California's SEERA vs. The Civil Service System: Making State Employee Collective Bargaining Work

The California Legislature enacted the State Employer-Employee Relations Act (SEERA) in 1977 to give state employees collective bargaining rights. In some instances, however, employee bargaining conflicts with the State Personnel Board's control of the state's constitutional civil service system. The state refuses to negotiate about civil service issues, including discipline and job specifications, that are within the Personnel Board's jurisdiction. This Comment examines SEERA and the California Constitution to determine the extent to which state employees should be allowed to negotiate about issues previously administered by the Personnel Board. The Comment concludes that the state has misinterpreted the strictures of the constitution to narrow the scope of bargaining for state employees. The Comment proposes an amendment to SEERA that clarifies the negotiability of subjects that relate to the civil service.

INTRODUCTION

In 1934 California voters rebelled against the "spoils" system[1] and the accompanying inefficiency in state government.[2] They amended the state constitution to include article XXIV,[3] later renumbered article

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[1] In a spoils system, elected public officers reward their loyal supporters, and loyal party members, by appointing them to public offices. *See* W. CROUCH, ORGANIZED CIVIL SERVANTS 116 (1978). For interesting accounts of two of the best known spoils systems, Tammany Hall in New York City and the Daley Machine in Chicago, see A. FRANKLIN, THE TRAIL OF THE TIGER 66-127 (1928) ("Boss" William Marcy Tweed of Tammany Hall); M. ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO (1971) (presenting a "typical" day in the life of Chicago's famous ex-mayor); M. WERNER, TAMMANY HALL 104-275 (1928) ("Boss" Tweed).

[2] *See infra* notes 29-38 and accompanying text.

[3] CAL. CONST. art. XXIV (1934, repealed 1976). California voters amend the constitution by initiative. CAL. CONST. art. XVIII, § 3; *see id.* art. II, § 8(a); *id.* art. IV, § 1. To qualify for the ballot, the initiative measure must be certified by the Secretary of State as signed by voters equal in number to 8 percent of the votes cast for all gubernatorial candidates in the last gubernatorial election. *Id.* art. II, § 8(b). The Secretary of State submits the measure to the voters at the next general election held at least 131

VII,[4] which created a merit-based civil service system[5] for state employees.[6] Article VII also created a state Personnel Board[7] to administer and enforce the civil service system.[8] Article VII gave the Personnel

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days after the measure qualifies, or at any special election held before that general election. *Id.* § 8(c). The Governor may call a special statewide election for the measure. *Id.* In addition to the initiative process, constitutional amendments may be proposed by the legislature, *see id.* art. XVIII, § 1, or by a legislatively called constitutional convention, *see id.* § 2.

[4] CAL. CONST. art. VII. In 1970, voters deleted obsolete and superfluous language from former CAL. CONST. art. XXIV's original provisions, but made no substantive changes. *See* BALLOT PAMPHLET, PROPOSED AMENDMENTS TO CAL. CONST. WITH ARGUMENTS TO VOTERS, GEN. ELECTION 23-24 (Nov. 3, 1970). In 1976, as part of a constitutional reorganization, voters repealed former art. XXIV, and adopted its provisions verbatim as art. VII. *See* BALLOT PAMPHLET, PROPOSED AMENDMENTS TO CAL. CONST. WITH ARGUMENTS TO VOTERS, PRIMARY ELECTION 58-59 (June 8, 1976); Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 184 n.8, 624 P.2d 1215, 1224 n.8, 172 Cal. Rptr. 487, 496 n.8 (1981). This Comment hereafter refers to both former CAL. CONST. art XXIV and present CAL. CONST. art. VII by only the latter designation.

[5] A civil service system (also called a merit system) is a comprehensive program of personnel management, unilaterally initiated and administered by a government employer. *Collective Bargaining in American Government: Report of the Western Assembly*, 13 CAL. PUB. EMPLOYEE REL. 12, 14 (1972) [hereafter *Report of the Western Assembly*]. Conceptually, a civil service system is any formally established set of procedures designed to implement the merit principle. R. VAUGHN, PRINCIPLES OF CIVIL SERVICE LAW § 9.3[6] (1976); Helburn & Bennett, *Public Employee Bargaining and the Merit Principle*, 23 LAB. L.J. 618, 620 (1972).

The merit principle dictates that personnel decisions be based on job performance, rather than on improper considerations such as political affiliation, race, sex, or religion. *See, e.g.*, J. GRODIN, D. WOLLETT, & R. ALLEYNE, JR., COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 145 (3d ed. 1979); Helburn & Bennett, *supra*, at 619-20. Personnel decisions include the hiring process (e.g., recruitment, selection, and appointment), assignments, promotions, demotions, transfers, layoffs, and discharges. *Id.* at 620. Some commentators include relative competence as a factor within the merit principle. *See, e.g.*, F. NIGRO, MANAGEMENT — EMPLOYEE RELATIONS IN THE PUBLIC SERVICE 41-42 (1969); R. VAUGHN, *supra*; *Report of the Western Assembly*, *supra*, at 14; Stanley, *What are Unions Doing to Merit Systems?*, 31 PUB. PERSONNEL REV. 108, 109 (1970).

[6] This Comment refers exclusively to California state civil service employees (state employees), a group that includes most state officers and employees. *See* CAL. CONST. art. VII, § 1(a); *see also id.* § 4, discussed *infra* note 38 (exempt employees).

[7] The California State Personnel Board (hereafter Personnel Board). *See infra* notes 38-42 and accompanying text.

[8] CAL. CONST. art. VII, §§ 1, 2 and 3, provide in pertinent part:

> § 1(a) The civil service includes every officer and employee of the state except as otherwise provided in this Constitution.
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> (b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination.

Board constitutional authority over personnel matters that the Board used, unhindered, to govern state employee relations for many years.[9] Then, in 1977, the California Legislature enacted the State Employer-Employee Relations Act (SEERA),[10] which granted collective bargaining rights[11] to state employees. According to SEERA, the state[12] must

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> § 2(a) There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified . . . .
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> (b) . . . .
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> (c) The board shall appoint and prescribe compensation for an executive officer who shall be a member of the civil service but not a member of the board.
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> § 3(a) The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.
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> (b) The executive officer shall administer the civil service statutes under rules of the board.

[9] The constitution specifically directs the Personnel Board to enforce the civil service statutes, prescribe probationary periods and classifications, and review disciplinary actions taken against state employees. CAL. CONST. art. VII, § 3(a). The constitution also directs the Personnel Board to ensure that "permanent appointment and promotion" are based generally "on merit ascertained by competitive examination." *Id.* § 1(b).

[10] 1977 Cal. Stat. ch. 1159. SEERA is codified at CAL. GOV'T CODE §§ 3512-3524 (West 1980 & Supp. 1985).

[11] The term "collective bargaining" describes the negotiation process between a state and the exclusive representative (or "union") of a unit of employees. Ideally, the process culminates in a written agreement comprising the mutually agreed upon terms and conditions of employment. The process differs from "meeting and conferring," which lacks one or more of collective bargaining's basic elements: exclusive representation, negotiation, or a written agreement. *See* Edwards, *An Overview of the "Meet and Confer" States - Where are We Going?*, 16 L. QUADRANGLE NOTES 9, 10-15 (1972), *reprinted in* H. EDWARDS, R. CLARK, JR. & C. CRAVER, LABOR RELATIONS IN THE PUBLIC SECTOR 263-67 (2d ed. 1979). The parties' actions, rather than the terminology of the legislature or the courts, define the process being used. SEERA officially requires "meeting and conferring," although the legislature actually intended "collective bargaining." CAL. GOV'T CODE § 3517 (West 1980); *see* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 177-79, 624 P.2d 1215, 1219-20, 172 Cal. Rptr. 487, 491-92 (1981) (the legislature wanted an expanded meet and confer process); Morgenstern, *The State Employer-Employee Relations Act (SEERA)*, 3 PROC. PUB. L. SEC. ST. B. CAL. 19, 21-22 (1978).

[12] The California Governor, or a designated representative, is the "state employer" for collective bargaining. CAL. GOV'T CODE §§ 3513(i), 3517 (West 1980 & Supp. 1985); Professional Eng'rs in Cal. Gov't v. California Dep't of Transp., 114 Cal. App. 3d 93, 99, 170 Cal. Rptr. 444, 447-48 (1980). The legislature designated the director of the Department of Personnel Administration (DPA), *see infra* note 44, to be the Gov-

negotiate with its employees over "wages, hours, and other terms and conditions of employment."[13] State employees are now technically entitled to bargain with the state about the civil service system and about matters constitutionally entrusted to the Personnel Board, including matters within the Personnel Board's exclusive authority.[14] Thus, collective bargaining under SEERA in some instances conflicts with the state constitution. This Comment highlights the nature of this conflict.

Conceptually, collective bargaining and the civil service fundamentally conflict.[15] The civil service is paternalistic, with a governmental board or commission unilaterally determining the employment conditions for all employees. To the contrary, collective bargaining is egalitarian, with workers themselves controlling or strongly influencing the conditions of their employment. Some commentators believe that the civil service and collective bargaining are incompatible, and predict that bargaining in time will replace, or at least drastically limit, the civil service.[16] However, other commentators foresee an accomodation between the two systems, with boundaries delineating negotiable personnel issues from those retained under civil service control.[17]

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ernor's representative for collective bargaining. CAL. GOV'T CODE § 19815.4(g) (West Supp. 1985).

[13] CAL. GOV'T CODE §§ 3516, 3517 (West 1980 & Supp. 1985); *see infra* notes 49-52 and accompanying text. Units of state employees are represented in collective bargaining with the state by elected exclusive representatives (or unions). The legislature called these representatives "employee organizations." CAL. GOV'T CODE § 3513(a) (West Supp. 1985); *see id.* §§ 3515 (West Supp. 1985), 3515.5 (West 1980).

[14] For matters constitutionally entrusted to the Personnel Board see *infra* notes 81 (disciplinary actions), 96 (classification), 103 (probationary periods), 122 (promotion). *See generally* CAL. CONST. art. VII, §§ 1-3.

[15] In many respects this conflict parallels the conflict between democratic and republican forms of government. *See* F. ZEIDLER, F. NIGRO, J. LOVE & W. HEISEL, RETHINKING THE PHILOSOPHY OF EMPLOYEE RELATIONS IN THE PUBLIC SERVICE 3-4 (1968); THE FEDERALIST No. 57 (J. Madison), No. 61 (A. Hamilton), No. 63 (J. Madison).

[16] *See Report of the Western Assembly, supra* note 5, at 14 (merit system "must in time be absorbed or replaced" by collective bargaining system).

[17] *See* Lewin & Horton, *The Impact of Collective Bargaining on the Merit System in Government*, 30 ARB. J. 199, 201 (1975). Scholarly opinion about the optimal interrelationship between collective bargaining and an existing merit system runs the gamut. At one end, some scholars feel that collective bargaining powerfully corrupts personnel decisions, and therefore should be sharply circumscribed. *See, e.g.*, Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805, 858-60 (1970). At the other end are scholars who feel that collective bargaining accurately reflects the parties' needs and desires, and therefore should be largely unobstructed by unilateral government decisionmaking. *See* Rehmus, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919, 927 (1969);

So far, the legislature's insertion of collective bargaining rights into the state civil service system has led only to confusion.[18] Since 1981, when bargaining under SEERA officially began,[19] state employees have sought to negotiate with the state about an increasingly broad range of civil service related issues, including disciplinary procedures, layoffs, involuntary transfers, promotional criteria, and grievance arbitration.[20] The state, however, has refused to negotiate about subjects that it

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Wollett, *The Bargaining Process in the Public Sector: What is Bargainable?*, 51 OR. L. REV. 177, 178-82 (1971); *see also* Stern, *Public Sector Bargaining in 1985*, 28 LAB. L.J. 264, 267, 275 (1977) (predicted that by 1985 public sector collective bargaining would be virtually unlimited in scope).

[18] Presently, employment conditions are determined by two seemingly distinct methods. Under the first method, the Personnel Board unilaterally sets employment conditions. Using the second method, parties meeting under SEERA determine employment conditions through collective bargaining. *See* Helburn & Bennett, *supra* note 5, at 622-23 (bargaining may "destroy" the merit principle); *see also* Lewin & Horton, *supra* note 17, at 199-200 (discussing disagreement over the propriety of public sector bargaining between "industrial" democrats, who favor collective bargaining, and "political" democrats, who favor equality and egalitarianism). This Comment concludes that collective bargaining can coexist with a civil service system. *See infra* text accompanying notes 135-43.

[19] Although SEERA became operative in July of 1978, bargaining did not actually begin until 1981. *See infra* note 67.

[20] *See* California Agricultural Labor Relations Bd., PERB Decision No. 431-S (Nov. 13, 1984), 8 Pub. Employee Rep. Cal. (LRP) 992, 993 (staff attorney case procedures); California Dep't of Transp., PERB Decision No. 361-S (Nov. 28, 1983), 7 Pub. Employee Rep. Cal. (LRP) 1182, 1183 (subcontracting); California Dep't of Transp., PERB Decision No. 333-S (Aug. 18, 1983), 7 Pub. Employee Rep. Cal. (LRP) 922, 923 (involuntary transfers); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-137-S (Nov. 27, 1984), 9 Pub. Employee Rep. Cal. (LRP) 3, 4 (salary compaction), 4 (staffing ratios), 5 (subcontracting); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, 734-35 (promotions), 735 (out-of-class payclaims), 735 (job descriptions and duties), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, 486 (subcontracting), 487 (promotions), 487-88 (layoffs), 488 (disciplinary procedures), 488 (position allocations and staffing ratios), 489 (job action interference), 489-90 (right to submit out-of-class wage claims to contractual arbitration), 490 (employee designations and assignments); California Dep't of Forestry Employees Ass'n, Hearing Officer's Proposed Decision in Case Nos. S-CE-128-S, S-CE-129-S, S-CE-132-S, S-CE-133-S, S-CE-135-S (Apr. 17, 1984) [hereafter Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984)], 8 Pub. Employee Rep. Cal. (LRP) 443, 446-48 (disciplinary actions, procedure, and criteria), 446-49 (grievance arbitration), 448-49 (nondiscrimination), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984).

claims are exclusively entrusted to the Personnel Board.[21] Similarly, the state has refused to negotiate specific proposals, such as those relating to promotion, that it claims violate the merit system.[22] In many instances, the state declined to offer substantive legal support for its continued refusals to negotiate.[23] Thus, the state adopted an often intransi-

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[21] *See* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-137-S (Nov. 17, 1984), 9 Pub. Employee Rep. Cal. (LRP) 3, 4-7 (salary compaction, staffing ratios, subcontracting); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, 734-35 (seniority for promotions), 735 (job descriptions and duties), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, 487 (promotions), 488 (disciplinary procedures); Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 446-47 (disciplinary procedures), 448-49 (nondiscrimination complaints), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984).

[22] *See* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, 734-35 (seniority for promotions), 735 (job descriptions and duties), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, 492-93 (promotion).

[23] In June of 1981, two months before collective bargaining under SEERA began, the Department of Personnel Administration (DPA) and the Personnel Board reached an agreement. Formalized by a June 22, 1981, memo from Marty Morgenstern, then director of the DPA, to Ronald Kurtz, then executive officer of the Personnel Board, the agreement provided that the Department would invite a member of the Personnel Board staff to all DPA negotiating sessions with the state employee organizations. During the 1982 round of negotiations, a Personnel Board representative attended each negotiating session. Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 445, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984). The Personnel Board representatives participated during negotiations "to represent the interests of the State Personnel Board in terms of their [sic] constitutional authority to protect the merit system. . . . [I]f they saw something that they felt infringed in an area that [the Personnel board] had jurisdiction over [the representative would] speak up and tell us." Testimony of Dennis Batchelder, Chief of Labor Relations for the Department of Personnel Administration, *id.* The Personnel Board representatives played a major role in formulating the DPA's bargaining positions during all stages of the negotiations. *Id.*, 8 Pub. Employee Rep. Cal. (LRP) at 445-46; *see also* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, 734 (DPA refused to negotiate any matter within the Personnel Board's alleged exclusive jurisdiction), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984).

In *Department of Forestry Employees*, Ronald Yank, an attorney and chief negotiator for five employee organizations, testified that his awareness of the potential consti-

gent bargaining stance intended to deny state employees the full benefits of collective bargaining under SEERA.[24]

This Comment explores the relationship between the civil service system under article VII of the state constitution and state employee collective bargaining under SEERA. Part I examines the civil service system, its parameters, and the Personnel Board's role in enforcing it. Part I also analyzes the collective bargaining rights of state employees under SEERA. Part II explores the specific limitations that article VII imposes on the range of employment terms and conditions about which parties can negotiate under SEERA.[25] Part II shows that article VII precludes parties from negotiating only a narrow range of bargaining proposals.[26] Part III proposes a test for determining the constitutionality of bargaining proposals. This test recognizes that the constitution permits parties to negotiate proposals that do not directly conflict with the civil service system or with the Personnel Board's administrative role, as defined by article VII. The Public Employment Relations Board (PERB), the quasi-judicial state agency that administers and enforces SEERA,[27] should confront and resolve the conflict in state employee negotiations by adopting this test in a PERB unfair practice

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tutional problems involved with proposals on discipline and discharge led him to "seek accommodation with concerns of the State Personnel Board." 8 Pub. Employee Rep. Cal. (LRP) at 446. Yank testified that during as many as seven bargaining sessions with the DPA, he offered a series of modifications to his organizations' proposals. Yank testified, however, that his efforts to win the Department's agreement were ultimately "fruitless." *Id.*; *accord* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S, 8 Pub. Employee Rep. Cal. (LRP) at 734.

[24] *See supra* notes 21-23.

[25] SEERA negotiations may not contravene the state constitution. *See infra* note 60.

[26] *See infra* notes 80-86 (discipline), 94-97 (classification), 102-07 (probationary periods), 113-16 (rulemaking), 117-29 (promotion), and accompanying text.

[27] In enacting SEERA, the legislature changed the name of the Educational Employment Relations Board (EERB), *see infra* note 43, to the Public Employment Relations Board (PERB), and expanded the Board's jurisdiction. CAL. GOV'T CODE § 3513(g) (West Supp. 1985). The Board's principal responsibilities and duties under SEERA include: (1) investigating and hearing charges of alleged "unfair practices"; (2) correcting unfair practices with remedies that effectuate SEERA's purposes; (3) determining subjects within the SEERA scope of representation; (4) arranging and supervising certification and decertification elections that determine a union's status as the exclusive bargaining representative of a unit of employees; (5) resolving disputes about unions' official status; (6) establishing appropriate employee bargaining units and resolving disputes about them; (7) establishing and maintaining lists of available mediators, arbitrators, and factfinders; (8) investigating and evaluating requests for injunctive relief; and (9) seeking injunctive relief in the courts. *See id.* §§ 3512-3524 (West 1980 & Supp. 1985).

decision.[28] Additionally, the legislature should include this test in an amended version of SEERA. By thus clarifying the constitutionality of various bargaining proposals, this test will increase stability and the peaceful resolution of disputes in state labor relations.

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[28] Four PERB hearing officer decisions have examined the state's refusals to negotiate. California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-137-S (Nov. 27, 1984), 9 Pub. Employee Rep. Cal. (LRP) 3; California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485; Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984). However, an important distinction exists between decisions of the PERB Board itself, and proposed or adopted decisions of PERB hearing officers. Hearing officer decisions have no precedential value, and bind only the parties in the particular case. Board decisions, however, are made after the Board members deliberate on cases appealed from hearing officer proposed decisions. Thus, they are binding as precedent. 7 PUB. EMPLOYMENT RELATIONS BD. ANN. REP. 9 (1983). Two of the hearing officer proposed decisions were not appealed and thus have been routinely finalized by the Board. California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984); Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984).

The other two hearing officer proposed decisions were appealed by the Department of Personnel Administration (DPA) to the PERB Board. The Board has not yet heard arguments on either case. California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-137-S (Nov. 27, 1984), 9 Pub. Employee Rep. Cal. (LRP) 3; California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485. The Personnel Board tried to enter the latter case and appeal, but PERB Executive Director Chuck Cole ruled that the Personnel Board was not a party and therefore had no standing to appeal the hearing officer's proposed decision. *Update on Scope Decisions*, 62 CAL. PUB. EMPLOYEE REL. 43 (1984). The Personnel Board did not appeal Cole's ruling, but indicated that it may sue PERB in court if parties bargaining under SEERA negotiate a memorandum that allegedly impinges on the Personnel Board's constitutional authority in an area such as discipline. *Id.* Apparently, the DPA has chosen to appeal the proposed decisions on only some issues. Specifically, DPA disputes whether the state must negotiate about the following topics: subcontracting, arbitration of discipline, and employee layoffs. 64 CAL. PUB. EMPLOYEE REL. 41 (1985).

I. BACKGROUND

A. The Merit System and the Personnel Board

The California Legislature in 1913 created the state's first merit system[29] by enacting the Civil Service Act.[30] The Act was designed to eliminate the spoils system[31] of political patronage in state employment. The legislature also hoped that the Act would increase governmental efficiency by allowing state employees to keep their jobs regardless of the political party in power and to receive promotions only for "faithful and honest service" to the state.[32] Although the Civil Service Act worked well for a number of years, by the early 1930's it proved inadequate.[33] The Governor, the legislature, and even the Civil Service Commission[34] had succumbed to political pressures, and the spoils system was again flourishing.[35]

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[29] For a discussion of the merit system, see *supra* note 5.

[30] 1913 Cal. Stat. ch. 590.

[31] *See supra* note 1.

[32] Allen v. McKinley, 18 Cal. 2d 697, 705, 117 P.2d 342, 347 (1941) (to promote efficiency among public employees, departments must whenever possible hold promotional rather than open examinations); *see also* Almassy v. Los Angeles County Civil Serv. Comm'n, 34 Cal. 2d 387, 404, 210 P.2d 503, 513 (1949) (Commission's promotional examination procedures must ensure "open, competitive examination").

[33] G. KING, DELIVER US FROM EVIL: A PUBLIC HISTORY OF CALIFORNIA'S CIVIL SERVICE SYSTEM 26-28 (1979). Of course, no civil service system is better than the officers who enforce it. *See infra* notes 34-35 and accompanying text. *See generally* Melle, *Ohio's Merit Principle: Its Abuse in Nondisciplinary Personnel Actions*, 8 CAP. U.L. REV. 491 (1979) (charging that Ohio's chief state personnel office, the Department of Administrative Services, failed to enforce the merit principle in Ohio public employment).

[34] While the legislature created the State Civil Service Commission to administer the Civil Service Act and enforce the merit principle in state employment, 1913 Cal. Stat. ch. 590, §§ 2-5, the Commission itself had three commissioners, all appointed by the Governor. *Id.* § 2.

[35] G. KING, *supra* note 33, at 15-30. The Civil Service Commission gradually exempted numerous departments and positions from the Civil Service Act's coverage. By 1932 nearly half of the state's full-time employees occupied exempted positions. *Id.* at 26. Also, many departments inappropriately hired "temporary" employees for full-time positions normally subject to civil service examination and eligibility lists. Many departments also violated the official three-month limitation on temporary appointments. By August of 1931, temporary employees comprised one third of the entire state civil service. *Id.* California's then Governor, James "Sunny Jim" Rolph, elected in 1930, was a prime abuser of the temporary appointment system. According to King, state workers would be interrupted on the job by letter carriers informing them that they had been replaced. The Governor also violated the merit system by openly offering jobs to friends and acquaintances. *Id.*

Reacting to the Civil Service Act's inadequacies, California voters in 1934 amended the state constitution to include a depoliticized civil service system.[36] The voters' amendment, now article VII,[37] created the Personnel Board to administer the Civil Service Act but prevented the Board from exercising the broad powers that its predecessor, the Civil Service Commission, had abused.[38] Article VII requires that permanent

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[36] CAL. CONST. art. XXIV (1934, repealed 1976), now CAL. CONST. art. VII. *See supra* note 4. The constitutional amendment made the civil service system largely immune from the Governor and the legislature. The amendment declared that the Personnel Board would consist of five members appointed by the Governor, with the advice and consent of the senate. The amendment staggered the Board members' ten-year terms so that a one-term Governor could not appoint a majority of the Board. G. KING, *supra* note 33, at 29; *see* CAL. CONST. art. VII, § 2(a). Further, the amendment prohibited temporary appointments lasting longer than six months. *Id.* §§ 2(a), 5 (maximum length of temporary appointment is now 9 months in any 12 month period). Supporters of the amendment expressed its purpose:

> The purpose of this constitutional amendment is to promote efficiency and economy in State government. The sole aim of the act is to prohibit appointments and promotion in State service except on the basis of merit, efficiency and fitness ascertained by competitive examination. Appointments of inefficient employees for political reasons are thereby prohibited, thus eliminating the "spoils system" from State employment.
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> [T]his constitutional amendment provides: (1) employment in the classified service based solely on merit and efficiency; (2) a nonpartisan Personnel Board; (3) prohibition of exemptions from the merit system of employment; (4) correction of the temporary political appointment evil.
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> Having by constitutional mandate prohibited employment on any basis except merit and efficiency, thereby eliminating as far as possible the "spoils system" of employment, the Legislature is given a free hand in setting up laws relating to personnel administration for the best interests of the State, including the setting up of causes for dismissal such as inefficiency, misconduct, or lack of funds.

BALLOT PAMPHLET, PROPOSED AMENDMENTS TO CAL. CONST. WITH ARGUMENTS TO VOTERS, GEN. ELECTION 12 (Nov. 6, 1934); *see also* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 184 n.7, 624 P.2d 1215, 1224 n.7, 172 Cal. Rptr. 487, 496 n.7 (1981) (proposed amendment's purpose was to establish the merit principle as a constitutional precept in California state employment). Voters passed the initiative by a margin greater than three to one. G. KING, *supra* note 33, at 29.

[37] CAL. CONST. art. VII; *see supra* notes 3-4 and accompanying text.

[38] The amendment prohibited the Personnel Board from exempting positions from the civil service. Instead, the constitution itself establishes exempted positions. CAL. CONST. art. VII, § 4. Section 4 presently exempts 13 broad categories of positions from the civil service. *See, e.g., id.* §§ 4(a) (officers and employees appointed or employed by the legislature or legislative committees); 4(d) (members of boards and commissions); 4(k) (members of the state militia engaged in military service). New exemptions can be created only by constitutional amendment. *See supra* note 3.

appointment and promotion be based generally "on merit ascertained by competitive examination."[39] Article VII also confers a narrowly defined authority upon the Personnel Board: to enforce the state civil service statutes, adopt rules, prescribe probationary periods and classifications, and review disciplinary actions.[40] The Personnel Board exercises its authority through the civil service statutes, an ever-expanding amalgam of government code sections that regulate virtually all aspects of state personnel relations.[41] Over time, the Personnel Board's focus has shifted from eliminating abuses of the spoils system to promoting government economy, efficiency, and fairness.[42]

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[39] CAL. CONST. art. VII, § 1(b). The legislature reaffirmed this constitutional merit precept when it enacted SEERA in 1977. CAL. GOV'T CODE § 3512 (West Supp. 1985) ("Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, . . . provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto."); *see also* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 202, 624 P.2d 1215, 1235, 172 Cal. Rptr. 487, 507 (1981).

[40] CAL. CONST. art. VII, § 3(a). The Personnel Board has additional minor constitutional functions, none of which are relevant to this Comment. *See, e.g., id.* §§ 2 (the Board elects one of its members as presiding officer; the Board elects an executive officer and prescribes her compensation) and 6 (Personnel Board may pass "special rules" in limited situations).

[41] The civil service statutes, CAL. GOV'T CODE §§ 18500-19798 (West 1980 & Supp. 1985), include the original Civil Service Act, 1913 Cal. Stat. ch. 590, and subsequent legislative enactments. The civil service statutes are collectively named the State Civil Service Act. CAL. GOV'T CODE § 18570 (West 1980). *See generally id.* §§ 18650-18720.5 (West 1980 & Supp. 1985) (administration); 18800-18807 (West 1980 & Supp. 1985) (classification); 18900-18979 (West 1980 & Supp. 1985) (employment lists); 19050-19237 (West 1980 & Supp. 1985) (appointments); 19250-19406 (West 1980 & Supp. 1985) (service); 19500-19593 (West 1980 & Supp. 1985) (separations from service); 19600-19607 (West 1980) (demonstration projects); 19610-19622 (West Supp. 1985) (shared savings programs); 19630-19635 (West 1980) (actions); 19680-19765 (West 1980 & Supp. 1985) (prohibitions and offenses); 19770-19786 (West 1980 & Supp. 1985) (military service); 19790-19798 (West 1980) (state civil service affirmative action program).

[42] *See* J. GRODIN, D. WOLLETT & R. ALLEYNE, JR., *supra* note 5, at 146; Rehmus, *supra* note 17, at 926-27. Developing "modern" personnel administration practices helped account for the Personnel Board's shifting focus. *See generally* R. DWOSKIN, RIGHTS OF THE PUBLIC EMPLOYEE 25-33 (1978). New areas of concern included the processing of employee grievances; employee training; salary administration; and safety, morale, and attendance control programs. Rehmus, *supra*, at 927. Another reason for the Personnel Board's shift was the declining power of political parties. *See* N. NIE, S. VERBA & J. PETROCIK, THE CHANGING AMERICAN VOTER 47-74 (enlarged ed. 1979). The changing partisanship of the American electorate is one measure of this decline. In 1960, 46% of Americans identified themselves as Democrats, 27% as Republicans, and 23% as Independents. In 1976 the tally was 40% Democrat, 33% Republi-

However, in 1977 the legislature shattered the Personnel Board's dominion over state employee relations. By enacting SEERA,[43] with its grant of collective bargaining rights to state employees, the legislature stopped the Personnel Board from unilaterally determining employment conditions for these employees.[44] The next section of this Comment explores the broad range of employment issues about which state employees and the state must collectively bargain under SEERA. The section also outlines the limitations that article VII imposes on the permissible scope of bargaining.

B. SEERA and Collective Bargaining for State Employees

Over time, the concerns of state workers shifted from eliminating political patronage as the primary source of their employment and job

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can, and 36% Independent. Thus, in just 16 years the number of Americans calling themselves Independents increased by more than 56%. A. CLEM, AMERICAN ELECTORAL POLITICS: STRATEGIES FOR RENEWAL 36 (1981). The decreasing prominence of partisan politics caused political pressures on state employees to decline markedly.

The Personnel Board's shifting focus from eliminating partisan excesses to promoting efficiency altered the Board's role. Today the Board administers a comprehensive program of personnel management for state employees. The Board's diverse duties include ensuring state compliance with various state and federal anti-discrimination laws, *id.* §§ 19700-19706 (West 1980); and overseeing and coordinating affirmative action programs for state employers, CAL. GOV'T CODE §§ 19790-19798 (West 1980), "upward mobility" plans of state employers for employees in low-paying positions, *id.* §§ 19400-19440 (West 1980).

[43] 1977 Cal. Stat. ch. 1159, codified at CAL. GOV'T CODE §§ 3512-3524 (West 1980 & Supp. 1985). The legislature patterned SEERA after an earlier legislative enactment, the Educational Employment Relations Act (EERA), which became operative July 1, 1976. 1975 Cal. Stat. ch. 961, § 2. EERA authorized collective bargaining over wages, hours, and specifically enumerated terms and conditions of employment for California public school (kindergarten through grade 12) and community college employees. CAL. GOV'T CODE §§ 3540-3549.3 (West 1980 & Supp. 1985). The legislature created the Educational Employment Relations Board (EERB) in 1975 to administer EERA. *Id.* § 3541 (West Supp. 1985); *see supra* note 27.

[44] In 1981, two years after a state "Little Hoover Commission" recommended a reorganization of state personnel and employee relations functions, *see, e.g.*, *Little Hoover Commission's Agenda for Civil Service Reform*, 43 CAL. PUB. EMPLOYEE REL. 73, 73-75 (1979), the legislature created the Department of Personnel Administration to manage the "nonmerit aspects" of the state's personnel system. 1981 Cal. Stat. ch. 230, § 55; CAL. GOV'T CODE § 19815.2 (West Supp. 1985). Nonmerit aspects include collective bargaining with state employee organizations. *See supra* note 12. The legislature also created the Division of Labor Relations within the Department, primarily to act as the Governor's representative in all labor relations matters other than the "meet and confer" process. 1981 Cal. Stat. ch. 230, § 55; *see* CAL. GOV'T CODE §§ 19819.5-19819.7 (West Supp. 1985). *See also supra* note 11 ("meet and confer").

security to attaining collective organizing and bargaining rights.[45] The legislature responded to the employees' new concerns by enacting SEERA, which entitles state employees[46] to bargain collectively[47] with the state[48] about subjects within the "scope of representation."[49] The legislature limited the scope of representation to "wages, hours, and other terms and conditions of employment."[50] The latter phrase is a

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[45] Lewin & Horton, *supra* note 17, at 199. Public sector employees were dissatisfied with their wages and fringe benefits, which lagged behind those of private sector employees. Public sector employees also drew increased attention from private sector unions seeking to bolster their dwindling ranks. *See* R. DWOSKIN, *supra* note 42, at 25-33; H. EDWARDS, R. CLARK, JR. & C. CRAVER, *supra* note 11, at 1-5. The shift was not attributable to employee discontent with the merit system. W. CROUCH, *supra* note 1, at 121.

Union membership in the private sector sharply declined in the 1970's. In 1970, 21.8 million nonagricultural employees in the United States were unionized. These employees represented 30.8% of the total U.S. workforce. In 1980, 22.8 million of these employees were unionized, but they now represented only 25.2% of the total workforce. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83 at 409 (103d ed. 1982). In California, the decline was even more drastic. From 1970 to 1980, unionized private sector employees as a percentage of the total nonagricultural work force dropped from 35.7 to 27.0%. *Id.* In the public sector, however, the numbers were very different. From 1970 to 1978, unionized state and local government employees in the United States increased their ranks from 4.6% to 10.3% of the total state and local government work force. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981 at 412 (102d ed. 1981); UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975 at 371 (96th ed. 1975).

[46] SEERA's terms cover all California civil service employees. CAL. GOV'T CODE § 3513 (West Supp. 1985); *see supra* note 6.

[47] *See supra* note 11.

[48] *See supra* note 12.

[49] CAL. GOV'T CODE § 3516 (West Supp. 1985).

[50] *Id.* Section 3516 provides: "The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Section 3516's primary language closely parallels the language that defines the scope of representation for private sector employees under § 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d) (1982). *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958) (interpreting NLRA's scope). PERB generally tries to conform its SEERA scope determinations to NLRA scope determinations:

> In interpreting language of SEERA, cognizance should be taken of the decisions of the National Labor Relations Board interpreting identical or similar language in the NLRA. In light of the virtually identical scope language of SEERA and the NLRA, PERB finds private sector precedent regarding transfer to be applicable to SEERA cases.

California Dep't of Transp., PERB Decision No. 333-S (Aug. 18, 1983), 7 Pub. Em-

term of art that the legislature left for PERB to interpret. In a SEERA unfair practice decision, PERB held that subjects not clearly falling within the category of wages or hours are "terms and conditions of employment" if they meet the following criteria: (1) the subject involves the employment relationship; (2) the subject so concerns both management and employees that conflict is likely to occur; (3) the mediating influence of collective bargaining is appropriate to resolving the conflict; and (4) the required negotiations will not unduly abridge the state's "freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to achieving the state's mission."[51] As interpreted by PERB, SEERA's scope of union representation is broad enough to include many subjects that state employees consider important to their job satisfaction.[52]

When bargaining under SEERA, the state and state employee orga-

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ployee Rep. Cal. (LRP) 922, 923 (citation omitted). *See also* Fire Fighters Union v. City of Vallejo, 12 Cal. 3d 608, 617, 526 P.2d 971, 977, 116 Cal. Rptr. 507, 513 (1974) (NRLA cases provide reliable, if only analogous, precedent on public sector labor relations issues). In Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960), the California Supreme Court held that:

> When legislation has been judicially construed and a subsequent statute on the same or analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes.

Id. at 688-89, 355 P.2d at 907, 8 Cal. Rptr. at 3. The proviso language of CAL. GOV'T CODE § 3516 provides that "the scope of representation shall not include consideration of the merits, necessity or organization of any service or activity provided by law or executive order." PERB interpreted this language as merely codifying the portion of PERB's announced SEERA scope test that recognizes essential managerial prerogatives to be outside the scope of representation. California Dep't of Transp., PERB Decision No. 361-S (Nov. 28, 1983), 7 Pub. Employee Rep. Cal. (LRP) 1182, 1184, *petition for rev. granted*, No. 3 Civ. 23587 (3d Dist. June 6, 1984).

[51] California Dep't of Transp., PERB Decision No. 361-S (Nov. 28, 1983), 7 Pub. Employee Rep. Cal. (LRP) 1182, 1184, *petition for rev. granted*, No. 3 Civ. 23587 (3d Dist. June 6, 1984). PERB's SEERA scope test parallels the scope test that PERB promulgated for public school employees engaged in collective bargaining under EERA. CAL. GOV'T CODE § 3543.2(a) (West Supp. 1985); Anaheim Union High School Dist., PERB Decision No. 177 (Oct. 28, 1981), 5 Pub. Employee Rep. Cal. (LRP) 660, 660; *see also supra* note 43. The California Supreme Court cited PERB's EERA scope test with approval in San Mateo City School Dist. v. Public Employment Relations Bd., 33 Cal. 3d 850, 857-60, 866, 663 P.2d 523, 527-29, 533-34, 191 Cal. Rptr. 800, 804-806, 810-11 (1983).

[52] *See generally supra* note 14 and accompanying text.

nizations[53] negotiate about subjects within SEERA's scope of representation.[54] The parties need not reach agreement upon, or even negotiate, every possible subject of bargaining. However, if one bargaining party insists on negotiating a subject within the scope of representation, the other party may not refuse to negotiate.[55] Parties generally limit their proposals to important subjects that they perceive to be within scope.[56] The parties negotiate some or all of these proposals and include the proposals agreed upon in a memorandum of understanding.[57] The state submits this memorandum to the legislature;[58] if the legislature approves it, the memorandum binds the parties to its terms for the life of the agreement.[59]

However, bargaining under SEERA does not take place in a vac-

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[53] *See supra* note 13.

[54] California Dep't of Transp., PERB Decision No. 361-S (Nov. 28, 1983), 7 Pub. Employee Rep. Cal. (LRP) 1182, 1184, *petition for rev. granted*, No. 3 Civ. 23587 (3d Dist. June 6, 1984); *see* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 178-79, 624 P.2d 1215, 1220, 172 Cal. Rptr. 487, 492 (1981).

[55] The National Labor Relations Board (NLRB) divides possible subjects of bargaining into three categories: (1) "compulsory subjects" — those about which bargaining is required by statute; (2) "permissive subjects" — those about which the parties may bargain if they choose; and (3) "illegal subjects" — those about which the parties may not bargain under any circumstances. N.L.R.A. § 8(d), 29 U.S.C. § 158(d) (1982); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-49 (1958). PERB has never officially recognized this distinction, and SEERA does not provide for it. Nonetheless, this distinction may reasonably be applied to possible bargaining subjects under SEERA. *See* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, 494. In that case, the PERB hearing officer rejected the DPA's argument that promotions are only a "permissive" SEERA bargaining subject. *Id.* at 494. The DPA had argued that even if the parties agreed to a proposal on promotions, the proposal would not take effect until the legislature amended a conflicting statutory provision. *See infra* notes 64-66 and accompanying text. The hearing officer found "no logic" leading from this proposition to the conclusion that promotions are only a permissive, rather than a compulsory, subject of bargaining. 8 Pub. Employee Rep. Cal. (LRP) at 494. The hearing officer's analysis, however, assumed that SEERA incorporated the distinction between mandatory and permissive bargaining subjects. *Id.*

[56] *See supra* notes 50-51 and accompanying text (outlining SEERA's generally broad scope of representation).

[57] CAL. GOV'T CODE § 3517.5 (West 1980). Under SEERA, the document that contains the parties' mutually agreed upon provisions is called a memorandum of understanding (memorandum). *Id.*

[58] As the final authority over all state budgetary and employee matters, the legislature must approve each memorandum before it becomes operative. CAL. GOV'T CODE § 3517.5 (West 1980); *cf. id.* § 3517.7 (West Supp. 1985) (parties may renegotiate unapproved memoranda provisions that require legislative funding).

[59] CAL. GOV'T CODE § 3517.6 (West Supp. 1985).

uum; SEERA is only one group of state laws that must coexist with other state laws. This fact complicates bargaining. Of primary concern to negotiators is the state constitution. Notwithstanding SEERA's scope of union representation, either party may refuse to negotiate a proposal that directly conflicts with the state constitution.[60] SEERA negotiations potentially conflict with article VII of the constitution when a bargaining proposal relates to hiring and promotion[61] or to subjects within the Personnel Board's exclusive constitutional jurisdiction.[62] Any direct conflicts must be resolved in the constitution's favor.[63]

SEERA negotiations may also conflict with existing state statutes, especially the civil service statutes.[64] However, these statutory conflicts should not affect the negotiability of proposals offered under SEERA. The legislature anticipated conflicts between proposals and existing statutory code provisions. It resolved them with a series of statutory mechanisms that include automatic supercession of some code sections and legislative amendment of others.[65] These mechanisms preclude bar-

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[60] The state constitution is the supreme law of the land in California, subject only to the United States Constitution. CAL. CONST. art. I, §§ 24, 26; Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 454 (SEERA does not permit negotiation of proposals that violate article VII of the California Constitution; instead, "[s]uch proposals are illegal and nonnegotiable."), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984); CAL. GOV'T CODE § 3512 (West Supp. 1985) ("Nothing in [SEERA] shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees . . . provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto.").

[61] CAL. CONST. art. VII, § 1(b). This section provides that "[i]n the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." *See infra* notes 117-29 and accompanying text.

[62] CAL. CONST. art. VII, § 3(a) provides: "The [Personnel] [B]oard shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions." *See infra* notes 78-82, 94-97, 102-07, 110-15 and accompanying text.

[63] *See supra* note 60.

[64] CAL. GOV'T CODE §§ 18500-19798 (West 1980 & Supp. 1985); *see supra* note 41. For example, a bargaining proposal might advocate hiring 6 temporary employees in a 45 employee unit. This number would exceed the maximum allowable number of temporary employees, which equals 10% of the total employees in the unit. CAL. GOV'T CODE § 19080.5 (West Supp. 1985). In this case, the upper limit would be five temporary employees.

[65] CAL. GOV'T CODE § 3517.6 (West Supp. 1985). The legislature sought to ensure that conflicts would be addressed only after the parties agreed to a memorandum's

gaining parties from lawfully refusing to negotiate proposals that con-

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provisions, thus eliminating the bargaining table as a conflict stage. The legislature determined that certain negotiated memorandum provisions would automatically prevail over certain conflicting Government Code sections. *Id.* The subordinate sections pertained to wages, hours, overtime, holidays, vacations, sick leave, disability leave, and similar subjects. The legislature also stated that memorandum provisions would prevail over conflicting Government Code sections dealing with layoffs and their effects, unless the Personnel Board found the memorandum's terms inconsistent with the merit principle. *Id.* If so, the Government Code sections would prevail unless the affected memorandum provisions were renegotiated to eliminate the conflict. *Id.* Finally, the legislature provided that a memorandum provision that conflicted with any other statutory code section would not become operative unless the legislature approved it and amended the code section. *Id.*

The legislature's power to amend prior statutory law, including the civil service statutes, is limited only by the state and federal constitutions. *See, e.g.*, Mitchell v. Winnek, 117 Cal. 520, 525, 49 P. 579, 581 (1897). The legislature may exercise all legislative power not expressly or implicitly denied to it by the constitution. Methodist Hosp. of Sacramento v. Saylor, 5 Cal. 3d 685, 691, 488 P.2d 161, 164-65, 97 Cal. Rptr. 1, 4-5 (1971) (" 'we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.' ") (citation omitted); Stephens v. Clark, 16 Cal. 2d 490, 492, 106 P.2d 874, 876 (1940); *see* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 180, 624 P.2d 1215, 1221, 172 Cal. Rptr. 487, 493 (1981). A PERB hearing officer rejected the argument that CAL. CONST. art. VII, § 3(a), by giving the Personnel Board authority "to enforce the civil service statutes," vests the Personnel Board with constitutional adjudicative powers. Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 445, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984). The Personnel Board's adjudicative powers rest simply on a statutory delegation of legislative authority. Shepherd v. State Personnel Bd., 48 Cal. 2d 41, 47, 307 P.2d 4, 8 (1957); *see* Boren v. State Personnel Bd., 37 Cal. 2d 634, 637-38, 234 P.2d 981, 983 (1951). Thus, the Personnel Board's adjudicative powers can be revoked or modified by the legislature at will. *See, e.g.*, Mitchell v. Winnek, 117 Cal. 520, 525, 49 P. 579, 581 (1897). To amend a statute, a majority of both houses of the legislature, the assembly and the senate, passes a bill to the Governor. CAL. CONST. art. IV, § 8(b). If the Governor signs the bill or does not return it to the legislature within 12 days, the bill becomes law. CAL. CONST. art. IV, § 10(a). The Governor may veto the bill by returning it with any objections to the house of origin. *Id.* A vetoed bill subsequently passed by two-thirds of the membership of each house becomes law. *Id. See generally id.* art. IV, §§ 1, 8-10.

The approach taken by the legislature in CAL. GOV'T CODE § 3517.6 resembles the approach taken by the American Federation of State, County, and Municipal Employees (AFSCME) in its proposed National Public Employee Relations Act. H.R. 17383, 91st Cong., 2d Sess., 116 CONG. REC. 13,823 (1970); H.R. 18972, 91st Cong., 2d Sess., 116 CONG. REC. 28,886. Under the proposed Act, the provisions of a negotiated collective bargaining agreement supersede all conflicting merit regulations, but Congress must approve the entire agreement. Proposed National Public Employee Relations Act, §§ 5(c), 13.

flict with existing state statutes.[66]

Because litigation delayed SEERA's full implementation, bargaining did not officially begin until August 1981.[67] At that time, employee organizations advanced proposals on subjects that they perceived to be negotiable under SEERA.[68] The proposals addressed many areas, in-

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[66] *See* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-137-S (Nov. 27, 1984), 9 Pub. Employee Rep. Cal. (LRP) 3, 12; California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, 737 ("the legislature did not permanently exclude from negotiations any subject within the SEERA scope of representation because of a possible conflict between the provisions of a memorandum of understanding and state law. Just the opposite is true."), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, 493-94 (the legislature envisioned parties negotiating proposals that conflict with statutory code sections). Thus, the parties are free to negotiate memoranda provisions that are contrary to existing state statutes. The only limitation is that negotiated memoranda provisions may require legislative action to become operative. CAL. GOV'T CODE § 3517.6 (West Supp. 1985), discussed *supra* note 65; *see* Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 453 (the last sentence of CAL. GOV'T CODE § 3517.6 indicates that the legislature intended to reserve to itself the right to judge the "ultimate product" of these negotiations), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984). *But see* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 187, 624 P.2d 1215, 1225, 172 Cal. Rptr. 487, 497 (1981) (while discussing the Personnel Board's constitutional authority to classify positions, the court in dicta stated that "[n]o provision of [SEERA] purports to authorize any other agency to classify positions in the civil service, and the act excludes the numerous statutory provisions relating to the State Personnel Board's classification power . . . from the list of statutes that may be superseded by the terms of a memorandum of understanding.")

The legislature may approve a memorandum provision and modify an inconsistent statute or statutes. Presumably, then, the Personnel Board must modify the appropriate rules, practices, or instructions that it gives to state agencies to implement legislation. However, the situation has not yet arisen.

[67] Once SEERA took effect on July 1, 1978, PERB implemented the Act by promulgating regulations, *see* CAL. ADMIN. CODE tit. 8, RR. 31001-51685 (1983), and holding hearings to determine appropriate bargaining units. Bogue, *PERB Determines 20 State Bargaining Units*, 43 CAL. PUB. EMPLOYEE REL. 7 (1979); Schneider, *Approaching the Unit Determination Problem: California's New Law and Experience Elsewhere*, 37 CAL. PUB. EMPLOYEE REL. 2 (1978). Litigation over the Act's constitutionality delayed any actual bargaining. In March of 1981, the California Supreme Court held that SEERA was facially constitutional. Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 624 P.2d 1215, 172 Cal. Rptr. 487 (1981). Bargaining officially began in August, 1981. *First Bargaining Sessions Start, Dental Plan Implemented*, 51 CAL. PUB. EMPLOYEE REL. 54 (1981).

[68] *See supra* note 20.

cluding discipline, promotion, and classification.[69] The state refused to negotiate about these and other proposals, claiming that they transgressed state law. However, the state included under "state law" both the civil service statutes and article VII.[70] The state did not limit its objections to subjects within the Personnel Board's constitutional jurisdiction. The state's refusal to negotiate these proposals significantly restricted SEERA's bargaining scope and denied state employees the full extent of their statutory rights. Part II of this Comment examines article VII; it concludes that article VII's terms would be unaffected by most SEERA bargaining proposals.

II. Potential Areas of Conflict Between SEERA Bargaining and the State Constitution

The state has unlawfully restricted SEERA bargaining by refusing to negotiate about subjects that it claims contravene various aspects of state law.[71] Parties can lawfully restrict bargaining only to the extent that bargaining is inconsistent with the terms of California Constitution article VII that specifically address state employee relations and the civil service.[72] Parties can negotiate proposals that address areas covered by article VII, so long as the negotiations do not directly conflict with article VII's terms.[73] Thus, if one party insists on negotiating a proposal that she perceives to be within SEERA's scope of union representation, the other party may not refuse to cooperate unless the proposal expressly contravenes article VII.

Part II of this Comment explores the provisions of article VII that limit collective bargaining. It first examines article VII's grant of constitutional authority to the Personnel Board, and then considers article

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[69] *See infra* notes 83-88 (discipline), 98-99 (classification), 124-25 (promotion), and accompanying text.

[70] *See supra* notes 21-22 and accompanying text.

[71] *Id.*

[72] Cal. Const. art. VII, §§ 1-9 ("Public Officers and Employees"); *see supra* notes 36-40 and accompanying text.

[73] This conclusion is supported by the statutory nature of SEERA collective bargaining rights, when coupled with well settled rules of constitutional construction. "Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the [California] Legislature." Methodist Hosp. of Sacramento v. Saylor, 5 Cal. 3d 685, 691, 488 P.2d 161, 164, 97 Cal. Rptr. 1, 4 (1971). These restrictions and limitations are to be construed strictly, and "are not to be extended to include matters not covered by the language used." Collins v. Riley, 24 Cal. 2d 912, 916, 152 P.2d 169, 171. Thus, all intendments are to favor the validity of the legislature's exercise of its plenary authority.

VII's mandated merit system for personnel hiring and promotion. This part finds that article VII confers only a limited authority upon the Personnel Board and only generally defines a merit system for hiring and promotion. It thus concludes that parties bargaining under SEERA have substantial leeway to negotiate proposals on civil service issues, provided that the proposals do not contravene article VII's implied prohibitions.

A. The Personnel Board's Constitutional Authority

Article VII invests the Personnel Board with authority to review disciplinary actions, prescribe classifications and probationary periods, adopt rules, and enforce the civil service statutes.[74] Bargaining under SEERA potentially conflicts with this constitutional authority when parties negotiate proposals about these subjects. Section A examines bargaining proposals that potentially conflict with the Personnel Board's constitutional authority. This section finds that parties are precluded from negotiating only those bargaining proposals that directly conflict with the Personnel Board's constitutional prerogative.[75]

1. Disciplinary Actions

State employers initially have wide latitude to discipline their employees.[76] However, once the employers institute formal disciplinary proceedings, their actions are restricted by a series of procedural safeguards.[77] In addition, the Personnel Board reviews the disciplinary ac-

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[74] CAL. CONST. art. VII, § 3(a).

[75] *See generally* Los Angeles Metropolitan Transit Auth. v. Public Util. Comm'n, 59 Cal. 2d 863, 869, 382 P.2d 583, 586, 31 Cal. Rptr. 463, 466 (1963) ("the provisions of our constitution 'must receive a liberal, practical common-sense construction' and be 'construed where possible to meet changed conditions and the growing needs of the people.' ") (citation omitted).

[76] State employers have 24 general grounds for disciplining employees. CAL. GOV'T CODE § 19572 (West Supp. 1985). The grounds include incompetency, insubordination, drunkenness on duty, addiction to controlled substances, immorality, improper political activity, misuse of state property, and unlawful discrimination on the basis of prohibited classifications against the public or other state employees while acting in the capacity of a state employee. *Id.* (b), (e), (g), (i), (l), (n), (p), & (w).

[77] CAL. GOV'T CODE §§ 18703, 19570-19589 (West 1980 & Supp. 1985). A state employer seeking to take adverse action against an employee must first provide the employee with timely written notice, specifying the nature of the alleged misconduct and advising the employee of her right to appeal. *Id.* § 19574 (West Supp. 1985). An employee who contests an adverse action is entitled to a hearing within a reasonable time before the Personnel Board. *Id.* § 19578 (West Supp. 1985). However, a negoti-

tions state employers bring against their employees.[78] However, the Personnel Board's constitutional authority does not require exclusive review of all discipline.[79] Rather, the Personnel Board's duty is satisfied

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ated memorandum provision can eliminate the employee's right to a hearing. *Id.* § 19576 (West Supp. 1985). The Personnel Board must issue a "just and proper" decision within a reasonable time after the hearing. *Id.* §§ 19582(a), 19583 (West Supp. 1985). The Board can modify or revoke the adverse action taken by the state employer. *Id.* § 19583 (West Supp. 1985). It can also return the employee to her position from the date of the adverse action or from a specified later date. *Id.* The employee must be paid her salary for the period of time that the Board finds the adverse action was improperly in effect. *Id.* § 19584 (West Supp. 1985). *See generally* Skelly v. State Personnel Bd., 15 Cal. 3d 194, 201-202, 124 Cal. Rptr. 14, 19 (1975) (these procedures "help insure that the goals of civil service are not thwarted by those in power, . . . [by] invest[ing] employees with substantive and procedural protections against punitive actions by their superiors.").

[78] CAL. CONST. art. VII, § 3(a). The legislature calls disciplinary actions "adverse actions," which it defines as dismissals, demotions, suspensions, and other disciplinary actions. CAL. GOV'T CODE § 19570 (West Supp. 1985). The legislature shifted the administration of salaries, hours, training, performance evaluations, layoffs, and grievances from the Personnel Board to the Department of Personnel Administration. *Id.* § 19816 (West Supp. 1985). The Personnel Board, however, retained the right to review disciplinary actions regarding layoffs or demotions of state employees "for consistency with merit employment principles." *Id.* § 19816.5 (West Supp. 1985). *See generally* CAL. CONST. art. VII, §§ 1-3.

[79] Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 196-200, 624 P.2d 1215, 1231-34, 172 Cal. Rptr. 487, 503-506 (1981). In concluding that PERB's jurisdiction over unfair practices may in some cases overlap with the Personnel Board's jurisdiction to review disciplinary actions, the Supreme Court held that:

> [N]othing in either the language or history of article VII, section 3, subdivision (a) suggests that in granting the State Personnel Board the power to 'review disciplinary actions' the drafters intended thereby completely to preclude the Legislature from establishing other agencies whose specialized watchdog functions might also, in some cases, involve the consideration of such disciplinary action.

Id. at 198-99, 624 P.2d at 1233, 172 Cal. Rptr. at 505. When it created the Department of Personnel Administration in 1981, the legislature shifted certain discipline related personnel functions from the Personnel Board's jurisdiction to the Department's jurisdiction. 1981 Cal. Stat. ch. 230, § 55. Those functions included reviewing automatic terminations for continued absence without leave, CAL. GOV'T CODE § 19996.2 (West Supp. 1985), employee protests about alleged disciplinary transfers, *id.* § 19994.3 (West Supp. 1985), and denials of merit salary adjustments, *id.* § 19832 (West Supp. 1985). The transfer of responsibility for reviewing automatic terminations appears to contravene the Personnel Board's constitutional authority to review disciplinary actions. CAL. CONST. art. VII, § 3(a). Interestingly, however, the Personnel Board did not dispute the transfer. Testimony of California State Personnel Board Chief Hearing Officer Jim Waller, *reported in* Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 448 ("Indeed, Personnel Board hearing officers hear[ing] cases involving

as long as the Board retains the ultimate power to review disciplinary actions.[80]

Because of this limited authority, a bargaining proposal affecting disciplinary actions does not necessarily conflict with the Personnel Board's constitutional review of state employee discipline.[81] However,

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disputes about such matters . . . forward the cases to the Department for final determination."), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984).

[80] *See* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, 498-99 (Personnel Board's constitutional authority to review disciplinary actions not constrained by being "placed at the end of a 'bargained' arbitration procedure"); Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 454-55 (proposal on disciplinary grievance procedure nonnegotiable because it restricted the Personnel Board's "right of ultimate review"), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984). *But cf.* California Dep't of Transp., PERB Decision No 459-S (Dec. 12, 1984), 9 Pub. Employee Rep. Cal. (LRP) 82, in which PERB overturned a Personnel Board-approved disciplinary suspension of a state employee. PERB based its decision on a hearing officer's finding that the employee had been disciplined unlawfully for exercising rights protected under SEERA. PERB rejected an argument that its holding would interfere with the Personnel Board's authority to review disciplinary actions. For authority PERB relied on the California Supreme Court's admonition to PERB and the Personnel Board to harmonize their competing jurisdictions, " 'insofar as possible, . . . to permit an accommodation of [their] respective tasks.' " *Id.* at 83 (quoting Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 198, 624 P.2d 1215, 1233, 172 Cal. Rptr. 487, 505 (1981)). PERB concluded that its own juridictional authority extended to ensuring "that any disciplinary action taken against a State employee is initiated for reasons other than the exercise of SEERA rights." *Id.* Whether the state will appeal PERB's decision to the courts is, at present, an open question. *See PERB Overturns SPB Discipline, Finds 'No Conflict' in Jurisdiction*, 64 CAL. PUB. EMPLOYEE REL. 40, 41 (1985) ("[T]he case is likely to see some judicial test" of the constitutional issue involved.).

[81] PERB has never determined whether disciplinary actions are a "term and condition of employment" that must be negotiated under SEERA. *See supra* notes 46-51 and accompanying text. Persuasive authority, however, indicates that they are. Recently, a PERB hearing officer found that proposals on discipline, discharge, and other adverse employer actions were negotiable under SEERA. Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 450-53, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984). In addition, PERB has held that adverse actions must be negotiated under EERA. San Mateo City School Dist., PERB Decision No. 375 (Jan. 5, 1984), 8 Pub. Employee Rep. Cal. (LRP) 130, 143-44, 148; *see supra* notes 43 & 51. Moreover, the NLRB has held that adverse actions are a mandatory subject of bargaining under § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982). NLRB v. Weingarten, 420 U.S. 251, 259-60 (1974); United States Gypsum Co., 94 N.L.R.B. 110, 111-16 (1951); *see supra* notes 50 & 55.

parties may not negotiate proposals that prevent final Personnel Board review of disciplinary actions.[82] For example, a PERB hearing officer recently found provisions in two separate bargaining proposals on disciplinary actions to be nonnegotiable.[83] The provision in the first proposal removed the Personnel Board's power to review disciplinary proceedings in which an arbitrator decided against imposing discipline.[84] The provision in the second proposal allowed an employee at the final stage of the negotiated grievance procedure to elect between appealing to an arbitrator or to the Personnel Board.[85] The hearing officer correctly concluded that the proposals unlawfully prevented ultimate Personnel Board review of certain disciplinary actions, and were therefore nonnegotiable.[86]

Parties may agree to a memorandum provision affecting disciplinary actions that conflicts with an existing state statute. The legislature can implement the memorandum provision simply by amending the inconsistent statute. CAL. GOV'T CODE § 3517.6 (West Supp. 1985); *supra* notes 65-66 and accompanying text.

Layoffs are treated differently from disciplinary actions. If the Personnel Board decides that layoff provisions in a memorandum conflict with the merit principle, the provisions will not take effect unless renegotiated to eliminate the alleged conflict. Thus, the legislature cannot cure the conflict by amending the statute. CAL. GOV'T CODE § 3517.6 (West Supp. 1985); *see supra* note 65.

[82] *See supra* notes 78-80 and accompanying text.

[83] Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443 (consolidated decision involving disciplinary proposals of five employee organizations), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984).

[84] *Id.* at 445. *Cf.* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485. The hearing officer approved a bargaining proposal that denied Personnel Board review of an arbitrator's decision to dismiss a disciplinary action. The proposal required that the parties submit all disciplinary actions arising under the memorandum to an arbitrator, rather than to a Personnel Board hearing officer. The proposal allowed the Personnel Board to review only arbitrator decisions to "uphold" or "reduce" disciplinary action. *Id.* at 488, 499. The hearing officer posed the key constitutional question as follows: If an arbitrator dismisses a disciplinary action, does a disciplinary action remain for the Personnel Board to review? *Id.* at 499. The hearing officer found the answer "debatable" and "exactly the sort of question which can be reconciled in the course of collective bargaining." *Id.* He thus concluded that the proposal did not violate the Personnel Board's constitutional authority to review disciplinary actions, and was therefore negotiable. *Id.*

[85] Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 455, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984).

[86] The hearing officer found the provisions nonnegotiable because they "restrict[ed] the Personnel Board's right of ultimate review" of disciplinary actions. *Id.*; *see* CAL. CONST. art. VII, § 3(a).

Apart from these instances, however, the range of allowable bargaining proposals affecting discipline is broad. Parties may negotiate proposals that provide for intermediate review of disciplinary actions, or that relate to disciplinary actions in some other way, as long as the proposals do not contravene the Personnel Board's power of final review. For example, a PERB hearing officer recently found negotiable a proposal that required the employer to have "just cause" to impose discipline, and that subjected employer violations of this requirement to the parties' negotiated grievance procedure.[87] However, the proposal allowed the Personnel Board ultimate review of all disciplinary actions, including actions originally reviewed by an arbitrator.[88] The hearing officer's finding of negotiability was proper because the proposal merely prescribed standards of review, which the Board could follow if it desired. Because the proposal did not constrain unduly the Personnel Board's power of review, it did not directly conflict with the Board's constitutional authority.

2. Classification

State employees are generally classified according to the job duties that they perform.[89] An employee's job classification affects her wages and the range of positions available to her through promotion.[90] The Personnel Board administers a single classification plan[91] for all state employees.[92] This classification plan includes job titles, job duties and responsibilities, minimum qualifications, and salary ranges for each class of positions.[93]

Article VII authorizes the Personnel Board to determine classifications.[94] The California Supreme Court concluded that this power was

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[87] Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 446, 457 n.6, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984).

[88] *Id.* at 455, 457 n.6.

[89] CAL. GOV'T CODE § 18801 (West 1980).

[90] *Id.* § 18802 (West 1980).

[91] On the role and development of classification plans, see generally W. CROUCH, *supra* note 1, at 117 (classification plans analyze and group together jobs requiring similar knowledge and skill, and bearing similar levels of responsibility); Finkelman, *Public Sector Bargaining: Some Basic Considerations*, 3 QUEENS L.J. 17, 26-27 (1976) (setting up classification standards "extremely onerous and time-consuming").

[92] CAL. GOV'T CODE § 18800 (West 1980). *See generally* CAL. GOV'T CODE §§ 18800-18807 (West 1980 & Supp. 1985).

[93] CAL. GOV'T CODE § 18800-18801 (West 1980).

[94] CAL. CONST. art. VII, § 3(a); *see* CAL. GOV'T CODE § 18702 (West 1980).

intended by the voters to be exclusive in the Personnel Board.[95] Therefore, parties bargaining under SEERA may not negotiate proposals that classify job positions.[96] However, the Personnel Board's job classification authority is limited. It does not prevent parties from negotiating proposals that relate to job classifications, provided the proposals do not actually classify job positions. Thus, for example, parties may negotiate proposals that transfer duties from one job classification to another, retitle classifications, or reassign employees from existing classifications to different or newly created classifications. These proposals are negotiable because they leave intact the Personnel Board's constitutionally mandated classification system.[97]

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[95] Stockton v. Department of Employment, 25 Cal. 2d 264, 272, 153 P.2d 741, 745 (1944); Noce v. Department of Finance, 45 Cal. App. 2d 5, 11, 113 P.2d 716, 719 (1941).

[96] *See supra* notes 94-95 and accompanying text. PERB has never determined whether classification is a negotiable subject under SEERA. *See supra* notes 46-51 and accompanying text. However, persuasive authority — by PERB hearing officers interpreting SEERA, by PERB itself under EERA, and by the NLRB interpreting the NLRA — finds classification to be a mandatory subject of bargaining. Moreover, the NLRB has specifically found job classification proposals to be mandatory subjects of bargaining under § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982). Central Cartage, Inc., 236 N.L.R.B. 1232, 1258 (1978), *enf'd*, 89 Lab. Cas. (CCH) ¶ 12,157 (7th Cir. 1979); Limpco Mfg., Inc., 225 N.L.R.B. 987, 990 (1976), *enf'd*, 96 L.R.R.M. (BNA) 2791 (3d Cir. 1977); Latin Watch Case Co., 156 N.L.R.B. 203, 206 (1965); *see supra* notes 50, 55. Further, PERB has also found job classification proposals to be mandatory subjects of bargaining under EERA. Alum Rock Union Elementary School Dist., PERB Decision No. 322 (June 27, 1983), 7 Pub. Employee Rep. Cal. (LRP) 726, 728; *accord*, San Mateo City School Dist., PERB Decision No. 375 (Jan. 5, 1984), 8 Pub. Employee Rep. Cal. (LRP) 130, 142-44; Anaheim Union High School Dist., PERB Decision No. 177 (Oct. 28, 1981), 5 Pub. Employee Rep. Cal. (LRP) 660, 660; *see supra* notes 43, 51, and accompanying text. Parties are free to negotiate bargaining proposals that relate to job classifications. However, a negotiated memorandum provision affecting job classifications will prevail over a conflicting statutory provision, *see* CAL. GOV'T CODE §§ 18800-18807 (West 1980 & Supp. 1985), only if the legislature amends the statute. CAL. GOV'T CODE § 3517.6 (West Supp. 1985); *see supra* notes 65-66 and accompanying text.

[97] *See* Alum Rock Union Elementary School Dist., PERB Decision No. 322 (June 27, 1983), 7 Pub. Employee Rep. Cal. (LRP) 726, 728 (decision to transfer duties from one classification to another must be negotiated under EERA), 729 (retitling of job classifications must be negotiated under EERA), 729 (reassignment of employees must be negotiated under EERA); *supra* notes 43, 51. A complex relationship exists between the Personnel Board's exclusive constitutional authority to prescribe classifications and the negotiability of wage proposals. Wages are specifically included within SEERA's scope of representation. CAL. GOV'T CODE § 3516 (West Supp. 1985). Thus, in Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 624 P.2d 1215, 172 Cal. Rptr. 487 (1981), the California Supreme Court rejected an argument that the Personnel Board's constitu-

Recently, a PERB hearing officer found negotiable a proposal requiring the state employer and the employee union to attempt to agree on proposed changes in job specifications and to submit their ideas jointly to the Personnel Board.[98] The proposal did not affect the Personnel Board's role in classifying positions, but simply required that the parties submit any input to the Personnel Board together rather than separately.[99] The proposal was properly held to be negotiable because it merely altered the method by which the parties recommended changes

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tional authority to prescribe classifications encompasses the power to set the classifications' salaries. *Id.* at 187-193, 624 P.2d at 1225-29, 172 Cal. Rptr. at 497-501. The court noted, however, that the Personnel Board's authority to prescribe classifications might "constrain" permissible salary agreements. *Id.* at 193, 624 P.2d at 1229, 172 Cal. Rptr. at 501. Under EERA, the state must negotiate about salary adjustments for individual job classifications within an occupational group. However, the parties must leave intact the relationship between individual positions, as established by the school board's personnel commission. Sonoma County Bd. of Educ. v. Public Employment Relations Bd., 102 Cal. App. 3d 689, 702, 163 Cal. Rptr. 464, 471-72 (1980). As it has in the past, PERB may apply this EERA precedent to cases arising under SEERA. *See, e.g.*, California Dep't of Transp., PERB Decision No. 333-S (Aug. 18, 1983), 7 Pub. Employee Rep. Cal. (LRP) 922, 923 (applying EERA test to determine "terms and conditions of employment"); California Franchise Tax Bd., PERB Decision No. 229-S (July 29, 1982), 6 Pub. Employee Rep. Cal. (LRP) 710, 712 (applying EERA principles to prevent employer retaliation against protected employee activities).

A PERB hearing officer recently found that the state was bound to negotiate with the bargaining representative for a unit of state attorneys and hearing officers about bargaining proposals on staffing ratios and salary compaction. California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-137-S (Nov. 27, 1984), 9 Pub. Employee Rep. Cal. (LRP) 3. Salary compaction results when an employee (generally a professional) is denied a promotion because the promotion would cause the employee to be paid more than a higher level employee in another classification (usually a non-professional). *Id.* at 4. The employees' bargaining proposal would have prohibited this practice. *Id.* at 6. Similarly, the employees' proposal on staffing ratios would have ended the Personnel Board's practice of allowing only 20% of each agency's attorneys to be employed at the highest level of that agency's attorney series. (For example, an agency may employ its attorneys in Legal Counsel and Staff Counsel I, II, III, and IV positions, with Staff Counsel IV representing the highest level in the series.) The hearing officer properly rejected the Department of Personnel Administration's argument (along with the Personnel Board, as an amicus) that the proposals interfered with the Personnel Board's authority to prescribe classifications. *Id.* at 14. The hearing officer added that, "Any other conclusion would be an unwarranted extension of the [Personnel Board]'s constitutional power." *Id.* at 13.

[98] California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, 735, 738-39, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984). No written proposal was entered into evidence. *Id.* at 740 n.12.

[99] *Id.* at 735.

to the Personnel Board's classification plan; the proposal did not interfere with the Personnel Board's exclusive authority to classify job positions.

3. Probationary Periods

Each employee hired into a civil service position initially serves a short probationary period.[100] During this period the state employer examines the employee's fitness for the position and can dismiss the employee for good cause.[101] Article VII authorizes the Personnel Board to establish the probationary periods for state employees.[102] Theoretically, probationary periods can also be a subject of collective bargaining under SEERA, because the Personnel Board's constitutional authority in this area has never been interpreted as exclusive.[103] Realistically, however, the Personnel Board's authority must be exclusive. Article VII provides that the Personnel Board "enforce[s] the civil service statutes" and "prescribe[s] probationary periods and classifications."[104] Courts have interpreted this clause to be a grant of exclusive jurisdiction to enforce the civil service statutes and determine classifications.[105]

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[100] The probationary period served upon appointment is six months. However, the Personnel Board may establish a longer period of not more than one year. CAL. GOV'T CODE § 19170 (West 1980).

[101] Boutwell v. State Bd. of Equalization, 94 Cal. App. 2d 945, 948-49, 212 P.2d 20, 22 (1950); CAL. GOV'T CODE § 19173 (West Supp. 1985).

[102] CAL. CONST. art. VII, § 3(a).

[103] PERB never has ruled on the negotiability of probationary periods. However, analogous NLRA and EERA case law establishes probationary periods as a "term and condition of employment" that must be negotiated under SEERA. *See supra* notes 46-51 and accompanying text. Probationary periods are a mandatory subject of bargaining under § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982). C.H. Guenther & Son, Inc., 174 N.L.R.B. 1202, 1208-09 (1969), *enf'd*, 427 F.2d 983 (5th Cir. 1970); *see supra* notes 50 & 55. Probationary periods are also a "term and condition of employment" that must be negotiated under EERA. San Mateo City School Dist., PERB Decision No. 375 (Jan. 5, 1984), 8 Pub. Employee Rep. Cal. (LRP) 130, 141 (PERB assumed the negotiability of a portion of a bargaining proposal that established the probationary period for restricted employees); *see supra* notes 43 & 51.

A memorandum provision relating to probationary periods will prevail over a conflicting statutory provision, *see* CAL. GOV'T CODE §§ 19170-19180 (West 1980 & Supp. 1985), if the legislature amends the inconsistent statutory provision. *Id.* § 3517.6 (West Supp. 1985); *see supra* notes 65-66 and accompanying text.

[104] CAL. CONST. art. VII, § 3(a).

[105] *See* Stockton v. Department of Employment, 25 Cal. 2d 264, 272, 153 P.2d 741, 745 (1944) ("Personnel Board has exclusive jurisdiction to classify positions in the state civil service."); Noce v. Department of Finance, 45 Cal. App. 2d 5, 11, 113 P.2d 716, 719 (1941) (same); Fair Political Practices Comm'n v. State Personnel Bd., 77 Cal.

Thus, a consistent reading of the clause also gives the Personnel Board exclusive jurisdiction to establish probationary periods.

If the Personnel Board's authority is exclusive, then parties bargaining under SEERA may not negotiate proposals prescribing probationary periods.[106] Beyond this limitation, however, lies a broad range of negotiable proposals that affect but do not prescribe probationary periods. For example, parties can negotiate a proposal that establishes guidelines for evaluating probationary employees.[107] This proposal is negotiable even though it affects probationary employees, because it refrains from setting the lengths of probationary periods.

4. Enforcement Powers

The civil service statutes cover much of the state employment relationship[108] and impose many affirmative duties on both employees and the state.[109] Article VII requires the Personnel Board to enforce the civil service statutes.[110] Because courts have found this duty to be implicitly exclusive,[111] parties bargaining under SEERA may not contravene the Personnel Board's constitutional authority in this area. Thus, for example, parties cannot negotiate a proposal that authorizes an arbitrator to enforce the civil service statutes. This proposal unlawfully deprives the Personnel Board of some of its prerogative power.

However, the Personnel Board's authority to enforce the civil service statutes does not preclude bargaining of proposals that restrict the Personnel Board's power. For example, a disciplinary proposal might require employees to process grievances directly through a negotiated

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App. 3d 52, 56, 143 Cal. Rptr. 393, 396 (1978) ("By reason of the mandatory language of section 3(a) that the Board shall enforce the civil service statutes, the Board has the exclusive power to administer and enforce those statutes.").

[106] *See supra* notes 102-05 and accompanying text.

[107] This proposal conflicts with CAL. GOV'T CODE § 19172 (West Supp. 1985), which authorizes the Department of Personnel Administration to prescribe methods for reviewing probationary employees. However, this inconsistency does not alter the proposal's negotiability. The legislature can implement the proposal as part of a negotiated memorandum by amending § 19172 to eliminate the discrepancy. *See id.* § 3517.6 (West Supp. 1985); *supra* notes 65-66 and accompanying text; *see also supra* note 103.

[108] *See supra* note 41.

[109] *See, e.g.*, CAL. GOV'T CODE §§ 18573 (West 1980) (describing general duties of state employers under the Civil Service Act), 18574 (West 1980) (describing general duties of state officers and employees under the Act).

[110] CAL. CONST. art. VII, § 3(a). *See generally supra* note 41 (outlining the civil service statutes).

[111] Fair Political Practices Comm'n v. State Personnel Bd., 77 Cal. App. 3d 52, 56, 143 Cal. Rptr. 393, 396 (1978).

grievance system, rather than through the statutory system administered by the Department of Personnel Administration (DPA).[112] By removing some employee grievances from the reach of the civil service statutes, this proposal affects the Personnel Board's enforcement powers: the Personnel Board cannot apply the statutory grievance system's results to these employees. However, the proposal is negotiable because it does not limit the Personnel Board's authority to enforce fully the terms of the civil service statutes, including the statutory grievance system, against those to whom the statutes apply.

Article VII also enables the Personnel Board to adopt rules authorized by statute.[113] This provision does more than affirm the Board's statutory rulemaking authority; it makes the Board's authority constitutional.[114] Thus, parties bargaining under SEERA may not negotiate proposals that would prevent the Board from rulemaking. For instance, parties cannot negotiate a proposal that revokes the civil service statutes, because this proposal leaves the Personnel Board without any civil service statutes to regulate.[115]

However, the Personnel Board's limited constitutional prerogative leaves parties free to negotiate many proposals that relate to the Board's rulemaking power. For example, parties can negotiate a proposal requiring that they jointly suggest probationary period increases to the Personnel Board. The proposal is negotiable even though it might lead the Personnel Board to enact a rule increasing the probationary periods of some employees.[116] Similarly, a bargaining proposal that has

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[112] CAL. GOV'T CODE § 18714 (West Supp. 1985) provides in pertinent part: "(a) Nothing in this part shall preclude the Department of Personnel Administration from providing by rule for a system of adjusting employee grievances . . . (b) If the provisions of this section are in conflict with the provisions of a memorandum . . ., the memorandum . . . shall [control] . . . ."

[113] CAL. CONST. art. VII, § 3(a).

[114] *See id.* art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.").

[115] *See supra* notes 113-14 and accompanying text.

[116] CAL. GOV'T CODE § 19170 (West 1980) provides in pertinent part: "The board shall establish for each class the length of the probationary period . . . The Board may provide by rule: (a) for increasing the length of individual probationary periods by adding thereto periods of time during which an employee while serving as a probationer is absent from his position . . . ." The Personnel Board has already made use of this section. For example, the Board by rule automatically extended the probationary period of employees absent from their positions. CAL. ADMIN. CODE tit. 2, R. 321 (1983). Thus, for instance, pursuant to this rule an employee serving a six-month probationary period automatically remains probationary until she has worked 840 hours. *Id.* tit. 2, R. 321(a)(1) (1983).

the effect of changing a civil service statute is negotiable provided that the proposal leaves intact the Personnel Board's power to enforce the provisions of the affected statute. These proposals are negotiable because they affect, but do not invalidate, the Personnel Board's rulemaking authority.

5. Summary

Section A examined how the constitutional powers of the Personnel Board restrict the scope of collective bargaining under SEERA. This section assumed that parties bargaining under SEERA cannot negotiate proposals that directly conflict with the Personnel Board's constitutional authority. Yet the section illustrated that within the loose constraints of the state constitution lies an abundance of negotiable proposals affecting the Personnel Board's authority. Section B examines the constitutional requirement that state employee promotion and hiring be made under a merit system. It concludes that the constitution's language is sufficiently general to allow negotiation of a wide range of bargaining proposals that relate to promotion or hiring without contravening the merit system.

B. The Merit System — Hiring and Promotions

Article VII directs the Personnel Board to ensure that "permanent appointment and promotion" are based generally on merit and competitive examination.[117] Bargaining parties may not negotiate proposals that "contravene the spirit or intent" of this merit principle.[118] Thus, for example, parties may not negotiate a proposal that requires the state employer to hire only friends of employees in the bargaining unit.[119] However, the self-defining language of article VII calls for a merit-based system only in the most general terms.[120] Rather than fix-

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[117] CAL. CONST. art. VII, § 1(b); California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, 492-93.

[118] Department of Forestry Employees, Hearing Officer's Proposed Decision (Apr. 17, 1984), 8 Pub. Employee Rep. Cal. (LRP) 443, 454 (non-merit proposal "illegal and nonnegotiable" under SEERA), *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 602 (May 7, 1984); *see* CAL. GOV'T CODE § 3512 (West Supp. 1985).

[119] CAL. CONST. art. VII, § 1(b); *see* Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 185, 624 P.2d 1215, 1225, 172 Cal. Rptr. 487, 496 (1981).

[120] CAL. CONST. art. VII, § 1(b) provides: "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination."

ing specific operational requirements, article VII instead allows for "a variety of mechanisms, procedures, and rules" to promote and appoint employees based on merit-related competitive examination.[121]

Article VII's flexibility frees parties to negotiate bargaining proposals that affect personnel hiring and promotion but do not conflict with article VII. For example, proposals[122] relating to the nature and gen-

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[121] *Id.*; *see* California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, 493. The legislative histories of statutory code sections on appointment and promotion support the conclusion that the constitution permits a variety of mechanisms to implement the merit system. *See, e.g.*, CAL. GOV'T CODE § 18950 (West Supp. 1985) (filling vacancies by promotion; promotional lists; reemployment lists; transfer of eligibility) (amended ten times since 1949).

[122] The existing systems for promotion, examination, and appointment are set out in CAL. GOV'T CODE §§ 18950-18954 (West 1980 & Supp. 1985) (promotion), 18930-18940 (West 1980 & Supp. 1985) (examination), and 19050-19237 (West 1980 & Supp. 1985) (appointment). The legislature can amend these sections if they conflict with provisions of a negotiated memorandum. *Id.* § 3517.6 (West Supp. 1985); *see supra* notes 65-66 and accompanying text.

Parallel NLRA and EERA case law establishes promotions as a "term and condition of employment" that must be negotiated under SEERA. CAL. GOV'T CODE § 3516 (West Supp. 1985); *see supra* notes 46-51 and accompanying text. Promotion is a mandatory subject of bargaining under § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1982). *See* Houston Chapter, Assoc. Gen. Contractors, 143 N.L.R.B. 409, 413 (1963), *enf'd*, 349 F.2d 449 (5th Cir. 1965); *supra* notes 50 & 55. Similarly, promotions must be negotiated under EERA. CAL. GOV'T CODE § 3543.2 (West Supp. 1985); San Mateo City School Dist., PERB Decision No. 375 (Jan. 5, 1984), 8 Pub. Employee Rep. Cal. (LRP) 130, 141-42, 151-52; *see supra* notes 43 & 51. *Cf.* CAL. GOV'T CODE § 3540 (West 1980) ("Nothing contained [in EERA] shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system . . . ."). *See generally* Stern, *supra* note 17, at 275 (predicting that in 1985 all civil service promotions will be governed by collective bargaining).

A PERB hearing officer recently held that promotions are negotiable under SEERA. California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, 736, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984). Also, in California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-125-S (May 4, 1984), 8 Pub. Employee Rep. Cal. (LRP) 485, the Department of Personnel Administration voluntarily agreed to bargain over promotions. Thus, negotiability was not at issue. *Id.* at 493. The hearing officer found, however, that an employee organization's proposal on promotion was constitutionally sound because it did not "directly conflict" with either article VII, § 1(b) of the California Constitution or with the Personnel Board's constitutional jurisdiction. *Id.* at 492-94.

However, appointment is not a "term and condition of employment" under SEERA, because only present employees are considered employees under SEERA. CAL. GOV'T CODE §§ 3513(a), (c) (West Supp. 1985); *see* Allied Chemical & Alkali Workers v.

eral scope of, and minimal qualifications required to take examinations used to establish promotion eligibility lists,[123] are negotiable so long as the proposals do not upset the general merit system.

A PERB hearing officer recently endorsed a proposal that required the state employer to promote from the eligibility list the most senior employee.[124] The hearing officer correctly concluded that constitutionally the state can base promotions in part on seniority because seniority is at least arguably job- and merit-related.[125] A second PERB hearing officer addressed two proposals that related to promotion.[126] The proposals removed classification structures and staffing ratios as promotional barriers to highly paid professional employees, in this instance state attorneys and hearing officers.[127] The hearing officer properly rejected arguments that the proposals conflicted with the merit principle as embodied in article VII.[128] The findings in these cases illustrate that

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Pittsburgh Plate Glass Co., 404 U.S. 157, 165-71 (1971) (retirees not employees under the NLRA). Therefore, parties need not, but may, negotiate a bargaining proposal that affects only the rights of prospective hirees. *Cf. id.* at 176-82 (retiree fringe benefits only permissive rather than mandatory subject of bargaining under the NLRA); *see also supra* note 55.

[123] The Personnel Board presently designs promotional examinations and establishes minimum fitness and qualifications standards for applicants. CAL. GOV'T CODE §§ 18930 (West Supp. 1985), 18931 (West 1980); *see* CAL. ADMIN. CODE, tit. 2, RR. 171, 172 (1983).

[124] California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-134-S (Aug. 10, 1984), 8 Pub. Employee Rep. Cal. (LRP) 733, 734, 737, *finalized in mem. op.*, 8 Pub. Employee Rep. Cal. (LRP) 765 (Aug. 30, 1984). The text of the proposal provided in part:

> A. Employees in the Bargaining Unit shall receive promotions on the basis of merit and seniority by the following procedure:
>
> 1. The state shall determine merit in accordance with the rules of the State Personnel Board.
>
> 2. After the state has determined merit and promotional lists have been established, those persons who are immediately available (or reachable) from the State Personnel Board promotional list shall be appointed on promotions on the basis of seniority.
>
> 3. . . .
>
> B. Seniority shall be the deciding factor, subject to the above listed limitations . . . for promotion purposes.

Id. at 740 n.8.

[125] *Id.* at 737.

[126] California Dep't of Personnel Admin., Hearing Officer's Proposed Decision in Case No. S-CE-137-S (Nov. 27, 1984), 9 Pub. Employee Rep. Cal. (LRP) 3.

[127] *Id.* at 6.

[128] *Id.* at 14 (The proposals fail to contravene "the spirit of limited intent of the merit principle in state employment as described by the [California] Supreme Court [in

within the loose constraints of a merit system, parties remain free to negotiate various proposals that impact on hiring and promotion.[129]

Section B examined further limitations that the state constitution imposes on collective bargaining for state employees. It illustrated that parties bargaining under SEERA may negotiate proposals affecting the merit system, as long as the proposals do not directly conflict with article VII. Part III of this Comment proposes a test to determine the constitutionality of bargaining proposals.

III. A Proposed Test of Constitutional Negotiability

Theoretically, a civil service system assures fair and neutral employment and personnel decisions, and prevents the imposition of artificial barriers to equal employment opportunities.[130] Empirically, however, little is known about the impact of civil service systems upon concepts of "fairness" and "equity" in public employment.[131] Even less is known about the impact of collective bargaining for state employees upon these same concepts.[132]

However unclear the eventual impact of collective bargaining on concepts of "fairness" and "equity," collective bargaining for California state employees is clearly being restricted in the name of the merit principle. The state has declared entire areas of the employment relation-

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Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 624 P.2d 1215, 172 Cal. Rptr. 487 *passim* (1981)].").

[129] *See supra* notes 120-21 and accompanying text.

[130] *See* Melle, *supra* note 33, at 525-26.

[131] *See* Lewin & Horton, *supra* note 17, at 209-11.

[132] *Id.* Collective bargaining does not inherently conflict with the merit principle. A collectively bargained personnel practice may enhance the merit principle, whereas a prior statutory procedure may have exacerbated existing inequity and inefficiency. *See generally id.*

> Equity, like efficiency, is an ephemeral concept subject to numerous interpretations and value judgments. At one time, the objective of eliminating political patronage as the source of employment and tenure in government appeared paramount. To the extent that merit systems have reduced if not eliminated patronage, they have satisfied (this definition of) the equity objective. Over time, however, equity in the public service has increasingly come to be defined by public employees in terms of their organizing and bargaining rights, or lack thereof. Today's public worker appears more concerned with managerial paternalism than with political patronage (though the latter remains an important concern for organized public employees), and collective bargaining more than the civil service system is seen as the protector of equity.

Id. at 210.

ship off-limits to collective bargaining, and thereby has caused needless debate about the negotiability of various bargaining subjects and proposals.[133] The state's intransigent bargaining stance is exacerbated by an absence of guidelines that would apprise the parties of the constitutionality of various employment issues. Appropriately, state employee unions have brought unfair practice charges against the state, but none of the ensuing unfair practice cases have yet reached the PERB Board itself.[134]

This Comment proposes a test to determine the constitutionality of bargaining proposals affecting state employees. The test identifies as unconstitutional proposals that directly conflict with article VII of the state constitution.[135] The test provides as follows: Any bargaining proposal that (1) prevents final Personnel Board review of disciplinary actions;[136] (2) classifies job positions;[137] (3) prescribes probationary periods;[138] (4) enforces the civil service statutes;[139] (5) limits the Personnel Board's rulemaking authority;[140] or (6) promotes or appoints state employees under a system not based generally on merit and competitive examination,[141] is unconstitutional. However, bargaining proposals that

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[133] *See supra* notes 18-24 and accompanying text. Professor Aaron believes that state civil service systems present the most difficult area for determining the scope of bargaining for public employees. B. AARON (Chair), FINAL REPORT OF THE CALIFORNIA ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS 155-76 (March 15, 1973), *reprinted in* J. GRODIN, D. WOLLETT & R. ALLEYNE, JR., *supra* note 5, at 145. This difficulty, he argues, is due to two strong but conflicting social policies, one in favor of granting state employers increased leeway to exercise unilateral managerial discretion, and the other in favor of granting public employees a voice in the determination of working conditions equal to that of their counterparts in the private sector. *Id.* at 145-48.

[134] The cases are cited *supra* note 21. PERB resolves disputes about the negotiability of bargaining proposals made under SEERA. *See* CAL. GOV'T CODE §§ 3519, 3519.5 (West 1980) (outlines PERB's unfair practice procedures); *supra* notes 27 & 50; *see also* W. CROUCH, *supra* note 1, at 265 (PERB will determine whether the civil service system ultimately survives after collective bargaining).

[135] CAL. CONST. art. VII, §§ 1(b), 3(a); *see supra* note 8.

[136] CAL. CONST. art. VII, § 3(a); CAL. GOV'T CODE §§ 18703, 19570-19589 (West 1980 & Supp. 1985); *see supra* notes 78-88 and accompanying text.

[137] CAL. CONST. art. VII, § 3(a); CAL. GOV'T CODE §§ 18800-18807 (West 1980 & Supp. 1985); *see supra* notes 94-99 and accompanying text.

[138] CAL. CONST. art. VII, § 3(a); CAL. GOV'T CODE §§ 19170-19180 (West 1980 & Supp. 1985); *see supra* notes 102-07 and accompanying text.

[139] *See* CAL. CONST. art. VII, § 3(a); *supra* notes 110-12 and accompanying text.

[140] CAL. CONST. art. VII, § 3(a); *see supra* notes 113-16 and accompanying text.

[141] CAL. CONST. art. VII, § 1(b); CAL. GOV'T CODE §§ 18930-18940, 18950-18954, 19050-19237 (West 1980 & Supp. 1985); *see supra* notes 117-29 and accompanying text.

meet this test are constitutional; bargaining proposals that also relate to subjects within the SEERA scope of representation[142] are negotiable. This test thus provides bargaining parties with a clear picture of the employment conditions that they can change through negotiations. Increased clarity will benefit the parties during their initial negotiations, as well as during the term of their negotiated memoranda.[143]

Additionally, the California Legislature should amend section 3516 of the Government Code, which statutorily defines SEERA's scope of representation,[144] to include this Comment's proposed test. Codification will give the test stability, and protect it from being overruled or too easily changed. A suggested version of section 3516 is fully set out in the appendix. This amended section 3516 clarifies the negotiability of SEERA bargaining proposals that relate to the civil service system.

CONCLUSION

In California, the relationship between the constitutional civil service system and statutory collective bargaining remains unsettled. By continually emphasizing the supremacy of California Constitution article VII over SEERA, the state has unduly restricted the scope of bargaining for state employees. Further, the state's precipitate actions have caused unnecessary debate about the constitutionality of bargaining proposals and distracted the parties from negotiating collective agreements.

Either PERB or the legislature should adopt a test that finds bargaining proposals not directly conflicting with article VII of the state constitution to be constitutional. This test represents a benchmark against which parties can measure the constitutional adequacy of bargaining proposals that relate to the civil service system, giving the parties a measure of certainty where none now exists. Thus, the parties may confidently invest resources in bargaining proposals and may together determine subjects of bargaining without fear of constitutional encroachment. By furthering a full and frank discussion of the important issues, this test facilitates the peaceful resolution of employment disputes without work stoppages. If adopted, this test will therefore

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[142] *See supra* notes 46-51 and accompanying text.

[143] *See* California Dep't of Transp., PERB Decision No. 333-S (Aug. 18, 1983), 7 Pub. Employee Rep. Cal. (LRP) 922 (state employer cannot unilaterally transfer employees within Personnel Board's merged classifications, but rather must first negotiate about the changes with the affected employees' exclusive representative).

[144] CAL. GOV'T CODE § 3516 (West Supp. 1985); *see supra* note 50.

lead to a more harmonious and effective working relationship between the state and its employees.

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APPENDIX:

PROPOSED AMENDED VERSION OF CALIFORNIA GOVERNMENT CODE SECTION 3516 (Proposed Language in Italics):

The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. *Further, the scope of representation shall not include consideration of bargaining proposals that directly infringe upon the exclusive constitutional authority of the State Personnel Board by (1) preventing final Personnel Board review of disciplinary actions; (2) classifying job positions; (3) prescribing probationary periods; (4) enforcing the civil service statutes; or (5) limiting the Personnel Board's rulemaking authority. Neither shall the scope of representation include the consideration of bargaining proposals that directly contravene article VII, section 1(b) of the California Constitution by allowing the promotion or appointment of state civil service employees under a set of criteria that do not generally include the concepts of merit and competitive examination. However, the scope of representation shall be interpreted broadly, and shall include any bargaining subject or proposal not directly prohibited by this section.*