

Glendale City Employees Association



November 2007 News



WHAT IS THE PURPOSE OF AN EMPLOYEES ASSOCIATION? by Robin Nahin, CEA Staff

As tough financial times face public agencies in California once again, more employees are asking, "What is the role of my employees association?" "How much control can we (or should we) have over our workplace?" "What can we do to maximize *our* share of the pie?" What follows is a summary of the legal *and* practical roles of our Association. If you have *specific* questions, please feel free to discuss these with your Association rep or with our staff.

The purpose of *any* labor organization is to improve the standard of living of its members. We do this by 1) enforcing your legal rights and 2) negotiating a Labor Contract (MOU) which details both these rights *and* your agreements with the Agency about wages, hours and benefits. The Association's functions continue year-round, and are conducted by the elected Board of Directors and your Professional Staff.

Most members don't see this work take place; they simply pay dues and come to the Association meetings to vote on a Contract. They have a vague understanding of their rights - until something bad happens. Thus, when the employer begins proposing "takeaways," the average member

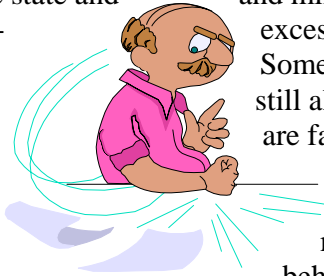
might, for the first time, begin reading the MOU. *OR*, when you, individually, are faced with some sort of discipline (or when the District refuses to implement a benefit you've negotiated...) you begin wondering how this "union" really works.

A large chunk of your organization's dues are spent to retain professional staff that is expected to be knowledgeable about the law, and about our MOU. Nevertheless, we are a union and have the responsibility to defend those rights collectively. This means that the Association has the job of educating its members, which we attempt to do with this newsletter. Members should also feel free to call their staff for information. They can advise you about how to handle work problems, and can email written summaries of most of the laws that pertain to us.



WHAT RIGHTS?

Traditionally, public employees have been excluded from many of the legal protections covering private sector workers. You are NOT covered by the Labor Code, the Wages and Hours Board, or the National Labor Relations Act. A good many new laws have passed in the last decade, however. You ARE covered by the Fair Labor Standards Act, OSHA, California Workers Compensation law, the state and federal Family Leave Acts, all federal anti-discrimination laws, including the Americans with Disabilities Act, and most recently, the Public Employees Relations Board. **Your Association has the obligation to defend your rights under these laws.**



City, county and "special district" employees in California fall under the Meyers-Milias-Brown Act (MMBA), which grants us the right to organize and to bargain a contract. The contract (MOU) builds *on top of* existing law to establish rules and benefits which are unique to your workplace. When we enforce the MOU by filing a grievance, we make sure that these rules are not violated. The Association not only negotiates this contract, it enforces it. **Your use of the grievance process enforces the MOU for everyone...**

Most benefits public employees enjoy are negotiated, and not mandated by law. Thus, unless you're a salaried professional, you must be paid time-and-a-half after 40 hours a week, *but the base pay is negotiable*. And, by law, you must be paid for your unused vacation when you leave the job, *but the amount of time you accrue is negotiable*.

ARE WE REALLY A UNION?

Yes. The association is your 'exclusive bargaining agent.' No other agent (or union) may represent you. The District **MUST** do business with your union and **MUST** confer certain rights upon its leadership. The MOU is a binding union contract, superior in force to any document except the local Charter. "Terms and conditions of employment" in your MOU can't be changed unless both the Association and Management agree to this.

If the MOU violated, it's the union's job to fix this. Since the Association is your **ONLY** legal representative, it is legally **REQUIRED** to represent you in any legitimate grievance or disciplinary

appeal. Even if you have done something wrong, Association has the responsibility to defend you against excessive or unjustified discipline. In this sense, your union membership is a sort of low cost insurance policy.

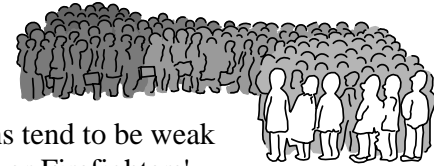
THREATS OF DISCIPLINE...

Only about 3% of employees ever face major discipline, but the workplace is a hotbed for conflict and minor discipline. Some supervisors have excessively high standards or play favorites. Some are just mean. Discrimination is sometimes still alive and well. Sometimes innocent people are falsely accused. Often people's personal lives get in the way of their professional behavior. The workplace is simply microcosm of "arbitrary and capricious" behavior - and the Association's job is to try to make sure that YOU are treated fairly.

And don't forget "innocent until proven guilty:" even the most "guilty" employee has the right to a fair hearing.

HOW STRONG IS THIS "UNION?"

General employees unions tend to be weak when compared to Police or Firefighters' groups. Everyone says this is because the public likes them better, but this is not the only reason. It is because Police and Firefighters are extremely well organized. They pay high dues and have 100% participation. They pick goals, negotiate "behind the scenes" and accomplish their tasks politically. They defend their members aggressively. The result has been stronger labor laws for safety officers (almost all of whom now have the 3% @ 50!) but economic stagnation for most other job classes.



There is no legal or structural reason that non-sworn employees cannot use these same techniques. This often means interviewing and endorsing supportive candidates and establishing a presence among civic organizations. (No, it is NOT a "conflict of interest" to meet with, or socialize with, our policy-makers...) Political work is unquestionably the strongest tool available to ALL public employees. Without it, we are often left to "collective begging," rather than collective bargaining.

But, even where politics have been ignored on the local level, they have paid off at the state and national levels. In just the last decade, we came to be

protected by the Family Medical Acts, the “KinCare” law, the Americans with Disabilities Act, stronger PERS law and stronger workers compensation law. And huge leaps were taken when city and water district employees came under the jurisdiction of the Public Employment Relations Board and the Agency Shop law. This means that

even small groups are able to enforce their rights quickly and affordably – without going to Court. And it also means that they can’t be torn apart by favoritism or retaliation. The end result will certainly be stronger bargaining and better legal enforcement for a better contract.



Cities Can’t “Impair” Retiree Health Benefits

By Robin Nahin, Association Staff

In this time of economic instability, when local agencies are searching for ways to cut corners, the high cost of retirement -- particularly retiree health benefits – leap to into the picture.

However, those agencies that currently provide health care to retirees, either fully or through monthly stipends **MUST** continue to provide these, as a matter of law.

In fact, not only must the retirement benefits continue to be provided to people who have already retired, but also they must continue (in general) to be provided to any current employees for whom these benefits were part of the employment package *at the point of hire!*

This assurance that retirement benefits must be sustained, once they are negotiated, has come as the result of considerable litigation on the behalf of retired public employees. The key to the Courts decisions have repeatedly lain with the **premise that retirement benefits are part of a deferred compensation package**, which may only be altered by the substitution of a benefit of equal value. The courts have looked at two main principles for their decisions on this issue:

The first principal lies in what the Courts call “the inviolability of private contracts.” What this means, simply, is that the constitution stands behind the concept that contracts must be enforceable. If a contract tells its employees that when they retire, they will have benefits, then the contract is binding.

This is because of the second principle: **the Courts have defined retirement benefits as a form of deferred compensation**. What this means is that they are a benefit that “vests” (becomes yours) at the time the employment is accepted. Additional rights may become vested during employment. Later contract negotiations may alter benefits for future employees, but not for employees who were hired under THIS contract. Retiree health benefits are “obligations of contract.” In fact, even when benefits were bestowed to employees without, or outside of, contract bargaining, the law deems these benefits to be considered contract between public employers and their employees.

Third, the Courts have taken a very strong position on the subject of retiree benefits (as opposed to other kinds benefits) because retirees do not have collective bargaining capacity! Even if younger, current employees desired to bargain away the benefits of their retirees, they are prohibited, by law, from doing so. For this reason, even employers’ attempts to modify medical plans by increasing co-payments or drug costs have been successfully thwarted by retirees’ lawsuits. Their inability to bargain collectively, say the Courts, means that retirees “vested benefits” cannot be altered.

What about economic crisis? In recent years, there have been court cases where the employer has cited severe economic instability as the need for getting out from under the “burden” of rising retiree health costs. Even in these circumstances, however, the Courts have leaned in the direction of protecting employees’ and retirees’ benefits. The public



agency may attempt to establish a “compelling interest” which is more important than the interest of the retirees, but the mere existence of a fiscal crisis is not sufficient to justify the “impairment” of a contract. Once you have been promised a retirement benefit, a public employer is strongly bound to follow through on that promise.

RECENT LEGAL DECISIONS

The following are significant Court decisions which further the rights of public employees in California. Please keep in mind that each case is unique. If you have a *specific* legal question or problem, email us at cea01@charter.net. There is no charge for Association members, and all conversations are confidential.

EMPLOYER CAN'T FIRE EMPLOYEE FOR CIRCULATING LETTER OF PROTEST

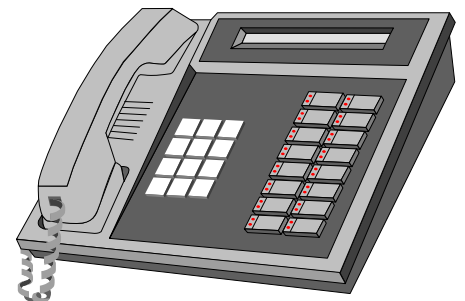
A federal court has recently decided that employees who circulate letters of protest about working conditions are exercising their right to participate in “concerted activities” and are therefore protected against retaliation by their employer. The government guarantees employees the right to participate in such activities (i.e. strikes, work actions, protests) “for purposes of mutual aid or protection,” without fear of discipline. Please keep in mind, however, that the right to participate in these activities may be negotiated away; many public sector MOU’s contain “no strike” agreement.

“WHISTLEBLOWERS’ LAW” PROTECTS EMPLOYEES AGAINST RETALIATION FOR REPORTING WRONGDOING

Court has reinstated several RTD employees who were terminated after they made reports to government officials about suspected forgery, fraud, mismanagement and an “official cover-up.” Government Code 12653 protects employees who alert or provide information to the government about false claims.

EMPLOYEE WHO’S PHONE CALLS WERE SECRETLY TAPED HAS RIGHT TO SUE EMPLOYER FOR INVASION OF PRIVACY

The City of National City tape recorded a phone conversation of one of its Police Department employees with a co-worker in an effort to substantiate a sexual harassment complaint the co-worker had filed against him. The employee responded by suing -- and won. Police Departments do have the legal right to “eavesdrop” in the course of investigating a criminal act. The case against the employee, however, was an administrative grievance, not a criminal case. Therefore, his employer had no right to tape record him without his knowledge.



EMPLOYEE’S SUICIDE FOUND COMPENSABLE UNDER WORKERS COMPENSATION LAW

The Fourth District Court of Appeals has found that the wife and children of a San Diego Police Officer who’s work caused him such stress and depression that he committed suicide do have the right to collect benefit under a Workers Compensation claim.

This decision is surprising, not only because the labor code excludes “willfully causing ones own death” from compensation, but because 1994 changes in the law made it virtually impossible for employees

made sick by harassment or stress to win a workers comp claim. The significance of this decision is that it puts employers on notice that extremely difficult or abusive work conditions *must be corrected*. Failure to correct these can be costly to the employer.

What is “Reasonable Accommodation” for a Sick Employee under the ADA?



The Americans with a Disability Act (ADA) was passed in 1990, with the goal of protected disabled employees against discrimination in the workplace. In public workplaces in California a good number of employees become disabled WHILE EMPLOYED – many of them in work-related injuries. This law, therefore, may be important to the large number of people who repair our streets and sewers, remove our trash, fix our vehicles, even inspect our buildings or type our letters.

Before the ADA, public employers *sometimes* provided modified duty or reclassifications for injured workers (especially injured Police Officers and Fire Fighters...) but more often than not, they threw injured manual workers out in the streets. The ADA still has large loopholes, but does provide a fairly good “speed bump” on the road to termination. The law states that an employee with a “qualifying disability” must be “reasonably accommodated” as long as this does not pose an undue hardship on the employer. Reasonable accommodation can be re-organizing the office or tool bench or countertop. It can be putting in a ramp, or improving the phone system. It can also be reassigning an employee to an entirely different job. In fact, even if the employer does claim that accommodating the disabled worker does pose hardship, the City can be pressed to reassign the employee to an equivalent position (or a lower position) if vacant. (The ADA cannot usually be used to force an employer to create an entirely new position, however...)

So what is a “qualifying disability” and what is an “undue hardship?” A qualifying disability usually means a permanent disability, although the Courts are now wrestling with the question of whether someone who is going through a lengthy recuperation also may have right some to accommodation on the job – rather than losing his job. “A disability” is defined by whether the person has “an impairment that substantially limits one or more major life activities.” Some serious conditions such as cancer or stroke are qualifying conditions, while a pregnancy (It is not an impairment.) or a hernia are not (It does not substantially limit one or more major life activity.).

“Undue hardship” is not defined anywhere. More than anything, it is a line of argument used by employers as to why they should not be forced to keep injured workers. More and more disabled people are beginning to “shove back” through the legal system, forcing employers to PROVE that keeping them on the job would pose great expense or difficulty.

One question that has arisen recently has to do with whether the need for bedrest or hospitalization can be considered part of “reasonable accommodation” which would protect the employee who is undergoing a lengthy recuperation from being terminated. In a recent lawsuit, an employee who was out on unpaid medical leave was able to block termination by arguing that the employer was not subjected to undue hardship by enabling her to be treated at home for a fainting disorder. She was terminated while on leave because she was unable to do the essential functions of her job, but the Court of Appeals ruled that the unpaid leave was a “reasonable accommodation” which did not impose undue hardship on this very large (Walmart) employer.

Your Right to Privacy on the Job

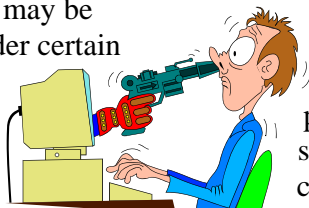


In general, when people talk about the “right to privacy” they are referring to the right to be left alone by the government. While the US Constitution does not include specific language giving us this right, the 4th Amendment *does* protect citizens from unlawful search and seizure by the government. The Supreme Court has also, through case law, created a “zone of privacy” for individuals, which is not to be invaded by the government. Additionally, the California State Constitution does specifically grant all citizens a right to privacy.

So it would seem that public employees in California would have the right to expect privacy on the job? It would seem that way, but it’s not entirely true. The right to privacy in general does NOT necessarily extend to the workplace. When you ask *specific* questions, the answer almost always depends on specific circumstances. Further, the law is always changing, as technology changes, in this arena. Here are answers to some of the more common questions we are asked.

QUESTION: Can my supervisor monitor my emails and voice mail?

ANSWER: Yes. Emails and voice mails may be monitored by your supervisor. In fact, under certain conditions, the public can request copies of any correspondence generated by a public employee. You should assume that when you use government equipment (computer, email, phones, copier machines, etc.) that what is produced is public and can be reviewed by your employer and maybe members of the public.



QUESTION: I was out on leave and my supervisor went through my desk and files? Can she do this?

ANSWER: Yes. If your supervisor has a *legitimate reason* to retrieve public papers/files from your desk or filing cabinet, she can do so. She also may search your computer to retrieve information. Also, if the public agency is conducting an investigation, it may also check your desk, computer and files. (It is difficult to try to argue that one’s supervisor would have no legitimate work reason to look through one’s desk...)

QUESTION: I have several letters from my supervisor that I don’t want anyone to see. Are personnel files available to the public?

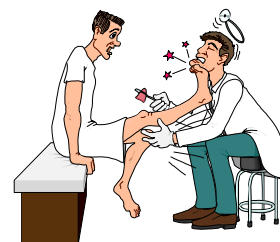
ANSWER: No. The California Public Records Act excludes personnel files from public access. Usually a court order is required before personnel files can be released to any one other than the employee. *However, recent court decisions have found that if you are convicted of certain kinds of crimes while working for a public agency, the agency has a legal obligation to notify prospective employers.*

Also, you should know that it’s becoming common for prospective employers to ask you to sign a waiver, allowing them to go into your past employment records.

QUESTION: I have a Workers’ Compensation claim. My employer, or its administrator, has asked for all of my medical records. Do I have to comply?

ANSWER: Yes, but only under certain conditions. The company providing workers’ compensation coverage to your employer is entitled to review your medical records if you are claiming that you have been injured or become ill as result of your job so that it can determine whether or not your job was actually the cause. The medical records can only be reviewed after you sign a “consent” form. *The insurance company cannot disclose your medical records to your employer.*

If your employer is “self insured” and provides its own workers’ compensation coverage, staff reviewing workers’ comp claims



can read your medical records, again only to determine whether or not your injury or illness is work related and only after you sign a “consent” form. No other employee can read your medical records. In both instances, your medical records may not be disclosed to anyone without your written consent.

QUESTION: I am disabled and requesting that the City “accommodate” me. Is the City entitled to see my medical records?

ANSWER: No. Under the Americans with Disabilities Act, the employer may request medical information concerning your disability and any work restrictions the disability related to your disability. But it cannot go on a “fishing expedition” and access your medical records.



QUESTION: Can my employer require me to tell them what I do “off the job”?

ANSWER: Under most circumstances, no. What you do off the job is your personal business. There are some circumstances when a public employer can inquire about your “off the job” activities. If you are claiming disability or injury under workers’ compensation, your employer can check on what you do “off the job” to make certain that you are truly disabled.

Some public agencies also have a policy requiring employees to disclose if they are working a second job and may require the employee to disclose information about the second job to determine whether or not the second job presents a “conflict of interest” for the public employee. For instance, an employee working in the planning department may have a conflict of interest if he also works as a real estate agent selling a property being approved by the planning department.

QUESTION: Does the City have a right to know if I got into a fight at a party on the weekend?

ANSWER: It depends upon what you do for a living. Off-duty Police Officers and Firefighters are held to a different level of accountability than are other types of public employees and can be disciplined for “off duty” behavior. Also, it depends on whether or



not you were “on-call” during the weekend when the fight occurred. You are considered essentially “on duty” if you’re “on call...” In general, if the City tries to discipline you for off-duty activity claiming that you “have exhibited behavior unbecoming a representative of the City” we can defend you on the grounds that you are NOT a representative of the City unless you are working.

QUESTION: Can my supervisor require me to let him see what I have in my purse or briefcase before I leave work?

ANSWER: No. You have a reasonable expectation that your personal effects are off limits to search. However, if you work in a public agency that requires all persons entering must be checked due to building security, you might have to allow inspection of your bags, briefcase and purse before you enter.

QUESTION: I drive a bus. Do I have to submit to a drug test on days I am off work?

ANSWER: No. The courts have been very clear that we have the “right to be left alone” on our days off work. The only exception might be if you have worked out a specific agreement to “allow” the City to invade your privacy as a condition of continued employment. Usually this involves some sort of “last chance agreement” which may also allow the City to gather information about you from a counselor you may have been sent to.

QUESTION: Can I be fired because of a drunk-driving charge on the way home?

ANSWER: Generally, no, unless you were drinking at work. The California Labor Code permits employees to “make claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during non-working hours away from the employers’ premises.” *However, if you lose your driving privileges, even for a while, you could lose your job...* The City can require that you maintain a driver’s license as a condition of employment.

Keep in mind, also, that some job classes (generally heavy vehicle drivers) are subject to random substance abuse testing. If you drink at night, but the alcohol shows up in the test the next day, you could be in jeopardy.