ACHRO/EEO
Association of Chief Human Resources Officers/
Equal Employment Officers

THE COMMUNICATOR

2009 Spring Edition Volume II, Issue 2

Inside this issue:

Message from our ACHRO/EEO President Irma Ramos…..

The votes are in! Please join me in congratulating your new and continuing ACHRO/EEO Executive Officers for 2009-2010:

President: Randy Rowe, Associate Vice Chancellor of Human Resources, State Center CCD;
Vice President: Wyman Fong (new), Director of Human Resources, Chabot-Las Positas CCD;
Treasurer: Connie Carlson, Human Resources Technician, Redwoods CCD;
Secretary: Teddi Lorch (re-elected), Director of Human Resources, South Orange CCD; and
Past President: Irma Ramos, Vice President of Human Resources, Mt San Jacinto CCD.

The Chancellor's Office has provided financial support to ACHRO/EEO for approximately 10 years and continues to Partner with ACHRO/EEO. The Chancellor's Office has generously provided ACHRO/EEO with a grant in the amount of $55,489 to provide support for the following activities: the annual training institute; one day fly in/drive in EEO training; travel reimbursement/training to readers for the evaluation of district EEO Plans; and travel reimbursement for members who participate in the Title 5 EEO Review Committee and other Chancellor's Office EEO Committees. On behalf of the Association, I want to thank the Chancellor's Office and Tosh Shikasho for their continued commitment to EEO.

This year's theme for the training institute is "15 Years of ACHRO/EEO, Change and Succession - Past, Present and Future." A key purpose of the Association is to take responsibility and assume leadership for the professional development efforts of human resource professionals. Developing our future leaders is a high priority; long-term succession planning is critical. The expanding role of community colleges in our society and the increased rate of retirement at every level mean that we cannot put off what we know we have to do: we must improve our knowledge, our skills, and abilities to respond to the rapidly evolving student and community needs. Through our institutes we offer a wide variety of professional development opportunities for all HR professionals, whether this is your first institute, ninth or fifteenth.

It is important to attend the training institute in spite of budget constraints. Districts can utilize staff diversity funds to pay for conference attendance since workshops offered directly affect staff diversity. (At this year's institute Tosh will present a number of workshops on EEO.)

I look forward to seeing you at the Fall Training Institute in October at the Doral Desert Princess Resort in Cathedral City. Please take advantage of every opportunity to grow and acquire knowledge!

Irma Ramos

Irma Ramos, ACHRO/EEO President
Vice President of Human Resources, Mt. San Jacinto College

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The ACHRO Website is live and active at www.acrhoeeo.com Check out the website and send any articles for future posting or publication in the Fall 09 Newsletter to Reneé Gallegos at RDGallegos@achroeeo.com

CCC Chancellor's Office

Update on Equal Employment Opportunity (EEO), Availability Data & District EEO Plans, & Furloughs

We are working on reviewing and updating the title 5 EEO regulations. Under consideration will be section (s) 51010 and 53000-53034. The title 5 EEO committee is scheduled to meet or has met on March 25, 2009 to begin the work of possibly revising these sections. The EEO, Diversity, & Availability Data Advisory Committee also is scheduled or has met on March 25, 2009 to discuss: Chancellor's Office update; 2008-09 & 2009-10 EEO Fund remains the same allocation at $1,747,000; nominations to the John Rice Diversity Awards (please consider submitting nomination(s); ACHRO/EEO Fall Institute workshop proposal(s); update on the Job Registry; improving EEO & Diversity; etc. Everyone is invited to these meetings. Our next scheduled meetings after March 25, 2209 are June 11, September 10, and December 10, 2009.

The San Francisco job fair experienced a 36% increase in job seekers from 550 in January 2008 to 750 in January 2009. The Los Angeles job fair had about the same number of job seekers of 1700 from 2008 to 2009. The EEO Job Registry experienced a 15% or 31,228 increase in average weekly hits from 210,905 for February 2008 to 242,133 for February 2009.The EEO Job Registry system features include: an online application, resume posting, reference posting and job postings for classified positions; improved database system for easier Human Resources Office accessibility as well as improved user/applicant accessibility and an online applicant tracking system at no cost to all college districts

The EEO, Diversity, & Availability Advisory Committee will discuss or has discussed and probably will recommend or has recommended whether we should or should not use the proposed availability data for the classified staff. Previously, the Chancellor's Office and this same committee had determined we will be unable to use the proposed availability data for managers, administrators, full-time faculty, and part-time faculty. Once a decision on the proposed classified availability data is finalized, work will begin to draft the memorandum to districts requesting EEO Plans; update the Model EEO Plan; and other work necessary to send this memorandum. The memorandum will allow districts one year from the date the memorandum is dated for EEO Plans to be submitted to the Chancellor's Office. We expect the memorandum to be sent sometime in Spring 2009.

As of March 13, 2009 the State Chancellor's Office as well as most other state agencies require their employees to take two furlough days a month. If the union members (voting by March 19, 2009) agree to a new contract and the Legislature and Governor concur, then the number of furlough days will be reduced from two to one day a month until June 30, 2010. This will mean less service to districts and the public. The designated furlough days will be agreed to between the employees and supervisors. There should be no furlough days were all the agency employees are off, therefore state agencies should be open during their regularly scheduled days and hours. If you have any questions, you can contact me Tosh Shikasho at **tshikash@cccco.edu** or (916) 323-4990.

Tosh

PARS - "Retirement Related Legislative and Regulatory Developments"

Public Agency Retirement Services (PARS) is pleased to contribute this article for the "The Communicator" highlighting recent retirement-related legislative and regulatory developments of interest to Human Resources Officers in California's community colleges. The PARS community college district consulting team includes Arnold Bray (former Director of Legislative and Community College Services for School Services of California) and Maureen Toal, Vice President of Public Affairs. Arnold and Maureen will combine their legislative expertise to elaborate further on these topics at the ACHRO Institute on October 22.

Governor's Benefits Commission Recommendations Become Legislation

Earlier this year, the Governor's Public Employee Post-Employment Benefits Commission released a final report of its findings related to California's growing liabilities for pensions and retiree healthcare. Some of the report's recommendations translated into bills now making their way through the state legislature.

The Commission surveyed California's public pension plan systems and nearly 1,200 public agency employers throughout the state to get a clear idea of pension funding status and retiree healthcare liabilities. According to the Commission, the total unfunded liability for pensions is around $63.5 billion whereas the unfunded liability for OPEB is around $118 billion, $48 billion of which is the liability for the State. Of the responding agencies, 78% reported that the do not pre-fund their OPEB liability.

The Commission made a total 34 recommendations including:

- that each public agency should adopt pre-funding as its policy, identify its OPEB liability, develop a pre-funding plan, make it public, and begin pre-funding the liability.
- that if in a given year there is no need for an employer contribution to the pension plan because it is significantly over-funded, then the amount of the employer contribution savings should go towards pre-funding OPEB liabilities.
- that the State Controller's Office develop a method to collect and report OPEB data from California's public agencies

Several bills have been introduced to address some of the recommendations:

- **SB 1123** – Requires local entities to prepare an actuarial study and make it public at least two weeks before changes to postemployment benefits (and not on consent calendar). It also creates the California Actuarial Advisory plan to provide expert and independent information to encourage greater transparency and understanding of actuarial methodologies and assumptions. This bill has passed both houses and is currently in the Senate Unfinished Business file.
- **AB 1844** – Establishes penalties for fraud related to STRS and PERS benefits; requires public agencies to report information on post-retirement healthcare to the State Controller every year. This bill has been passed by both houses and has gone to the Governor for signature.

STRS Taskforce Pitches Uniform Retiree Healthcare Benefits

STRS formed the Public Education Health Benefits Task Force to recommend how STRS and PERS could assist educational agencies in addressing the affordability of healthcare. The Task Force report recommends a program for retired members over age 65 that would provide:

monthly health allowance of $400 – retired prior to 1999monthly health allowance of $300 – retired in 1999 or after

monthly health allowance of $100 – retired after implementation of program

base monthly allowance based on years of service

benefit would increase based on medical care component of CPI or 5% compounded (which ever is less)

could designate beneficiary to receive allowance

Benefits would be funded by:

For those retired prior to implementation - by state contribution or redirection of its contribution to the Supplemental
Benefit Maintenance Account

For those retired after implementation – employer contributions

Increase in contributions as a percentage of payroll would be required: 1.717% for retired members and 1.788% for active members.

Report Examines State Healthcare Pool for School Employees

A tentative report has been issued by the Mercer Consulting firm hired by PERS to study the feasibility and cost-effectiveness of establishing a single statewide healthcare pool covering all education employees. In 2005 the Legislature passed a bill that was signed by the Governor, requiring PERS to conduct the study.

The study recommends that participation in a statewide education employee health pool that would include multiple PPO and HMO plan options should also be mandatory.

According to the report, aggregating all school district employees, both actives and retirees, into a single risk pool, would create a pool of roughly 720,000 employees. Currently PERS covers nearly 576,000 employees and 660,000 dependents, insuring 1.2 million members. The report estimates that combining PERS members with district employees and their dependents would create a combined pool of around 2.6 million

participants, establishing greater leverage in California's healthcare market. The report will soon be submitted to the Legislature for consideration.

Post Retirement Earnings Limits Under Scrutiny

STRS formed a Post-Retirement Earnings Limitations Working Group this year to recommend legislative changes to post-retirement work by teachers and administrators. Originally the taskforce discussed amending current bill, **AB 2390**, to eliminate the earnings limitation for retirees over the normal retirement age of 60, but place additional restrictions on retirees under age 60 and for retirees who return to work. The group could not reach consensus on this issue. Instead, the bill moved through both houses of the Legislature and to the Governor with only the year long "status quo" extension of the current earnings limitation exemptions.

Some of the issues being considered were:

- Require employers to contribute the "actuarially sound" cost of hiring retired members
- Require employers to pay full 8.25% contribution for hiring retired STRS members.
- Permit a district to hire a retired employee only if the district pays 8.25% of employee's creditable compensation towards its OPEB liability.

Change the earning limit to 50% of final compensation per year as averaged over a 3 to 5 year span

STRS hopes that the group will reach a consensus on a more permanent solution in the future.

We'll provide greater detail on these developments and others at the ACHRO Training Institute session on October 22. If you have any questions on this issues call Arnold or Maureen at (800) 540-6369 ext. 127 or abray@pars.org, /mtoal@pars.org .

A message from the ACHRO/EEO Secretary. . .

Rescue Me!

During tough budget times, there exist financial impacts within the community college system. The State legislature believes the State budget package is a good one under the circumstances. Some of us in Human Resources react by initiating frosts, freezes and lay-offs while others react with structural reorganization, delaying technology upgrades, and chopping off funds for staff development, training, supplies, and new equipment. Interesting reactions while trying to accommodate record increases in the student enrollment without adequate funding. The news from Sacramento is going to save us all by raising taxes. Washington is cutting taxes. AIG is giving bonuses. Rescue Me!

HR Stimulus Package: Sustainability through Training and Workforce Planning

To get ahead of this financial tsunami, Human Resources must become sustainable by investing in our future and becoming more proactive. Training and workforce planning offer hope and provides success to all of us. Because we are not going to be here 100 years from now, sharing our successes and putting structures in place will ensure the survival value of Human Resources. Since research and planning departments already exist within our colleges, this is a tool we can use to forecast work force changes and assist our colleges with staff projections. Training provides nourishment to the future of HR. It may cost time but long term training prevents small issues from becoming emergencies and insurmountable problems. On-line training saves dollars and provides stress relief by re-focusing people on certain essential tasks. If in a training session you find one item that saves you 10 minutes a day, that same 10 minutes aggregates to 40 hours in a year. That's one free week – so you can do more productive work. Other ideas for training include: inviting HR colleagues from other community colleges to present their best practices and your staff reciprocates; creating internships for students; and the ultimate training program- the Fall 2009 ACHRO-EEO conference - with lots of excellent training opportunities to keep pace with the financial tsunami!

Don't Get Lost in the Stress of the Moment

Every time the door opens in HR there comes a challenge of some kind. It certainly makes life interesting. Discipline, lay-offs, bizarre behaviors, we see them all. People are on edge when times are tough! We need to step back and take a deep breath and remember who we are. We are the ones people count on and, therefore, should be consistent in how we respond by treating everyone with dignity and respect. This is our leadership role in the community college, no matter how many financial tsunamis or how difficult the tasks at hand. This is our leadership moment as the college and the community at-large look to us for guidance on handling each and every challenge that comes our way. Every person is an individual and has a perspective or life view. We need to ensure every individual is treated fairly, equally and with respect. This applies even when, by most standards, they are not acting like they deserve it. Don't get lost in your job because your job does not define who you are. Above all, we must maintain integrity, fairness, and equity. It helps to remember who you are and that no matter how dark the clouds of the moment, there's always sunshine ahead!

Teddi Lorch

A few words from our Past-President . . . .

It is spring break here on our campus, so I thought I would take advantage of the "relative" quiet to dash off a note to my ACHRO/EEO colleagues. Not that I'm really counting, but there are only 4 more meetings left in my term of office. I will be attending another Consultation Council meeting at the Chancellor's Office this week (yes, it's true – they have dropped the attempt to rename themselves to the "System Office" and are back to being known as the Chancellor's Office!). I can honestly say that my time as past president has been one of *the most* educational things I have done in my entire HR career! Since I was fairly new to the community college system when I agreed to run for office in our organization, I was concerned about whether I would really have anything to contribute in these statewide meetings. I had also heard wild stories about how contentious discussions had been in the past with various constituent groups who are represented on the Council. It turned out that while this occurred "back in the day", it has absolutely not been the case in the past couple of years. Certainly there are different, and sometimes opposing, points of view expressed by administrators, faculty, classified or student representatives. But I have been extremely impressed by how knowledgeable and passionate everyone is to do the things that will be best for our students. I have gained a wealth of knowledge and understanding of how our system works that have served to make me a more effective Human Resources professional on my own campus.

One other effort I want to highlight is the collaborative effort underway with staff from the Chancellor's Office to look at rewriting Title V with regard to requirements for EEO plans. For those who you who may be new in the last 6 months, this effort sprung out of a joint workshop done at the ACHRO training institute last October. It was a terrific example of what can happen when we collectively voice our opinions and are able to magnify the impact as opposed to individuals feeling too small to make a difference. A group of ACHRO/EEO individuals have volunteered to work on this important effort and the first meeting of the task force will take place at the end of March. If you have not yet signed up, but are interested in assisting please contact Tosh Shikasho at TSHIKASH@CCCCO.edu.

So I would encourage each and every one of you to consider getting involved in ACHRO/EEO – not only to benefit your colleagues statewide, but also to benefit your own personal and professional development. Plus, I can guarantee you that you'll have a lot of fun!!

Sheri Wright

ACHRO Past-President
swright@miracosta.edu

Governing Board May Convene In Closed Session to Initiate Process to Dismiss Teacher Without Providing 24-Hour Notice to Employee

By: Warren Kinsler, Esq. and Aaron O'Donnell, Esq.
Atkinson, Andelson, Loya, Ruud & Romo

In the context of a school district's dismissal of a certificated employee, the Court of Appeal recently concluded that the district need not issue a 24-hour Brown Act notice to a certificated employee before commencing dismissal proceedings. [*Kolter v. Commission on Professional Competence of the Los Angeles Unified School District* (February 5, 2009, B206134) ___ Cal. App. 4th ___]. This decision is a departure from the widespread practice of providing employees with 24-hour notice, pursuant to Government Code section 54957, when a governing board will be considering in closed session whether to initiate disciplinary proceedings based on recommended charges, . We believe the Court's decision in *Kotler* should apply with equal force in the community college district context.

Factual Background

On May 2, 2006, the governing board of the Los Angeles Unified School District ("LAUSD") met in a closed session to initiate the process to dismiss Colleen Kolter from her employment as a tenured elementary school teacher pursuant to Education Code section 44934. (A process comparable to that described in Education Code Section 87672, applicable to community college districts.) LAUSD did not give Kolter any pre-meeting notice that it would be considering charges against her. However, after the closed session, the district sent Kolter notice that it would seek to dismiss her and informed her of her right to a public hearing.

Kolter exercised her right to a hearing before a Commission on Professional Competence ("CPC"). (In community college districts faculty dismissals are heard before either an agreed upon arbitrator or and administrative law judge assigned by the Office of Administrative Hearings.) Before the CPC, Kolter sought to have the proceedings dismissed for several reasons, including a claim that the district's failure to give her 24-hour notice prior to its vote to initiate termination proceedings violated the Brown Act. The CPC rejected this claim and found cause for her dismissal. Kotler then asked the courts to overturn the dismissal based on the Brown Act.

24-Hour Brown Act Notice Not Required Before Initiating Certificated Dismissal

Although the Brown Act generally requires that all meetings be open to the public, it contains a "personnel exception" [Government Code section 54957(b)], which provides in part that:

"Nothing contained in this chapter shall be construed to prevent the legislative body of a local agency from holding closed sessions . . . during a regular or special meeting *to consider* the appointment, employment, evaluation of performance, *discipline, or dismissal* of a public employee *or to hear complaints or charges* brought against the employee by another person or employee unless the employee requests a public session. [¶] As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open

session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void." (Emphasis added.)

Kolter argued that because the governing board was considering "charges" against her, she was entitled to the 24-hour notice and failure to provide the notice voided the board's action. The Court of Appeal, in ruling that the 24-hour notice was not required, cited a 1999 appellate court decision, which held that given the legislative history of Section 54957, the governing board need only provide the 24-hour notice when "hearing" complaints or charges against the employee and not when merely "considering" whether to move forward with discipline. That decision very practically distinguished between whether the governing board was to "hear" or to "consider" complaints or charges. It determined that the governing board was "hearing" complaints or charges against the employee if it actually conducted an evidentiary hearing on the statement of charges against the employee. In contrast, simply deliberating as to whether the charges warranted the initiation of dismissal proceedings was not a "hearing," but amounted only to "considering" such charges. In other words, consideration of whether charges, *if proven*, would warrant dismissal, is not a "hearing" that requires a 24-hour Brown Act notice, whereas a proceeding to determine whether such charges can be proven based on the evidence is a "hearing," and does require notice under the Brown Act. In Kolter's case, because the governing board was simply deciding whether or not to initiate dismissal proceedings against her rather than conducting an evidentiary hearing, it was not required to issue her a 24-hour Brown Act notice.

Impact of the Decision

As a result of the *Kolter* decision, if the board chooses to deliberate in closed session as to whether particular charges against a faculty member warrant the initiation of dismissal proceedings, the district is not required to give the 24-hour Brown Act notice to the employee. The court's opinion suggests that the 24-hour notice need only be given if the board is actually conducting some form of evidentiary hearing, such as when the board acts as the adjudicator and hears a classified dismissal or suspension case. Because the governing board does not have the power to dismiss a faculty member on its own and must instead await the binding decision of an arbitrator or administrative law judge, it appears that in the context of faculty discipline, a board would generally not need to issue a 24-hour notice to a faculty member when considering whether to initiate disciplinary action.

This decision does not alter a district's obligation to provide 24-hour notice in other circumstances where the board acts as the adjudicator, such as an appeal of a public complaint against an employee. It also does not affect any contractual provisions requiring such notice.

Atkinson, Andelson, Loya, Ruud & Romo is a 140-attorney, full-service firm serving California community college districts from offices throughout the state, including Cerritos, Fresno, Irvine, Pleasanton, Riverside, Sacramento and San Diego. The firm provides practical legal solutions in the areas of employment, labor, construction, education, real estate, general business, business litigation, corporate, taxation, bankruptcy and immigration.

TERMINATION OF EMPLOYEES FOR A CRIMINAL "CONVICTION" MAY BE UNTENABLE WHERE BASED UPON A PLEA OF "NOLO CONTENDRE"

Written by Frances Rogers, Associate, Liebert Cassidy Whitmore

On February 23, 2009, a California Court of Appeal upheld a trial court's order that a classified employee of a K-12 school district be reinstated after the district dismissed the employee for a criminal conviction following a plea of nolo contendre (meaning, "no contest") to a misdemeanor charge of forging, altering, and/or issuing a prescription for a controlled substance (Health & Safety Code § 11368). In *Cahoon v. Governing Board of Ventura Unified School District* (2008) -- Cal.Rptr.3d --, the district sought to dismiss the employee under Education Code 45123(b) which states, "no person shall be employed or retained in employment by a school district, who has been convicted of a controlled substance offense…" However, the Court pointed to Penal Code section 1016 which states that for crimes other than those punishable as a felony (i.e., misdemeanors or infractions), a plea of nolo contendre "may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." Civil suits include administrative hearings. (*Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762, 773-774.) Accordingly, as the classified employee pled nolo contendre to a misdemeanor charge, the plea could not be used against him for purpose of termination.

The Court's holding was based, in part, on a prior court decision regarding the revocation of a professional license following a plea of nolo contendre to a misdemeanor charge. (*Cartwright*, *supra*,16 Cal.3d 762, 773-774.) In response to that court decision, the California Legislature has, by a piecemeal process, attempted to close this loophole created by Penal Code section 1016. For example, the Legislature amended certain K-12 Education Code sections to provide that "a conviction following a plea of nolo contendre shall be deemed to be a conviction within the meaning of this subdivision." (*See* Educ. Code §45123(a) pertaining to convictions for sex offenses in K-12 districts.) The Court in *Cahoon* observed that the Legislature explicitly provided that a plea of nolo contendre sufficed as a "conviction" for purposes of a sex offense, but did not state this with regards to a controlled substance offense. If the Legislature had intended to extend this reasoning to controlled substance offenses, it would have done so. Thus, the Court reasoned, the district could not presume a nolo contendre plea to a misdemeanor or infraction drug charge was intended to suffice as a "conviction" and override Penal Code section 1016.

How does this apply to community colleges? The Legislature has taken measures to address certain situations where K-12 employees plead nolo contendre on a misdemeanor or infraction charge for specified criminal offenses (e.g. sex offenses). The Legislature, however, did not extend these same protections to community college districts.

The first thing a community college district should note, is that Penal Code section 1016 provides that only for crimes punishable as something other than a felony (such as a misdemeanor or infraction), the plea of nolo contendre may not be used against the defendant in a civil suit or administrative hearing arising out of the same conviction.

Thus, community colleges may still rely on pleas of nolo contendre to felonies when deciding upon discipline for an employee.

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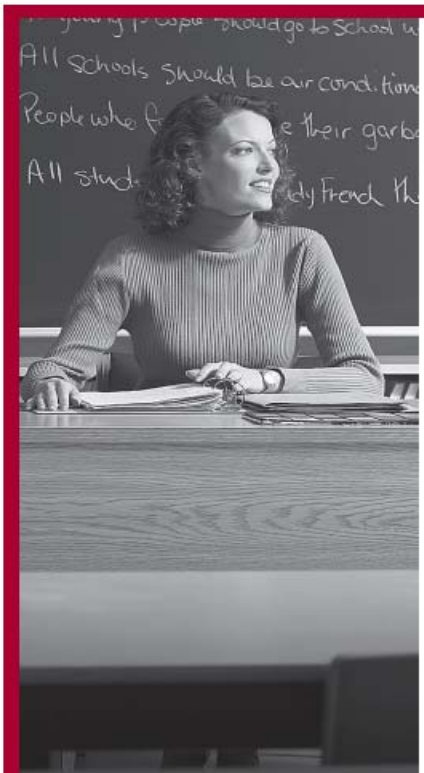
The second thing community college districts should be aware, is that the Education Code sections pertaining to employment of persons convicted of sex and controlled substance offenses and the dismissal of employees *do not state* that a plea of nolo contendre is considered to be a "conviction" for purposes of these Code sections. Specifically, Education Code sections 87009, 87010, 87011, 87405, 87732, 88022, and 88123 do not reflect the Legislature's intention to allow districts to rely on misdemeanor or infraction convictions resulting from pleas of nolo contendre. For this reason, if a district has an employee it seeks to discipline or dismiss because of a plea of nolo contendre to any misdemeanor or infraction, it is likely the decision to discipline or otherwise dismiss the employee will not be upheld.

What can a community college do if an employee pleads nolo contendre to a misdemeanor or infraction? First, for classified employees, the causes for discipline are typically the subject of collective bargaining, Board policy, administrative regulation, or, in the case of merit system districts, personnel commission rules . Therefore, a community college may seek to bargain with the exclusive representative (or in the absence of exclusive representative, by Board policy, administrative regulation, or personnel commission rule) that for any ground for discipline pertaining to "convictions," a plea of nolo contendre will be considered a "conviction" for purposes of that cause for discipline. Some community college districts may already have a similar provision in a classified collective bargaining agreement, Board policy, administrative regulation, or other rule. If so, the district may be able to rely upon the provision to discipline or dismiss an employee for a misdemeanor or infraction conviction based upon a plea of nolo contendre.

Second, for academic employees, because the grounds for dismissal are codified in Education Code section 87732, community colleges do not have the ability to add additional grounds for dismissal. Education Code section 87732 provides that one ground for dismissal is "conviction of a felony or of any crime involving moral turpitude." A plea of nolo contendre may be used to prove that the academic employee has been convicted of a felony. However, a plea of nolo contendre may not be used to prove conviction of a misdemeanor involving moral turpitude.

Nonetheless, a community college district should consider if the misconduct which resulted in the conviction qualifies for another ground for dismissal, such as, "immoral or unprofessional conduct" or "evident unfitness for service." If so, the district is not seeking to dismiss the employee for the conviction, but for engaging in conduct that is immoral, unprofessional or reflects evident unfitness for duty. Be mindful, however, that the district will have the burden of proving that the employee engaged in such conduct (i.e., admission of employee, statements of witnesses, documentation, lawful surveillance videos, etc.) The district will not be able to rely on a court document reflecting the conviction after a plea of nolo contendre to the misdemeanor or infraction. The district will also have to establish a nexus between the conduct engaged in by the employee and its effect on the learning environment at the district (also known as *Morrison* factors).

Finally, community college districts may wish to lobby their district's state legislators to add provisions to these Education Code sections which would provide that a plea of nolo contendre will be considered a "conviction" for purposes of that Code section. Until the Legislature sees fit to amend these Education Code sections, community college districts will be limited in their ability to rely on convictions of misdemeanors and infractions after a plea of nolo contendre.



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We hope to see you at the 2009 ACHRO/EEO

Fall Training Institute!

" 15 Years of ACHRO/EEO, Change and Succession, Past, Present and Future. "

October 21-23, 2009

at the Doral Desert Princess Resort.

Contact Ruth Cortez

klavier88@verizon.net

Article from our ACHRO/EEO Consultant. . . .

Wow! It seems like only yesterday we published our Fall Newsletter and here we are with our spring edition. Time flies when we're having fun.

We distributed and have received 46 completed RFPs for our **2009 Fall Institute in October** - this is the most we have received since the beginning of our institutes!! There are so many excellent topics that have been submitted I only wish we could have 3-full days of workshops. But we have only 2 ½ days of workshops and will have to exclude a number of great workshops. We're going to try a different format this year - offering beginner 101 workshops on a particular subject matter, to be followed by intermediate/advanced 201 workshops on the same subject matter because of the many 'new' CHROs in the system. We believe this format will be more beneficial to all in attendance. Obviously, there will be workshops that do not fit this format and those workshops will be offered as we have in the past--'stand-alone' workshops for all.

We understand the financial situation a majority, if not all, college districts are facing this year and next, but we also feel that we should continue with our Institutes because if anything else, it's a time when we need many of the workshops we will be offering (i.e. Academic and Classified layoffs and EEO Model Plan). We hope you will be able to attend. All districts have Faculty & Staff Diversity Funds that may be used to pay for your attendance since there will be a number of workshops that are related to staff diversity issues.

Hope to see you all at the Doral Desert Princess Resort in Cathedral City on October 21-23, 2009. Call to make your reservations ASAP. I was able to renegotiate our contract and obtained a lower room rate from $135 to $125 per night to include a free continental breakfast one day (for those of you who don't care to get up early to join the rest of the attendees in the breakfast buffet we provide).

ACHRO/EEO 2009
Fall
Institute
October
21-23, 2009
at the
Doral Desert
Princess Resort
Cathedral City CA!

DID YOU KNOW...

Faculty & Staff Diversity Funds may be used to pay for the cost of attending the Fall 2009 Institute!

Integrated Wellness Programs…
A Marriage Made in Heaven?

Article Submitted by Kathy Espinoza, MBA, MS, CPE, CIE

It is a well-researched fact that healthy workers have fewer work-related injuries, and of those who are injured, recovery tends to be faster in healthier employees. So, the dilemma comes about in finding a way to GET workers healthy and accountable for their own health.

The idea of worksite wellness, as a means of creating a happy, healthy workforce, has been around since the 1980's. Study after study has shown that wellness programs reduce sick time, increase productivity and morale, and reduce healthcare costs. Many entities have tried to implement programs that steer their workers towards becoming healthy specimens but most programs fail. Is this effort futile? Why don't wellness programs take hold?

The main problem with worksite wellness is, ***"Whose Program Is It?"*** Who is it that takes accountability for it, spends the time on it, measures, promotes, and implements this huge wellness undertaking?

- It would make sense for the ***Benefits Department*** to foster and own the wellness program, as they are concerned with providing the benefits intended to create and keep employees healthy. They look for vendors who can offer individual employees the opportunity to achieve healthy goals.

- It might make sense for ***Risk Management/Safety/Loss Control*** to own the wellness program because their main focus is *Injury Prevention*. They understand that healthy employees are one key factor in injury prevention. Their job is concerned with finding hazards, educating employees and encouraging them to stay healthy.

- What about the ***Workers' Comp Department?*** They are ultimately responsible for the cost of the injury. With wellness in mind, the ultimate cost of the injury is directly related to the health and conditioning of the injured worker.

- Any thoughts to involving the ***EAP*****?** Typically, EAPs (Employee Assistance Programs) are seen as resources and services to solve employee personal problems, often described as an employee benefit. In reality, EAPs can be an effective tool to reduce workers' comp and disability costs by supporting employees during the recovery process to ensure they get back to their normal life as quickly as possible.

Is it possible that an integrated marriage between Benefits, Risk Management, Workers' Comp and EAP might increase the success of a wellness effort within the organization? A successful partnership between these departments, where all parties contribute equally, will increase the odds developing a healthier workforce. Unfortunately, wellness programs are seen as an afterthought for most of these departments because focus comes alive only *after* the injury occurs.

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With the ultimate cost of the injury directly related to the health of the workforce and the physical condition of the injured worker, it's logical that Benefits, Risk Management, Workers' Comp and EAP should work together in creating a healthy workforce focused on injury prevention and post-injury treatment.

What IS a Wellness Program?

If I gathered a room of 30 people interested in establishing a wellness program for their district, municipality, or hospital, I would have 30 different ideas on, "What IS a wellness program?" Wellness programs can be huge, all-inclusive programs or just a few areas of health, done well. Programs can cover a variety of services: Health Risk Appraisals (HRA), flu shots, weight-management, smoking cessation, stress reduction programs, to onsite fitness centers, health club discounts, web-based health tools, mental health and substance abuse counseling.

In marrying your Benefits, Risk Management, Workers' Comp and EAP programs, the GOAL of your wellness program should be to develop and encourage a ***healthier employee workforce***. We have all heard that 'beauty is in the eye of the beholder' but so is health. For some, being healthy is managing a chronic condition, like diabetes. For others, it may be walking three times a week, regardless of their weight. Wellness and health are different for each individual and each organization. Survey your employees to see which areas of wellness are important to them. Chose the top three areas to start and run a pilot program to determine if the interest is there.

What Makes a Wellness Program Work?

With budgets stretched and in-house people overworked, it may be wise to hire an outside vendor to partner with you in your quest for a healthy workforce. An integrated wellness program is a big job to add to someone who is already 'wearing many hats'. There are some organizations that hire an in-house health/wellness ***cheerleader*** to bring the team together (Benefits, Risk Management, Workers' Comp, EAP), to keep wellness alive and focused.

Incentives are a compelling reason for people to change and a key to a successful program. In an ideal world, a reduction in healthcare premiums and co-pays might inspire program participation. Other incentives might include cash contributions to health savings and reimbursement accounts, or paying employees to be fit. Police and Fire Departments offer extra pay to employees who can prove they are fit through annual Fitness for Duty testing. In their jobs, the importance of being fit and healthy is paramount and cannot be understated. Many times, added incentives can bring the 'fence-sitters' into the wellness program more effectively than the tough-love approach. Forced fitness or placing a surcharge on premiums for those who don't participate may develop into an 'employee rights/attitude' issue.

How to Begin a Wellness Program

Know your budget. Four budgets are better than one. If Benefits, Risk Management, Workers' Comp, and EAP each contribute towards the wellness program, it will be less painful monetarily and create a stronger employee buy-in, which will increase the success of the program.

Find your team and cheerleader. Yes, we've all heard that if you want something done, just ask a busy person, but it doesn't work well in this situation. Wellness programs take more time commitment than one may think. Does someone in the Benefits, Risk Management, or Workers' Comp. Department **really** have this much **EXTRA** time to spend on the wellness program? You need to find an energetic soul who enjoys promoting the program, has the time to establish program boundaries, advertise, promote, encourage and measure success. If there isn't anyone around with lots of available time, consider contracting someone through your Occ. Med facility, Employee Health Department, School Nurse, or perhaps with a trainer from the local gym. Without a specific, designated person to champion the cause, the wellness program will struggle.

Ask some hard questions first.

What are the goals we would like to see? Between the four departments (Benefits, Risk Management, Workers' Comp, and EAP), the goal should be to develop healthier employees who are stronger, which will lead to fewer injuries, claims and shorter recovery times.

How can we make our integrated wellness program as unique as our organization? People come in all ages, shapes, sizes and fitness levels. Make sure your wellness program will apply to everyone. Perhaps establishing a "walking club" with a marked path around the facility may be all you need. Can you hand out pedometers to promote the program? How about a "stair master club" to encourage employees to use the stairs rather than the elevators? Be sure the areas chosen to walk and climb are safe from hazards, well-lit and encourage walking in pairs.

How involved do YOU want to be? Do you, personally, have the time to organize health fairs, find lunch-and-learn speakers, post flyers to advertise up-coming programs, design wellness newsletters and paycheck stuffers?

How much money do we have to spend? Health fairs, speakers, promotional items, incentives all cost money. How much do we have in the budget for these items? Figure out which incentives you will offer by surveying your workforce to find out what matters and motivates them. Perhaps a casual dress day to the department winners? Maybe a Wellness Kick-Off BBQ, with healthy foods, of course.

What does our attorney have to say? If an employee signs a consent form prior to participation, does that eliminate your liability and responsibility? What if someone gets hurt on a noon walk, on company time, on company property? Is this a workers' comp claim? What can be done when implementing the wellness program to lessen the liability to the organization? This is where the Risk Manager is most knowledgeable, as they are experts in risk transfer, risk control and best practices. Also, be sure to have a benefits attorney review the plan to make sure it doesn't unwittingly contain any provisions that might be deemed to be discriminatory.

Do we know how to handle personal information gathered? A lot of health screening information is asked for and collected during the scope of a wellness program. Many employers with fully-insured health plans aren't always up to speed with respect to HIPAA obligations, since these are handled by the insurers. Once they operate a wellness plan program, however, employers will be responsible for enduring that the requirements of the HIPAA privacy regulations are met with respect to these programs. Emphasize to each person involved that all information obtained falls under the Health Insurance Portability & Accountability Act (HIPPA).

Wellness programs come in many different 'packages' but the most important aspect is to create an integrated wellness program supported by Benefits, Risk Management, Workers Comp and EAP. It might be a once-a-year health fair put on by the Benefits Department. Risk Management/Loss Control might provide some lunch-and-learn topics on ergonomics, back injury prevention and how to work safely on the job. Perhaps a community Physical Therapist, OT, or local hospital can provide screenings or sessions on nutrition, blood pressure, and cholesterol. Weight watchers will come on-site to your facility if there is enough interest. Remember that money talks. Offer them an incentive if they attend 8 of the 10 sessions during the year. American Express gift cards, movie tickets, gas cards, preferred parking spaces, casual dress days are all examples of incentives.

The bottom line is **healthy** employees have fewer work-related injuries, return to work sooner because of shorter recovery times, are more aware of safety efforts, and more apt to mentor and encourage others to get healthy. Through a joint effort between Benefits, Risk Management, Workers' Comp, and EAP Departments, employees are encouraged to adopt healthy lifestyles and try programs that allow them to take accountability for their own health. It's a win-win situation, better yet, it's a marriage made in heaven.

Online Resources: www.healthierus.gov, www.healthfinder.gov, www.smokefree.gov, www.cdc.gov/HealthyLiving, and www.cdc.gov/niosh/jobstress.html

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RIGHT OF UNION TO HAVE MULTIPLE REPRESENTATIVES OR REPRESENTATIVES OF CHOICE AT INVESTIGATORY INTERVIEWS

ISSUE

Is a union entitled to send multiple representatives, or a specific representative of choice, to a meeting with a unit member regarding potential disciplinary issues?

ANSWER

An employer is not required to postpone an interview to allow for a specific representative to be present, so long as another representative is available. Furthermore, it is not unreasonable for an employer to limit the number of representatives at a meeting, and in most cases one competent representative should be able to adequately represent the interest of the individual in question and the union.

DISCUSSION

Under the EERA, employees have a right to representation at investigatory interviews where the employee reasonably believes that discipline may occur (State of California (Department of Forestry) (1988) PERB Decision No. 690-S) or in other "highly unusual circumstances." (Redwoods CCD v. PERB (1984) 159 Cal.App.3d 205 Cal.Rptr. 523; see NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251.) Courts have balanced this right of representation with the needs of management to proceed in an efficient and orderly fashion.

I. Right to Representative of Choice

In balancing the union employee's right of representation with the needs of management to proceed in an efficient and orderly fashion, PERB has relied on National Labor Relations Board decisions which held that an employer is not required to postpone or delay an investigatory meeting to allow for a specific representative to be present, so long as other union representatives are available. (Enter v. Regents (2003) PERB Dec. No. 1519-H, citing Coca Cola Bottling Co. of Los Angeles (1977) 227 NLRB 1276 94 LRRM 1200; Roadway Express, Inc. (1979) 246 NLRB 1127 103 LRRM 1050.) PERB has also held that the right to union representation does not include the right to select particular union representatives. (State of CA (Dept. of Transportation) (1994) 18 PERC 25098.)

Accordingly, in the face of a legitimate managerial need to proceed quickly, an employee or union cannot delay an interrogation merely for its own convenience. If a union chooses only authorize one or two representatives and refuses to authorize other union officials to represent employees in disciplinary matters, it does so at its own peril and the peril of its members. If the union's practice of having only one representative would unreasonably hamper the employer in such cases, the employer is free to proceed without waiting for the particular individual to be present. The employer is also free to continue its investigation without offering the employee an opportunity to provide exculpatory information through an investigatory interview. (Mobil Oil Corporation (1972) 196 NLRB 1052 80 LRRM 11881.) On the flip side, however, the employer cannot ignore an employee's legitimate representation rights if a reasonable delay will not interfere with its need to investigate concerns in a timely manner. Finally, it should be noted that the right to a representative has also been held not to apply to "run-of-the-mill shop-floor conversations" because it would hamper an employer's legitimate prerogative to give directions to employees. (Weingarten)

II. Right to Multiple Representatives

Occasionally, unions will request to send multiple representatives to sit in on investigatory interviews. Aside from difficulties in scheduling, this can also result in disruption during the interview and interference with the investigation. In deciding this issue, PERB has held that it is not unreasonable for an employer to limit the number of representatives at a hearing for the purpose of maintaining order. (Regents of the University of California, PERB Decision No. 308-H, citing City of Hackensack (12/21/77) 4 NJPER 4041; see also Hollis v. Cal. State Univ. (1988) 13 PERC (LRP) (Order No. 710-H). PERB has further held that "one competent representative should, in most cases, be able to adequately represent the interest of the individual in question and the Association." (Id.) Accordingly, in order to have more than one union representative attend an investigatory interview, the union has the burden of establishing that a single representative is insufficient and that the rights of an employee will be harmed if more representatives are not permitted to attend. (Id.) Furthermore, "merely demonstrating that multiple representatives would provide better representation is insufficient." (Id.) Rather, it must be demonstrated that the impact will be to deprive employees of their statutory rights …" (Id.)

Thus, there is no inherent right to multiple representatives at a disciplinary proceeding. However, if a district has a past practice of allowing multiple representatives attend investigatory meetings, caution should be exercised before unilaterally restricting the number of attendees in the future. (See, eg. Long Beach Unified School District, 23 PERC 30003 (holding that unilateral change was not shown where employer allowed only three (3) exceptions to its policy of allowing only one representative at *Skelly* hearings.) Accordingly, if there is an established past practice at the District in allowing multiple representatives to attend disciplinary meetings, the District should consider carefully whether an attempt to limit that number in the future would constitute a change in a past practice. (Cal. State Univ. Employees Union v. Trustees (2007) PERB Dec. No. -H.)