

# **Glendale City Employees Association October '07 News**



## **Courts Crack Down on “Common Law” Employees**

For nearly a decade now, public employers have been using ‘temp agencies’ to fill many jobs that used to be filled by permanent employees. For a reasonable fee, you can find a “temp” to do anything -- from mowing the lawn to running the City’s payroll. Temps are easy to hire (none of those messy eligibility lists...) easy to fire (certainly no “Skelly” rights...) and so, so much cheaper than permanent employees with benefits. In fact, the only obstacles to an even broader use of “temps” are a few state and local laws – as well as the increasing objections from public employees unions.

The objections that unions have to “temps” are threefold: first, they weaken our bargaining capacity and serve as a constant reminder that “your job can always be done cheaper.” Second, they erode the “bargaining unit,” by failing to pay dues and failing to help support employee rights. (In fact, they are living embodiments of unenforced rights!) And finally, they fail to contribute to shared benefit pools, the most obvious of which is the PERS system.

Thankfully, the public sector unions ARE beginning to fight back, challenging the use of “temps,” both legally and politically, and particularly focusing on the issue of unpaid benefits. Probably the most significant recent challenge was the *Cargill* case, brought by the union the Metropolitan Water District. Here, the Union was able to prove that Dwayne Cargill and hundreds of his (“temp agency”) co-workers were actually permanent MWD employees -- and that the District was violating PERS law by failing to make their contributions. The MWD was forced to pay millions in back benefits.

The term the Court use for these employees (who supposedly work for an outside agency, but are actually under full-time direction of a much larger employer) is “Common Law” employees. The Courts findings were that Common Law employees of the MWD are due the same legal protections **and benefits** as other



employees who performing the same duties for the same employer.

The concept behind 'common law' employment is similiar to the other form of "common law" we're more familiar with: common law marriage. It this means is that *the circumstances of the employees (or the cohabitating couple) are so similar, and have gone on for so long, that they must be treated the same as people with a contractual relationship*. In fact, "common law employees" have long been recognized by the Social Security Administration and IRS in their attempt to crack down on employers' who use "independent contractors" to avoid payroll taxes. An independent contractor sets his own hours, works from his own office or shop, maintains his own tools and performing services independent of supervision – *definitely not the employment conditions of the "temporary" maintenance workers at the MWD!*

***The significance of the Cargill case is that dozens – if not hundreds -- of public employers in California now know that they violating the law. We expect that it is just a matter of time before other Unions and Associations file suit...***

## 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, please call your Board Rep or our professional before taking action.**

### **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.

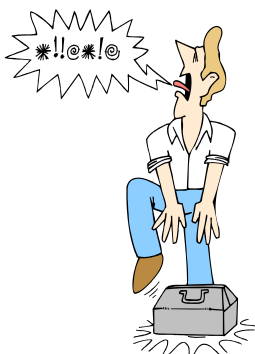
The employee and association filed a grievance that this action was retaliatory, punitive and a loss of pay without due process. The case moved into the courts, where the employee filed under a violation of

the 14<sup>th</sup> 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.

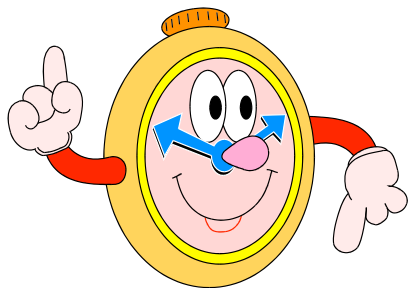
### **CALIFORNIA SUPREME COURT EXTENDS RIGHTS OF INJURED WORKERS**

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.



## YOUR RIGHTS ON THE JOB: OVERTIME

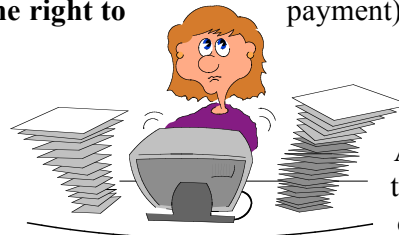
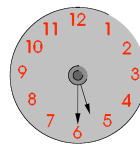
By Robin Nahin, Association Staff

*The following are questions and answers about your rights on the job - but it is **GENERAL** information only. If you have a specific work-related problem, please talk to your*

*Board Rep or professional staff.*

**QUESTION:** My boss asked me to work overtime, but to take the time off -- at straight time -- before the end of the week. My work is very busy now, and I'd rather take the time off when I need it. In fact, I would rather receive **MONEY** than comp time. Don't I have the right to take my comp time off *when I want*? Also, isn't overtime supposed to be paid at time-and-a-half - and don't I have the right to take money rather than time?

**ANSWER:** Yes, yes, and maybe - depending on whether or not you are considered an "exempt" employee. Overtime rates are governed by the Federal Fair Labor Standards Act, which has covered public employees since 1985, and which establishes that non-management, non-exempt employees must be paid time-and-a-half for all time worked over 40 hours in a week. Professional employees *may be* defined as "exempt," but this would already have been negotiated, and established in your contract. Back in 1985, there was considerable haggling over exactly which public employee job classes could be so defined. If you've been receiving overtime or comp time all along, the city can't decide, now, that you are exempt...



Assuming that you are, therefore, NOT an exempt employee, the law states that **unless the method of compensation is discussed BEFORE the overtime is worked, you always have the right to the money, at the rate of time-and-a-half.** All compulsory overtime (which means overtime which you are simply assigned to perform, without any advance discussion of form of payment) must be treated in this manner.

But non-compulsory overtime is another story: If Management asks you **AHEAD OF TIME** to work overtime, but to accept comp time instead of money, you do not have to accept the overtime. You can "just say no." If you say "yes," the comp time should be at time-and-a-half unless you agree VOLUNTARILY to take it off within the same pay period. (Time taken off within the same pay period may be viewed as a simple schedule change, and therefore no overtime law pertains....)

**HOWEVER, it is considered a violation of the FLSA (and also a possible violation of your MOU) for the employer to forcibly alter your schedule to avoid the payment of overtime.** If you are under pressure to cooperate with these sorts of

evasions, call your Board Rep or Staff, and we will happily process the case.

**QUESTION: I thought only sworn employees could be forced to work overtime. Can I be forced?**

**ANSWER:** Yes, you can. But again, you must be compensated at time-and-a-half in MONEY, if you want it. Also, if you are chronically required to work overtime, while others are not, you may have a case of discrimination. And, if you are ALL chronically working overtime, you may have an understaffing problem, which could also be approached through the grievance process.

**QUESTION: What if I WANT more overtime, but all the opportunities go to a few 'chosen' employees? Don't they have to rotate?**

**ANSWER:** Equal access to overtime is a negotiable subject. The goal at the bargaining table is usually to set up a fair system for letting people sign up for overtime slots that are known in advance. If you *have* such a system, and are denied access to it (and systems can vary from department to department) you may want to grieve this.

If you have no fair system, you may want to propose this during the next bargaining period, but there is no *legal* requirement that overtime be distributed fairly or equally.

**QUESTION: I've just discovered that I have always been eligible for overtime, but my employer has not paid me for it. What can or should I do?**

**ANSWER:** If you know that you are owed back overtime, there are two courses you can follow, one by reporting the "error" to the Department of Labor; the other by using your local grievance process under the MOU. Either way, you will be able to gain either two or three year's back wages. Let us explain:

The Fair Standards Labor Act (FLSA) provides that all covered employees be paid one and one half times their straight time wages for all hours *actually worked* in excess of forty in a work week. The law permits recovery of up to two years of back overtime, three years if the violation was willful. **If**

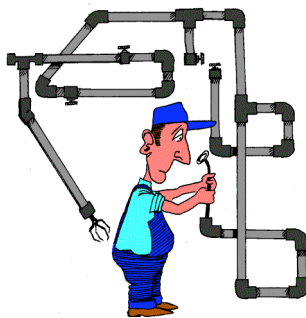
**you call the Department of Labor**, they'll conduct an initial investigation and, if your claim proves legitimate, will audit your employer's payroll records to determine how much is owed to *all* employees. All affected employees will be entitled to all back overtime payments, plus "liquidated damages". If you must take your employer to court, you can also recover Court costs.

"Straight time wages" means all money paid to the employee for the regular workweek including differentials and premiums. Hours actually worked means hours on the job, not including holidays, sick leave, or other time compensated but not spent working. Liquidated damages are an amount equal to actual back unpaid overtime. Liquidated damages are provided automatically.

**If you opt to pursue the claim through the MOU**, most of the above is negotiable. You will file a grievance (either alone or with others so affected,) and you'll be entitled to all overtime payments that should have been made under your MOU, *which may define overtime differently*. One difference between the basic FLSA and the MOU may be that "hours actually worked" will not be as important as the negotiated definition of "overtime." (For example, many employers include Sick Leave and Holidays in the calculation of overtime...)

Another difference between the MOU and the Department of Labor is time limits. The Grievance Process moves quickly; the DOL may take months to investigate your claim. Either way, however, you have the right to go back three years for past wages, as the law requires that payroll records be retained for three years in California. Also either way, the filing limits usually start when you found out about the underpayments or when you should reasonably have known.

We advise clients to allow your City to resolve this kind of problem in a cooperative way, before "blowing the whistle" on the whole City. Also, keep in mind that this is a complex subject, and that the "boomerang effect" on the whistle blower can be significant. We suggest that you consult your Board rep or professional staff *before* taking formal action.



# CAN THEY MAKE ME TO TAKE A LIE DETECTOR TEST?



The short answer for most employees is “No.” The Federal Employee Polygraph Protection Act (EPPA), passed in 1988, restricts employers’ ability to require employees to take a polygraph test as a condition of continued employment. With some exceptions (for jobs relating to state security, government contracts and matters related to criminal investigations) polygraph tests no longer have any place in the public workforce.

In California, this right was first established in 1984, by the Long Beach CEA on behalf of a group of Harbor Patrol Officers who were being forcibly polygraphed about the disappearance of some petty cash.

Today public employers are prohibited from:

- 1) Requiring, requesting, suggesting or causing, directly or indirectly, any employee or prospective employee to submit to a lie detector test;
- 2) Using, accepting, or inquiring about the results of a lie detector test of any employee or prospective employee; and
- 3) Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any employee or prospective employee to take such action for refusal or failure to take or submit to such test.

California Law includes similar provisions in Labor Code Section 432.2(b) which adds that if you voluntarily submit to a lie detector test, the employer must, before the test begins, provide you with a written notice about you rights, including your right to refuse to take the test.

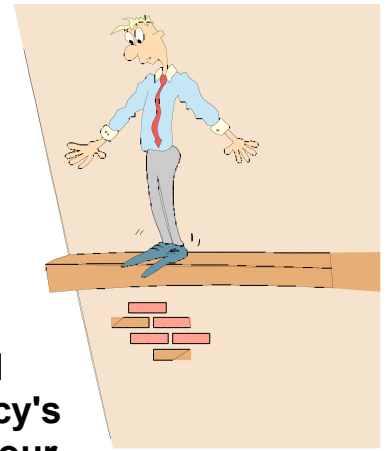
Although employers are prohibited from requiring polygraph exams, employees may cooperate with law enforcement authorities in allowing criminal investigations, including polygraphs, to be conducted on city premises. This cooperation may also include releasing an employee during working hours to take a test at police headquarters.

Cooperation of this type must be distinguished from actual participation in the testing of employees suspected of wrongdoing and employers are prohibited from accessing or using information gathered from a polygraph test in the discipline of an employee.

Finally, the law prohibits the “simulated use of a polygraph instrument so as to lead an individual to believe that an actual test is being or may be performed.” In other words, it is illegal for the employer to pretend or threaten to perform a lie detector exam in order to elicit confession, admissions of guilt or other information about oneself or ones co-workers on the job...

# WARNING ...

## IN CASE OF WORK RELATED INJURY, BE SURE TO KEEP YOUR DOCTOR'S NAME ON FILE



If you do not have your doctor on file with your employer and are hurt on the job, you will be sent to the doctor of the agency's choice, and will not have the right to see your own Doctor. Your doctor and the City's doctor may have varying opinions about the extent of your injury, how it should be treated, and when and whether you should return to work. This could well have serious consequences on your medical condition, your job and the outcome of any Workers Compensation claim. Unless you have your doctor on file prior to the injury, the city will be in control of your medical treatment for the first 30 days.

### NOTIFICATION OF EMPLOYEE'S DOCTOR OF PREFERENCE In Accordance with California Labor Code §4600

To: \_\_\_\_\_, Personnel Department

From: \_\_\_\_\_, Employee

Re: DESIGNATION OF TREATING PHYSICIAN

I hereby designate Dr. \_\_\_\_\_, located at \_\_\_\_\_ as my primary treating physician in the event that I suffer an industrial accident or illness. This office maintains my medical records.

The Doctor's telephone number is \_\_\_\_\_.

\_\_\_\_\_/\_\_\_\_\_  
Employee Signature                      Date

Acknowledgment of Receipt \_\_\_\_\_