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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

CALIFORNIA STATE PERSONNEL BOARD et al., Plaintiffs and Respondents, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SEIU, AFL-CIO, Defendant and Appellant.	C042437 (Super. Ct. No. 02CS00787)

APPEAL from a judgment of the Superior Court of Sacramento County, Lloyd G. Connelly, J. Reversed.

Anne M. Giese and Robin O'Sullivan for Defendant and Appellant.

Elise S. Rose and Dorothy Bacskai Egel for Plaintiffs and Respondents.

Howard L. Schwartz, Linda D. Buzzini, Patricia Keegan and Marguerite D. Seabourne for the Department of Personnel Administration as Amici Curiae on behalf of Defendant and Appellant.

Carroll, Burdick & McDonough, Ronald Yank, Gregg McLean Adam; and Benjamin C. Sybesma for the California Correctional Peace Officers' Association as Amici Curiae on behalf of Defendant and Appellant.

The California State Employees Association (CSEA) and the Department of Personnel Administration (DPA) negotiated collective bargaining agreements, also known as memoranda of understanding (MOUs), for state civil service employees of three bargaining units. The MOUs contain provisions for pilot programs, known as "post and bid," that would apply to a limited number of appointments and promotions to certain clerical, technical, and professional classifications.

Under the pilot programs, "bid notices" regarding available positions are "posted" by the employer department in various sites where job announcements are normally posted. "Eligible employees may bid for posted positions by submitting a completed bid form provided by the department." Selection of the person to fill a position is based upon eligibility and seniority. "The most senior [eligible] bidder, if any, within the departmental geographic area shall be offered the position. If no employee from the departmental geographic area bids, then the most senior bidder in the department shall be offered the position. If no departmental employee bids, the position shall be offered to the bidder with the highest seniority, regardless of department."[1]

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[1] The pilot program for one unit does not take into account whether a bidder is within the departmental geographic area where the position is available.

The California State Personnel Board (SPB) sought a writ of mandate to prohibit implementation and enforcement of the MOUs' "post and bid" provisions. Agreeing with SPB that the provisions violate the constitutionally mandated merit principle of the civil service system (Cal. Const., art. VII, § 1, subd. (b)), the superior court issued the writ.

CSEA appeals from the judgment. In CSEA's view, SPB lacks standing to challenge the post and bid provisions of the MOUs and, in any event, the post and bid programs are not unconstitutional.

Rather than plod through the thicket of standing, we shall reverse the judgment on the ground that the post and bid provisions do not violate the constitutionally mandated merit principle of the civil service system.

As we will explain, appointments or promotions under the post and bid pilot programs are based on merit ascertained by competitive examination. This is so because the MOUs preserve the requirement of competitive testing and the rule of three ranks, whereby applicants who have passed a competitive examination and have been placed in the top three ranks may be considered for appointment. The MOUs simply dictate which of the qualified candidates from the first three ranks will be selected, and base this selection on seniority, which SPB concedes is a merit-related factor and may be a basis for preferential job credits. Seniority is an objective factor that does not promote a spoils system of governmental employment. The fact that the most senior employee selected under a post and bid program may not be the most qualified employee does not mean the program violates the merit principle.

This is so because the merit principle "does not require that the most qualified or best candidate be chosen." (*Alexander v. State Personnel Bd.* (2000) 80 Cal.App.4th 526, 542.)

FACTUAL BACKGROUND

DPA represents the Governor of the State of California in collective bargaining agreement negotiations with the elected representatives of state civil service employees. (Gov. Code, §§ 19815, subd. (b), 19815.4, subd. (g); further section references are to the Government Code unless otherwise specified.) CSEA is the elected, exclusive representative for state employees in Bargaining Unit 1 (professional, administrative, financial, and staff services), Unit 4 (office and allied staff), and Unit 11 (engineering and scientific technicians). (§ 3513, subd. (b).)

DPA and CSEA entered into MOUs for Units 1, 4 and 11, which were approved by the Legislature and were signed by the Governor. Each MOU contains a provision for a post and bid pilot program that applies to a limited number of classifications in the three units. With respect to Units 1 and 4, the program applies to 50 percent of appointments within the specified classifications. The program was designed to sunset at the expiration of the contract on July 2, 2003, unless the parties agree to continue it during negotiations of the successor agreement.[2]

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[2] Although the MOUs have expired, it is likely the challenged provisions will be incorporated in the new MOUs because both the bargaining parties wish to pursue the post and bid pilot program. It also is likely that the parties will be unable to obtain appellate review before the expiration of the new MOUs. Therefore, we have not dismissed the appeal as moot since the

Under the MOUs' post and bid programs, eligible employees may bid on posted positions in specified clerical, technical, and professional classifications. To be eligible, an employee must have immediate list eligibility or be eligible for appointment under the civil service rules and either have permanent full-time civil service status, or have permanent intermittent civil service status and meet the eligibility criteria for a time base change under SPB Rule 277. In addition, the MOU for Unit 11 provides that "[f]or promotional bids, employees must also have list eligibility for the posted position and be appointable under civil service rules."

The other eligibility requirements for the post and bid programs are that the employee (1) may not be on probation or on an official training and development assignment; (2) must meet the minimum qualifications for the posted position and possess the physical ability to perform the essential job functions; (3) must not have had an adverse action relating to his or her job performance within the 12 months preceding the bid process; and (4) must have an overall satisfactory performance in his or her current job. Employees in Unit 11 may be denied the right to bid under the program "for reasons related to safety, security or for other job related reasons (e.g., to avoid violating nepotism

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issues raised by CSEA regarding the constitutionality of the post and bid program are of continuing public interest and importance, and they are likely to recur but evade review. (*DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58; *In re Christina A.* (2001) 91 Cal.App.4th 1153, 1159; *Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985, 989.)

policies or where the appointment would pose a demonstrable threat to the health and safety of any employee)."

Once the bidding process is closed, the appointing authority's selection among eligible employees is based on seniority. Except for certain positions in the Employment Development Department (EDD), the post and bid program for Unit 1 and Unit 4 provides: "1. All bidders must satisfy the Eligibility to Bid criteria . . . . [¶] 2. Selection will be based on the departmental geographic area (geographic region, program, division, etc.). The most senior bidder, if any, within the departmental geographic area shall be offered the position. If no employee from the departmental geographic area bids, then the most senior bidder in the department shall be offered the position. If no departmental employee bids, the position shall be offered to the bidder with the highest seniority, regardless of department. [¶] 3. If the most senior bidder within the appropriate pool declines the position, then the procedure continues by offering the position to the next most senior bidder until there are no bidders left. When there are no bidders left, management may then fill the posted position through any other means. . . ."

As for Unit 1 Employment Program Representatives (EPR) and Disability Insurance Program Representatives (DIPR) seeking full time positions with EDD, selection is based on the most senior employee meeting the eligibility requirements.

The selection process for the Unit 11 post and bid program is as follows: "The most senior timely bidder who satisfies the eligibility criteria shall be offered the position. Management

may contact, meet with and/or make inquiries to ensure that bidders satisfy the eligibility criteria and understand the objective qualifications. If the most senior bidder is ineligible or disqualified for any reason listed in subsection C above [regarding eligibility requirements], that bidder will be notified of the ineligibility or disqualification at the time the selection is announced."

The MOUs for Units 1 and 11 also provide for a 30-day trial period during which an employee has the right to return to his or her former position. Regarding Unit 1, management has the right to return the employee to his or her former position during this same 30-day period. The MOUs do not purport to eliminate the probationary period applicable under state civil service rules and statutes. (§§ 19170, 19171; Cal. Code Regs., tit. 2, § 322.) In fact, each MOU provides that, except for those rights abridged by the MOU, all rights are reserved to the State.

The MOUs also specify they are "not intended to . . . contravene the spirit or intent of the merit principle in State employment," and that "[a]ny matters which concern the application of the merit principle to State employees are exclusively within the purview of those processes provided by Article VII of the State Constitution or bylaws and rules enacted thereto."

SPB filed a petition for writ of mandate, seeking to enjoin the implementation and enforcement of the MOUs' pilot post and bid programs, and seeking declaratory relief that the provisions and the implementing legislation violate the constitutionally mandated

merit principle of state civil service. (Cal. Const., art. VII, § 1, subd. (b).)

The superior court held that the merit principle extends throughout the hiring process, and not just during the initial qualification and examination process underlying the compilation of eligibility lists. Thus, it determined that the post and bid programs, which based the selection of eligible applicants on seniority, violated the merit principle. Accordingly, the court enjoined DPA and CSEA from implementing the post and bid provisions of the MOUs for Units 1, 4, and 11.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

Article VII, section 1, subdivision (b), of the California Constitution states: "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination."

This constitutional mandate is known as the "merit principle," and its "cornerstone . . . is a competitive examination process that determines merit, effectiveness and fitness for appointment and promotion. [Citations.]" (*Lund v. California State Employees Assn.* (1990) 222 Cal.App.3d 174, 186; accord, *Alexander v. State Personnel Bd., supra,* 80 Cal.App.4th at p. 542.) As explained in detail in *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, the merit principle is intended to combat the "spoils system" of political patronage in state employment and to ensure that appointments and promotions are made solely on the basis of merit, thereby promoting efficiency and economy in state government.

(*Id.* at pp. 181-184 & fn. 6; *Kidd v. State of California* (1998) 62 Cal.App.4th 386, 401.)

To implement the merit principle, the Legislature has decreed "[t]he appointing power . . . shall fill positions by appointment . . . in strict accordance with this part and the rules prescribed from time to time under this part, and not otherwise. Except as provided in this part, appointments to vacant positions shall be made from employment lists." (§ 19050.)

Employment lists are established by competitive examinations that are of such character as to test and to determine the qualifications, fitness, and ability of competitors actually to perform the duties of the class for which they seek employment. (§§ 18900, 18930.) These examinations "may be assembled or unassembled, written or oral, or in the form of a demonstration of skill, or any combination of these; and any investigation of character, personality, education, and experience and any tests of intelligence, capacity, technical knowledge, manual skill, or physical fitness which the board deems are appropriate, may be employed." (§ 18930.)

"In establishing any eligible list or promotional list following an examination, the names of the persons who have attained the passing mark in such examination shall be placed on the list in the order of final earned ratings . . . ." (§ 18937.)

Section 19057 provides in pertinent part: "[T]here shall be certified to the appointing power the names and addresses of the three persons standing highest on the promotional employment list for the class in which the position belongs and who have

indicated their willingness to accept appointment under the conditions of employment specified. . . . The appointing power shall fill the position by the appointment of one of the persons certified."

Notwithstanding section 19057, positions in certain classes are to be filled from the highest three ranks on the employment list, rather than from the three persons with the highest standing. (§§ 19057.1, 19057.2, 19057.3.) For example, section 19057.1 states in pertinent part: "[F]or positions in classes designated by [SPB] as professional, scientific, or administrative, or for any open employment list, there shall be certified to the appointing power the names and addresses of all those eligibles whose scores, at time of certification, represent the three highest ranks on the employment list for the class, and who have indicated their willingness to accept appointment under the conditions of employment specified. [¶] . . . [¶] [T]he appointing authority shall fill the position by appointment of one of the persons certified."

This "rule of three ranks" is designed to safeguard the merit principle by assuring that one of the better candidates will be chosen. (*Alexander v. State Personnel Bd., supra,* 80 Cal.App.4th at p. 542 (hereafter *Alexander*); *Kidd v. State of California, supra,* 62 Cal.App.4th at p. 404 (hereafter *Kidd*).) However, "the merit principle does not require that the most qualified or best candidate be chosen." (*Alexander, supra,* 80 Cal.App.4th at p. 542; *Kidd, supra,* 62 Cal.App.4th at p. 404.)

To ensure those in power do not thwart the merit principle, the state Constitution designates SPB as the sole agency to administer this principle, by directing that SPB "shall enforce the civil service statutes and . . . shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions." (Cal. Const., art VII, § 3, subd. (a).) Section 18701 authorizes SPB to prescribe rules for the administration and enforcement of the civil service statutes, including the aforementioned statutes pertaining to appointments to positions within the civil service.

Subject to the merit principle and SPB's duty to administer this principle, "the Legislature [has] a 'free hand' to fashion 'laws relating to personnel administration for the best interests of the State.'" (*Pacific Legal Foundation v. Brown, supra,* 29 Cal.3d at p. 184 (hereafter *Brown*).) "Nothing in the Constitution . . . prohibits the Legislature from experimenting to treat certain employees under different rules, *provided the merit principle is not infringed*." (*Alexander, supra,* 80 Cal.App.4th at p. 536, orig. italics.)

In addition to statutes that govern civil service, the Legislature has enacted statutes regarding collective bargaining in state employment--statutes presently known as the Ralph C. Dills Act and formerly known as the State Employer-Employee Relations Act (SEERA). (See, e.g., §§ 3512-3524; *Sacramento County Employees Organization v. County of Sacramento* (1988) 201 Cal.App.3d 845, 854.)

The purpose of the statutory scheme is "to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations. . . ." (§ 3512.) However, "[n]othing in [the statutes] 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." (§ 3512.)

In *Brown, supra,* 29 Cal.3d 168, the California Supreme Court held that the statutory scheme does not violate the merit principle, and that the Legislature carefully crafted the statutes with the constitutional mandate of article VII firmly in mind. (*Id.* at p. 174.) *Brown* recognized that "theoretically the *product* of the collective bargaining process may possibly in specific instances conflict with the merit principle," such as if the Governor and an exclusive bargaining representative agreed to an MOU authorizing hiring or promotions on a politically partisan basis. (*Id.* at p. 185, orig. italics.) However, the scheme "neither explicitly nor implicitly authorize[s] any such an encroachment on the merit principle of article VII through the collective bargaining process." (*Ibid.*) Rather, the Legislature reaffirmed the primacy of the merit principle and carefully crafted the statutes to minimize any potential conflict. (*Ibid.*)

The Supreme Court noted: "The act . . . provides that, except with respect to a number of specific statutes which the Legislature

has expressly determined may be superseded by a memorandum of understanding, any provision of a memorandum of understanding in conflict with a statutory mandate shall not be effective unless approved by the Legislature. [§ 3517.6]" (*Brown, supra*, 29 Cal.3d at p. 178.) "[I]n designating the statutes that may be superseded by a memorandum of understanding without legislative approval, the Legislature excluded those statutes relating to classification, examination, appointment, or promotion, areas in which a potential conflict with the merit principle of employment would be most likely to occur." (*Id.* at p. 185.)

DISCUSSION

I

As we have noted, article VII, section 1, subdivision (b), of the California Constitution provides: "In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." It is this competitive examination process "'that determines merit, effectiveness and fitness for appointment and promotion.' [Citation.] It is this process that the merit principle requires." (*Alexander, supra,* 80 Cal.App.4th at p. 543.)

CSEA contends the post and bid programs do not violate the merit principle of article VII, section 1, subdivision (b), of the California Constitution because they are implemented after the competitive testing mandated by the Constitution for state employment. Since the programs require that eligible employees (1) have a satisfactory job performance evaluation and (2) have not been disciplined within the last 12 months, CSEA argues the

programs do not contravene the merit principle because they are based upon merit and do not encourage the appointment of persons on the basis of political patronage.

SPB does not dispute that the post and bid programs are implemented after competitive examinations and that selection is limited to candidates in the top three ranks. Rather, it alleges that application of the merit principle must continue throughout the selection process, not just the examination process. Hence, regardless of the fact that the applicants have met the minimum qualifications for the job, have satisfactorily performed their present civil service job, have not experienced discipline problems within the last year, and also satisfy the rule of three ranks, the merit principle is violated if an applicant who meets these eligibility requirements is selected on the basis of seniority. We disagree.

In essence, SPB argues that the merit principle is not limited to the competitive examination process and must continue throughout the selection process (thus precluding the selection of a qualified candidate based on seniority) because, otherwise, the process would not ensure that the best candidate is hired. However, "the merit principle does not require that the most qualified or best candidate be chosen," only one of the better candidates, i.e., one of those in the top three ranks. (*Alexander, supra,* 80 Cal.App.4th at p. 542.)

SPB has not promulgated any rules or regulations governing the appointing authority's discretion in choosing a candidate from the first three ranks. Nor does it point to any constitutional or statutory mandate that, following the required competitive testing

and ranking, the appointing authority must consider certain specified factors in making its selection among the candidates. All that exists is the constitutional requirement of ascertaining merit via a competitive examination (Cal. Const., art VII, § 1, subd. (b)), which examination must be designed to measure the applicants' competency and qualifications (§ 18930), and a statutory directive of hiring someone from the top three candidates or the first three ranks. (§§ 19057, 19057.1, 19057.2, 19057.3.)

Here, the MOUs preserve the requirement of competitive testing and the rule of three ranks; they simply dictate which qualified candidates from the first three ranks will be selected, and base the selection on seniority, which SPB concedes is a merit-related factor and may be a basis of preferential job credits. (§§ 18950.1, 18951, 18951.5.) Seniority is an objective factor that does not promote a spoils system of governmental employment. In fact, it is less likely to result in a candidate being selected based on political partisanship than if the appointing authority is given unfettered discretion to hire any candidate in the first three ranks.

Although certain statutes intimate the appointing authority is entitled to choose among applicants in the first three ranks (see, e.g., § 19057.1), this is a legislatively created choice.[3]

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[3] Section 19057.1 provides in pertinent part: "If the names on the list from which certification is being made represent fewer than three ranks, then additional eligibles shall be certified from the various lists next lower in order of preference until names from three ranks appear. If there are fewer than three names available for certification, and the appointing authority

As such, it can be "preempted," so to speak, by a collective bargaining agreement approved by the Legislature, as long as the MOU does not dictate the appointment or promotion of employees based on improper factors such as political partisanship. (*Brown, supra*, 29 Cal.3d at pp. 178, 185; § 3517.6.)[4]

The Legislature's approval of the MOUs necessarily constituted its approval of the MOU's deviation from the statutes granting the appointing authority discretion to choose among any of the applicants in the first three ranks (e.g., §§ 19057, 19057.1, 19057.2, 19057.3), and not just the most senior person. This legislative approval renders the MOUs valid. (See *Communications Workers of America v. State of California* (1984) PERB Dec. No. S-CE-134-S [8 PERC ¶ 15138] [union's proposal that the appointing authority be required to select the most senior employee on the eligibility list did not unlawfully infringe on the merit principle and was within the scope of representation under the Ralph C. Dills Act].)

Furthermore, some of the MOUs provide a 30-day trial period for the new position. More importantly, none of the MOUs purport

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does not choose to appoint from among these, the appointing authority may demand certification of three names. In that case, examinations shall be conducted until at least three names may be certified by the procedure described in this section, and the appointing authority shall fill the position by appointment of one of the persons certified."

[4] Section 3517.6, subdivision (b), provides in pertinent part: "If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above [such as the statutes regarding appointment from the first three ranks], those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature."

to eliminate the probationary period applicable under state civil service rules and statutes. (§§ 19170, 19171; Cal. Code Regs., tit. 2, § 322.)[5] In fact, the MOUs all provide that except for

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[5] Section 19171 states: "The service of a probationary period is required under the following circumstances: (a) when an employee enters or is promoted in the state civil service by permanent appointment from an employment list, (b) upon reinstatement after a break in continuity of service resulting from a permanent separation, or (c) after any other type of appointment situation not specifically excepted from the probationary period requirement by statute or by board rule."

California Code of Regulations, title 2, section 322 states: "Probationary period requirements for permanent appointments from an employment list; or by reinstatement, or by transfer, or by demotion are: [¶] (a) A new probationary period shall be required when an employee enters or is promoted in the state civil service by permanent appointment from an employment list; upon reinstatement after a break in continuity of service resulting from a permanent separation; or by reinstatement or appointment from a reemployment list, pursuant to Section 548.152 or 548.153, to a classification with a promotional relationship to the classification of the employee's former position. [¶] (b) An employee who has not attained permanent status when accepting another appointment shall serve the remainder of that probationary period unless required to serve a new probationary period. [¶] (c) A new probationary period shall be required unless waived by the appointing power when an employee is being appointed: [¶] (1) Without a break in service in the same class in which the employee has completed the probationary period but under a different appointing power. [¶] (2) Without a break in service to a class with substantially the same or lower level of duties and responsibilities and salary range as a class in which the employee has completed the probationary period. [¶] (3) From a general reemployment list to the same class in which the employee has completed the probationary period but under a different appointing power. [¶] (4) By reinstatement or appointment from a reemployment list, pursuant to Section 548.152 or 548.153, to a classification to which the employee could have transferred from his or her former position. [¶] (d) A new probationary period shall not be required when an employee is being appointed: [¶] (1) From any reemployment list under the same appointing power, except as

those rights abridged by the MOUs, all rights are reserved to the State. Thus, although the MOUs dictate which of the qualified applicants in the top three ranks will be selected, the appointing authority retains the discretion to terminate the employee for unsatisfactory performance during either the trial period provided by the terms of the MOUs, or the probationary period provided by the civil service statutes. This is sufficient to protect the appointing authorities' hiring discretion, and to ensure that the employee is qualified to perform the job.

An analogous case from New York upheld an arbitration award enforcing a provision of a collective bargaining agreement (CBA) that required the Buffalo Board of Education to promote the highest-scoring unit member on a civil service eligible list. (*Professional, Clerical, Technical Employees Association v. Buffalo Board of Education* (1997) 90 N.Y.2d 364, 369 [683 N.E.2d 733, 734] (hereafter *PCTEA v. Bd. of Educ.*).)[6] The New York Constitution states that civil service appointments and promotions "shall be made according to merit and fitness to be ascertained, as far as

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otherwise provided in this section; [¶] (2) By reinstatement with a right of return, except as otherwise provided in this section; [¶] (3) Without a break in service under the same appointing power and to the same class in which the employee had completed the probationary period; or [¶] (4) By demotion under Government Code Section 19997.8. [¶] 'Without a break in service' as used in this section is continuous service as defined in Section 6.4."

[6] New York's Taylor Law (Civil Service Law § 204), like California's Ralph C. Dills Act, requires a public employer to negotiate collectively with employee organizations concerning the terms and conditions of employment. (*PCTEA v. Bd. of Educ., supra,* 90 N.Y.2d at p. 372 [683 N.E.2d at p. 736].)

practicable, by examination which, as far as practicable, shall be competitive." (N.Y. Const., art. V, § 6.) The Legislature enacted statutes to implement these requirements, including a rule of three candidates statute (Civil Service Law § 61), which is similar to California's section 19057. Under this rule, the appointing authority retains discretion to select from any one of the three highest scoring candidates and need not select the one who scored the highest. (*PCTEA v. Bd. of Educ., supra,* 90 N.Y.2d at pp. 374-375 [683 N.E.2d at pp. 737-738].) The board contended that the MOU improperly restricted this discretion. (*Id.* at pp. 369, 375 [683 N.E.2d at pp. 734, 738].) However, the New York court concluded that "nothing in [the] State's Constitution, the Civil Service Law or decisional law . . . prohibits an appointing authority from agreeing through collective negotiations on the manner in which it will select one of the top three qualified candidates from an eligible list for promotion," where a probationary period precedes the candidate's permanent appointment. (*PCTEA v. Bd. of Educ., supra,* 90 N.Y.2d at pp. 369, 373-375 [683 N.E.2d at p. 734, 737-738].) The challenged appointments were probationary under civil service rules, during which time the employee could be terminated if his or her conduct or performance was not satisfactory. These probationary terms provided the board with sufficient opportunity to exercise its discretion prior to the appointment becoming permanent. (*Id.* at pp. 375-377 [683 N.E.2d at pp. 738-739].)

The same reasoning applies here. Because the post and bid pilot programs do not eliminate competitive testing, do not eliminate the requirement that employees be appointed or promoted

from the first three ranks, and do not eliminate the statutorily mandated probationary periods, the programs do not violate the merit principle of civil service appointment mandated by article VII of the California Constitution.

II

SPB contends that *Lucchesi v. City of San Jose* (1980) 104 Cal.App.3d 323 (hereafter *Lucchesi)* supports SPB's contention that appointments or promotions based on seniority violate the merit principle.

In *Lucchesi,* an ordinance gave preference for firefighter positions to persons already employed by the city. (104 Cal.App.3d at p. 327.) *Lucchesi* held this violated the requirement of the city charter that appointments to civil service positions be made on the basis of merit and fitness as demonstrated by examination and other evidence of competence. (*Id.* at pp. 328-329.) This was so because no consideration was given to the employee's performance record or quality of work. (*Id.* at pp. 329, 334.) "[A] City employee with an extensive disciplinary record, poor work record, but a written test score of 80 percent or better, would be placed on the promotion eligible list and offered an available firefighter position before a non-City employee who scores 100 percent . . . ." (*Id.* at p. 329.)

Here, unlike in *Lucchesi,* the post and bid programs do consider the employee's work history. Employees are not eligible for the programs if they have received an adverse disciplinary action against them within the preceding 12 months, have not received an overall satisfactory performance review in their

current job, or do not possess the physical ability to perform the essential job functions. In addition, employees in Unit 11 may be denied the right to bid under the program for reasons related to safety, security, or other job-related reasons.

Furthermore, the requirements of the post and bid programs tend to increase efficiency in the workplace, which is a goal of the merit principle, by (1) encouraging employees to perform well and be discipline-free for the preceding year in order to be eligible for the programs, and (2) encouraging supervisors to monitor their staff better by pursuing disciplinary action when appropriate, rather than letting poor behavior slide, and by not giving satisfactory performance evaluations as a matter of course.

For these reasons, SPB's reliance on *Lucchesi* is unavailing.

III

SPB also relies on the decision in *Kidd, supra,* 62 Cal.App.4th 386, the decision in *Professional Engineers in Cal. Government v. State Personnel Bd.* (2001) 90 Cal.App.4th 678 (hereafter *Professional Engineers*), and the decisions in *McGowan v. Burstein* (1988) 71 N.Y.2d 729 [525 N.E.2d 710] and *Barthelmess v. Cukor* (1921) 231 N.Y. 435 [132 N.E. 140] to support its position that the merit principle is not sufficiently protected by hiring an applicant from the first three ranks who meets the other eligibility requirements set forth in the MOUs.

SPB claims *Kidd* rejected the argument that a state agency has complete discretion to appoint anyone who passes the competitive examination for a position, pointing out *Kidd* stated "[t]he notion that defendants can hire any applicant who passes an examination

without consideration of that applicant's standing in relation to others who passed the examination reads the word 'competitive' out of the state Constitution." (*Kidd, supra,* 62 Cal.App.4th at p. 402.)

However, SPB takes this statement out of context and overlooks that the challenged affirmative action program in *Kidd* allowed certain minority and female applicants to be considered for appointment even though *they did not place in the top three ranks of the list of eligible candidates*. (*Kidd, supra,* 62 Cal.App.4th at pp. 391, 393.) In other words, the rule of three ranks, which is designed to safeguard the merit principle by assuring that one of the better candidates will be chosen (*Alexander, supra,* 80 Cal.App.4th at p. 542), was ignored by the challenged program. *Kidd* properly concluded that "merit" was more than a passing score on the examination and that eschewing rankings "renders the examination noncompetitive, emasculating the merit principle." (*Kidd, supra,* 62 Cal.App.4th at p. 402.)

Here, rankings are not disregarded, and the post and bid programs do not permit appointment of the most senior person who simply "passed" the competitive examination.

SPB relies on *Professional Engineers* for the proposition that a competitive examination must distinguish the relative merits of the candidates, and that the hiring authority must have the ability to make the actual selection based upon a comparison of these relative merits. (*Professional Engineers, supra,* 90 Cal.App.4th at pp. 694-695, 702.) Therefore, SPB asserts, application of the merit principle does not end with a competitive examination.

Again, SPB takes certain language from the cited case out of context. *Professional Engineers* concerned a regulation implementing the selection and transfer of applicants in the Career Executive Assignment program, allowing the selection and transfer of applicants without ranking them. (*Professional Engineers, supra,* 90 Cal.App.4th at pp. 682, 694.) Although the regulation purported to require the use of a competitive examination, it also stated the appointing authority "'is not required to distinguish between groups or individuals as to who is qualified or not qualified or as to relative level of qualification.'" (*Id.* at p. 694.) *Professional Engineers* held that examinations without rankings do not qualify as competitive examinations and, therefore, the challenged regulation violated the merit principle. (*Id.* at p. 694, 703.)

SPB points to nothing in the present case demonstrating that the post and bid programs permit the appointment, promotion, or transfer of employees based on examination results that are not ranked. Accordingly, SPB's reliance on *Professional Engineers* is misplaced.

As for the two cases from New York upon which SPB relies (*McGowan v. Burstein, supra,* 71 N.Y.2d 729 [525 N.E.2d 710] and *Barthelmess v. Cukor, supra,* 231 N.Y. 435 [132 N.E. 140]), both are inapposite.

McGowan v. Burstein, supra, 71 N.Y.2d 729 [525 N.E.2d 710] held that the constitutional merit principle did not prohibit the use of zone scoring, "which discounts marginal and perhaps statistically insignificant degrees of success on the written

examination, when necessary to accommodate adequate consideration of other relevant criteria." (*Id.* at p. 734 [525 N.E.2d at p. 712].) It did not address whether the merit principle necessarily requires that the appointing authority be permitted to consider an applicant's relative merits once the applicant has been ranked as one of the highest three on the eligibility list.

Barthelmess v. Cukor, supra, 231 N.Y. 435 [132 N.E. 140] held a statute mandating that applicants for civil service appointment or promotion, who were veterans and had passed a civil service examination, "shall be employed" even if the veterans' test scores were not among the three highest, violated the merit principle. (*Id.* at pp. 439-441 [132 N.E. at pp. 141-142].) In effect, the Legislature had "substituted a preference for a test." (*Id.* at p. 444 [132 N.E. at p. 142].)

Plainly, neither case supports SPB's position. Furthermore, neither case involved collective bargaining agreements. And the decision in *PCTEA v. Bd. of Educ.*, *supra*, 90 N.Y.2d 364 [683 N.E.2d 733], demonstrates that the MOU provisions in question in this case would not offend the merit principle under New York's Constitution. Hence, SPB's reliance on New York case law to support its position is unavailing.

IV

SPB says the post and bid programs lead to absurd results because the most senior employee is not always the most qualified employee and, therefore, less qualified employees will be appointed in some cases.

But, as we have noted, "the merit principle does not require that the most qualified or best candidate be chosen," only one of the better candidates, i.e., one of those in the top three ranks. (*Alexander, supra,* 80 Cal.App.4th at p. 542.) The post and bid programs meet this requirement and also ensure that the selected employee has not been a recent discipline problem, has performed his or her current job satisfactorily, and then successfully completes a probationary period in the new position. And the post and bid programs in Units 1 and 4 apply to only 50 percent of the appointments within specified positions. If an undeserving "problem employee" is likely to vie for a particular position, the appointing authority need not use the post and bid process for that position.

Although *in some instances* the post and bid programs might result in the advancement of an applicant who is qualified, but perhaps less qualified than some other applicants, this fact is insufficient to demonstrate that the programs create "a present total and fatal conflict with applicable constitutional prohibitions." (Cf. *Brown, supra*, 29 Cal.3d at pp. 180-181; *Alexander, supra*, 80 Cal.App.4th at pp. 535, 543.)

V

For all the reasons stated above, the post and bid pilot programs in the three MOUs do not violate the merit principle.

Consequently, the superior court erred in enjoining implementation and enforcement of the pilot programs.

DISPOSITION

The judgment is reversed.

SCOTLAND, P.J.

We concur:

SIMS, J.

ROBIE, J.