LCW Liebert Cassidy Whitmore

Education Matters

News and developments in education law, employment law, and labor relations for School and Community College District Administration.

May 2019

INDEX

LCW NEWS

Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Education Matters*** should not be acted on without professional advice.

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STUDENT SEXUAL ABUSE

Trial Court Abused Discretion in Categorically Excluding All Evidence of Inappropriate Conduct Not Involving Teacher's Physical Contact with Students.

D.Z. was a high school student in the Los Angeles Unified School District. She alleged that when she was a student, teacher James Shelburne sexually abused her at school. Specifically, D.Z. alleged that Shelburne touched her body multiple times over a few months, hugged her so tightly she could feel his penis, offered her a ride home, and reached under her clothes to touch her bare buttocks in the classroom. After the last incident, D.Z. reported Shelburne to the principal.

About a year prior to the incidents involving D.Z., a group of female students and a female teacher met with the principal regarding their complaints that Shelburne made inappropriate, sexually-charged comments, massaged students on their shoulders or lower backs, and touched students during class in ways that made the students feel uncomfortable.

D.Z. sued the District alleging negligent supervision and that the District knew or should have known of the danger posed by Shelburne, and the District's failure to respond appropriately resulted in harm to her.

Prior to trial, the District filed a motion to exclude evidence of Shelburne's alleged bad acts toward anyone other than D.Z. and of Shelburne's alleged bad acts unrelated to D.Z.'s negligence claim. In particular, the District sought to exclude evidence of: (1) comments by Shelburne to students that the District claimed were "non-sexual" but otherwise inappropriate, (2) Shelburne's offers to give multiple female students a ride home, (3) questions from Shelburne to female students about their boyfriends and sexual experiences, (4) photographs Shelburne took of students he kept on his computer and posted on his personal Facebook page, as well as Facebook friend requests Shelburne sent to female students, and (5) Shelburne's favoritism toward female students. At a hearing on the motion, the court ruled that only evidence related to other instances of physical touching was admissible and excluded other evidence of Shelburne's conduct.

During a two-week trial, multiple teachers testified they witnessed Shelburne touch female students, stare at their breasts, and make sexual comments. Despite being required by statute to report incidents of child abuse, the teachers did not file a mandated report but said they reported it to the

principal. Office staff denied seeing Shelburne engage in inappropriate behavior. One principal stated he never saw Shelburne touching a student's private parts and never received any such complaint between 1995 and 2007. Another principal confirmed the group of female students complained about Shelburne, but she did not remember if she discussed the issue with Shelburne or document it in his personnel file. This principal stated she filed a District incident report after receiving D.Z.'s complaint, and the police investigated. Shelburne denied all alleged conduct.

A jury returned a verdict in favor of the District and found Shelburne did not pose a risk of sexually abusing students. D.Z. appealed.

On appeal, D.Z. argued the trial court erred by excluding all evidence of prior inappropriate conduct by Shelburne that did not involve physical touching of students. D.Z. argued this evidence was relevant and therefore admissible.

To support her negligent supervision claim, D.Z. was required to prove both that Shelburne posed a risk of harm to students and that the risk of harm was reasonably foreseeable (i.e., the District knew or should have known of the risk). Evidence tending to prove either of these elements was relevant to her claim.

The Court of Appeal found the trial court's decision regarding the exclusion of evidence was arbitrary because it excluded all evidence of conduct other than touching even though that evidence was relevant to D.Z.'s claim. The Court of Appeal found no authority to support the premise that only evidence related to touching was relevant to whether the risk of harm was reasonably foreseeable.

The District then tried to argue the erroneous exclusion of evidence was harmless. However, the Court of appeal concluded the erroneous exclusion of evidence prejudiced D.Z. Shelburne's comments and inappropriate questions to students about boyfriends and sexual experiences was crucial to D.Z.'s argument that the District knew or should have known of the risk that Shelburne would commit sexual abuse of a student. Moreover, the exclusion of non-touching evidence affected D.Z.'s ability to offer otherwise admissible evidence of prior complaints. Therefore, it was reasonably probable that the admission of this evidence would have led to a result more favorable to D.Z.

D.Z. also argued the trial court erred in giving several form jury instructions with modifications the District had requested. The Court of Appeal agreed that two of the modified form jury instructions were confusing and did not reflect the scope of D.Z.'s claim.

Ultimately, the Court of Appeal reversed the trial court's decision and ordered a new trial.

The Court of Appeal declined to address D.Z.'s argument on appeal that the trial court erred when it refused to let her call a rebuttal witness because the issue was moot given order granting a new trial.

D.Z. v Los Angeles Unified School District (2019) __ Cal. App.5th __ [2019 WL 2098674].

STUDENT DISCIPLINE

College's Investigation and Adjudication of a Student's Claim of Sexual Assault was Flawed Where the College Did Not Comply with Its Own Policies, Relied on Statements from Non-Testifying Critical Witnesses, Withheld Evidence from the Accused Student, and Denied the Accused Student an Opportunity to Question Witnesses.

Jane Roe's mother reported John Doe, a student at Westmont College, raped Jane, also a student, at an off-campus party. Pursuant to the College's policies and procedures, the Associate Dean for Resident Life began a preliminary investigation.

The Dean interviewed Jane who reported John had sex with her without her consent when the two left a house party together to go on a walk. John denied the allegations and stated he never had sex with Jane and was never alone with her at the party. Both parties identified additional witnesses whom the Dean interviewed. This testimony sometimes contradicted Jane or John's testimony.

The Dean completed his preliminary investigation and determined the information warranted a student conduct meeting. A panel comprised of the Dean and two additional staff members convened the student conduct meeting. The Panel would review the documents and materials discovered or developed by the Dean during the investigation and meet with witnesses including the complainant and respondent. This Panel deliberates privately to determine whether it was more likely than not a sexual assault occurred, and if it did, what sanctions to impose.

The Dean compiled all notices, summaries of witness statements and interviews, and other documentary evidence, and provided copies to Jane, John, and the Panel members. The summaries omitted some of the Dean's questions and witnesses' answers. Jane and John submitted statements that addressed the evidence they received.

The Panel interviewed Jane, John, and six other witnesses. A College employee took detailed notes of the Panel's questions and all witnesses' responses. Jane also gave the Panel a written statement. Despite John's request, the Panel did not interview four witnesses. The Panel recalled Jane as a witness twice and John once. During the follow-up sessions, the Panel asked some questions Jane and John suggested, and it provided them with oral summaries of other testimony. John alleged several errors in the witnesses' testimony. He submitted additional documents at the meeting and later emailed additional points after the meeting, the latter of which the Panel did not accept.

The Panel found a preponderance of the evidence showed John committed sexual assault against Jane in violation of the College's policies. The Panel based its decision on Jane's account of the incident, which it deemed credible and consistent throughout the proceedings. The Panel also found corroboration for Jane's account in some witness statements. The Panel did not find John credible. John did not dispute the timeline Jane provided or confront Jane about her statements that they engaged in sexual activity, and his witnesses either did not corroborate his account of the evening or were not credible. Furthermore, the Panel found John's denials of having a sexual encounter with Jane were inconsistent.

The Panel suspended John for the remainder of the semester. John appealed, alleging procedural errors and excessive sanctions. The Vice President for Student Life summarily denied John's appeal.

John challenged the Panel's decision by filing a special petition in the trial court. John claimed the College did not provide a fair hearing, and substantial evidence did not support the Panel's decision. The trial court granted John's motion and concluded the College denied him a fair hearing. The trial court found the Panel had access to more information bearing on witness credibility than was provided to John, especially with respect to those witnesses the Dean interviewed who did not testify at the student conduct meeting. The Panel did not give John the notes recording the Panel's questions and witnesses' responses, impeding his ability to respond to the evidence against him. Additionally, John had no ability to question the details of the witnesses' testimony, even indirectly. The trial court did not reach the issue of whether substantial evidence supported the Panel's substantive decision.

The trial court ordered the Panel to set aside its decision and vacate the sanctions imposed. It also barred the Dean from participating on the Panel. The College appealed.

The Court of Appeal reviewed the College's decision to determine independently whether the College provided John with a fair hearing. The Court of Appeal acknowledged that adjudicating a student sexual misconduct proceeding is not analogous to a criminal proceeding, but the College must give John notice of the allegations against him and a fair hearing, at which he may attempt to rebut those allegations.

The Court of Appeal referenced recent cases that describe the requirements of a fair hearing where, as here, the case turns on witness credibility: a college must comply with its own policies and procedures, those procedures must provide the accused student with a hearing before a neutral adjudicatory body, the college must permit the accused to respond to the evidence against him or her, the alleged victim and other critical witnesses must appear before the adjudicatory body in some form—in person, by video conference, or by some other means—so the body can observe their demeanor; the college must provide the accused student with the names of witnesses and the facts to which each testifies; and the accused must be able to pose questions to the witnesses in some manner, either directly or indirectly, such as through the adjudicatory body.

Here, the Court of Appeal held the College violated its own internal policies and denied John the opportunity to respond fully to the evidence against him. Specifically, the Panel did not hear testimony from three critical witnesses, yet it relied on portions of their statements to corroborate Jane's account or to impeach the credibility of John and his supporting witnesses. Where critical witnesses provide inconsistent accounts of an alleged incident, each adjudicator must independently evaluate a witness's credibility.

Additionally, the information and documents the Panel disseminated—the Dean's investigative reports and oral summaries of witness testimony—did not adequately appraise John of the evidence against him. The Dean omitted some of his questions and the witnesses' answers from his preliminary report, and the College only gave John oral summaries of witness statements during the student conduct meeting that contained significantly less detail than the notes taken by the College employee. Where the outcome of a sexual misconduct disciplinary proceeding turns on witness credibility, an adjudicatory body cannot base its determinations on information in its possession that is not available to the accused.

Finally, John had little opportunity to pose questions for Jane or other witnesses because the Panel withheld information from him and did not recall witnesses for follow-up questions. John could not propose questions for critical witnesses the Panel relied on for its decision because the witnesses did not testify at the student conduct meeting. Other than Jane, the Panel did not recall any witnesses, so John was unable to challenge the discrepancies he saw in the witnesses' responses.

The Court of Appeal held that if the College proceeded with a new student conduct meeting, it must: (1) allow John to access the Dean's notes, as required by its policies and procedures; (2) provide John with any notes recording the Panel's questions and witnesses' responses during the student conduct meeting; and then (3) either permit him to submit a list of questions for the witnesses or fashion some other mechanism for him to suggest questions the Panel can ask.

Accordingly, the Court of Appeal affirmed the trial court's decision setting aside the College's determination and sanctions against John and directing the College to conduct further proceedings. The Court of Appeal did not prohibit the Dean from acting as an adjudicator so long as the College provided John with a fair hearing.

Doe v. Westmont College (2019) 34 Cal. App. 5th 622.

STUDENT DISABILITIES

U.S. Department of Education Requests Public Comments regarding IDEA State and Local Implementation Study 2019.

In Fall 2019, the U.S. Department of Education (Deparment) will issue surveys to state and local education agencies to examine how states, districts, and schools identify and support children with disabilities under the Individuals with Disabilities Education Act (IDEA). The purpose of this data collection is to develop an up-to-date national picture of how states, districts, and schools implement IDEA in order to provide the Department, Congress, and other stakeholders with knowledge that can inform the next reauthorization of IDEA and how educational entities provide services to children.

Prior to distributing these surveys and collecting data, the Department is soliciting public comments on the proposed surveys. The Department is especially interested in public comment addressing the following issues:

1. Is this collection necessary to the proper functions of the Department?
2. Will this information be processed and used in a timely manner?
3. Is the estimate of burden accurate?
4. How might the Department enhance the quality, utility, and clarity of the information to be collected?
5. How might the Department minimize the burden of this collection on the respondents, including information technology?

The public comment period is an opportunity for the Department to solicit comment and make a record of ideas or positions on the topic. Institutions should consider utilizing the public comment period, which remains open until June 14, 2019.

For more information and to submit a public comment, click here.

PUBLIC RECORDS ACT

Certain Peace Officer Personnel Records Created Before 2019 are Also Public Records Under New California Law.

Senate Bill No. 1421 ("SB 1421"), which went into effect on January 1, 2019, allows the public to obtain certain peace officer personnel records by making a request under the California Public Records Act. Prior to SB 1421, these records were only available by court order and in narrow circumstances. The peace officer personnel records that are now public records include those relating to: a peace officer who shoots a firearm at a person; a peace officer's use of force that results in death or great injury; or a sustained finding that a peace officer either sexually assaulted another or was dishonest.

Since SB 1421 went into effect, numerous public agencies across California have been involved in lawsuits over whether the new law applies to records created before 2019.

In its first published decision addressing the issue, the California Court of Appeal held that applying SB 1421 to pre-2019 records does not make the new law impermissibly retroactive. The court noted that "[a]lthough the records may have been created prior to 2019, the event necessary to 'trigger application' of the new law – a request for records maintained by the agency – necessarily occurs after the law's effective date." The court reasoned that the new law "does not change the legal consequences for peace officer conduct described in pre-2019 records . . . Rather, the new law changes only the public's right to access peace officer records." Thus, SB 1421 allows the public to request certain peace officer personnel records that were created before January 1, 2019.

Walnut Creek Police Officers' Association v. City of Walnut Creek (2019) 33 Cal.App.5th 940.

NOTE:

LCW previously reported on this case in a Special Bulletin published on April 1, 2019. LCW will continue to update public agencies as this area of law evolves.

BUSINESS AND FACILITIES

Creditors May Recover a Monetary Judgement on Junior Liens After Foreclosing Property and Extinguishing Rights to Recover Under Senior Lien.

In 2005, Michael and Kathleen Cobb borrowed $10 million from Citizens Business Bank, executing a promissory note secured by the Cobbs' deed to a piece of commercial property outside Los Angeles. The first note provided if the Cobbs defaulted on the loan, the creditor could force a sale of the property at auction and use the proceeds from that sale to pay down the outstanding loan amount. California law prohibits a creditor who forecloses on a piece of property and forces a sale from then seeking a "deficiency judgment" in court to recover the outstanding amount owed on the loan.

Two years later, in 2007, the Cobbs returned to Citizens Business Bank, this time borrowing $1.5 million. Again, the Cobbs executed a promissory note on the property, executing a second deed of trust in order to secure the loan. The Cobbs' second note stated that it was secondary and inferior to the obligations established under the first note, meaning that the holder of the second note could not collect until the debt associated with the first note was paid.

In January 2014, Citizens Business Bank packaged and sold both of the Cobbs' loans to Black Sky Capital, LLC. Less than six months later, in June 2014, Black Sky sent the Cobbs notice of default on both loans and informed the Cobbs of Black Sky's decision to sell the property at auction as provided in the first note. In October 2014, Black Sky sold the property at a public auction for $7.5 million.

In November 2014, Black Sky then sued the Cobbs to recover the amount that the Cobbs still owed to Black Sky under the second note.

In the trial court, the Cobbs argued that Black Sky could not collect any money they owed under the second note because the Black Sky foreclosed and sold the property for less at auction than the total amount they owed. Therefore, the Cobbs contended that any monetary award, including recovery of the balance on the second note, would constitute a "deficiency judgment" against the Cobbs, and the Code of Civil Procedure prohibits such recoveries after a foreclosure. The Cobbs argued that Code of Civil Procedure section 580d precludes monetary judgments for a creditor on a junior note if that creditor also foreclosed the senior note. The trial court agreed that *Simon* applied to the circumstances of the foreclosure sale and attempted recovery and barred Black Sky from recovering anything under the second note. Black Sky appealed.

On appeal, Black Sky argued that the trial court misapplied the law. Black Sky pointed to a Supreme Court case holding the Code of Civil Procedure section 580d does not preclude recovery by a creditor who owns a junior lien if that creditor is not involved in the sale of the property. Black Sky argued that it was immaterial who owned the lien, so long as the different promissory notes established the liens, and the foreclosure did not implicate the more junior of the liens.

The Court of Appeal agreed, observing that while the senior and junior creditor are the same in this case, "[a]ny debt owed on the junior note in this case has no relationship to the debt owed on the senior note," and the prohibition against deficiency judgments under section 580d only applies where there is one note. The Court of Appeale stated that "[t]he unambiguous

language in section 580d . . . indicate[s] that section 580d applies to a *single* deed of trust" and "does not apply to preclude Black Sky from suing for the balance due on the junior note in this case." (Emphasis added.) The Court of Appeal reversed the trial court's judgment, and remanded the matter to the trial court for further proceedings. The Cobbs sought review in the California Supreme Court.

The California Supreme Court granted review. After examining the record, the Supreme Court affirmed the Court of Appeals' analysis, concluding that the plain language of Section 580d bars a deficiency judgment on a note secured by a deed of trust when the creditor sells the property "under power of sale contained in *the*... deed of trust." (Emphasis in original.) The Supreme Court explained that the definite article in the phrase "*the* ... deed of trust" makes clear that the Code of Civil Procedure prohibits recovery under the foreclosed deed, and not under any other note. Therefore, while the Code of Civil Procedure would prohibit Black Sky from recovering a deficiency judgment on the senior note, its foreclosure of the property did not affect the second note, any obligations the Cobbs owed to Black Sky on the second note, or Black Sky's attempted recovery through the courts.

Black Sky Capital, LLC v. Cobb (2019) __ Cal.5th __ [2019 WL 1984289].

LABOR RELATIONS

Court of Appeal Declines to Invalidate Initiative Placed on Ballot in Violation of MMBA.

The City of San Diego's Mayor Jerry Sanders championed a citizens' initiative in 2010 that would eliminate traditional defined benefit pensions for most newly-hired City employees, and replace them with defined contribution plans. The affected unions argued that Mayor Sanders was acting in his official capacity to promote the initiative and, in doing so, was making a policy determination that required meeting and conferring with the unions under the Meyers-Milias-Brown Act ("MMBA"). The City's voters eventually adopted the initiative, without the City ever meeting and conferring with the unions.

In 2018, the California Supreme Court held that the City violated the MMBA because Mayor Sanders made a policy decision to advance a citizens' pension reform initiative without meeting and conferring with the affected employees' unions. The California Supreme Court then remanded the case to the Court of Appeal to determine the appropriate remedy for the City's violation of the MMBA.

On remand, the Court of Appeal declined to invalidate the citizens' pension reform initiative. The Court of Appeal concluded that because the voters adopted the initiative and the initiative has taken effect, the initiative can only be challenged in a special quo warranto proceeding. Thus, the validity of the initiative was beyond the scope of the court's review.

However, the Court of Appeal did order the City to meet and confer with the unions over the effects of the initiative and to pay the affected current and former employees the difference, including interest, between the compensation the employees would have received before the initiative went into effect, and the compensation the employees received after the initiative became effective. The court reasoned that this remedy reimburses the employees for the losses they incurred and reduces the City's financial incentive for refusing to bargain.

Additionally, the Court of Appeal ordered the City to cease and desist from refusing to meet and confer with the unions. Instead, the Court found that the City is required to meet and confer upon the unions' request before the City can place a measure on the ballot that affects employee pension benefits or other negotiable subjects. The Court noted that this remedy was appropriate because it "prevents the City from

engaging in the same conduct that violated the [MMBA] in this case without impermissibly encroaching on matters more appropriately decided in a separate quo warranto proceeding."

Boling v. Public Employment Relations Bd. (2019) 245 Cal. Rptr.3d 78.

NOTE:

LCW previously reported on the California Supreme Court's decision in this case in the September 2018 Client Update and in a blog post available here.

Although this case involved an interpretation of the Meyers-Milias-Brown Act, the bargaining statute that applies to cities, counties, and special districts, PERB frequently looks to decisions under the MMBA in interpreting the Educational Employment Relations Act.

RETIREMENT

Employee Who Settles a Pending Termination for Cause and Agrees Not to Seek Reemployment Is Not Eligible for Disability Retirement.

In 2001, Linda Martinez began working at the State Department of Social Services ("DSS") after working for the State since 1985. During this time, Martinez also served in various positions with her union.

In 2014, DSS sought to terminate Martinez's employment and provided her with a notice citing numerous grounds for her dismissal. Martinez challenged the dismissal, believing that her termination "was taken in retaliation for her union activities."

The parties later negotiated a settlement. DSS agreed to: pay Martinez $30,000; withdraw the notice for dismissal; and remove certain matters from her personnel file. In return, Martinez agreed to voluntarily resign effective September 30, 2014. DSS also agreed to cooperate with any application for disability retirement filed by Martinez within the six months following her voluntarily resignation.

Martinez filed her disability retirement application on the grounds that she could longer function in her role at DSS because of various job-related conditions. The California Public Employees Retirement System ("CalPERS") cancelled her application. CalPERS notified Martinez that she was not eligible for disability retirement because she was "dismissed from employment for reasons which were not the result of a disabling medical condition" and that "the dismissal does not appear to be for the purpose of preventing a claim for disability retirement." Martinez appealed the denial to the Board of CalPERS, which denied Martinez's petition for reconsideration.

Martinez and her union then sued CalPERS, its Board, and DSS to request the court to order the Board to set aside and reverse its decision. The trial court denied Martinez's petition.

Ordinarily, governmental employees lose the right to apply for disability retirement if they are terminated for cause. However, prior decisions have carved out exceptions to this general rule. For example, in *Haywood v. American River Protection District*, 67 Cal.App.4th 1292 (1998), the court held that a terminated-for-cause employee can still qualify for disability retirement when the conduct which prompted the termination was the result of the employee's disability. In *Smith v. City of Napa*, 120 Cal.App.4th 194 (2004), the court concluded that a terminated employee may qualify for disability retirement if he or she had a "matured right" to a disability retirement prior to the conduct that prompted the termination.

Further, relying on *Haywood* and *Smith*, the CalPERS Board determined that an employee loses the right to apply for disability retirement when the employee settles a pending termination for cause and agrees not to seek reemployment. The CalPERS Board reasoned that such a situation is "tantamount to dismissal." (*In the*

Matter of Application for Disability Retirement of Vandergoot, CalPERS Precedential Dec. No. 12-01 (2013).)

On appeal, Martinez argued that *Haywood* and *Smith* have been superseded by statute and that the Board's decision in *Vandergoot* is no longer precedential. Specifically, Martinez relied on a 2008 amendment to the retirement law that provides "[i]n determining whether a member is eligible to retire for disability, the board or governing body of the contracting agency shall make a determination on the basis of competent medical opinion and shall not use disability retirement as a substitute for the disciplinary process." Thus, Martinez argued that determinations of eligibility for disability retirement can only be made because of competent medical opinion.

However, the Court of Appeal disagreed. The court noted that the section Martinez relies on "is but a single sentence in a single statute, and cannot be examined to the exclusion" of the entire retirement law. The Court noted that because Martinez's voluntary resignation "constituted a complete severance of the employer-employee relationship, thus eliminating a necessary requisite for disability retirement." As a result, the Court said that the 2008 amendment to the retirement law did not supersede *Haywood* and *Smith*. Further, the Court concluded that the Board's decision that a settlement not to seek reemployment is "tantamount to dismissal" was "eminently logical." Thus, the precedent established in *Haywood, Smith*, and *Vandergoot* remains the law.

Martinez v. Public Employees' Retirement System (2019) 33 Cal. App.5th 1156.

NOTE:

This case confirms that an employee who settles a pending termination for cause and agrees not to seek reemployment is precluded from applying for disability retirement. LCW attorneys specialize in advising public agencies regarding the complexities of retirement law.

BROWN ACT

Individuals Had Valid Claims Challenging the Adequacy of District's Meeting Agendas.

Roger Gifford and Kimberly Oslon sued the Hornbrook Community Services District regarding various issues with the District's posted agendas for three Board meetings. First, for the District's August 16, 2016 meeting, the agenda indicated that the District would be considering payment of the quarterly premium for the State Compensation Insurance Fund. The agenda indicated that the quarterly premium amounted to $285.75. However, when the item came up for discussion at the August meeting, the Board Secretary indicated that she had received additional communications from the State Compensation Insurance Fund and that the amount of the quarterly premium would be higher than the amount stated on the agenda. Without offering any explanation as to why the amount changed, the Secretary insisted the District approve the new demand for payment.

Second, for the District's September 20, 2016 meeting, the agenda indicated that the District would be approving and authorizing signatures for various bills listed on the agenda. The list included payment to an individual for his services for an unspecified amount, but did not include an AT&T bill. At the meeting, the Secretary announced that she had received a bill from AT&T that she wanted to add to the agenda. The Secretary also filled in the amount of the payment for the individual on the blank space of the agenda, without any motion or vote to do so.

Third, for the District's January 24, 2017 meeting, the agenda allowed for public comment at the start of the meeting "on any matter within the jurisdiction of the [District] that is NOT ON THE AGENDA . . . Any person wishing to address the [District] on an item ON THE AGENDA will be given opportunity at that time." The agenda also indicated that the District would be approving bills and authorizing signatures for District expenses received through January 24, 2017.

Members of the public objected that the District was violating the Brown Act because individuals who wished to comment on agenda items were required to sit through the entire meeting until those items came up for discussion. The Secretary indicated that she did not believe the District's conduct was in violation of the Brown Act and that the District would continue with its practice regarding public comment.

Following each meeting, the individuals each sued the District for violating the Brown Act. They claimed that the District failed to adequately describe several items it acted on, and unreasonably limiting public comment. The trial court dismissed all of their claims, and they appealed.

The Brown Act guarantees the public's right to attend and participate in meetings of local legislative bodies. The Act requires that agendas for the meetings of legislative bodies contain a brief general description of each item of business to be discussed. The Act generally prohibits the legislative body from taking action or discussing any item that does not appear on the posted agenda. Further, the Brown Act requires that every agenda for regular meetings provide an opportunity for members of the public to address the legislative body on any item of interest to the public.

On appeal, the District argued that the Brown Act challenges to the three agendas must fail because the District provided a general description of the item the District was to act upon. The District also argued that even if the general description was not sufficient, it still substantially complied with the agenda requirements. Under the Brown Act, a legislative body's actions cannot be nullified if it "substantially complied" with the agenda requirements.

The Court of Appeal concluded that the individuals had valid claims as to the August and September 2016 agendas, but not as to the January 2017 agenda. For the January 2017 agenda, the court found that the description indicating that the District would be approving bills and authorizing signatures for District expenses received through January 24, 2017 "leaves no confusion as to the essential nature of the District's action" and because the District actually took the action it described. Further, the Court of Appeal noted that nothing in the Brown Act prohibits the District from restricting comment on items appearing on the agenda until the items come up for discussion.

For the August 2016 agenda, the court reasoned that the District's agenda adequately communicated the essential nature of its action – to discuss and approve payment to the State Compensation Insurance Fund. The court noted that a difference in the amount of payment was insignificant because "[t]hose interested in the payment had notice that it was going to be discussed and acted upon … and could attend the meeting and participate in the Board's action regardless of the amount to be paid." However, the court determined that even though the agenda description was in compliance, the individuals could still pursue the allegation that the District took an action different from what it notified the public it would take when it authorized a higher payment for the State Compensation Insurance Fund premium. The court noted that while those interested in this item would know to attend the August 2016 meeting, "those interested in the particulars . . . may be persuaded not to attend the meeting in reliance on the [District's] assurance of the scope of the action it would take."

With regard to the September 2016 agenda, the Court found that the individuals could challenge the sufficiency of the agenda description because it specifically stated that the District would be approving a specific list of payments. The court reasoned that those interested in payments not listed would not know to attend the September 2016 meeting so they could comment on the subject.

Olson v. Hornbrook Community Services District (2019) 33 Cal. App.5th 502.

NOTE:

Public agencies can fall out of compliance with the intricate requirements of the Brown Act. LCW attorneys can provide your agency a Brown Act compliance review.

DID YOU KNOW....?

Whether you are looking to impress your colleagues or just want to learn more about the law, LCW has your back! Use and share these fun legal facts about various topics in labor and employment law.

- Several California city attorneys and county counsels won a procedural victory in the Ninth Circuit involving numerous new California immigration laws that affect the employer-employee relationship. *United States v. State of California, et al, Case No. 18-16496*.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney as part of the consortium service to answer direct questions not requiring in-depth research, document review, written opinions, or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

Question: A human resources manager contacted LCW to ask whether a public agency is required to payout an employee for unused, accrued vacation when the employee separates from the agency.

Answer: The attorney advised that the answer is "yes," unless a collective bargaining agreement says otherwise. Labor Code section 227.3 provides that "unless otherwise prohibited by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination."

BENEFITS CORNER

Mid-Year Election Changes Under a Section 125 Cafeteria Plan.

A Section 125 Cafeteria Plan is an arrangement that employers use to allow employees to make pre-tax contributions for qualified benefits such as health insurance. Employers must comply with a variety of rules to maintain the validity and tax advantages of their cafeteria plan. Among these rules are strict limitations on when the plan may permit participants to make changes to their benefit elections.

Typically, employees are entitled to make elections during an annual "open enrollment" period that precedes the plan year or, for new hires, during an initial enrollment period. In general, once made, these elections are irrevocable for the duration of the plan year. However, there are some exceptions.

A cafeteria plan may – but is not required to – permit participants to change or revoke an election for the remainder of a plan year upon the occurrence of a qualifying event, if the election change is consistent with that event.

The most common qualifying event is a change in status that affects eligibility for coverage, including:

- A change in legal marital status, including marriage, divorce, death of a spouse, legal separation, or annulment;
- A change in the number of dependents;
- A change in employment status which affects eligibility under the cafeteria plan or for an underlying benefit, including a termination or commencement of employment, a strike or lockout, a commencement of or return from an unpaid leave of absence, a change in worksite, or another employment-related change;
- A change in dependent eligibility status; or
- A change in the place of residence of the employee, spouse, or dependent.

Additionally, a cafeteria plan may allow an election change under an adoption assistance program when an employee begins or terminates adoption proceedings.

A cafeteria plan may also allow a mid-year election change, other than to a Health FSA, on account of any of the following:

- An increase or decrease in the cost to participants of a plan benefit during the coverage period;
- Significant coverage curtailment (with or without loss of coverage);
- A benefit option being added or significantly improved;
- A change in coverage under another employer plan; or
- A loss of group health coverage sponsored by a governmental or educational institution.

Certain mid-year elections may also be made (if allowed under the plan) to correspond with HIPAA special enrollment rights; COBRA eligibility; a court order requiring coverage for a participant's child or dependent foster child; Medicare/Medicaid entitlement status; or FMLA leave.

Finally, under IRS Notice 2014-55, a cafeteria plan may permit a participant to revoke an election for group health coverage (other than a Health FSA) where the participant's weekly hours of service are expected to drop below 30 (even if eligibility under the plan is not affected) or the participant intends to enroll in ACA Marketplace coverage.

Again, these are optional exceptions to the general prohibition on mid-year election changes. To be effective, they must be referenced in the employer's plan documents and the election change must be consistent with the applicable event. Additional conditions and restrictions apply for each qualifying event. The person drafting or updating the cafeteria plan documents should be familiar with relevant legal authorities to avoid potentially invalidating the plan.

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Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please visit **www.lcwlegal.com/news**.

Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of our ***Education Matters*** newsletter.

If you have any questions, contact Selena Dolmuz at 310.981.2000 or info@lcwlegal.com.

LCW Webinar

HOW TO HIRE CALPERS RETIREES THE RIGHT WAY

Wednesday, June 5, 2019 | 10:00 AM - 11:00 AM
CalPERS contracting agencies are using retirees more and more to provide needed services. The restrictions on hiring retirees have become stricter and enforcement of those rules has increased. The result is that public agencies and the retirees they hire are increasingly getting hit with penalties for violating the rules. Hiring retirees the right way is not easy, but it is possible. This webinar will discuss how to do it. Topics to be covered include:

1. What retirees can be hired to do
2. Limits on hours, salary, benefits and duration of appointment
3. Penalties for violating the rules
4. "Extra Help" assignments and the limits on filling a vacant position
5. The difference between independent contractors and employees

Who Should Attend?
Human Resources personnel and Department Heads and other managers that have authority to hire employees.

Workshop Fee:
Consortium Members: $75,
Non-Members: $150

PRESENTED BY STEVEN M. BERLINER

REGISTER TODAY:
WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING

New to the Firm

Donald Le is an Associate in Liebert Cassidy Whitmore's Los Angeles office where he assists clients in matters pertaining to labor & employment law as well as business, construction and facilities. He represents the interests of both public and private sector clients in transaction and litigation matters. He has experience representing and advising owners, contractors, design professionals, and large sub-contractors on a wide variety of construction matters and projects throughout the state.

He can be reached at 310.981.2020 or dle@lcwlegal.com.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

May 31 **"Promoting Safety in Community College Districts"** & **"Allegations and Reports of Sexual Misconduct: Effective Institutional Compliance with Title IX and Related Statues"**
Central CA CCD ERC | Monterey | Laura Schulkind

June 13 **"Name That Section: Frequently Used Education Code and Title 5 Sections for Community College Districts"** & **"Managing Performance Through Evaluation"**
Central CA CCD ERC | Merced | Eileen O'Hare-Anderson

June 13 **"Creating a Culture of Diversity in Hiring, Promotion and Supervision"**
LA County HR Consortium | Los Angeles | Kristi Recchia

June 19 **"Leaves, Leaves and More Leaves"**
Orange County Consortium | Buena Park | Jennifer Rosner

June 20 **"The Future is Now – Embracing Generational Diversity and Succession Planning"**
San Mateo County ERC | Belmont | Heather R. Coffman

Customized Training

June 1 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Carlsbad | Stephanie J. Lowe

June 1 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
Rancho Simi Recreation and Park District | Simi Valley | Joung H. Yim

June 3,6,12,14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Stockton | Kristin D. Lindgren

June 4,12,13 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Newport Beach | Christopher S. Frederick

June 5 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of La Habra | Jenny Denny

June 11 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Hesperia | Danny Y. Yoo

June 11 **"Preventing Workplace Harassment, Discrimination and Retaliation and Bias in the Workplace"**
Regional Housing Authority | Yuba City | Kristin D. Lindgren

June 11 **"Board Ethics"**
San Jose-Evergreen Community College District | San Jose | Laura Schulkind

June 13,14 **"Preventing Workplace Harassment, Discrimination and Retaliation"**
City of Glendale | Stacey H. Sullivan

June 13 **"Ethics in Public Service"**
City of Rancho Cucamonga | Kevin J. Chicas

June 17 **"Preventing Workplace Harassment, Discrimination and Retaliation and Mandated Reporting"**
East Bay Regional Park District | Oakland | Kelsey Cropper

June 19 **"Mandated Reporting"**
City of Rancho Cucamonga | Christopher S. Frederick

Speaking Engagements

June 12 **"#MeToo: A Guide to Effectively Addressing Risk"**
Public Agency Risk Management Association (PARMA) San Diego Chapter Luncheon | San Diego | Stephanie J. Lowe

Seminars/Webinars

Register Here: https://www.lcwlegal.com/events-and-training

June 5 **"How to Hire CalPERS Retirees the Right Way"**
Liebert Cassidy Whitmore | Webinar | Steven M. Berliner

June 20 **"The Rules of Engagement: Issues, Impacts & Impasse"**
Liebert Cassidy Whitmore | Suisun City | Richard Bolanos & Kristi Recchia

ON THE MOVE!

Our SAN DIEGO Office is relocating! As of June 1, we'll be located at:
401 West "A" Street, Suite 1675
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619.481.5900

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