Torrance Professionals & Supervisors Association

December 2018 News

HOW TO ENSURE YOUR AGENCY FOLLOWS FAIR HIRING AND PROMOTION PRACTICES

Tis the season for joy and holiday cheer! Especially if you are getting hired or promoted. But often, folks who have worked long and hard, and are very deserving, get passed over. As 2019 draws near, and everyone looks forward to the holidays in the weeks ahead, let's look at what you and your employee organization can do to help ensure that hiring and promotional decisions are fairly made.

Employers are supposed to be unbiased when it comes to hiring and promotional practices. It is illegal to discriminate because of race, ethnicity, gender, age, religion, sexual orientation or disability. Government agencies have an even greater responsibility to be fair and equitable because they are entrusted with the public's money. Jobs are supposed to be filled primarily based on merit: the absolute best person for the job determined by an objective testing procedure.

Merit-based appointments date back to the late 19th and early 20th centuries. The spoils system – the practice whereby a political party gives government civil service jobs to its supporters, friends and relatives as a reward for helping them to victory – had prevailed since the inauguration of Andrew Jackson and remained rampant up until Ulysses S. Grant's presidency. Reform movements that began in the late 1860s, and accelerated after the assassination of James A. Garfield, led to the Civil Service Reform Movement and the enactment of laws to ensure that civil servants are selected based on merit – *i.e.* credentials, demonstrated knowledge, skills and abilities, etc.

These days, agencies are not supposed to hire based on who you know or what money you contributed to a political campaign. Most agencies have detailed rules barring nepotism and requiring that positions be filled from eligibility lists. In general, this means that job applicants, for both entry-level positions and higher jobs in a series, must take a written exam and interview with a panel. Larger agencies have detailed Civil Service Rules and Departments to oversee the testing and selection process. In smaller agencies, the function is typically carried out by the Human Resources (or Personnel) Department.

But even with detailed Civil Service or Personnel Rules, management may still exercise considerable discretion when it decides how to fill a job. It is pretty common for employees to complain that a testing process wasn't fair, an interview panel was biased (or had prior relationships with managers or candidates), eligibility standards were manipulated, a candidate who didn't meet the standards was allowed to test, the successful candidate was pre-selected, or an eligibility list was completely ignored (or deliberately suspended) in order to allow a hand-picked candidate to fill a position.

Unfortunately, these accusations are sometimes true. Management often does have a specific person in mind for a job when they post it. When rules about merit and equity are bypassed in order to achieve management's goal, employees who believe they are victims of these practices have every right to file a complaint. Violations of Civil Service Rules or Personnel Rules are enforceable. Be advised, though, that grievances over unfair hiring practices have some serious inherent pitfalls. This doesn't mean that you or your co-workers shouldn't file a complaint when it's clear that the rules were broken. But it does mean that you should be prepared to overcome some obstacles.

The biggest obstacle involves proof. It is one thing to allege that someone on the interview panel is best friends with the person who got the job; it is another to prove that this is the reason they got the job and not because they "interviewed well." While it's easy to assert that "everyone knew" a person had already been groomed for this job, it's often very difficult to prove this. If management goes through the motions of following the rules, it can be difficult to prove an ulterior motive.

Some violations are easier to prove. For example, it is not legal for management to change job specifications or eligibility requirements in order to hire an otherwise ineligible applicant. Job specs are negotiable. The Agency cannot change them without notifying your Association and extending an opportunity to meet and confer. If

management has manipulated the job duties or requirements in order to select a specific candidate, you and your organization may want to take a strong stand on this.

This erosion of in-house promotional rules and merit appointments goes hand-in-hand with an agency's use of contract and at-will employment, which were often strictly prohibited under old-style Civil Service Rules. As jobs are filled by non-permanent, non-union labor, this shrinks the bargaining unit and bargaining power of your employees' organization. After all, if there are no more jobs that are subject to the rules, then there can be no violations for the union to grieve!

If there are still rules in your Agency, the other big obstacle facing employees who have been unjustly bypassed for promotion is retaliation. Once management has decided who to hire for a position, they are not likely to change their minds about this unless forced to do so. If the rules truly have been broken you can force the agency to go back and run an honest, equitable exam. But the last person they are likely to hire when this is all finished is the person who complained about the violation. This is just reality. Yes, this is retaliation – but, again, it is difficult to prove. To guard against this, consider filing an Association grievance rather than an individual grievance. The goal is to get the Agency to follow their own rules and be consistent and fair in the selection process.

Know too that the Agency must comply with other legal mandates, like accommodating disabled workers under the ADA (Americans with Disabilities Act), or bumping procedures that are triggered by a layoff. In both cases, it's possible that the Agency must give a vacant job to a disabled worker or a more senior employee over others who are on an eligibility list and who want the chance to compete for that same vacant job.

Longevity in a lower level classification does not by itself guarantee selection to a higher-level job class. Neither does hard work or good evaluations. If you want a promotion, ask your boss if there are things that you can do now to make you more competitive for a later job opening. Many tuition reimbursement policies cover costs for training classes and certifications, not just general education. Take advantage of these programs if they're offered. If you want a supervisory or managerial position, seek out a "lead" position or ask your boss for more administrative assignments in addition to your normal workload, especially if this experience will benefit you in a recruitment. Learn what the job you want entails. Then master those duties. Most managers are happy to help you get a leg up. If you get nowhere in your chain of command, consider contacting HR, Personnel, or Civil Service to learn what you can do to put yourself in that final pool of

top applicants. They may be able to help you improve your interview skills, provide a sample of interview questions that you can use to prepare, or share feedback on what you can do or say during the interview to get a leg up. Remember, it's almost always better to approach a vacancy by competing for it than by losing and filing a grievance.

That said, it's important to know that all aspects of the hiring process are negotiable – and enforceable. If you have rules, and they're not working, consider re-negotiating them during the next round of contract negotiations. If you don't have rules at all, consider proposing some (and call professional staff for assistance). A common rule is for a promotional preference – *i.e.* giving strong preference to current employees over outside applicants. Many agencies have written policies on meritorious promotion, career ladders, internal recruitments, or a desire to "hire from within." Negotiate a rule that says the agency must fill the job by internal promotion if there's a qualified candidate, before opening the job to outside candidates – in other words, no "open and competitive" exam. Or negotiate that positions be filled by one of the top scorers on an objective exam, not just based on subjective interview assessments. Learn the rules, and if you need to, enforce them. Some Personnel Rules and Civil Service rules allow for disputes or appeals to be heard before a Personnel Board or Civil Service Commission. If you have a specific problem, call your Association's professional staff for help.

Retired Public Employees Association News

In a stunning upset, Jason Perez, a Corona police officer and RPEA's endorsed candidate, won the CalPERS Board seat held by long-time board member and current Board President, Priya Mathur. The unofficial results indicate that Perez received 9,208 votes, which represents 56.78% of the votes cast and Priya Mathur received 7,008 votes, or 43.22%.

This places two members on the Board representing active and retired CalPERS members who are committed to redirect CalPERS investment activities to more keenly focus on return on investment and less on divestment, environmental, social and governance issues. At 71% funded, the pension fund is not as "healthy" as it needs to be in terms of overall value and must be further enriched to fully back its pension promises. An 80% funded level is considered healthy for a public pension fund.

A new Chief Investment Officer and a new Chief Financial Officer have been added to the CalPERS staff in recent weeks. Both new hires are highly qualified. With them on-board we can expect new investment initiatives that will enhance return on investment and propel the fund back to a healthy level—a very welcome condition! We must also hold the discount rate (*i.e.* the anticipated rate of investment return) at its current seven percent level to keep our contract agencies in a viable budgetary condition.

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.

Legal Update

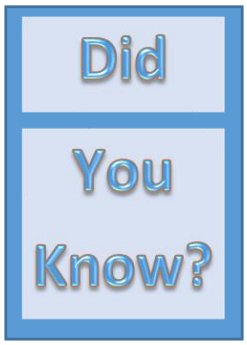
U.S. SUPREME COURT SAYS SMALL LOCAL GOVERNMENTS ARE NOT EXEMPT FROM FEDERAL AGE DISCRIMINATION LAW

Last month, the U.S. Supreme Court issued their first opinion of the new Fall 2018 term. The case, *Mount Lemmon Fire District v. Guido*, involved the applicability of the federal age discrimination law – the Age Discrimination in Employment Act of 1967 (ADEA) – to public agencies. Two firefighters filed suit against their employer, a local fire district, which had terminated their employment. The firefighters claimed their termination was because of their age, in violation of the ADEA.

The ADEA applies to private employers with 20 or more employees. A 1974 revision added liability to state and local governments. The question was whether that liability existed regardless of the size of the local government, or whether it applied only to those agencies with 20 or more employees. The Court held that the ADEA applies to all local governments regardless of size, unlike with private employers. The Court looked at Congressional intent, which strongly suggested that the ADEA revision was intended to hold all government employers liable for violations. All Justices joined in the decision, except for Justice Kavanaugh, who had not yet been confirmed.

This case is important because it clarifies that all public agencies must not discriminate based on age, regardless of how many people the agency employs. The state anti-discrimination law – the California Fair Employment & Housing Act – already applies to all California public agencies. But the *Mount Lemmon* case nonetheless confirms that employees for small local agencies may have viable federal claims as well.

Good news is coming for military service members and their families. SB 1123, signed into law on September 27, 2018, expands the scope of paid leave benefits allowed under the State Disability Insurance (SDI) Paid Family Leave (PFL) program. Expanded benefits will take effect starting January 1, 2021.



Under the Family Medical Leave Act (FMLA), eligible employees are entitled to take time off for a "qualifying exigency" arising from the deployment of the employee's spouse, parent, or child for active military duty to a foreign country. Examples of "qualifying exigencies" include attending military events, making childcare arrangments, handling financial and other legal matters arising from the service obligation, and accompanying the military member during a rest and recuperation leave during their deployment.

Currently, California employees who wish to receive pay during leave for a qualifying exigency must use their own accrued vacation or paid time off hours. But SB 1123 allows the employee to apply for wage replacement benefits from the State of California Paid Family Leave insurance program for qualifying exigency leaves. Employees applying for benefits may be asked to provide a copy of any active duty orders or other documentation issued by the military to support the request for benefits.

These wage replacement benefits are only available to employees who pay into the SDI system. This is yet another example of one of the many benefits of participating in SDI. Others include wage replacement benefits for a short-term disability (up to a maximum of 365 days) or for baby bonding leave (up to a maximum of 6 weeks).

If you don't currently pay into SDI, you might request to do so during the next round of MOU bargaining. The cost is absorbed by the employee, about 1% of gross pay, but the Agency helps facilitate by deducting pay and remitting to the SDI system on your behalf.

News Release - CPI Increases!

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

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

2.5% - CPI for All Urban Consumers (CPI-U) Nationally

3.5% - CPI-U for the West Region

4.1% - CPI-U for the Los Angeles Area

4.4% - CPI-U for San Francisco Bay Area

2.8% - CPI-U for San Diego Area (6 months through December 2017)

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 your professional staff.

Question: The Agency was studying my position for a possible reclassification. Management just notified me that they completed their review. They've decided not to reclassify me. Yet, I'm still assigned the duties that are outside my position. I've never been compensated extra for doing these extra duties, but I should have been, and now they're saying it is just part of my job duties going forward. Can I file an out of class grievance?

Answer: The starting point for an out of class case is your job specification. List all the extra duties that you are performing and then compare those duties to your job spec. If those duties are not in your job spec. and belong to a higher classification, then you can file a grievance seeking to either be reclassified into the higher position, receive additional out-of-class pay, or to stop being assigned those higher-class duties. Contact professional staff for assistance with your case.

Question: Our Department just issued a memo on our standby pay program. They are saying the memo is to "clarify" how the program currently works. The memo says that the Department will skip my spot in the rotation for the standby assignment if I'm on any type of leave – *e.g.*, out sick, on vacation. I don't agree. I've never been skipped before. Do they have the right to deny me standby pay if I'm on leave? I don't think it's fair that I must now choose between the standby pay assignment

and the legitimate use of my earned leave benefits. What are my options?

Answer: Your Department can't just change the way people are paid standby pay on its own. It must meet and confer with your Association before implementing that change. However, typically serving on standby requires the employee to be available to return to the worksite, or otherwise perform work duties, if needed. Check the standby policy language closely to see if that is a requirement. If so, and if your leave makes you unavailable to return to perform the work, then it will be difficult to demand that you continue to receive that assignment. That said, if your Agency has a longstanding practice of paying employees standby pay even when they are on leave, and there is no language to the contrary, then you can file a grievance seeking to enforce that practice. Please contact professional staff for help.

Question: Is there a law limiting how much I can be required to work? My Agency says I'm exempt from the overtime laws. I routinely work after hours due to workload and various Agency functions that I'm required to attend. We also have an electronic time card system and it won't let me report working more than 80 hours in a pay period. But yet I have to certify that my hours are correct. This doesn't seem right. Are they legally allowed to do this? At the very least, I should be allowed to report my true hours and I should be compensated for the extra work. There should also be some cap on how much they can make me work for the same salary.

Answer: If you are exempt under the Fair Labor Standards Act then your Agency does not have to pay you overtime, no matter how many hours you work, unless your MOU requires it. Although most MOUs do not require Agencies to pay overtime for exempt employees, many Associations negotiate for administrative leave in their MOUs, which is extra time off that is designed to make up for the uncompensated extra time that exempt employees work. If your MOU does not include administrative leave for exempt employees, you should ask your Association to include that in your next round of negotiations.

Regarding the time card issue, although exempt employees can be required to clock in and out of work, you should not be required to certify an incorrect time sheet. The best approach is to obey first and grieve later. Keep good records of your actual time worked. Contact professional staff for assistance.

Question: The Agency gave us a recruitment posting for a new position. I spoke with my Association about this. We don't think there's a need for another person to do this work. Can we object? Can we ask the Department

why they think there's a need for this person? There are so many other jobs that are more pressing to fill than this one. It makes absolutely no sense.

Answer: Unfortunately, Management has the right to make staffing decisions, even bad ones. But your Association can bring your concerns to Management. The Association can ask to meet with Management directly to discuss this staffing decision. The Association can also ask to meet and confer over the contents of the job posting. During that meeting, they can discuss whether other positions might be filled instead of this one. Finally, your Association can bring this issue to a Labor Management Committee (LMC). This is a great topic to discuss at an LMC meeting. If your MOU does not allow for an LMC, your Association can still request one. If Management declines, you could bargain for LMCs during the next negotiations.

Question: I'm a manager and I just received a notice that I'm being investigated for alleged misconduct. According to the notice, one of the other unions complained I was discouraging their employees from becoming members of their union. Can I really be written up for this? What does it mean to "deter or discourage" employees from joining their union. I'm a member of my own Association board. The employee approached me. All I said was that you have options, you don't have to join if you don't want to. I thought I was just stating the law. My Agency has not trained me on what I can or cannot say. I don't think it's right to be investigated and written up for stating something that's 100% true. Please advise.

Answer: Senate Bill (SB) 285, which went into effect on January 1, 2018, prohibits public employers from deterring or discouraging their employees from becoming or remaining members of a union. Since you are a member of Management, telling an employee that they don't have to join the union can be easily interpreted as discouraging union membership. However, your Agency should have provided you training on how to handle inquiries about union membership. Since you were not told about the new law or trained on what constitutes deterring or discouraging union membership, you should not be written up for your statement. Please contact professional staff to attend any investigative meetings and assist you with this defense.