STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 707, Charging Party, v. COUNTY OF SONOMA, Respondent.	Case No. SF-CE-293-M PERB Decision No. 1962-M June 17, 2008

Appearance: Renne Sloan Holtzman Sakai, LLP, by Jeffrey Sloan and Timothy G. Yeung, Attorneys, for County of Sonoma.

Before McKeag, Wesley, and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the County of Sonoma (County) to an administrative law judge's (ALJ) proposed decision. In the proposed decision, the ALJ held that the County violated the Meyers-Milias-Brown Act (MMBA)[1] sections 3503, 3505 and 3506 and PERB Regulation section 32603(a), (b) and (c),[2] by implementing a new policy with respect to involuntarily placing employees on unpaid leave status in cases of disputed ability to work under disability accommodations without prior notice and affording the Service Employees International Union, Local 707 (SEIU), an opportunity to meet and confer over the decision to implement the policy and the effects of the policy.

[1]MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

We have reviewed the entire record in this case, including, but not limited to the complaint, the County's answer, the hearing transcript, the parties' post-hearing briefs, the ALJ's proposed decision, and the County's statement of exceptions and supporting brief.[3] Based upon this review, we hereby reverse the proposed decision and find SEIU failed to establish that the County implemented a new policy with respect to involuntarily placing employees on unpaid leave without pay.

PROCEDURAL HISTORY

On May 31, 2005, SEIU filed an unfair practice charge with PERB against the County. On September 26, 2005, the Office of General Counsel issued a complaint against the County alleging that it did not have a policy for treating employees who were no longer able to perform the essential functions of their job and that in February 2005, the County instead created such a policy by placing M. J.[4] on leave without pay (LWOP) status after determining that she "was unable to perform the essential functions of her position despite reasonable accommodation." As a result of this action, SEIU alleges, inter alia, that the County unilaterally implemented a new policy within the scope of representation without noticing, meeting, and conferring with the employee organization.

An informal conference was conducted on February 6, 2006, without resolution and on May 23, 2006, a formal hearing was conducted before the ALJ. Post-hearing briefs were submitted on July 27, 2006; however, on December 12, 2006, the County requested that the evidentiary record be re-opened for the receipt of newly discovered evidence: the November 9, 2006, Sonoma County Employees' Retirement Board (SCERB) approval of M. J.'s application for service-connected disability retirement retroactive to January 26, 2005.

[3]SEIU did not file a response to the County's exceptions.

[4]The initials of the public employee will be used to protect the confidentiality of her medical information.

SEIU opposed the admission of the new evidence. The ALJ re-opened the record on December 15, 2006, and the County filed its supplemental briefing on December 26, 2006, when the matter was again resubmitted for decision.

The ALJ issued his proposed decision on January 17, 2007. The County requested and was granted a 20-day extension to file exceptions which were filed on March 5, 2007.

FINDINGS OF FACT

SEIU is the exclusive recognized employee organization for six County bargaining units, including the Clerical Non-Supervisory bargaining unit. Since February 2000, Paul Carroll (Carroll) has been the Field Representative employed by SEIU to represent these County employees. M. J. was an Account Clerk III working for the County's Auditor-Controller Office and was a member of the Clerical Non-Supervisory unit.

The County is a public agency within the meaning of MMBA section 3501(c). Rodney Dole (Dole) is the County Auditor-Controller and Linda Jenkins (Jenkins) is the County's Human Resources Manager for Equal Employment Opportunity (EEO) and disability issues. Jenkins is responsible for conducting EEO investigations of discrimination complaints filed by County employees with the County.

The SCERB was formed and operates pursuant to the County Employees Retirement Law (CERL) of 1937. (Gov. Code sec. 31450 et seq.) Under CERL, if a county employee is "permanently incapacitated" as a result of an injury arising out of, and substantially contributed by, his employment, he shall receive a "service-connected" disability retirement and receive one-half of his final compensation.[5] (Gov. Code secs. 31720 and 31727.4.) Either the injured employee or county employer may apply for disability retirement on behalf of the

[5]If the injury does not arise out of or in the course of employment, the employee may receive a "non-service-connected" disability retirement. (Gov. Code sec. 31725.8.)

employee. The County as the employer may not separate an employee who is otherwise eligible[6] to be disability retired, unless the employee waives that right, rather the employer "shall" apply for the disability retirement of that employee, if he is "believed to be disabled." (Gov. Code sec. 31721(a).) CERL does not require the employer to send the employee to a fitness for duty examination or medical evaluation prior to applying for disability retirement on behalf of the employee. (Gov. Code sec. 31723.) When an employer applies for disability retirement on behalf of an employee, the employee is not entitled to paid leave pending the determination of the local retirement board. However, the employee may seek to apply for interim benefits while awaiting the determination. (Rodarte v. Orange County Fire Authority (2002) 101 Cal.App.4th 19 [123 Cal.Rptr.2d 475]; and Gov. Code sec. 31725.7.)

The County also has a Civil Service Commission (Commission) which promulgated rules for formal separation actions to be taken against employees (including for medical reasons) as well as actions the County can take when an employee returns to work from an illness or disability. Specifically, Commission Rule 12.3 entitled "Return to Work after Illness or Disability" provides:

> When an employee is absent due to illness or disability, the appointing authority may require that the employee pass a medical examination by a County Physician prior to his/her return to work. Failure to pass such examination shall result, after expiration of the employee's accumulated sick leave, in further leave with pay; leave without pay [LWOP]; and/or separation of the employee, as may be authorized in accordance with these rules.[7]
> (Emphasis added.)

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[6]The eligibility of M. J. for disability retirement is not in question.

[7]Notwithstanding Commission Rule 12.3, an employer has the statutory authority under the Fair Employment and Housing Act (Gov. Code sec. 12900 et seq.) to require any medical examinations or inquiries which it can demonstrate are job-related and consistent with business necessity. (Gov. Code sec. 12940(f)(2).)

Commission Rule 10.3A.(5) entitled, "Dismissal of Permanent Employee" allows the County to dismiss an employee for "reasonable cause" including for "incapacity due to mental or physical disability to the extent permissible by law." Rule 10.5A. dictates that the notice of this proposed action provides that the employee shall be given the "opportunity to respond to the department head before the action is taken," and Rule 10.5B.(2) provides that the order of the action shall "advise the employee of his/her appeal rights" to the Commission. The Commission Rules also provide for procedural rules governing hearings before the Commission or a Commission hearing officer.

The County uses a written procedure entitled, "Sonoma County Disability Guidelines," outlining a seven-step process when dealing with issues of reasonable accommodation: (1) the identification of the disability; (2) the employer contacting the County's EEO office; (3) the employer contacting the employee's physician to determine what the disability is and what temporary or permanent working restrictions the employee has; (4) the employee and employer engaging in an interactive resolution process resulting in an agreement or employer decision; (5) the employee filing a complaint of the employer's decision to the County EEO office if the employee disagrees with the employer's decision; (6) the investigation of the complaint by the County EEO office; and (7) the employee's appeal of the County's EEO's investigation recommendation to the Commission for final review if the employee is still dissatisfied.[8]

On April 15, 1998, the California Second District, Court of Appeal rendered its decision in Bostean v. Los Angeles School Dist. (1998) 63 Cal.App.4th 95 [73 Cal.Rptr.2d 523] (Bostean), which decided that when an employee obtains a property right in his public

[8]SEIU and the County have a current Memorandum of Understanding (MOU) governing the time period of July 23, 2002 through June 30, 2008. The MOU specifically states that an employee alleging unlawful discrimination "may" utilize the County's EEO Discrimination Procedure, but may not use the MOU's grievance procedure.

employment, the employee must be given the constitutionally mandated procedural due process rights in continued employment of: (1) written notice of the charges; and (2) an opportunity to respond before the employee is effectively placed on an involuntary illness LWOP.[9]

On November 12, 1998, the Commission requested that Chief Deputy County Counsel, Rosemary Morgan (Morgan) discuss the impact of the Bostean decision with the Commission at its November 19, 1998 meeting. All County employee organizations were notified of this request. On November 19, 1998, Morgan submitted a memo to the Commission citing that the due process requirements set forth in Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102 [278 Cal.Rptr. 346] (Coleman), should satisfy due process requirements for an involuntary illness LWOP case.[10] Morgan did not recommend any rule change for the Commission setting forth the procedures to be followed in fulfilling the due process requirements as:

> the determination of what process is due depends so much on the particular facts of each case. It is doubtful that a rule could be

[9]Prior to Bostean, the Sixth District Court of Appeal held differently than Bostean. In Sienkiewicz v. County of Santa Cruz (1987) 195 Cal.App.3d 134 [240 Cal.Rptr. 451] (Sienkiewicz), the appellate court decided that a county employee being placed on indefinite medical LWOP, without an opportunity to respond prior to the effective date of the leave, did not violate due process if the employee was given a right to respond during the leave or within a reasonable time thereafter because the employee controlled the ability to return to work. The appellate court also did not require that a medical evaluation of the employee be obtained prior to imposing the leave. (Sienkiewicz, at p. 141.)

[10]In Coleman, the California Supreme Court decided that the level of due process afforded to an employee who was separated for being absent without leave for five or more consecutive working days was that the employer must give the employee written notice of the contemplated action, the facts supporting the action and an opportunity to present his version of the facts in an informal hearing before a neutral factfinder. (Coleman, at pp. 1122 and 1123.) Commission Rule section 10.5 A. designates the neutral factfinder to be "department head" for the most serious property right deprivations of dismissal, demotion and suspension.

> crafted that would cover all of these instances. Thus, I believe this issue should be determined on a case-by-case basis with the advice of counsel.
> (Emphasis added).

SEIU representative Tom Drumm was present at that meeting. One of the employee organizations expressed its concern about the due process afforded to an employee on a return to work issue. The Commission Chairperson stated that it "was unnecessary and premature to give guidance and each situation should be dealt with as it arises." (Emphasis added.) This statement was reflected in the Commission minutes. The evidentiary record is silent as to whether SEIU (or anyone else for that matter) protested this announced case-by-case basis approach to the determination of the level of due process accorded to an employee placed on involuntary LWOP status.

Unilateral Change Allegation

M. J. was employed with the County from 1988 to January 26, 2005. Before April 2002, when M. J. was injured on the job, she worked as an Account Clerk III with the Auditor-Controller's Office. As a result of this injury, she had difficulties with repetitive motion, pushing and pulling, sitting and standing for long periods of time and lifting objects above her chest. Her normal duties included editing and compiling spreadsheets on various accounts of other departments within the County.

M. J. went on medical leave from June 18, 2002 to July 31, 2003, and received workers compensation benefits. Accommodations were made by the County when she returned to work. She went on leave again in December 2003 for three weeks and returned to work with additional accommodations. On November 15, 2004, M. J. returned to work from medical leave a third time with work restrictions from her physician. Upon M. J.'s return to work as before, the County modified M. J.'s work schedule, duties and work station. M. J. performed her job but complained about pain and would occasionally be absent from work or go home

early due to the pain. The last incidents recorded that M. J. went home early for pain was January 4 and 5, 2005. On January 10, 2005, M. J. provided the County with new restrictions of a modified work schedule from her physician.

On January 12, 2005, Dole sent a letter to M. J. addressing her ability to perform the essential functions of her position which specifically stated:

> Based upon the permanent restrictions of your doctor, you were returned to work with accommodations November 15, 2004. During the past two months, we have attempted to assign tasks that met the restrictions. We have provided you with a variety of assignments and attempted to allow you to control the pacing of each element of each assignment. We have purchased equipment and tools to assist you: . . . We have had an ergonomic consultant review your work area three times as we made adjustments to be sure that it was set up properly. You have been provided the opportunity to work a reduced schedule, beginning with 4 hours per day, with the intent of increasing your hours to fulltime over the course of 2 – 4 weeks. In addition, management has made themselves available to you on a daily basis to work with you in an effort to make your return a success.
>
> Despite the above, you have encountered problems in the daily work. . . . You have numerous times requested to leave early or not come in due to issues of pain and 'flare-ups' in your arms. When you have tried to increase your hours to 6-hour days, you have encountered pain and returned to 4-hour days again. You have been unable to demonstrate the ability to perform the necessary activities in a manner that allows you to consistently complete all elements of each task.
>
> Not only is your medical condition not improving, but you have continued to tell us about pain you are experiencing. Your treater had hoped by now you would be able to increase the work hours to 8 hours/day, but that has not happened. In fact, a recent note (dated January 10, 2005) included new temporary restrictions that need to be in place until your scheduled medical appointment on February 24, 2005. We are a small department, and our tasks require a significant amount of document handling and data entry.
>
> Based on the above, it appears that we are unable to provide accommodation that would enable you to perform the essential functions of Account Clerk III (copy attached). Your final day of work will be Friday, January 14, 2005. If you believe that there is an accommodation that would enable you to perform these

> functions, please contact me or Linda Jenkins, the County's Equal Employment Opportunity Manager, at . . . A copy of the County's Disability Guidelines is attached.
>
> After reviewing the vacancies in our department, there do not appear to be any positions for which you are medically qualified, and have the requisite educational and/or work experience. Please contact me if you would like to discuss these vacant positions.
>
> . . . . . .
>
> You may be entitled to a disability retirement. To find out more information regarding retirement, you can contact . . . .
>
> . . . . . .
>
> Please contact me if you have any questions about the options available to you. I would like to hear from you by January 26, 2005 regarding your intentions.[11]
> (Emphasis added.)

On January 14, 2005, M. J. and SEIU representative Carroll met with Dole in his office. Carroll contended that in order for Dole to remove M. J. from pay status, Dole either needed to send M. J. to a medical examination conducted by a County physician or take a formal separation action against her pursuant to the Commission Rules. Carroll's concern was that Dole's January 12, 2005 letter did not contain any language concerning M. J.'s appeal rights as a disciplinary action did. At the end of the January 14 meeting, Dole, M. J. and Carroll agreed to meet again on January 19 to provide M. J. and Carroll with another opportunity to respond.

Dole followed up that meeting with a letter to M. J. on January 14. In this letter, Dole clarified that the purpose of the January 12 letter was to give M. J. "notice and an opportunity to respond" to the allegations that she could not perform the essential functions of her position. Dole also clarified that although the letter stated that January 14 would be M. J.'s last day of work that she would still be a county employee, but rather carried on LWOP status. Dole

[11]Most of the letter is set forth in order to address the issue of whether the January 12, 2005 letter fell within the dynamic status quo contended by the County.

explained that he was placing M. J. on paid administrative leave from January 14 through 19, 2005.

M. J. wrote Dole a letter on January 18, 2005 protesting some of the contents of Dole's January 12 letter and contesting some of the actions taken by Dole. She ended her letter by requesting that she be allowed to return to work.

On January 19, 2005, M.J., Carroll, Dole, M. J.'s supervisor and another Auditor-Controller employee met as agreed. M. J.'s January 18 letter was discussed as well as proposed accommodations. On January 21, 2005, Dole sent a letter to M. J. which reflected what occurred during that meeting, M. J.'s proposed accommodations and why the office could not make them. The letter stated that the County was unable to provide M. J. with effective and reasonable accommodations that would enable her to perform her essential job functions. The letter closed by listing several of the options available to M. J. as listed in the January 12 letter and attached a copy of the County's Disability Guidelines. Dole notified M. J. that her last day of paid administrative leave would end on January 26, 2005, at which time she would be placed on LWOP.

In a letter to Dole dated January 24, 2005, Carroll contended that the County failed in its obligation to participate in the interactive process to determine if M. J. could be accommodated. Carroll requested that the County continue the interactive process. In Dole's January 26, 2005, response to M. J. and Carroll, he informed them that a meeting had been set for February 2, 2005, to further discuss the interactive process and if that meeting did not produce an agreement, M. J. could file a discrimination complaint with the County EEO office under the County's Disability Guidelines. Dole stated that effective January 27, 2005, M. J. would be on LWOP status. At the time that M. J. was placed on LWOP, she chose not to

expend her remaining leave balances. M.J. did not exercise her right to file a discrimination complaint with the County EEO office.

In Carroll's January 28, 2005 letter to the County's Employer/Employee Relations Manager, Joanne Sidwell (Sidwell), he stated that based on his recent telephone conversation with Deputy County Counsel, Jeff Berk (Berk), who had been advising Dole on the matter,[12] Carroll requested the County meet and confer over "the lack of written policy or guidance when removing a worker from pay status without benefit of a Skelly [hearing][13] and Civil Service Administrative remedies." Sidwell responded to the letter on February 4, 2005, stating that she did not believe the County had an obligation to meet and confer as M.J. had notice that the department was going to place her on LWOP status and an opportunity to respond prior to the LWOP status becoming effective. Additionally, Sidwell replied that if M.J. disagreed with the County about the conclusion of the interactive process, she could file a discrimination complaint with the County EEO office and the conclusion(s) of the EEO office can be appealed to the Commission.

Carroll testified that, for the cases that SEIU was aware of, the County always sent employees out for a medical examination by a County physician when wanting to remove them from paid status. Jenkins explained that the County does not always refer an employee to a medical examination, but primarily relied on medical restrictions provided by the employee's treating physician. She explained that the treating physician understands the employee's medical condition more than a County physician. The decision as to whether the County could accommodate the restrictions (temporary or permanent) is often made based on the treating

[12]In a later letter from Berk dated April 25, 2005, Berk admitted that he was unaware of a written County policy that was used to remove M. J. from paid status, however, Berk argued that the Bostean decision applied to M. J.

[13]Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] (Skelly).

physician's medical evaluation. Jenkins explained that placing an employee on LWOP, instead of taking a formal separation action, gave the employee time off and an opportunity to recover and return to work.

Jenkins further testified that if an employee exhausts all leave balances, the County does not have a mechanism to pay the employee and the County would have no choice, but to place the employee on LWOP status. Jenkins listed four employees in a similar situation as that of M. J. The first employee exhausted all of her leave before she was placed on involuntarily LWOP. When she returned to work, she resigned after 45 minutes. The second employee was off work due to a workers compensation injury and had been on LWOP status for two years. This particular employee tried to return to work, but was unsuccessful because one of the doctors examining him prohibited him from doing so. A third employee, who had deteriorating vision as well as another physical ailment, was placed on involuntary LWOP status, and he did not contest the County's action. The fourth employee was also placed on involuntary LWOP and did not contest the action.

M. J. eventually appealed the level of due process afforded to her by the County Auditor-Controller's Office to the Commission who granted her a hearing. On February 16, 2006, the Commission denied M. J.'s appeal and found that the level of due process afforded to M. J. comported with the legal principles of due process.

On August 1, 2006, M.J. filed an application for service-connected disability retirement with the SCERB. On November 9, 2006, the SCERB granted M. J.'s application retroactively effective January 26, 2005; the day after the last day that M. J. received regular compensation.

ALJ'S PROPOSED DECISION

The ALJ found that the County adopted a new policy when it placed M. J. on involuntary LWOP status due to her inability to perform the essential functions of her position

even after several accommodations were made. In making such a finding, the ALJ rejected the County's assertion that it was not creating a new practice, but was rather following its previous practice of making decisions on these cases, including the due process accorded, on a "case-by-case" basis. The ALJ reasoned that a case-by-case past practice led to a "blanket sanction" of the County's decision to place an employee on involuntary LWOP status once he/she ran out of leave regardless of whether the interactive discussions had been completed. The ALJ also held that the County "failed to prove it had a clearly enunciated, reasonably ascertainable policy" regarding employees in M. J.'s situation and the County expressly refused to adopt a policy addressing the procedural due process concerns set forth in Bostean.

RESPONDENT'S EXCEPTIONS

In its exceptions the County contended, among other things, that the ALJ erred in not crediting the County's "case-by-case basis" approach as its past practice and status quo regarding it's determination of the level of due process to be accorded for an employee being placed on involuntary LWOP status. Additionally, the County contends that it was SEIU, not the County, who had the burden of proof to establish the change in the existing practice, which included determining the status quo from the regular and consistent patterns of changes in the conditions of employment (dynamic status quo) as set forth in Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley).

DISCUSSION

SEIU carries the burden of proof as to all elements set forth in a unilateral change allegation. (Riverside Sheriff's Assn. v. County of Riverside (2003) 106 Cal.App.4th 1285, 1291 [131 Cal.Rptr.2d 454] (Riverside).) To establish that the employer implemented a unilateral change in terms and conditions of employment within the scope of representation, SEIU must establish by a preponderance of the evidence:

> (1) the employer breached or altered the parties written agreement, or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; and (4) the change of policy concerns a matter within scope of representation.
> (California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 935 [59 Cal.Rptr.2d 488].)

SEIU Failed to Establish a Breach in Written Agreement or Past Practice

SEIU's contention that the County created a new policy/practice was twofold: (1) that the County did not send M. J. to a medical examination pursuant to Commission Rule 12.3 as it did for other employees of whom the union was aware; and (2) the lack of due process setting forth the steps the County took when placing M. J. on a involuntary LWOP status which could ultimately allow an appeal before the Commission. Based on our review of the record, we find that SEIU failed to satisfy this first element for the test of a unilateral change in terms and conditions of employment for the following reasons.

1. Medical Examination

SEIU is in error regarding the applicability of Commission Rule 12.3, which would have required her to be examined by a County physician prior to being placed on involuntary LWOP status. Based on the amount of time that elapsed from M. J.'s return to work in November 15, 2004, and Dole's January 12, 2005 letter, the County could not have required M. J. to pass a medical examination pursuant to Commission Rule 12.3 as this medical examination was to be ordered "prior to" M. J.'s return to work on November 15, 2004 and not afterwards. M. J.'s subsequent absences were only occasional and she had already returned to work by the time the January 12, 2005 letter was sent.

Additionally, once the County determined that M. J. was unable to perform the essential functions of her position as stated in its January 12 and 21, 2005 letters, its course of action was dictated by CERL rather than Commission Rule or past practice. One of the options set forth in these letters was that M. J. may be eligible for disability retirement. However, as M. J. was a vested employee with an occupational injury, if the County believed that no further accommodation could be made for M. J., she was not able to perform the essential functions of her job, and she was not qualified to work in another position, the County was mandated by statute (Gov. Code sec. 31721(a)) to apply for disability retirement on her behalf. Once having applied for disability retirement, the County was not required to pay her while awaiting SCERB's determination. If the application for M. J. was successful, her disability retirement date would be retroactive to the last day she received compensation (Gov. Code sec. 31724). While the County did not follow the dictates of the statute, such failure cannot be considered a violation of MMBA as it is not a breach of the parties "written agreement or own established past practice."

Lastly, SEIU failed to establish that it was the County's past practice to send its employees to a medical examination conducted by a County physician before placing them on involuntary LWOP status. In order to establish a past practice, SEIU has the burden to show that the practice is: (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a reasonable period of time as a fixed and established practice by both parties. (Riverside, at p. 1291.) Carroll testified generally that every case that the union was aware of, the County sent the employee to a medical examination by a County physician. On the contrary, Jenkins testified that primarily the County relied upon the treating physicians' opinion and gave some specific examples, although not identical to M. J., to support her testimony. Additionally, Jenkins' testimony was supported by the County's Disability

Guidelines which focuses on the employer's interactions with the employee's treating physician and not a medical examination performed by a County physician. Based upon the totality of this record, SEIU has not carried its burden of proof to establish that Carroll's testimony should be credited over Jenkins' testimony.

2. Due Process

The County, in its exceptions, contends that the change in the status quo must be evaluated from a dynamic status quo: PERB "must take into account the regular and consistent patterns of changes in the conditions of employment." (Pajaro Valley, at p. 6.) In the most recent PERB dynamic status quo decision, Regents of the University of California (2004) PERB Decision No. 1689-H (Regents), the Board in resolving a dynamic status quo defense cited to Regents of the University of California (1983) PERB Decision No. 356-H, at pp. 16–17 which provided:

> Where the employee has traditionally exercised a large measure of discretion in making such changes, it is impossible for the exclusive representative to know whether or not there has been a substantial departure from past practice, and therefore the exclusive representative may properly insist that the employer negotiate regarding such changes.
> (Regents, at p. 30; emphasis added.)

Eventually in Regents, PERB decided that the University unilaterally changed the status quo when it deviated from a "benchmark methodology" in determining its annual health benefits contribution. In M. J.'s instance, it cannot be established that the County deviated from its benchmark methodology in determining what level of due process she should be accorded.

It is undisputed that on November 19, 1998, the Commission Chairperson announced at a Commission meeting in the presence of a SEIU representative that it would take a case-by-case basis approach in its application of Bostean to placing employees on involuntary LWOP

status.[14] SEIU did not object to such a declaration. However, the application of a case-by-case basis approach did not mean that the County was going to apply unfettered discretion to each case, but rather was going to follow the parameters of due process set forth in Bostean: (1) written notice of the charges, and (2) an opportunity to respond before the employee is effectively placed on an involuntary illness LWOP.

Additionally, the County Counsel advised the Commission to apply the due process protections found in the Coleman decision. These protections were clearly applied to M. J. as she was given written notice of the contemplated action, the facts supporting the action and an opportunity to present her version of the facts before the department head, as set forth in Commission Rule 10.5 A. who met with M. J. and her representative on at least two occasions. M. J. appealed the level of due process afforded to her by the County Auditor-Controller's Office to the Commission, which found that the process utilized by the County did comport with due process. Finally, M. J. was notified of her options, including her right to appeal (to file a discrimination complaint regarding the County's decision not to accommodate her further to the County EEO office, which ultimately culminates in a hearing before the Commission). Therefore, it cannot be found that the County unilaterally created a new policy when it issued M. J. her January 12 and 21, 2005 letters notifying her that she would be placed on involuntary LWOP status.

[14]A case-by-case basis approach has been recognized as the status quo in Riverside, where the employer determined whether an employee on Labor Code section 4850 leave should receive a step pay increase.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-293-M are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.