



Glendale City Employees Association July 2007 News

UNDERSTAFFING & WHAT YOU CAN DO ABOUT IT

There is an old adage in labor relations: "Management has the right to Manage." This means that the City's policy makers, in their wisdom, have the right to decide how public money will be spent, and city services, rendered. Within certain federal limits, they can decide which programs to run and how to run them, decide how to staff, both quantity and quality of service to the public. One thing they CANNOT DO, however, is to violate employee rights -- and these include the right to do work that is safe, non-harassing, and not in violation of your negotiated benefits.



Unfortunately, as revenue streams become thin, it is possible that a public agency's efforts to provide full service with less money *will* infringe on employees' rights. Public programs are labor intensive, so there isn't any way to save substantial money except by squeezing more work out of fewer people. So, while direct "takeaways" at the bargaining table are rare, understaffing and "corner cutting" are often common.

Management has the legal right to reduce staffing levels (and generally accomplishes this through attrition.) **But, without careful planning, it is almost inevitable that the remaining employees become overloaded, and a number of grievable conditions arise:**

- Excessive hours of work
- Inability to take lunches or breaks



- Inability to schedule or use vacation, holiday or comp time
- Encouragement to work when sick, or family is sick
- Encouragement to take work home or work extra hours "off the clock"
- Dangerous working conditions
- Actual injuries due to working alone or hurrying
- Harassment from supervisors for unfinished work; tension with co-workers
- Stress-related illnesses
- Out of Classification work
- Poor performance evaluations or actual discipline, based on unrealistic job requirements

Some of these conditions are direct violations of rights; others (such as workers comp claim or

employee lawsuits) could create new expenses. Some employers seem truly to be “penny-wise, pound-foolish....” **But either way, if you and your co-workers are facing a number of the above circumstances, you have every right to request relief.**

The first step in "requesting relief" is to talk to your union rep and, very possibly, file a grievance.



A Group Grievance?

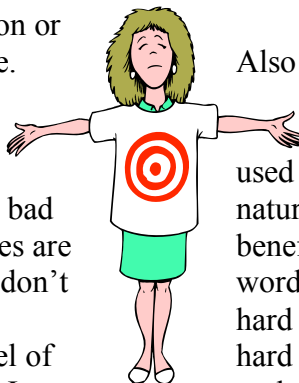
If you are working in understaffed conditions, you are probably not the only person suffering. Filing a grievance *as a group* lends credence to your complaint. Your representative has the task of organizing your information, filing a complaint and arranging a meeting with City Management.

In the meeting your representative will enumerate your complaints. Hopefully, you are keeping some good records; it IS necessary to have specific names and dates. Keep in mind that a grievance is a complaint over legal violations; it is NOT a violation merely to have "too much work to do." Unless you are denied time off, harassed, or being made ill by the job, you do not have a grievance.

The response to a grievance

Management's resolution to your grievance does *not* have to include hiring more help. It simply has to address your right to take a vacation or take lunch breaks, or not to work excessive hours, or not be reprimanded for work you're unable to finish. Thus, the employer can assign some of the work elsewhere, restructure your duties, or simply tell you (preferably in writing or in front of witnesses) that it's OK not to finish some tasks. They can also eliminate an entire function or cancel a public service – it's their choice.

Most Managers will take staffing grievances seriously due to the morale problems - productivity problems - that bad work conditions create. When employees are angry, overwhelmed or exhausted, they don't do their jobs very well. Often, however, Management is unaware of the high level of stress that the understaffing has created. It may take a formal grievance to articulate the problem.



Further, if your first line of supervision doesn't want to (or have the authority to) to resolve your complaints, a formal grievance goes to the next level of Management. This will mean that the immediate supervisor will now have *his* management skills scrutinized – an activity he would certainly prefer to avoid!

Ultimately, if employees are the victims of real abuses or violations on the job, they can “seek relief” before a third party: a Civil Service or Personnel Commission or an arbitrator – or even the Public Employment Relations Board.

How do We Distinguish between ‘hard work’ and abuse?

The line between a good day's work and an abusive day's work varies highly from person to person. Most employees will tolerate understaffed working conditions for quite a long time before they will lodge a complaint. Most people are "team players" who don't want to exacerbate an already unstable work situation. They are looking forward to long careers, promotions and ultimately, to retirement, and don't want to be viewed as troublemakers. So...it is up to you and your co-workers to decide when too much is enough. When people are chronically exhausted, unable to use free time to attend to their normal lives and/or bordering on stress-related illnesses, these are all pretty good ground for complaint!



Keep in mind that your upper Management is not necessarily aware of your work conditions. There is nothing wrong with bringing these to their attention...

Also while it used to be generally true that "good employees don't file grievances," it also used to be true that public employment used to be much, much “cushier,” both in the nature of the work and the relative pay and benefits for the work, than it is today... In other words, you should not necessarily assume that hard work will lead to anything other than more hard work. The longer you fail to complain about understaffed working conditions, the more likely it

may be that this state of affairs is considered to be normal!

For the last decade, policy makers in California's cities how to provide public services without

enough money. Public employees are unquestionably the victims. You have the right to a safe *and sane* workplace, and your union's job is to take the steps necessary to accomplish this....

MAJOR LEGAL DECISIONS

The following are significant Court decisions improving the rights of public employees. Please keep in mind that each case is unique. If you have a *specific* legal question or problem, call your Board Rep or our legal staff at the CEA office: 562-433-6983.



EMPLOYEE CAN'T BE FORCED TO TAKE UNPAID MEDICAL LEAVE WITHOUT HEARING

The Second District Court of Appeal has firmly established the right of *all* public employees to a "Skelly" hearing prior to any employer action which would result in loss of pay -- even in cases of illness.

This case involved a Health Technician for the L.A. School District, who complained about being made ill by exposure to fumes and hazardous materials encountered on the job. His grievance was dismissed after the district installed air conditioning, but when his medical condition worsened, the District placed him on unpaid, *involuntary* medical leave.

A month later, gave him approval to return to work, so long as special protective clothing was provided. However, the District refused to return him to work.

The employee and association filed a grievance that this action was retaliatory, punitive and a loss of pay without due process. The case moved into the courts, where the employee filed under a violation of the 14th amendment, arguing that he had a constitutionally protected property interest in

his job -- and that the District's had deprived him of these rights. This right to 'due process' before the "taking" of ones job is the basis of public employees' *Skelly* right.

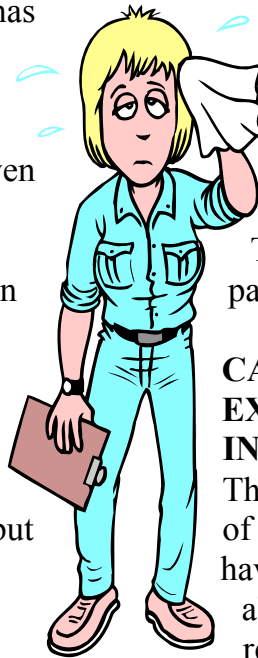
The Court found that he did, indeed, have a property right to his job and that by placing him in unpaid status for seven months, he had been denied that right.

The employee was reinstated, with back pay.

CALIFORNIA SUPREME COURT EXTENDS JOB PROTECTION FOR INJURED WORKERS

The High Court has overturned sixteen years of employers' right to dismiss workers who have been injured on the job. While it has always been illegal to fire an employee in retaliation for filing a workers comp claim, employers have used the excuse of "business necessity" in order to dismiss an employee if he was unable to perform the full range of his job. This problem had persisted despite the passage of the Americans with Disabilities Act, which requires employers to "reasonably accommodate" injured workers.

The case involved a clerical employee at City of Moorpark who sustained injury to her knees and was no longer



able to stoop to get low files, nor to use stairs. Her doctor said that she could still do her job if allowed to use wheelchair ramps and had help moving low files. The City refused to allow her to return to work, thus forcing her back on workers compensation pay, and eventually dismissed her since she could no longer do all of the duties of her initial job.

The employee sued and won. The City appealed. The State Supreme Court heard the case, which now establishes this precedent for all public employees: if there are reasonable accommodations that could be made to allow an employee to continue working; and the employer fails to make these, the employee has the right to file a discrimination suit -- with the ability to collect damages, if he/she has lost income.

COURTS PROTECT EMPLOYEES' RIGHT TO "SPEAK THE TRUTH"

In a recent appellate decision, the Fourth District Court ruled that the Lake Elsinore Unified School District violated the free speech rights of a secretary when it suspended her for revealing truthful information. In this case, the secretary had communicated to the unsuccessful bidders about a conflict of interest involving a consultant hired by the District. The Court, in arriving at the decision that the employee should NOT be suspended for supposedly "disrupting District business," stated that truthful speech by an employee should not result in discipline, absent "unusual circumstances, such as an extraordinary need for confidentiality or a sensitive employment position."

In blazing this new trail, the court announced its conclusion that "it is appropriate to require an actual showing of disruption." Finding none, the court found that the employer's interests did *not* outweigh the employees' free speech protections.



In *another* free speech case, however, the Ninth Circuit Court of Appeals ruled that a public employee's free speech protection is limited to matters involving public concern. The affected employee filed a lawsuit against the City alleging that City officials denied her a pay raise, suspended her, denied her a promotion and treated her disparately because she spoke out about unlawful discriminatory practices on the part of the City. The Court found that a public employee's right to speak out must involve a matter of public concern in order to be protected by the First Amendment. The fundamental purpose of the First Amendment is to foster participation in the interchange of political and social ideas, said the court. At its core, the First Amendment protects an array of behavior and activities for the same fundamental reason. Thus, employees' are not protected against discipline in *all* circumstances where one speaks out in public...

EMPLOYEES THREATENED WITH DISCIPLINE DO HAVE RIGHT TO SUBPOENA OTHER EMPLOYEES' FILES

The line between *your privacy* and another employee's right to make comparisons about treatment on the job is a difficult one for the Courts. This issue often comes in the context of a discipline hearing, when one employee alleges that he or she is being punished more severely (say for tardiness or absenteeism...) than others who have committed similar infractions.

The Courts have now solidly agreed that the appealing employee DOES have the right to subpoena other employees' records. But employers are also concerned about "invasion of privacy" claims on the part of their employees. The trick has been to come up with ways to compare employees' personnel files while protecting each individual's privacy. The first thing a judge or arbitrator will do when presented a request to subpoena files is to try to "limit the scope" of the

request. The arbitrator can review the documents alone or request that the City block out names or I.D. numbers. Additionally, the arbitrator can limit the review of documents to the hearing room, closing the portion of the hearing that deals with the sensitive file or sealing the transcript of the hearing.



Questions from Employees...

The following are questions often asked by public employees. Each situation is unique, however. If you have a problem or question, please contact your Board Rep or Association staff, Robin Nahin, Mike Gaskins or Attorneys, Michael Koskie or David Twedell at (562) 433-6983 or e-mail: cea1@charter.net. There is no charge for Association members, and all conversations are confidential.

Question: I had an argument with my boss and said I was quitting. Later the same day, I realized this was a mistake, and I told him I was not quitting. He said I was too late and had lost my job. Is there anything I can do?

Answer: When an employee gives notice that he's quitting a job, he may change his mind unless the employer has already taken direct steps which, if undone, would "*substantially prejudice*" the employer. For example, if the City has already selected a replacement from an employment list, contracted the work out, or reached other agreements, which would cost the city a significant amount of money, it may refuse to allow you to withdraw your resignation. When an employee has merely an argument with a boss and has stated that he is quitting out of anger or hurt, and then changes his mind the same day, it is doubtful enough time elapsed for the employer to take action. In other words, it you should be able to hold on to your job. Call your Association rep, ASAP, if the City continues to deny you access.

Question: I was on vacation out of the country and was unable to get back to work on time because I was "bumped" off my flight. I missed two days of work.



In an employer still objects to the release of the document, the arbitrator may need to decide whether the need for the evidence in this particular hearing is sufficient to outweigh the employer's concerns that it might be found liable for the invasion of privacy.

The City said this was the same as resignation, and I had lost my job. Can they do this?

Answer: the City cannot legally construe two days absence at the end of a vacation as a voluntary resignation without proving that substantial actions have already been taken to replace you. Further, a the Courts have determined that even when an employee *does* disappear, or appear to have abandoned the job, the employer must send him a notice and allow him due process before he can be considered terminated.

Question: I told a coworker that our boss was keeping a private file on him. My boss found out and chewed me out. What should I do? Could I be disciplined?

Answer: In general, a supervisor is entitled to keep private files on employees they supervise, but nothing in a file may be used against an employee for disciplinary purposes, unless he has seen and had the opportunity to respond to it. There is nothing illegal about your discussing either the existence of, or the contents of, a co-workers' file - *unless you are a confidential employee, with access to information that other employees don't have.* (If you are a confidential employee you could be disciplined for violating job duties, which might require you to not divulge information you become privy to.)

You should not be "chewed out" in retaliation for talking to your co-worker about his file, and you

certainly can't be formally disciplined. In theory, you could file a grievance about harassment, but there's probably no "remedy" (since the event has already occurred.) You *might* consider filing a grievance, however, if you are repeatedly faced with chewing's out in front of co-workers or other kinds of verbal confrontations. You do have the right not to live with a hostile work environment.

QUESTION: I just informed the City that I'll be retiring in a few months. I have a lot of accrued comp time and vacation, and they want me to use it up before leaving, rather than being paid off. Can they require this?

ANSWER: Both vacation and "comp time" are legally vested benefits (in fact, comp time is a form of overtime which is guaranteed by the Federal Fair Labor Standards Act. This means that both benefits have monetary value, which can't be taken away. The employer CAN encourage you to use them, but must pay you for any time still on the books at the point of actual retirement.

QUESTION: I have a permanent injury (carpal-tunnel syndrome, from typing...) and will have surgery this week. My Workers Comp claim has been settled, and my doctor believes that I WILL be able to continue to work. But the City has terminated me and filed for my PERS Disability Retirement! What should I do?

ANSWER: First of all, you can't be terminated, even for disability, without a fair hearing. The first step, the "Skelly hearing" is usually with the Department Head; the second step is a full evidentiary hearing. At a full hearing you'll have the opportunity to present evidence of your ability to continue to work. The burden is on the employer, by the way, to prove that you are UNABLE to work. If they can't prove this, your job is retained.

You may also have a claim under the American's With Disabilities Act, which now requires employers to 'provide reasonable accommodation' to disabled workers (i.e., modify your work station or reclassify you.) AND you may have a claim on the basis of your Workers Compensation case, because it is illegal to retaliate against an employee for filing a claim.



Ultimately, however, your case revolves around your capacity to do your regular job after your surgery. The laws only provide a set of obstacles for the employer; if you really can't go back to doing what you were doing before, they can, in the long-run, terminate you.

QUESTION: I had a run-in with a neighbor over the weekend, and the police were called. Apparently this has been reported to my department, and I've been told I'm going to be reprimanded. Do they have the right to discipline me for something that happened off the job?

ANSWER: No! Even if they refer to some written rule about 'activity unbecoming a representative of the Agency,' you can't be held liable for activity off the job. This is true UNLESS your off-duty activity does have actual relationship to your work.

The Courts have ruled that "there is no just cause for adverse action (i.e. discipline) unless there is some nexus (connection) between the disapproved -of behavior and the public service in which the employee is engaged."

Question: What does 'hostile work environment' really mean?

Answer: There's a formal, legal meaning to this term, as well as an informal, frequently used meaning. *Legally speaking*, anti-discrimination



laws afford employees the "right to work in an environment free from discriminatory intimidation, ridicule and insult." *However discrimination complaints can be filed by a person who is a member of a "protected class,"* Protected classes involve age, disability, race, gender, sexual orientation and national origin. Also, under California's labor law, "Union Leader" is a class protected against retaliation for union activity. In other words, formally speaking, employees are protected against intimidation or harassment on the job IF they can show that the harassment was an example of discrimination against them for being a member of a protected class.

Formal discrimination claims may be filed with the Equal Employment Opportunity Commission, but proving discriminatory harassment isn't easy. The

employee must be able to demonstrate that (1) he or she *is* a member of a protected group; (2) that he was subject to severe harassment that unreasonably interfered with work performance *because of* his or her age, sex, race, disability, religion or union leadership; (3) that both a reasonable person and the employee would view the behavior as harassment; and (4) that the employer should be held legally responsible for the “hostile work environment.”

Informally, ANY employee who is subject to “intimidation, ridicule or insult” may file a grievance. Most Personnel Rules and/or MOU’s provide some sort of language that says employees have the right to a healthy, non-harassing work environment. The “hostility” must be repeated and well documented. If possible, it should be able to be

corroborated by witnesses. Group grievances against harassing work conditions often are more effective than individual grievances.

QUESTION: My Department Head put information in my Performance Review that is a complete lie! What can I do about it?

ANSWER: First of all, your performance reviews, because they go in your permanent personnel record, are grievable under the terms of the Contract (your MOU.) So, you can grieve the statements. Second, you COULD hold your employer responsible for libel, if the performance review accuses you of "criminal conduct, lack of integrity, incompetence or reprehensible personal character or behavior." This is based on a 1993 California State Appeals Court decision.



Your Right to Time Off for Jury Duty, for Victims of Crime or Response to Domestic Violence

In 2001, California’s labor law was modified to include employees’ right to attend to Court matters or to seek a restraining order in response to domestic violence. Specifically, Section 230 of the Labor Code now clarifies that:

- **No employer shall discharge or in any manner discriminate against an employee for taking time off to serve on an inquest jury or trial jury, if the employee, prior to taking the time off, gives reasonable notice to the employer that he or she is required to serve.**
- **No employer shall discharge or discriminate or retaliate against an employee who is a victim of a crime, for taking time off to comply with a subpoena or other court order as a witness in any judicial proceeding.**
- **No employer shall discharge or discriminate or retaliate against an employee who is a victim of domestic violence as defined in Section 6211 of the Family Code for taking time off from work to obtain relief, including, but not limited to, a restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of a domestic violence victim or his or her child.**

Please note that this law does NOT require that the City provide PAID time off for these purposes, but does prevent you from being threatened, harassed or disciplined if you must take time off...

What Are My Rights If I Am Called To Active Duty...?

By Mike Gaskins, Veteran and Staff



Since 9/11/01 many public employees who were in Military Reserve or National Guard status have called up to go to Afghanistan or Iraq. The Federal Law that governs this situation is USSERA (Uniformed Services Employment and Reemployment Rights Act - 1994) and applies to all employers regardless of the number of employees in the organization. This information is intended to give a broad outline of the rights and responsibilities of someone, under USSERA, who is called to active duty.

First of all, employees who are “called up” do have some obligations to their employer. You must give advance notice, orally or in writing, that you are being called to active duty -- unless there is some special circumstance preventing you from doing so. If your length of service is less than 31 days, you must return to the employer at the start of the next regularly scheduled work shift commencing more than eight hours after release from active duty. If your service is between 31 and 180 days you must submit application to the employer that you are going to be returning, within 14 days following release. If your service is greater than 180 days, you must submit application within 90 days of release from service. Failure to meet these deadlines would mean the employer does not have to uphold their obligation to hold the job for you.

Upon return from active duty, you must be provided the same position or a similar one, with the same status (seniority) pay and benefits as the one you were employed in at the time of call up. Your employer does not have to pay your salary or medical benefits or allow you to accumulate vacation and sick leave while you are on active duty but they are required to honor all seniority-based benefits. Thus, your length of service must be considered for pay increases, vacation accrual rate, FMLA rights etc. as if you had remained on the job. This includes step increases based on years of service, continuous service for retirement purposes (CalPERS year credit). Additionally, you may voluntarily use accrued vacation while you are on your military leave but you cannot be compelled to do so.

An employer who discriminates against a returning veteran or retaliates against the same may be guilty of a misdemeanor under California Labor Code 394.