



# ACHRO/EEO

Association of Chief Human Resources Officers/  
Equal Employment Officers

## THE COMMUNICATOR

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## ACHRO President's Message

It certainly seems like a long time since many of us gathered at the Doral for our Fall Institute in Palm Springs! The executive committee was very pleased with the way the institute went, and the evaluations submitted by participants were overwhelmingly positive. The active participation by ACHRO/EEO members and sponsors was as strong as we've ever seen it and we thank you all for that!

Since that time we have all been busy with day to day tasks that HR professionals deal with every day. We hope that this mid year newsletter will serve to remind you to celebrate past professional development opportunities and look forward to the institute being planned for next Fall. 2008 is proving to be challenging for all of us due to budget constraints. In recognition of this, the training committee is revising the program in the hopes that a shortened program will allow as many people as possible to attend. Separate workshops will be provided at other times of the year for para-professionals. Irma Ramos, chair of the training committee will provide many more details about these things.

One item discussed at last Fall's institute was work being done to revise and update the ACCCA ethics statement. Four ACHRO/EEO members (Pat Demo, John Didion, Abe Ali and myself) participated in a panel discussion at the ACCCA conference in Costa Mesa at the end of February. Participants were challenged to review the existing statement and make suggestions for improvement. That revision process will continue in the coming months and we will provide any final revisions to you once they are available.

As I reported after the last Consultation Council meeting, the political environment in the state is very much in flux due to the pending departure of several long term legislators in Sacramento. And yet the work of the legislature never stops and there are a number of bills pending which could significantly impact our colleges and the jobs of HR and EEO professionals. Among them are:

- SB325 – Higher Education Accountability – requires the state to establish a statewide accountability framework to biennially assess and report on the collective progress made by the four system's of postsecondary education in meeting state educational policy goals.
- AB591 – allows districts to hire adjunct faculty up to 100% of a load

Other significant issues on which input is being sought from ACHRO/EEO members include:

- A task force to explore single course equivalency for many rural districts who find it difficult to hire faculty that meet minimum qualifications in the broader discipline in which they teach. If you have thoughts on this issue, please contact Lori Gaskin at [gaskin@lcc.edu](mailto:gaskin@lcc.edu) as soon as possible.
- Input for the staff at UCLA who are working on the availability data for the EEO plans. If you have comments or suggestions on the availability data, please contact Tosh Shikasho in the Chancellor's office at [TSHIKASH@CCCCO.edu](mailto:TSHIKASH@CCCCO.edu). The more input they receive from the field, the better they will be able to meet the needs of the colleges!

So thanks to everyone for your participation in many projects of vital importance to the HR/EEO professions at California community colleges! I hope the remainder of the Spring semester is successful for each of you.



Log on to our  
Website at  
[www.achroeeo.com](http://www.achroeeo.com)



*Sheri Wright*

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## CCC Chancellor's Office

### Availability Data Committee Volunteers



The State Chancellor's Office is looking for human resources and equal employment officers to volunteer for the availability data committee.

The availability data committee will provide input and feedback on the development of the availability data. The availability data is used for analyzing the initial applicant pools and allow districts to complete their equal employment opportunity plans. Most communications will be via e-mail. If interested or if you have questions, contact Tosh Shikasho right away at [tshikash@cccco.edu](mailto:tshikash@cccco.edu) or call (916) 323-4990."

## ACHRO Website is up and running

Ron and I have been working hard over the last several months to rebuild the ACHRO website. Please use Google as the main browser and enter [www.achroeeo.com](http://www.achroeeo.com). This will direct you to the new website hosted through Microsoft Office Live. Please forward any suggestions/recommendations to Reneé Gallegos at [RDGallegos@achroeeo.com](mailto:RDGallegos@achroeeo.com). Any articles of interest to the membership, personnel changes or updates and any item relevant can be submitted for inclusion in the Fall Newsletter. Feedback is welcomed and needed!

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## The results are in—Lake Tahoe here we come . . . .

Hello Everyone,

We would like to thank each of you for participating in our ACHRO/EEO conference survey. It has been determined that as a result of your responses the 2008 ACHRO conference will be held at Harvey's in Lake Tahoe starting at noon on October 22<sup>nd</sup> and ending at noon on October 24<sup>th</sup> (2 full days).



We are also planning to hold two paraprofessional days one in Northern and one in Southern California, the subcommittee is currently working to determine dates and locations for these workshops.

Registration information is not currently available but you will be notified upon its availability.

Thanks again for your assistance.

Irma Ramos, Chair,  
ACHRO/EEO Training Committee



<http://www.harrahs.com/casinos/harveys-lake-tahoe/hotel-casino>

# Update from Liebert Cassidy Whitmore

## PROBATIONARY FACULTY NONRELECTION:

### WHAT IF WE DO MAKE A MISTAKE?

By

Mary L. Dowell and Arlin B. Kachalia

### **Probationary Faculty and Tenure Decisions**

Tenure is now controlled by Education Code §§ 87600 et seq. A contract faculty member normally serves under three probationary contracts. An employee is employed under his or her first probationary contract for one year (Education Code § 87608), is employed under his or her second probationary contract for one year (Education Code § 87608.5), and is employed under his or her third probationary contract for two years (Education Code § 87609). Each of these Education Code sections require that on or before March 15 of the year the contract ends, the district do one of three things: 1) The district may notify the employee on or before March 15 and before the expiration of any one of the three contract periods that it will not enter into a contract for the following academic year(s); 2) it may notify the employee that it will enter into a contract for the following academic year; or 3) it may notify the employee that it will employ him or her as a regular employee for all subsequent academic years.

A faculty member must serve a full academic year for the year to count towards acquisition of tenure. Education Code §§ 87468 and 87469 define this as service for at least 75 percent of the number of days the district is maintained, or the number of hours considered a full-time assignment for regular employees performing similar duties. An employee who is required to take an illness leave which renders his or her service in one (or more) years to be less than 75 percent is still deemed to have served a full college year.

Education Code § 87776 provides as follows:

No leave of absence when granted to a contract employee shall be construed as a break in the continuity of service required for the classification of the employee as tenured. However, time spent on any unpaid leave of absence shall not be included in computing the service required as a prerequisite to attainment of, or eligibility for, tenure.

A district may release a probationary faculty member from employment at the end of his or her first contract (first year), at the end of his or her second contract (second year), or at the end of his or her third contract (fourth year). If a governing board elects to release a probationary faculty member, it must give the faculty member notice by March 15 of the preceding academic year. It cannot release a faculty member mid-year without compensation. The district must issue the notice by registered or certified mail.

A district's failure to give a probationary employee notice in the manner and at the time required by Education Code § 87610 has various consequences depending on the contract year the probationary employee is serving. Probationary employees in their first year who do not receive proper notice of the district's decision not to renew their contract will automatically have their contract renewed for the following academic year. (Ed. Code § 87608.) Probationary employees working under their second year contract who do not receive proper notice will automatically have their contract renewed for the following two academic years. (Ed. Code § 87608.5.) Failure to give proper notice to an employee working under his third contract will result in granting him or her tenure.

The governing board, in making a decision regarding tenure, must assure that four requirements are met. Section 87607 sets these out as follows:

- (a) The employee has been evaluated in accordance with the evaluation standards and procedures established in accordance with the provisions of Article 4 (commencing with Section 87660) of this chapter, a fact determined solely by the governing board.
- (b) The governing board has received statements of the most recent evaluations.

The governing board has received recommendations of the superintendent of the district .

The governing board has considered the statement of evaluation and the recommendations in a lawful meeting of the board.

### **Challenges to Decisions Not to Rehire or Not to Grant tenure**

In districts where tenure procedures are collectively bargained, a probationary faculty member who receives notice that he or she will be released may file a grievance if a grievance procedure exists. The only issue in a grievance filed by a first or second year probationary faculty member is whether there has been a violation, misinterpretation or misapplication of the policies and procedures governing the evaluation of probationary employees. (Ed. Code §§ 87610.1, subd.(b).) A grievance filed by a fourth year probationary faculty member may also address the narrow question of whether the district's decision not to retain the employee was unreasonable to a reasonable person. (Ed. Code §§ 87610.1, subd.(b).)

The grievance procedure *must* end in a form of arbitration. The Education Code provides that "arbitration" means advisory arbitration as well as final and binding arbitration. But, if a contractual grievance procedure has not been adopted, the allegations must proceed to a hearing "in accordance with [Education Code] section 87740." (Ed. Code § 87610.1, subd. (b).) This is the same procedure used when an employee is dismissed for cause or laid off: the employee's challenge proceeds to a hearing before an Administrative Law Judge employed by the Office of Administrative Hearings of the State of California. The Administrative Law Judge renders a *proposed* decision for the governing board. (Ed. Code § 87740, subd. (c)(3).)

The grievance may be filed by the employee or by the union. In such a proceeding, the union does not owe the employee a duty of fair representation. The employee is entitled to pursue the matter to arbitration with or without a union representative. However, if an employee chooses not to be represented by the union, the resulting decision will not be considered precedent for purposes of interpreting tenure procedures and policies in the future. Rather, the decision will only affect that particular case at issue. If the case goes forward without the union, the employee may be required to post security to ensure payment of the employee's share of arbitration costs.

## What Can the Faculty Member Win?

Even if the faculty employee proves a violation, misapplication, or misinterpretation of the evaluation procedures, subdivision (d) of that same § 87610.1 provides that an arbitrator is without power to grant tenure, except for failure to give notice on or before March 15 pursuant to subdivision (b) of Section 87610. This statute does not specifically state that a remedy must be granted for any slight deviation or non-substantive violation of the evaluation procedures. Rather, Education Code section 87610.1, subdivision (d) authorizes an arbitrator to fashion an appropriate “make-whole remedy.” This may include, but need not be limited to, back pay and benefits, reemployment in a probationary position, and reconsideration. In vesting the arbitrator with such discretion, the statute arguably suggests that the arbitrator can conclude that a violation is not sufficiently material to warrant any remedy.

## So What If We *Did* Make A Mistake?

If there was a technical or clerical misinterpretation, misapplication or violation of the evaluation procedures (e.g. deadlines were missed, a meeting was not held or was held late, forms were not filled out correctly, etc.), how serious a problem has been created?

The Education Code does not define “non-substantive” errors in the community college context. However, it does address non-substantive errors in the K-12 context. Education Code section 44944 states that a decision by a Commission on Professional Competence to reverse a decision for dismissal of an employee for cause “shall not be based on nonsubstantive procedural errors committee by the school district or governing board unless the errors are prejudicial error.” (Ed. Code, § 44944(c)(2).) This language is instructive and relevant to similar Education Code sections dealing with community colleges.

A Court of Appeal explained the rationale for the restriction on considering non-substantive error in *Governing Board of the El Dorado Union High School District v. Commission on Professional Competence* (1985) 171 Cal.App.3d 324. There, the school district served a notice of intent to dismiss a teacher. The teacher demanded a hearing and moved to dismiss the charges based on the district’s failure to provide evaluations in a timely manner. (*Id.* at 329.) The administrative law judge granted the motion and the district appealed. The Court of Appeal reversed. It noted that even though the district missed the deadline, the teacher “was given more than adequate notice that her performance needed improvement” and the district provided alternative sources of input that satisfied the statutory requirements. (*Id.* at 333.) Since the alleged violation concerned a procedural issue and did not deny the teacher a defense on the merits, the district’s errors were nonsubstantive under the law. (*Id.* at 334.)

An arbitrator has implicit authority to fashion an appropriate remedy, once a contractual violation has been found. (*Southern Cal. Rapid Transit Dist. v. United Transportation Union* (1992) 5 Cal.App.4th 416, 423-424; *Social Services Union v. Alameda County Training and Employment Bd.* (1989) 207 Cal.App.3d 1458, 1463.) Nevertheless, a remedial order is improper if it conflicts with a statute. (*Bellflower Education Association v. Bellflower Unified School Dist.* (1991) 228 Cal.App.3d 805, 811-812; *Paramount Unified School Dist. v. Teachers Association of Paramount* (1994) 26 Cal.App.4th 1371, 1384.)





In *Bellflower Education Association v. Bellflower Unified School District* (1991) 228 Cal.App.3d 805, a collective bargaining agreement provided procedures for evaluating the performance of teachers and for arbitration of grievances for alleged violations. When the school district decided not to reelect a teacher who had completed her second probationary year, she filed a grievance. The teacher argued that because the district violated the negotiated procedures for her performance evaluation, she was deprived of a fair opportunity to achieve permanent or tenured status. She sought to have all derogatory information removed from her personnel file and reinstatement for an additional year of probationary employment.

The district contended that, under California law, the non-reelection of probationary employees was not subject to arbitration. The arbitrator disagreed, ordered the district to cease and desist from conducting further evaluations in violation of the Agreement, to reinstate the teacher for an additional probationary year, and to evaluate the teacher for reelection in accordance with the procedures set forth in the agreement. The district filed a petition to vacate the arbitrator's award maintaining that the Education Code preempted the order that it reelect a probationary employee. The trial court denied the petition and confirmed the arbitration award. The Court of Appeal reversed the trial court. The Court noted that the subject of the grievance - violation of negotiated evaluation procedures - is within the scope of collective bargaining. *But the Court held that the remedy of reinstatement, however, was beyond the scope of the arbitrator's powers.* Since the teacher was a second year probationary employee, the Court held that reinstatement would interfere with the District's exclusive right and statutory duty to dismiss probationary employees under applicable provisions of the Education Code for any reason, without providing a statement of that reason and without the need for hearing and appeal from such decisions. (*Id.* at 811-812.)

In a similar case, *Paramount Unified School District v. Teachers Association of Paramount* (1994) 26 Cal.App.4th 1371, the Court of Appeal explored the remedies available to a probationary employee for violations of the a negotiated collective bargaining agreement. There, the District timely notified the teacher of non-reelection. The teacher and the union filed a grievance alleging violations of the evaluation provisions of the collective bargaining agreement. The arbitrator directed the District to reinstate the teacher for a second probationary year and to purge her personnel file. The District filed a petition to vacate the arbitration award. The superior court vacated the award as to reinstatement, but confirmed it in all other respects. The teacher appealed, but the Court of Appeal found that the arbitrator lacked the power to reinstate her. The court did find, however, that she could seek different remedies within the arbitrator's powers. (*Id.* at 1378-1379.)

In light of the similarity in procedures, we believe the above principles apply equally to community college districts. An arbitrator is specifically prohibited from granting a fourth year probationary faculty employee tenure. Although subdivision (d) also permits "reemployment in a probationary position," this remedy *only* makes sense where probationary employment is still possible, e.g., for a first and second year probationary employee. As long as he or she does not grant tenure, the arbitrator may choose various remedies to make a wronged faculty member whole, but only if the faculty member has sustained a real injury. Not every little violation will injure the faculty member. Where the error is nonsubstantive, we believe a district can expect to prevail on the grievance.





Sandy Lindoerfer visiting with the 'worker bees' - Ruth & Danny



Just one of our many on-going sponsors Liebert Cassidy Whitmore



Foreground—the "Butte Connection"



ACHRO/EEO's fearless (or to be feared?) leader, Sheri Wright



Our "Awesome Kick-Off Speaker," John Alston



Ruth, Wayne, Tina, Judy & Kim dancin the night away & having a great time at our indoor beach



Just visiting - Fran, Ron, Fusako, Ruth, Sheri, Wyman (yes, it's him) and Nickole.



Photos from the 2007 Fall Institute in Cathedral City, CA

Looking forward to the Fall 2008 Institute—stay tuned for more info!