

AGENDA

COMMITTEE OF THE WHOLE

Meeting: 1:00 p.m. Tuesday, March 16, 2004
Arena Floor – Save Mart Center

Debra S. Farar, Chair
Murray L. Galinson, Vice Chair
Roberta Achtenberg
Bob Foster
Eric Z. Guerra (non-voting)
William Hauck
Ricardo F. Icaza
Kathleen E. Kaiser
M. Alexander Lopez
Shailesh J. Mehta
Dee Dee Myers
Ralph R. Pesqueira
Frederick W. Pierce, IV
Charles B. Reed, Chancellor
Kyriakos Tsakopoulos
Anthony M. Vitti

Consent Item

Approval of Minutes of Meeting of January 28, 2004

Discussion Items

1. Welcome to California State University, Fresno, *Information*
2. Report on the State of Education, *Information*

Consent Item

3. Litigation Report No. 19, *Information*

**MINUTES OF THE MEETING OF
COMMITTEE OF THE WHOLE**

**Trustees of The California State University
Office of the Chancellor
Glenn S. Dumke Conference Center
401 Golden Shore
Long Beach, California**

January 28, 2004

Members Present

Debra S. Farar, Chair
Murray L. Galinson, Vice Chair
Roberta Actenberg
Bob Foster
Eric V. Guerra
William Hauck
Kathleen Kaiser
M. Alexander Lopez
Shailesh J. Mehta
Ralph R. Pesqueira
Frederick W. Pierce, IV
Charles B. Reed, Chancellor
Kyriakos Tsakopoulos
Anthony M. Vitti

Members Absent

Ricardo F. Icaza
Dee Dee Myers

Chancellor's Office Staff

David S. Spence, Executive Vice Chancellor and Chief Academic Officer
Richard P. West, Executive Vice Chancellor and Chief Financial Officer
Jackie R. McClain, Vice Chancellor, Human Resources
Christine Helwick, General Counsel

Chair Farar called the meeting to order at 10:02 a.m.

Consent Items

Approval of Minutes

The minutes of September 17, 2003 were approved as submitted.

Discussion Items

2
COW

Appointment of Member to the California State University Headquarters Building Commission

Chair Farar stated that the trustees appoint two members to the California State University Headquarters Building Commission. Reappointment is needed for one of the trustee members. The position is uncompensated and must be held by a California elector.

The trustees passed the following resolution (RCOW 01-04-01):

RESOLVED, By the Board of Trustees of the California State University, that Mr. George Pardon be reappointed a commissioner of the California State University Headquarters Building Commission for a succeeding four year term

Chair Farar announced that the business of the Committee of the Whole was concluded.

Adjournment

The meeting adjourned at 10:04 a.m.

COMMITTEE OF THE WHOLE

Welcome to California State University, Fresno

Presentation By

John D. Welty, President
California State University, Fresno

Summary

President Welty will welcome the Board of Trustees to California State University, Fresno.

COMMITTEE OF THE WHOLE

Report on the State of Education

Presentation By

Jack O'Connell
Superintendent of Public Instruction

Summary

Superintendent Jack O'Connell will deliver remarks about the state of public education in California.

COMMITTEE OF THE WHOLE

Litigation Report No. 19

Presentation By

Christine Helwick
General Counsel

Summary

This is the biannual report on the status of significant litigation confronting the CSU, which is presented for information. "Significant" for purposes of this report is defined as litigation: (1) with the potential for a systemwide impact on the CSU; (2) which raises public policy issues of significant interest or concern; (3) brought by or against another public agency; or (4) which, for other reasons, has a high profile or is likely to generate widespread publicity. *New information since the date of the last report is printed in italics.*

The cases contained in this report have been selected from 112 currently active litigation files.

New Cases

Andes v. State of California, et al. -- Butte County Superior Court

McNamar v. California State University, Chico, et al. -- Butte County Superior Court

These cases arose from a multiple fatality automobile accident. Volunteer student employee Lauren DeLucchi was assisting with transportation for a University conference. While driving back from the Sacramento airport, DeLucchi fell asleep and caused an automobile accident involving multiple cars. Three people were killed. No alcohol or drugs were involved. DeLucchi was criminally convicted, by plea of no contest to misdemeanor vehicular manslaughter. Plaintiffs are relatives of the deceased victims, and asserted claims of negligence against the University. The State Office of Risk and Insurance Management accepted CSU's tender of the cases. The two cases settled in November 2003 for a total of \$3 million.

Bartel v. CSU, et al. – San Diego County Superior Court

Stephen Bartel, the former SDSU Athletics Department equipment room manager, has sued the CSU and various individuals on a variety of legal theories, including defamation, invasion of privacy, gender and age discrimination and harassment, for statements made during the audit investigation of alleged improprieties in the equipment room. This case is in the pleading stage. CSU's anti-slapp motion to dismiss based on the theory that all of the alleged statements which form the basis of this claim are privileged will be heard on March 19, 2004.

Batchelor, et al. v. CSU Fresno – Fresno County Superior Court

Valley v. CSU Fresno – Fresno County Superior Court

Thirteen members of the Fresno State women's swim team have filed complaints alleging they were injured by excessive chlorine levels in the North Gym pool during October of 2002. Three of the women have since withdrawn from the lawsuit. This case is in the discovery stage.

Garcia, et al. v. California Polytechnic State University, San Luis Obispo, et al. -- San Luis Obispo County Superior Court

Plaintiffs, Rita Garcia, Erika Medina, Miguel Puente are three unsuccessful applicants for admission to Cal Poly San Luis Obispo. Along with one taxpayer and the League of United Latin American Citizens, they seek injunctive and declaratory relief from Cal Poly's admissions process. They claim that it adversely affects minority applicants because it gives (1) unlawful preference to students residing in the campus' service area; and (2) unlawful weight to SAT or ACT Iscores, which are inherently discriminatory. The case is in the initial pleading stage.

Hinkle v. Baker, et al -- United States District Court, Los Angeles

Steven Hinkle, a student at Cal Poly San Luis Obispo, claims campus officials violated his First Amendment rights by subjecting him to discipline after he posted flyers about a controversial speaker on the campus. He was charged with disrupting a campus function. He challenges the constitutionality of the "disruption" provision in CSU's Student Code of Conduct. Hinkle applied for a temporary restraining order to prevent Cal Poly from enforcing the disruption rule, and the court denied his application. Hinkle thereafter filed a request for a preliminary injunction, which is presently pending before the court. The parties are engaged in settlement negotiations.

Jappert v. California State Polytechnic University, Pomona - Los Angeles County Superior Court

Carl Jappert, a student in an engineering class, and his wife Charise Jappert were injured while attending a "battlebot" contest class activity when a piece broke off a robot striking both Mr. and Mrs. Jappert. The complaint asserted causes of action for negligence and dangerous condition of public property. The case is in the early discovery stage.

Moore v. Trustees, et al. -- Los Angeles County Superior Court

Walter Moore is a tenured full professor in the College of Health and Human Services at CSULB. In this lawsuit, he alleges that he has been retaliated and discriminated against in a variety of ways over the last eight years due to having filed several complaints to the Department of Labor on veterans' issues and/or his status as a veteran. This matter was just recently filed and is in the early stages of discovery.

Ohton v. CSU, et al. -- San Diego Superior Court

David Ohton, SDSU Athletics Department strength and fitness coach, has sued the CSU and various individuals for alleged retaliation under the state "whistleblower" statute, claiming he was retaliated against for statements he made in the context of the CSU's investigative audit of alleged improprieties in the SDSU Athletics Department and its equipment room. This case is in the pleading stage.

Quan v. California State University -- Los Angeles County Superior Court

Randal Quan, the former campus police chief who was non-retained, filed this action complaining that he was terminated because he objected to hiring an African American female. The case is in the early pleading stage.

Construction Cases

BDM Construction Co. v. CSU – Sonoma County Superior Court

BDM Construction Co. built student apartments at Sonoma State University, and is now suing for over \$4 million for delays, costly changes in the project, and change orders that it alleges were signed under fraud and duress. The CSU Claims Review board previously granted BDM \$58,204.00 and CSU \$1,542,510.00. Two subcontractors have now sued BDM. BDM has in turn filed a cross-complaint for indemnification against CSU. The cases are in the discovery phase. *CSU prevailed on a motion for summary adjudication on three of eight causes of action.*

CSU v. Huntcor et al. -- Los Angeles County Superior Court

CSU filed this action to redress construction defects which are now appearing in Cal Poly Pomona's Classroom, Laboratory and Administration Building, completed in 1992. There is significant water infiltration throughout the building and the exterior skin is not holding up. An early motion to dismiss was denied by the court in August 29, 2003. Several other defendants have filed early motions to dismiss, which will be heard *on March 5, 2004*. *Proceedings have been delayed and the previous trial date vacated as a result of three changes in judges assigned to this case. The case has now been designated as complex litigation and a new judge has been assigned. Mediation was held on December 8, 2003 and two additional dates for mediation are scheduled for June 8 and July 6, 2004.*

CSU v. Southwest Industries, et al. – San Diego County Superior Court

CSU contracted with Southwest Industries to perform necessary mold remediation and abatement after settlement of an earlier case with Blake Construction for defective construction at Chapultepec Residence Hall. CSU is now suing Southwest Industries for breach of its contract because it fell behind the construction schedule and failed to adhere to the contract specifications for mold removal and remediation. Southwest has, in turn, filed a cross-complaint against CSU for allegedly improperly terminating the contract. *This case is in the discovery stage.*

Pacific Engineering Builders, Inc. v. CSU - San Francisco County Superior Court

American Manufacturers Mutual Insurance Company v. CSU - San Francisco County Superior Court

Bohm Environmental v. Pacific Engineering Builders, Inc., et al.; - San Francisco County Superior Court

Architectural Glass Construction, Inc. v. Pacific Engineering Builders, Inc., et al.; - San Francisco County Superior Court

Pacific Engineering Builders, Inc. contracted with the University to seismically retrofit Hensill Hall, which houses the Biology Department. PEBC failed to complete the first of three phases of

the project and in April 2002, the University terminated PEBI. The University then entered into a Project Takeover and Completion Agreement with the bonding company, American Manufacturers Mutual Insurance Company. PEBI has sued the University alleging breach of contract, negligence, defamation and interference with economic advantage. The bonding company has also sued separately for breach of contract. Both cases are in the pleading stage.

Bohm Environmental and Architectural Glass Construction, Inc. subcontractors of PEBI, have now filed "stop notice" actions alleging that they have not been paid by the contractor.

Employment Cases

Brown v. California State University - Fresno County Superior Court

Horsford, et al. v. California State University - Fresno County Superior Court

Snow v. California State University - Fresno County Superior Court

Auwana Brown, a former employee in the CSU Fresno Police Department, filed a lawsuit claiming to have been sexually harassed by the former chief of police, Willie Shell. As a part of the settlement of this lawsuit, Brown agreed to resign her university employment. After Brown's resignation became effective, however, she petitioned the State Personnel Board to reinstate her. The State Personnel Board refused, and Brown then filed a second action, which asks the Court of Appeal to order the State Personnel Board to set aside her resignation. The court instead sent the case back to the State Personnel Board for further findings. The State Personnel Board has not scheduled a new hearing yet. Brown subsequently filed yet another action, which seeks monetary damages and to rescind her resignation under the settlement agreement. The court has stayed all further proceedings in this action until the State Personnel Board case has been completed. Brown is represented in the current actions by the same attorneys who represented her in the earlier sexual harassment case, and who also represent the plaintiffs in the Horsford and Snow cases, as well as the Zamora case (described separately below).

Daniel Horsford and five other employees or former employees in the CSU Fresno Police Department filed a separate lawsuit claiming that a variety of actions in the CSU Fresno Police Department while Shell was chief constituted reverse discrimination. The plaintiffs in this action are white, Hispanic and Asian; Shell is black. Shell resigned his employment at CSU Fresno before any of the lawsuits were filed, and later pled no contest to felony charges of misconduct while he was chief of police at CSU Bakersfield before coming to Fresno. CSU filed motions for summary judgment against all six plaintiffs. Three were granted. The other three were granted in part, leaving significant but narrowed issues for trial. The trial of this case began in May and continued through August 2000. The jury rendered a verdict for plaintiffs in the total amount of \$4.25 million. In December 2000, the court reduced this verdict to \$1.17 million. The court awarded plaintiffs' attorneys \$1.2 million in fees. Both the verdict and the attorneys' fee award are on appeal. *Briefing on the liability portion of the case is complete; briefing on the fee award is under way.*

Richard Snow, one of the Horsford plaintiffs, suffered a work-related hip fracture in November 2000 and was deemed disabled as a police sergeant in subsequent workers' compensation proceedings. His disability retirement became effective in February 2003. Snow filed a new lawsuit shortly thereafter, alleging that the university discriminated against him because of his disability, failed to accommodate him, and retaliated against him because of the Horsford verdict and other protected activities. *The matter is in the pleading stage as plaintiff's attorneys are amending the complaint to add additional defendants and include retaliation claims by another Horsford plaintiff, Steven King. Settlement discussion of all outstanding claims have been initiated.*

Green v. SFSU -- San Francisco County Superior Court

Marcia Green, a 15 year Lecturer at San Francisco State University, was not hired into a tenure track position and subsequently was not rehired as a Lecturer. She alleged that she was the victim of discrimination on the basis of her Polish ancestry, marital status and age. The case was tried for three weeks in August and September 2000. The jury returned a verdict in favor of CSU on the discrimination claim, but awarded Green \$1.56 million for retaliation. CSU appealed. Judgment was affirmed on October 1, 2002 and has been paid. A settlement agreement for attorneys' fees and costs in the amount of \$375,000 was reached in April 2003 and has been paid.

Green and her husband, Geoffrey, who is also a professor at SFSU, filed a second lawsuit in which they claim to have been retaliated against following the verdict in Ms. Green's first lawsuit. *Mediation is set for March 5, 2004, and a settlement conference is set for March 16, 2004. Trial is scheduled for April 19, 2004.*

Jouganatos v. CSU, Sacramento -- Sacramento County Superior Court

George Jouganatos, a part-time Lecturer at CSU, Sacramento, alleged that he was the victim of discrimination based on his Greek ancestry and subjected to offensive comments of a sexual nature by two faculty members. He further alleged that he was not hired as a tenure-track faculty member in the Economics department in retaliation for his complaining about the discrimination and harassment. The case is in the discovery phase.

May v. Trustees – Monterey County Superior Court

James May is a former faculty member at CSU Monterey Bay who retired in 2000. He alleges that he was forced to take an early retirement due to continuing mistreatment, race, disability and age discrimination, harassment, retaliation, failure to prevent discrimination, and wrongful termination. On February 28, 2002 the jury returned a \$375,000 verdict in favor of May for harassment and retaliation on the basis of race and national origin. On May 9, the court granted CSU's motion for a new trial. May has appealed both the trial court's grant of a new trial and the defense verdict on his discrimination claims. Briefing is underway.

Washington v. CSU, et al. – San Diego County Superior Court

Pat Washington, an African-American woman and former SDSU tenure-track faculty member in the Women's Studies Department, sued the University and the Women's Studies Department Chair alleging she was improperly denied tenure because of racial discrimination and retaliation. This case is in the early pleading stage.

Zamora v. Trustees, et al. - Fresno County Superior Court

Mark Zamora, formerly an officer in the CSU Fresno Police Department, filed a lawsuit claiming that Sergeant. Lupe Shrum sexually harassed him and then retaliated against him from January 1995 through December 1999, and that Chief Lynn Button and Lieutenant Sergio Silva did nothing to stop it. Zamora also complains that the university discriminated against him because of his disability (diabetes), and refused his requests for reasonable accommodation. Zamora resigned from his university employment, but claims that he was constructively discharged. Zamora is represented by the same attorneys who represent the plaintiffs in the Brown and Horsford cases (described above). *The university's motion for summary judgment will be heard on April 8, 2004, and trial is scheduled to begin on May 10, 2004.*

Environmental Cases

City of Marina v. CSU, et al. – Monterey County Superior Court

Fort Ord Reuse Authority v. CSU, et al. – Monterey County Superior Court

Plaintiffs in these two lawsuits are challenging the adequacy of the final environmental impact report prepared for CSU Monterey Bay's Physical Master Plan. They allege that the city and FORA will suffer unmitigated adverse impacts if the plan is implemented and that the CSU improperly fails to recognize the jurisdiction of FORA over campus development that does not involve education or research. The trial court issued a decision in favor of the City of Marina and FORA. CSU filed an appeal. On June 17, 2003, the Court of Appeal reversed the trial court and ruled that CSU is not required to contribute to the cost of local infrastructure improvements, notwithstanding the mitigation requirements of environmental law. This opinion will have far-reaching implications for all CSU campuses. A Petition for Rehearing was denied. FORA filed a Petition for Review with the California Supreme Court, *which was granted. Briefing is underway.*

Neighborhoods North of Foothill, Inc v. Trustees of the California State University, et al. - San Luis Obispo County Superior Court

Neighborhoods North of Foothill, Inc., a homeowners' association in San Luis Obispo, filed a petition challenging the Trustees' certification of the environmental impact report for the faculty and staff housing project on the Cal Poly campus. The petition alleged that the EIR failed to adequately address a number of impacts, including traffic safety and circulation. Additionally, the complaint asked for a judicial declaration that the project is subject to planning and zoning laws of the County and/or City of San Luis Obispo.

In December 2002, the court found that there were several deficiencies in the environmental impact report. CSU was ordered to prepare a Supplemental Environmental Impact Report which

then had to be re-certified by the Board. The court further ruled the project is not subject to local zoning or building regulations and ordinances

A Supplemental Environmental Impact Report was approved by the Board of Trustees at the September 2003 Board meeting. On February 10, 2004, the Court ruled the Supplemental Environmental Impact Report satisfied the Court's previous order as well as CEQA requirements. The Court also removed the injunction it previously issued, thereby allowing the project to proceed.

Personal Injury Cases

Sy, et al. v. Union Pacific Railroad Company, et al., San Luis Obispo County Superior Court Plaintiffs, Enrique Sy (father), Amelia Finocchio (mother) and Erika Sy (sister and personal representative), filed this action for the wrongful death of Cal Poly student Jason Sy, who, while riding his bike to attend classes at Cal Poly, was struck by a freight train at a grade crossing located adjacent to the campus and killed. The defendants are the landowner Union Pacific Railroad Company, and adjacent landowners, CSU, The Church of Jesus Christ of Latter Day Saints, First Worthing Company, and City of San Luis Obispo. Causes of action against CSU include dangerous condition of public property and nuisance.

The court granted CSU's motion for dismissal. Plaintiffs have appealed this ruling.

Student Cases

Neal, et al. v. Board of Trustees of the CSU, et al. - United States District Court, Fresno Members of the CSU Bakersfield wrestling team, both men and women, filed this lawsuit to enjoin the elimination of wrestling, or the placement of any cap on the male membership of the team, in order to comply with the Consent Decree in the Cal NOW litigation. The plaintiffs argued that both the Consent Decree and the federal regulations implementing Title IX are discriminatory.

In December of 1997, the court ruled that achieving proportionality in male and female participation in athletics is not a "safe harbor" against claims of (reverse) discrimination. The opinion acknowledged its inconsistency with five federal appellate opinions that have considered this same issue. It followed instead a lone Louisiana district court opinion.

In February 1999, the court granted plaintiffs' request for a preliminary injunction, stating that capping men's teams is a quota in violation of Title IX. CSU appealed. In December 1999, the Ninth Circuit Court of Appeals reversed the lower court, ruling that the capping of men's teams is not a violation of Title IX.

The plaintiffs filed and lost a petition for rehearing in the Ninth Circuit. The case was returned to the trial court, where the plaintiffs argued a need for further discovery. On September 25, 2001,

the court granted CSU's motion for summary judgment. In conformity with the Ninth Circuit's earlier decision, the court ruled that Title IX does not prevent a university from making gender-conscious decisions where there is a disproportionately higher percentage of athletic availability for the male students. Plaintiffs appealed this ruling to the Ninth Circuit. The Ninth Circuit affirmed the trial court's decision. Plaintiffs filed a petition with the U.S. Supreme Court. *In November 2003, the U.S. Supreme Court declined to hear plaintiff's petition, and the judgment in CSU's favor is now final.*

Other Cases

Board of Trustees v. Bello's Sporting Goods – San Luis Obispo County Superior Court

This lawsuit sought a permanent injunction to prevent Bello's Sporting goods, a store in San Luis Obispo, from engaging in further sales of clothing and other merchandise bearing the "Cal Poly" name. Bello's contends that it has a right to do so because: (1) it sold clothing with the "Cal Poly" name before CSU began doing so; and (2) CSU waived its rights by not filing suit earlier. Bello's filed a cross complaint for damages against CSU and Cal Poly Foundation.

In July 2001, the trial court denied most of the relief sought by CSU in a decision that ruled the phrase "CAL POLY" is not protected under trademark law because it is not understood by the public as a name for a particular educational institution but instead is a generic term that identifies and refers to all polytechnic or technical schools located in California. Thus, Bello's Sporting Goods can continue using the phrase because it is generic. However, the court did enter a limited injunctive order directing that Bello's Sporting Goods place labels on all goods indicating that the CSU did not approve, sponsor or authorize the clothing goods sold by Bello's that are marked with the words CAL POLY. Both CSU and Bello's appealed this ruling.

Effective January 2, 2002, the Legislature amended the Education Code to clarify that the name "Cal Poly" and other abbreviated campus names are state property and may not be used without CSU's express permission.

In July 2003, the Court of Appeal issued a decision which reverses the trial court's ruling and remands the matter for further hearing on the newly enacted Education Code provision.

Bello's Sporting Goods petitioned for review to the California Supreme Court, which denied this request. The case is therefore back in the trial court.

CSU v. California Faculty Association – Los Angeles County Superior Court

CSU v. California Faculty Association – Los Angeles County Superior Court

The Board of Trustees has filed a complaint to recover \$45,000 from the California Faculty Association for costs incurred in gathering and providing information requested by the union. A related petition to compel arbitration has also been filed to require the parties to arbitrate the dispute as required under the contract. Both cases *have been dismissed as part of a larger settlement with CFA.*

Construction Industry Force Account Council, et al. v. CSU, et al. - Butte County Superior Court
Plaintiffs Construction Industry Force Account Council and Foundation for Fair Contracting claim to be organizations representing construction trade groups, labor unions and contractors throughout California. Plaintiffs allege that the Chico Research Foundation is the alter ego of CSU and is therefore obligated to follow all statutory competitive bidding and prevailing wage requirements imposed on CSU as a public agency. Plaintiffs claim that the Foundation did not follow all such requirements in awarding a recent contract for the renovation of administrative offices, and seek injunctive and declaratory relief, as well as attorneys' fees under California's Unfair Business Practices Act. Plaintiff Delbert Baker is an individual who failed to receive the contract award. The successful bidder, BCM Construction Company, Inc., has also been named as a defendant. The case is in the discovery phase.

Villanueva v. CSU – Sacramento County Superior Court

Ricardo Villanueva completed his doctorate degree in Theater in 1994 and was a participant in the CSU Forgivable Loan/Doctoral Incentive Program. He claims that CSU breached its contract and defrauded him because no campus has hired him for a tenure-track faculty position, and as a result his loans have not been forgiven. *This case is awaiting a trial date.*