide similar issues under our state bargaining laws that fall under PERB.

The case is *Local Joint Executive Board of Las Vegas v. National Labor Relations Board (NLRB)*, No. 15-72878 (9th Cir., 2018). The employers maintained collective bargaining agreements (CBAs) with the culinary workers’ and bartenders’ unions that did not contain union security clauses – clauses that condition employment upon union membership. These clauses are prohibited in Nevada, which is a “right-to-work” state. But the CBAs

did require the employers to deduct union dues from the paychecks of employees who had authorized them. When the CBAs expired, the employers continued to honor dues deduction for over a year, but then unilaterally stopped. The unions filed an unfair labor practice charge with the NLRB claiming an unlawful “unilateral change” but the Board dismissed the case. The unions appealed and ultimately won before the Ninth Circuit, who concluded that in a right to work state, dues checkoff is akin to any other term of employment that is a mandatory subject of bargaining. The Court remanded the case for determination of the proper remedy. On remand, the Board ordered a “cease and desist” letter, an order to bargain, a rescission of the unilateral changes, and a notice and mail posting, but did not award any money damages. The unions again appealed to the Ninth Circuit, and this most recent decision held that a “make-whole” relief is proper for this violation. This includes not just prospective relief, but retroactive damages as well (meaning back union dues that the employers should have been withholding all along).

This decision makes clear that even if the Supreme Court strikes down Agency Shop arrangements in the *Janus* case, the Agency still can’t unilaterally cease dues deduction. If they do, the Association could recover retroactive damages for the uncollected dues.

U.S. Supreme Court Rejects Interpretation that Found Retiree Medical Benefits Were Vested for Life; Says Labor Agreements Must Be Reasonably Interpreted Based on Ordinary Principles of Contract Law

In 2015, the U.S. Supreme Court ruled that courts must not presume that CBAs vest retiree benefits for life. The courts had previously presumed, in a variety of circumstances, that CBAs vested retiree benefits for life, even when the contract was silent on the duration. This was called *Yard-Man* inferences. The Court had rejected these inferences as inconsistent with ordinary principles of contract law.

The matter was back before the Court, which issued another set back for retiree medical benefits last month, in *CNH Industrial N.V. v. Reese*, 583 U.S. __ (2018). The contract at issue was again “silent” on whether health care benefits vest for life. But this time, the lower courts had used the *Yard-Man* inferences to find the contract ambiguous as to how long the retiree medical benefits should last. Finding the contract ambiguous, the court then considered external evidence of the party’s intent, ruling the intent was to vest benefits for life. The Supreme Court reversed. The Court held that the *Yard-Man* inferences could not be used to deem a contract ambiguous, any more than they could presume a lifetime duration. The Court said that “[i]f the parties meant to vest health care benefits for life, they easily could have said so in the text. But they did not.” Note – every contract is different and must be interpreted based on its own terms.

Retired Public Employees Association News



As the second half of the year for the legislative session reaches the point when bills have been introduced and hearings are being scheduled, it is clear that the fight to undermine pensions remains strong. As always, RPEA is taking a leadership role to defeat any new bills that might negatively impact active employees and retirees.

Orange County Senator John Moorlach—of whom we have spoken in the past—has authored two more bills that follow suit with his previous attempts to initiate a California reversal from reliable pensions. Last year, Senator Moorlach tried to pass six different bills related to pensions. Four of these (SB 32, SB 454, SB 681 and SCA 1) failed to pass out of their house of origin and one eventually died on the floor. In the beginning of February, Senator Moorlach authored and introduced SB 1031 and SB 1032:

- ❖ **SB 1031 (Moorlach)** – This bill would prohibit a public retirement system from making a cost-of-living adjustment to any allowance payable to, or on behalf of, a person retired under the system, or to any survivor or beneficiary of a member or person retired under the system, for any year beginning on or after January 1, 2019, in which the unfunded actuarial liability of that system is greater than 20%. It would also require that the determination of unfunded actuarial liability be based on a specified financial report and would apply the prohibition on cost-of-living adjustments, if any, to the calendar year following the fiscal year upon which the report is based.
- ❖ **SB 1032 (Moorlach)** – This bill would authorize a contracting agency to terminate its contract with the Board of Administration of the Public Employees’ Retirement System at the agency’s will and would not require the contracting agency to fully fund the board’s pension liability upon termination of the contract. The bill would authorize the board to reduce the member’s benefits in the terminated agency pool by the percentage of liability unfunded. It would also authorize a contracting agency who terminates its contract with the board to transfer the assets accumulated in the system to a pension provider designated by the contracting agency.

We have been here before. While we have defeated the Senator’s bills in the past, we do not take anything for granted, as RPEA testifies strongly against these poorly formed legislative notions.

Since the beginning, RPEA has been actively involved in enhancing the lives of retirees. We are the only statewide association representing all PERS retirees. RPEA works tirelessly to safeguard and promote the retiree benefits of California's public employees. For more information regarding retiree pensions and health benefits or to learn more about the Retired Public Employees' Association of California, check out our website www.rpea.com.

Questions & Answers about Your Job

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

Question: The Agency is removing all the hot & cold filtered water dispensers throughout the Agency facilities. All that's left for people to drink is tap water from the bathroom faucets if they don't bring their own. Does this constitute a change in working conditions? Do we have the right to meet and confer, or to file a grievance? There's very little if any cost savings to the Agency, but it is a big drag on morale. All the employees would like to stop the Agency from doing this.

Answer: Unfortunately, Agencies have the right to decide about equipment without meeting with the Association and water dispensers would normally be considered equipment. However, there are exceptions to this rule. If the tap water in your agency is unsafe to drink, like it might be if you worked in Flint, Michigan, then you could file a grievance for unsafe working conditions. If you are in negotiations and the Agency removed the water dispensers to retaliate against the Association for not agreeing to its bad contract proposal, then the Association could file an Unfair Labor Practice charge with the Public Employment Relations Board (PERB). But if this doesn't fall within one of those unusual exceptions, the Agency has the right to remove the water dispensers.

Just because the Agency has the right to remove the water dispensers, however, doesn't mean the morale problem should be swept under the carpet. The Association can let management know about the impact of this decision on its members by bringing it up in the next labor/management committee meeting. If your MOU doesn't establish a labor/management committee process, this is something you can bargain for in your next round of negotiations.

Question: Is there any standard to judge when sick leave use becomes "abuse?" My supervisor is questioning me about the number of absences. I have enough paid sick leave on the books to cover, and I'm not out for any longer than two days in a row. Three days, and you need a doctor's note. Most of my co-workers take vacation leave in blocks, but I take vacation and sick leave in smaller increments more frequently. My supervisor says I'm a sick leave abuser, but his judgment seems completely arbitrary. I thought that if I have the leave on the books, I should be allowed to take it free of harassment from management. Is that true? How do you determine what's "abuse?"

Answer: Even though you have a rule that requires a doctor's note only when you've been out three days or more, the general rule regarding sick leave is that it should be used when you are actually sick or when you need to take care of an ill family member. If your supervisor suspects that you are using your sick leave as additional vacation, then he can ask you about it. Some patterns of sick leave usage raise red flags with management – such as calling out sick on the same days every month, or frequently calling out sick the day before or the day after the weekend or a holiday. In those situations, you might be asked to explain your absence – even if it was less than three days.

However, you should not be harassed or treated differently from how your co-workers are treated when they use their sick time. And the leave may be protected under the Family Medical Leave Act or California Family Rights Act. If you think this is the case it's best to call professional staff for assistance.

Question: Is there a specific code or procedure the Agency must follow when it comes to eligibility lists for hire? Our Agency has initial interviews performed by an outside panel. Then applicants are assigned a number and ranked on an eligibility list, from the top #1 candidate on down. HR then gives the list to the hiring division/department, but only the top three candidates on the list. Historically, candidates were notified of their ranking number, but for the last year or so the Agency has only notified candidates whether they passed or failed and whether they're on the eligibility list, not their actual numerical ranking. Can they do this? Is this standard?

Answer: The rules that govern your Agency's hiring practices are established by your Agency. They are typically set forth in the Civil Service Rules, the Personnel Rules, or sometimes an ordinance that governs personnel matters. There is no standard rule on whether HR must notify candidates of their individual ranking, these rules are truly local. So, the first step you should take is to look at the rules to see if HR is following them. If not, then you should contact professional staff. We can point out to HR that they are violating their own rules and, if that doesn't work, we can assist you with filing a grievance.

If the rules are silent, you have a more difficult case. An Agency can be required to meet and confer with the Association before it changes its past practices, but there is a 6-month time limit that must be followed to enforce these rights at PERB. If your Agency changed its practice more than six months ago, it may be too late to challenge it at PERB. Time limits can be tricky. You should contact professional staff as soon as possible to help you with this issue.

Question: What are our rights when it comes to "comp time?" We used to be able to cash out hours in our comp time bank, but the last six months or so, HR has been scrutinizing requests more closely and asking whether this is specifically permitted in the MOU. Some bargaining units specifically permit cash out, either once a year, or upon request. Ours is silent on the topic of cash out. Some of our members have cashed out previously, but others are being told now that they can't cash out unless we negotiate for this benefit in our MOU. Is that right? I thought it was our

time that we earned through overtime and that they must cash it out when we leave. So, what precludes us from cashing out in the middle of the fiscal year? It doesn't seem right that we must "negotiate" for this.

Answer: Your comp time rights are governed by the federal Fair Labor Standards Act (FLSA), your MOU and past practice. The FLSA sets forth the minimum requirements that your Agency must follow if it offers comp time. For example, the FLSA requires comp time for non-exempt employees to be banked at the rate of one and one-half hours of comp time for each hour of overtime worked. The FLSA caps the total comp time maximum accrual for non-public safety employees at 240 hours and requires Agencies to permit employees to use comp time "within a reasonable period after making the request if the use of comp time does not unduly disrupt the operations of the public agency."

The FLSA doesn't require your Agency to offer a comp time cash out, but since it has a past practice of doing so, it shouldn't change that practice without negotiating with your Association. If that didn't happen here, then we may be able to grieve this unilateral change or challenge it at PERB. If you are heading into negotiations, then this is an item that could also be brought to the table.

Question: I'm a probationary employee near the end of my probation, and I have a medical condition that I've requested accommodation for. There's a position that is a lateral transfer that I'm qualified for

that I can perform without any accommodation. When I asked to be reassigned, the Agency said that I must formally apply. My condition prevents me from getting the application in on time. Also, the agency says they can't guarantee me the position, that I must interview and compete with other candidates. Is this legal? It's much easier for me to perform the essential functions of this other job than the one I currently hold, given my condition.

Answer: Under the Americans with Disabilities Act (ADA) and California Fair Employment and Housing Act (FEHA), the Agency must accommodate disabled employees provided the employee can perform the essential functions of the job, with or without reasonable accommodation. The ADA makes no distinction between probationary and non-probationary employees, so you are clearly covered by the law.

In your case, however, the question is can you perform the essential functions of your current job, with or without accommodation? The disability laws give an employer the right to choose which accommodation it will offer a disabled employee, provided the employee can perform the essential job functions with the accommodation that the employer selects. Since you have already requested an accommodation for your current job, the Agency can provide that to you and make you compete for the other position.

The California Public Employees Retirement System (CalPERS) has a special power of attorney form that you can file now, in order to protect your retirement benefits later, if you become incapacitated prior to filing for your retirement.

Did

You
Know?

Called the CalPERS Special Power of Attorney, this form allows you to designate a representative to conduct your retirement business if you're unable to do so. If you become unable to act on your own behalf, your designated attorney-in-fact will be able to perform important duties concerning your CalPERS business, such as address changes, federal or state tax withholding elections, and retirement benefit elections, including beneficiary designations.

Remember, not all power of attorney forms are the same – the CalPERS Special Power of Attorney form is specifically designed for CalPERS retirement issues. You may already have a power of attorney set up through another resource (e.g. your will or estate plan), but it may not address your CalPERS retirement benefits. If you don't complete and submit the form, you run the risk that, should you become incapacitated prior to retirement, that CalPERS may find it necessary to withhold your retirement allowance until a court appoints a conservator to handle your affairs, which can be both expensive and time-consuming. Completing and submitting the form ensures you get to decide who gets to make these decisions in the unfortunate situation that you can't.

You may call toll free at (888) CalPERS (or 888-225-7377). You can also learn more, and download the form, at:

<https://www.calpers.ca.gov/powerofattorney>

<https://www.calpers.ca.gov/docs/forms-publications/special-power-of-attorney-form.pdf>

<https://www.calpers.ca.gov/docs/forms-publications/special-power-attorney-pub.pdf>

<https://www.calpers.ca.gov/docs/power-of-attorney-flyer.pdf>

Not all public employees in California are in CalPERS. Some are in local County retirement systems. This includes counties with retirement systems under the County Employees' Retirement Law of 1937. Many of these systems have reciprocity agreements with CalPERS, and many look to CalPERS as the leader in managing pension systems. You should contact your county retirement system if you're a member and inquire about whether they have a special power of attorney form.