Hearing Date: January 27, 2017
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ITEM 4

TEST CLAIM

PROPOSED DECISION

Government Code Sections 3505.4, 3505.5, and 3505.7

Statutes 2011, Chapter 680 (AB 646)

Local Agency Employee Organizations: Impasse Procedures

15-TC-01

City of Glendora, Claimant

TABLE OF CONTENTS

Renne Sloan Holtzman Sakai LP, Navigating the Mandatory Fact-Finding Process Under AB 646 [November 2011], pages 1, 8, http://www.pccfacultyassociation.org/wp-content/uploads/2012/09/fact_finding.pdf, accessed November 9, 2016

Emily Prescott, "Mandatory Fact-Finding Under the Meyers-Milias-Brown Act," California Labor & Employment Law Review, Vol. 26 No. 1, dated January 2012

Best Best & Krieger LLP, AB 646's Impact On Impasse Procedures Under the MMBA (Mandated Factfinding), dated December 2011

Stefanie Kalmin, "A.B. 646 Raises Many Questions," U.C. Berkeley Institute for Research on Labor and Employment, December 2011

Minutes, Public Employment Relations Board Meeting, April 12, 2012

Senate Public Employment and Retirement Committee, Analysis of AB 1606 as introduced on February 7, 2012

Operating Engineers Local 3 v. City of Clovis, PERB Case No. SA-CE-513-M

Exhibit A

1. TEST CLAIM TITLE

Local Agency Employee Organizations: Impasse Procedures

2. CLAIMANT INFORMATION

City of Glendora
Name of Local Agency or School District

June Overholt
Claimant Contact

Finance Director - City Treasurer
Title

116 E. Foothill Boulevard
Street Address

Glendora, CA 91741-3380
City, State, Zip

(626) 914-8241
Telephone Number

(626) 852-9650
Fax Number

joverholt@cityofglendora.org
E-Mail Address

3. CLAIMANT REPRESENTATIVE INFORMATION

Claimant designates the following person to act as its sole representative in this test claim. All correspondence and communications regarding this claim shall be forwarded to this representative. Any change in representation must be authorized by the claimant in writing, and sent to the Commission on State Mandates.

Annette Chinn
Claimant Representative Name

Consultant
Title

Cost Recovery Systems, Inc.
Organization

705-2 E. Bidwell, #294
Street Address

Folsom CA 95630
City, State, Zip

(916) 939-7901
Telephone Number

(916) 939-7801
Fax Number

AchinnCRS@aol.com
E-Mail Address

For CSM Use Only
Filing Date

RECEIVED
June 2, 2016
Commission on State Mandates

Revised on June 17, 2016

Test Claim # 15-TC-01

4. TEST CLAIM STATUTES OR EXECUTIVE ORDERS CITED

Please identify all code sections (include statutes, chapters, and bill numbers) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]), regulations (include register number and effective date), and executive orders (include effective date) that impose the alleged mandate .

Government Code sectopm 3505.4, 3505.5 and 3505.7, Statutes 2011, Chapter 680 (AB 646)

☑ *Copies of all statutes and executive orders cited are attached.*

Sections 5, 6, and 7 are attached as follows:

5. Written Narrative: pages 1 to 13.
6. Declarations: pages 14 to 14.
7. Documentation: pages 15 to 65.

(Revised 6/2013)

8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

June Overholt
Print or Type Name of Authorized Local Agency or School District Official

Finance Director - City Treasurer
Print or Type Title

J A Overholt
Signature of Authorized Local Agency or School District Official

6/16/16
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

BEFORE THE
COMMISSION ON STATE MANDATES

Test Claim of:
The City of Glendora

Local Public Employee Organizations: Impasse Procedures

Chapter 680, Statutes of 2011

STATEMENT OF THE CLAIM

OVERVIEW

On June 22, 2011, Assembly Bill 646 (Atkins) added duties to Collective Bargaining activities falling under Milias-Meyers-Brown Act (MMBA). Specifically Section 3403.4 was repealed and replaced with a new section, and sections 3505.5 and 3503.7 were added.

The bill authorized the employee organization, if the mediator is unable to effect settlement of the controversy within 30 days of his or her appointment, to request that the matter be submitted to a factfinding panel. The bill would require that the factfinding panel consist of one member selected by each party as well as a chairperson selected by the board or by agreement of the parties. The factfinding panel would be authorized to make investigations and hold hearings, and to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. The bill would require all political subdivisions of the state to comply with the panel's requests for information.

This bill would prohibit a public agency from implementing its last, best, and final offer until at least 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties and the agency has held a public hearing regarding the impasse.

.

Specifically, this bill:

1) Requires the fact-finding panel shall meet with the parties within 10 days after appointment and take other steps it deems appropriate. Specifies that the fact-finding panel consist of one member selected by each party and a chairperson selected by the Public Employment Relations Board (PERB) or by agreement of the parties.
2) Authorizes the fact-finding panel to make inquiries and investigations, hold hearings, and take any other steps it deems appropriate, and to issue subpoenas

requiring the attendance and testimony of witnesses and the production of witnesses.

3) Requires state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel.
4) Specifies the criteria the fact-finding panel should be guided by in arriving at their findings and recommendations.
5) Requires the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. This information must first be provided to the parties before being made available to the public.
6) Requires the costs of the chairperson of the fact-finding panel to be paid for by both parties whether or not PERB selected the chairperson. Any other costs incurred will be borne equally by the parties, as specified.
7) Allows an employer to implement their last, best and final offer once any applicable mediation and fact-finding procedures have been exhausted and despite the implementation of the best and final offer, allows a recognized employee organization the right each year to meet and confer.

Government Code §3505.4 currently reads:

> **3505.4.**
>
> (a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.
>
> (b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.
>
> (c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their

possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Government Code §3505.5 currently reads:

3505.5.

(a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary

travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

Government Code §3505.7 currently reads:

3505.7.

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters

within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

A. NEW ACTIVITIES

This legislation has led to increased costs related to the Collective Bargaining activities related to Impasse declaration including:

If mediation did not result in settlement after 30 days and if the employee organization requests factfinding:

1) The agency must notice impasse hearing if delay in factfinding request.
2) Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of its member
3) If chairperson is not approved by other party, agency must select a different chairperson.
4) PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.
5) The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)
6) The agency shall participate in all factfinding hearings.
7) The agency shall review and make the panel findings publicly available within 10 days of receipt.
8) The agency shall pay for half of the costs of the factfinding.
9) The agency must hold a public impasse hearing, if it chooses to impose its last, best offer.
10) The agency shall meet and confer with union and submit/resubmit last, best offer.

One time costs would include:

1) Train staff on new requirements
2) Revise local agency manuals, polices, and guidelines related to new factfinding requirements.

B. LEGISLATIVE HISTORY PRIOR TO 1975

There was no Mandatory Impasse Procedures requirement prior to 1975, nor in any of the intervening years, until the passage of Chapter 680, Statutes of 2011, filed on October 9, 2011.

SHOULD WE MENTION OTHER RELATED MANDATE PROGRAMS – SUCH AS:

The Commission on State mandates has found other similar mandates pertaining to Personnel issues such as BINDING ARBITRATION (01-TC-07), LOCAL GOVERNMENT EMPLOYEE RELATIONS (02-TC-30), COLLECTIVE BARGAINING (97-TC-08) to be reimbursable State Mandated programs.

C. SPECIFIC STATUTORY SECTIONS THAT CONTAIN THE MANDATED ACTIVITIES

Government Code Sections 3504.4, 3505.5.5 and 3505.7were added by specified legislation and relate to the reimbursable provisions of this test claim.

D. COST ESTIMATES

The City of Glendora estimates that the costs to comply with this new mandate exceeded $63,448 in fiscal year 2014-15 and fiscal year 2015-16, when the City had to enter mediation as required by these statutes. The City first incurred increased costs as a result of this statute on June 16, 2015.

E. STATEWIDE COST ESTIMATES

According to the Assembly Floor Analysis, "There could be substantial state mandated reimbursement of local costs. The amount would depend on the number of requests for fact finding. PERB staff raised the possibility of exceeding 100 cases annually in the first years of the program. Assuming an individual case is likely to cost around $5,000, with the local agency footing half the bill, reimbursable costs could exceed $2.5 million. The Commission on State Mandates has approved a test claim for any local government subject to the jurisdiction of PERB that incurs increased costs as a result of a mandate, meaning their costs are eligible for reimbursement." *(K. Green – September 1, 2011)*

F. FUNDING SOURCES

The City of Glendora is unaware of any funding sources for the new activities mandated.

G. ELIGIBILITY FOR REIMBURESMENT

The costs incurred by the City of Glendora as a result of the statute on which this test claim is based are all reimbursable costs as such costs are "costs mandated by the State"

under Article XIII B (6) of the California Constitution, and Government Code §17500 *et seq.* of the Government Code. Section 17514 of the Government Code defines "costs mandated by the state", and specifies the following three requirements:

1. There are "increased costs which a local agency is required to incur after July 1, 1980."

2. The costs are incurred "as a result of any statute enacted on or after January 1, 1975."

3. The costs are the result of "a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIIIB of the California Constitution."

All three of the above requirements for finding costs mandated by the State are met as described previously herein.

MANDATE MEETS BOTH SUPREME COURT TESTS

The mandate created by this statute clearly meets both tests that the Supreme Court in the *County of Los Angeles* v. *State of California* (1987) created for determining what constitutes a reimbursable state mandated local program. Those two tests, which the Commission on State Mandates relies upon to determine if a reimbursable mandate exists, are the "unique to government" and the "carry out a state policy" tests. Their application to this test claim is discussed below.

Mandate Is Unique to Local Government

The sections of the law claimed involve the Milias-Meyers-Brown Act (MMBA). As described in Government Code section 3500 and highlighted by the Public Employment Relations Board (PERB), the MMBA applies specifically and solely to Local Agencies (Cities, Counties and Special Districts) and their employees. Similar to the Education Employment Relations Act (EERA) for public school and college districts only, with this law, the MMBA now requires uniform Impasse Procedures to local agencies. Thus, this requirement is unique to government.

Mandate Carries Out a State Policy

From the legislation, it is clear that the Legislature wishes to require uniform Impasse Procedures for local agencies after a public employee organization requests a factfinding panel. Prior to the passage of this legislation, the MMBA contained no requirements related for the creation of and activities relating to a factfinding panel.

In summary, this statute mandates that local government add a level of service in the Collective Bargaining process with the requirement of uniform factfinding procedures. The City of Glendora believes that uniform factfinding process as set forth above satisfies the constitutional requirements for a mandate.

STATE FUNDING DISCLAIMERS ARE NOT APPLICABLE

There are seven disclaimers specified in Government Code §17556 which could serve to bar recovery of "costs mandated by the State", as defined in Government Code §17556. None of the seven disclaimers apply to this test claim:

1. The claim is submitted by a local agency or school district which requests legislative authority for that local agency or school district to implement the Program specified in the statutes, and that statute imposes costs upon the local agency or school district requesting the legislative authority.

2. The statute or executive order affirmed for the State that which had been declared existing law or regulation by action of the courts.

3. The statute or executive order implemented a federal law or regulation and resulted in costs mandated by the federal government, unless the statute or executive order mandates costs which exceed the mandate in that federal law or regulation.

4. The local agency or school district has the authority to levy service charges, fees or assessments sufficient to pay for the mandated program or increased level of service.

5. The statute or executive order provides for offsetting savings to local agencies or school districts which result in no net costs to the local agencies or school districts, or includes additional revenue that was specifically intended to fund the costs of the State mandate in an amount sufficient to fund the cost of the State mandate.

6. The statute or executive order imposed duties which were expressly included in a ballot measure approved by the voters in a Statewide election.

7. The statute created a new crime or infraction, eliminated a crime or infraction, or changed the penalty for a crime or infraction, but only for that portion of the statute relating directly to the enforcement of the crime or infraction.

None of the above disclaimers have any application to the test claim herein stated by the City of Glendora.

CONCLUSION

The enactment of Chapter 680, Statutes of 2011 adding sections 3505.4, 3505.5 and 3505.7 imposed a new state mandated program and higher level of service which resulted in increased costs to the City of Glendora by establishing a program within the Collective Bargaining process with Local Agencies and their employee organizations under the Milias-Meyers-Brown Act. The mandated program meets all of the requirements established by the California Constitution and Government Codes as a reimbursable State mandated program.

G. CLAIM REQUIREMENTS

The following elements of this test claim are provided pursuant to Section 1183, Title 2, of the California Code of Regulations:

Exhibit 1: Chapter 680, Statutes of 2011

CLAIM CERTIFICATION

The foregoing facts are known to me personally and if so required, I could and would testify to the statements made herein. I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and complete to the best of my personal knowledge and as to all matters, I believe them to be true.

Executed this 16 day of June, 2016, at Glendora, California, by:

June Overholt, Finance Director – Treasurer
City of Glendora

DECLARATION OF JUNE OVERHOLT

I June Overholt, make the following declaration under oath:

I am the Finance Director and Controller-Treasurer for City of Glendora. As part of my duties, I am responsible for the complete and timely recovery of costs mandated by the State.

I declare that I have examined the City of Glendora's State mandated duties and resulting costs, in implementing the subject law, and find that such costs are, in my opinion, "costs mandated by the State", as defined in Government Code, Section 17514:

> " 'Costs mandated by the State' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

The City of Glendora first incurred increased costs as a result of this Test Claim statute on June 16, 2015.

I am personally conversant with the foregoing facts, and if so required, I could and would testify to the statements made herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own knowledge, except as to the matters which are stated upon information or belief, and as to those matters, I believe them to be true.

Executed this 16 day of June, 2016, at Glendora, California.

J A Overholt

June Overholt
Finance Director /City Treasurer
City of Glendora

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT **CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of Los Angeles)

On June 16, 2016 before me, Kathleen Rae Sessman, Notary Public,
Date *Here Insert Name and Title of the Officer*

personally appeared June Adel Overholt
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~she/~~they~~ executed the same in ~~his~~/her/~~their~~ authorized capacity(~~ies~~), and that by ~~his~~/her/~~their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

KATHLEEN RAE SESSMAN
Commission # 2068392
Notary Public - California
Los Angeles County
My Comm. Expires Jun 12, 2018

Signature _____
Signature of Notary Public

Place Notary Seal Above

OPTIONAL

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document
Title or Type of Document: Test Claim Document Date: June 16, 2016
Number of Pages: _____ Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____	Signer's Name: _____
☐ Corporate Officer — Title(s): _____	☐ Corporate Officer — Title(s): _____
☐ Partner — ☐ Limited ☐ General	☐ Partner — ☐ Limited ☐ General
☐ Individual ☐ Attorney in Fact	☐ Individual ☐ Attorney in Fact
☐ Trustee ☐ Guardian or Conservator	☐ Trustee ☐ Guardian or Conservator
☐ Other: _____	☐ Other: _____
Signer Is Representing: _____	Signer Is Representing: _____

Assembly Bill No. 646

CHAPTER 680

An act to add Sections 3505.5 and 3505.7 to, and to repeal and add Section 3505.4 of, the Government Code, relating to local public employee organizations.

[Approved by Governor October 9, 2011. Filed with Secretary of State October 9, 2011.]

LEGISLATIVE COUNSEL'S DIGEST

AB 646, Atkins. Local public employee organizations: impasse procedures.

The Meyers-Milias-Brown Act contains various provisions that govern collective bargaining of local represented employees, and delegates jurisdiction to the Public Employment Relations Board to resolve disputes and enforce the statutory duties and rights of local public agency employers and employees. The act requires the governing body of a public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations. Under the act, if the representatives of the public agency and the employee organization fail to reach an agreement, they may mutually agree on the appointment of a mediator and equally share the cost. If the parties reach an impasse, the act provides that a public agency may unilaterally implement its last, best, and final offer.

This bill would authorize the employee organization, if the mediator is unable to effect settlement of the controversy within 30 days of his or her appointment, to request that the matter be submitted to a factfinding panel. The bill would require that the factfinding panel consist of one member selected by each party as well as a chairperson selected by the board or by agreement of the parties. The factfinding panel would be authorized to make investigations and hold hearings, and to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. The bill would require all political subdivisions of the state to comply with the panel's requests for information.

This bill would require, if the dispute is not settled within 30 days, the factfinding panel to make findings of fact and recommend terms of settlement, for advisory purposes only. The bill would require that these findings and recommendations be first issued to the parties, but would require the public agency to make them publicly available within 10 days after their receipt. The bill would provide for the distribution of costs associated with the factfinding panel, as specified.

This bill would prohibit a public agency from implementing its last, best, and final offer until at least 10 days after the factfinders' written findings

of fact and recommended terms of settlement have been submitted to the parties and the agency has held a public hearing regarding the impasse.

The people of the State of California do enact as follows:

SECTION 1. Section 3505.4 of the Government Code is repealed.

SEC. 2. Section 3505.4 is added to the Government Code, to read:

3505.4. (a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

SEC. 3. Section 3505.5 is added to the Government Code, to read:

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

SEC. 4. Section 3505.7 is added to the Government Code, to read:

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included

in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

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3505.4. (a) The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

(e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

8. CLAIM CERTIFICATION

*Read, sign, and date this section and insert at the end of the test claim submission.**

This test claim alleges the existence of a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. I hereby declare, under penalty of perjury under the laws of the State of California, that the information in this test claim submission is true and complete to the best of my own knowledge or information or belief.

June Overholt
Print or Type Name of Authorized Local Agency or School District Official

Finance Director - City Treasurer
Print or Type Title

J A Overholt
Signature of Authorized Local Agency or School District Official

6/16/16
Date

** If the declarant for this Claim Certification is different from the Claimant contact identified in section 2 of the test claim form, please provide the declarant's address, telephone number, fax number, and e-mail address below.*

Supporting Documentation

BILL ANALYSIS

CONCURRENCE IN SENATE AMENDMENTS
AB 646 (Atkins)
As Amended June 22, 2011
Majority vote

ASSEMBLY:	50-25	(June 1, 2011)	SENATE:	23-14	(August 31, 2011)

Original Committee Reference: P.E., R. & S.S.

SUMMARY : Allows local public employee organizations to request fact-finding if a mediator is unable to reach a settlement within 30 days of appointment, defines certain responsibilities of the fact-finding panel and interested parties, and makes specified exemptions from these provisions. Specifically, this bill :

1) Requires the fact-finding panel shall meet with the parties within 10 days after appointment and take other steps it deems appropriate. Specifies that the fact-finding panel consist of one member selected by each party and a chairperson selected by the Public Employment Relations Board (PERB) or by agreement of the parties.

2) Authorizes the fact-finding panel to make inquiries and investigations, hold hearings, and take any other steps it deems appropriate, and to issue subpoenas requiring the attendance and testimony of witnesses and the production of witnesses.

3) Requires state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel.

4) Specifies the criteria the fact-finding panel should be guided by in arriving at their findings and recommendations.

5) Requires the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. This information must first be provided to the parties before being made available to the public.

6) Requires the costs of the chairperson of the fact-finding panel to be paid for by both parties whether or not PERB selected the chairperson. Any other costs incurred will be borne equally by the parties, as specified.

7) Allows an employer to implement their last, best and final offer once any applicable mediation and fact-finding procedures have been exhausted and despite the implementation of the best and final offer, allows a recognized employee organization the right each year to meet and confer.

8) Exempts a charter city, charter county, or a charter city and county that has a procedure, as specified, that applies if an impasse has been reached between the public agency and a bargaining unit regarding negotiations to which the impasse procedure applies.

The Senate amendments exempt a charter city, charter county, or a charter city and county that has a procedure, as specified, that applies if an impasse has been reached between the public agency and a bargaining unit regarding negotiations to which the impasse procedure applies.

EXISTING LAW , as established by the Meyers-Milias-Brown Act (MMBA):

1) Contains various provisions intended to promote full communication between public employers and their employees by

providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.

2) Provides that if, after a reasonable amount of time, representatives of the public agency and the employee organization fail to reach agreement, the two parties may mutually agree on the appointment of a mediator and equally share the cost. If the parties reach impasse, the public agency is not required to proceed to interest arbitration and may implement its last, best and final offer.

3) Authorizes a local public agency to adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under the MMBA.

4) Delegates jurisdiction over the employer-employee relationship to PERB and charges PERB with resolving disputes and enforcing the statutory duties and rights of local public agency employers and employee organizations.

AS PASSED BY THE ASSEMBLY , this bill was substantially similar to the version approved by the Senate.

FISCAL EFFECT : According to the Assembly Appropriations Committee:

1) Based on the staffing that PERB estimated was necessary to administer the bill, the fiscal impact of administering the provisions of this bill is approximately $200,000.

2) There could be substantial state mandated reimbursement of local costs. The amount would depend on the number of requests for fact finding. PERB staff raised the possibility of exceeding 100 cases annually in the first years of the program. Assuming an individual case is likely to cost around $5,000, with the local agency footing half the bill, reimbursable costs could exceed $2.5 million. The Commission on State Mandates has approved a test claim for any local government subject to the jurisdiction of PERB that incurs increased costs as a result of a mandate, meaning their costs are eligible for reimbursement. Increasing the waiting time before fact finding can begin should reduce the costs slightly.

COMMENTS : According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.

"The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in

order to assist them in resolving differences that remain after negotiations have been unsuccessful. Mediators are often useful in restarting stalled negotiations, by encouraging dialogue where talks have broken down; identifying potential areas where agreement may be reached; diffusing tension; and, suggesting creative compromise proposals. Fact-finding panels can also help facilitate agreement, by making objective, factual

determinations that can help the parties engage in productive discussions and reach reasonable decisions."

Opponents state, "AB 646 undermines a local agency's authority to establish local rules for resolving impasse and the requirement that a local agency engage in factfinding may delay rather than speed the conclusion of contract negotiations." Opponents go on to say they are not aware of any abuses or short-comings of the current process and question the need for making such an important change in the process of reaching a collective bargaining agreement.

Opponents conclude, "Most importantly, the provisions in AB 646 could lead to significant delays in labor negotiations between public employers and employee organizations and result in additional costs to public employers at a time when public agencies are struggling to address budget shortfalls and maintain basic services for their residents. AB 646 would provide a disincentive for employee organizations to negotiate in good faith when there exists the option of further processes under the PERB that will prolong negotiations. Most collectively bargained contracts are stalled due to cost-saving measures being sought by the public agency in a downturned economy; requiring mediation and fact finding prior to imposing a last, best and final offer would simply add costs and be unhelpful to both the employer and the employees."

Analysis Prepared by : Karon Green / P.E., R. & S.S. / (916) 319-3957

FN: 0002141

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM:

Government Code Sections 3500, 3500.5, 3501, 3502.5, 3507.1, 3508.5, 3509, 3510, and 3511;

California Code of Regulations, Title 8, Sections 31001-61630;

Statutes 2000, Chapter 901;

Filed on August 1, 2002 by the City of Sacramento and the County of Sacramento, Claimants.

Case No.: 01-TC-30

Local Government Employment Relations

STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7

(Adopted on December 4, 2006)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on December 4, 2006. Pamela Stone, John Liebert, Ed Tackach, Dee Contreras, and Krista Whitman appeared on behalf of City of Sacramento and County of Sacramento, claimants. Susan Geanacou, Donna Ferebee, Carla Castaneda, and Wendy Ross appeared on behalf of Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

At the hearing, the Commission adopted the staff analysis to partially approve this test claim by a vote of 6-0.

Summary of Findings

This test claim addresses statutes that amended the Meyers-Milias-Brown Act (hereafter "MMBA"), regarding employer-employee relations between local public agencies and their employees. The test claim statutes authorize an additional method for creating an agency shop arrangement and expand the jurisdiction of the Public Employment Relations Board (hereafter "PERB") to include resolving disputes and enforcing the statutory duties and rights of those public employers and employees subject to the MMBA.

Under the existing provisions of MMBA, the governing body of a local public agency is required to "meet and confer in good faith" regarding wages, hours, and other terms and conditions of employment with recognized employee organizations. When agreement is reached between the parties, a memorandum of understanding is jointly prepared to present to

the governing body for acceptance; if accepted, the memorandum becomes binding on both the public employer and employee organization.

Local agencies are authorized to adopt reasonable rules and regulations, after consultation with employee organizations, for administering employer-employee relations under the MMBA. Prior to 2001, labor-management disputes under MMBA were resolved through locally adopted procedures, and appeals from that process could be made to the courts. In 2001, the test claim statutes placed enforcement of the MMBA under PERB jurisdiction, but excluded the City of Los Angeles, the County of Los Angeles, and peace officers from PERB jurisdiction.

The Commission finds that the test claim statutes and regulations impose a reimbursable state-mandated program on local public agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following activities:

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code § 3508.5, subd. (b))
2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5. (Gov. Code § 3502.5, subd. (c))
3. Follow PERB procedures in responding to charges and appeals filed with PERB, by an entity *other than* the local public agency employer, concerning an unfair labor practice, a unit determination, representation by an employee organization, recognition of an employee organization, or an election. Mandated activities are:
    a. procedures for filing documents or extensions for filing documents with PERB (Cal. Code Regs., tit. 8, §§ 32132, 32135 (Register 2001, No. 49));
    b. proof of service (Cal. Code Regs., tit. 8, § 32140 (Register 2001, No. 49));
    c. responding to subpoenas and investigative subpoenas (Cal. Code Regs., tit. 8, §§ 32149, 32150 (Register 2001, No. 49));
    d. conducting depositions (Cal. Code Regs., tit. 8, § 32160 (Register 2001, No. 49));
    e. participating in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070 (Register 2001, No. 49)); and
    f. filing and responding to written motions in the course of the hearing (Cal. Code Regs., tit. 8, § 32190 (Register 2001, No. 49)).

Proposition 1A, approved by the voters November 2, 2004, amended article XIII B, section 6 of the California Constitution to require that unless the Legislature appropriates the full payable amount in a fiscal year for a mandate, the operation of the mandate shall be suspended for that fiscal year. However, section 6, subdivision (b)(5), states that this provision is not

applicable to "a requirement to provide or recognize any procedural or substantive protection, right, benefit, or employment status of any local government employee or retiree, or of any local government employee organization, that arises from, affects, or directly relates to future, current, or past local government employment and that constitutes a mandate subject to this section." The Commission finds that subdivision (b)(5) is applicable to this test claim.

BACKGROUND

This test claim addresses statutes that amended the MMBA, regarding employer-employee relations between local public agencies and their employees. The test claim statutes and regulations authorize an additional method for creating an agency shop[1] arrangement and expand the jurisdiction of PERB to include resolving disputes and enforcing the statutory duties and rights of those public employers and employees subject to the MMBA. If approved, the reimbursement period for this test claim would begin with the 2001-2002 fiscal year.

The MMBA was enacted in 1968[2] with the following intent:

> It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by those organizations in their employment relationships with public agencies ....[3]

Public agencies covered under the MMBA include "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not," but do not include school districts, a county board of education, a county superintendent of schools, or a personnel commission in a school district having a specified merit system.[4]

Public employees covered under the MMBA include "any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state."[5] The test claim

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[1] "Agency shop" means "an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization ..." (Gov. Code § 3502.5, subd. (a)).

[2] Statutes 1968, chapter 1390.

[3] Government Code section 3500, subdivision (a).

[4] Government Code section 3501, subdivision (c).

[5] Government Code section 3501, subdivision (d).

statutes, however, specifically exclude peace officers from the provisions,[6] and therefore peace officers and their employee organizations are not considered in this analysis.

Under the existing provisions of MMBA, the governing body of a local public agency, or its designee, is required to "meet and confer in good faith" regarding wages, hours, and other terms and conditions of employment with recognized employee organizations.[7] When agreement is reached between the parties, a memorandum of understanding is jointly prepared to present to the governing body for acceptance;[8] if accepted, the memorandum becomes binding on both the public employer and employee organization for its duration.[9]

Local agencies are authorized to adopt reasonable rules and regulations, after consultation with employee organizations, for administering employer-employee relations under the MMBA.[10] The test claim statutes established that PERB may adopt rules in areas where a local public agency has no rule,[11] and enforce and apply the rules adopted by a local public agency concerning unit determinations, representation, recognition, and elections.[12]

An agency shop agreement may be established through negotiation between the local public agency employer and a public employee organization which has been recognized as the exclusive or majority bargaining agent.[13] The test claim statutes provide an additional method for an agency shop arrangement to be established:

> [A]n agency shop arrangement ... shall be placed in effect, without a negotiated agreement, upon (1) a signed petition of 30 percent of the employees in the applicable bargaining unit requesting an agency shop agreement and an election to implement an agency fee arrangement, and (2) the approval of a majority of employees who cast ballots and vote in a secret ballot election in favor of the agency shop agreement. The petition may only be filed after the recognized employee organization has requested the public agency to negotiate on an agency shop arrangement and, beginning seven working days after the public agency received this request, the two parties have had 30 calendar days to attempt good faith negotiations in an effort to reach agreement.[14]

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[6] Government Code section 3511.

[7] Government Code section 3505.

[8] Government Code section 3505.1.

[9] *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215.

[10] Government Code section 3507.

[11] Government Code section 3509, subdivision (a).

[12] Government Code section 3509, subdivision (c).

[13] Government Code section 3502.5, subdivision (a).

[14] Government Code section 3502.5, subdivision (b).

Agency shop arrangements are not applicable to management, confidential, or supervisory employees.[15]

With regard to agency fee arrangements, the MMBA states that nothing shall affect the right of a public employee to authorize a dues deduction from his or her salary.[16] The test claim statutes added the following requirement of the employer:

> A public employer *shall deduct* the payment of dues or service fees to a recognized employee organization as required by an agency shop arrangement between the recognized employee organization and the public employer. (Emphasis added.)[17]

Prior to 2001, the labor-management disputes under MMBA were resolved through locally adopted procedures, and appeals from that process could be made to the courts. In 2001, the test claim statutes placed enforcement of the MMBA under PERB jurisdiction.[18] Thus, a complaint alleging any violation of MMBA or of any rules adopted by a local public agency pursuant to Government Code section 3507 are now resolved by PERB as an unfair practice charge,[19] and rules adopted by a local public agency concerning unit determinations, representation, recognition, and elections are enforced and applied by PERB.[20] However, the City of Los Angeles, the County of Los Angeles, and peace officers as defined in Penal Code section 830.1 are not subject to PERB jurisdiction.[21]

Although the MMBA has not previously been the subject of a test claim, claims for some collective bargaining activities under the Educational Employment Relations Act (EERA) have been determined to constitute reimbursable state mandates, as described below.

Collective Bargaining Under the Educational Employment Relations Act (EERA)

In the *Collective Bargaining* Statement of Decision, the Board of Control determined that Statutes 1975, chapter 961 (the EERA), constituted a reimbursable mandate. Parameters and guidelines were adopted on October 22, 1980, and amended seven times before the decision on the next related claim: *Collective Bargaining Agreement Disclosure* (97-TC-08).

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[15] Government Code section 3502.5, subdivision (e), formerly subdivision (c); that provision was subsequently amended to delete confidential and supervisory employees (Stats. 2003, ch. 311).

[16] Government Code section 3508.5, subdivision (a).

[17] Government Code section 3508.5, subdivision (b).

[18] Government Code section 3510 (amended and renumbered from section 3509 by Stats. 2000, ch. 901); PERB is an independent state body, consisting of five members, with jurisdiction to administer and enforce several California employer-employee relations statutes including the MMBA (Gov. Code §§ 3541 and 3541.3).

[19] Government Code section 3509, subdivision (b).

[20] Government Code section 3509, subdivision (c).

[21] Government Code sections 3509, subdivision (d), and 3511.

On March 26, 1998, the Commission adopted the Statement of Decision for the *Collective Bargaining Agreement Disclosure* test claim. The Commission found that Government Code section 3547.5 (Stats. 1991, ch. 1213) and California Department of Education Management Advisory 92-01 constitute a reimbursable mandate for requiring K-14 school districts to publicly disclose the major provisions of all collective bargaining agreements after negotiations, but before the agreement becomes binding.

The parameters and guidelines for *Collective Bargaining Agreement Disclosure* were adopted in August 19, 1998, and consolidated with the *Collective Bargaining* parameters and guidelines. The reimbursable activities in the consolidated parameters and guidelines can be summarized as follows:

- Determination of appropriate bargaining units for representation and determination of the exclusive representatives:
  a. Unit determination;
  b. Determination of the exclusive representative.
- Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.
- Negotiations: reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.
- Impasse proceedings:
  a. Mediation;
  b. Fact-finding publication of the findings of the fact-finding panel.
- Collective bargaining agreement disclosure.
- Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.
- Unfair labor practice adjudication process and public notice complaints.

Agency Fee Arrangements

In December 2005, the Commission approved in part and denied in part a test claim filed by Clovis Unified School District regarding fair share fees by non-union members in California's K-14 public schools (*Agency Fee Arrangements*, 00-TC-17/01-TC-14). In modifying the EERA, the test claim statutes required that: 1) employees of K-14 school districts must either join the selected employee organization or pay such organization a service fee; 2) employees who claim a conscientious objection to joining or supporting a union shall not be required to

do so but may be required to pay equal amounts to a charitable organization and proof of such contribution may be required by the employee organization or the public school employer; 3) public school employers deduct the amount of the fair share service fee from the wages and salary of the employee and pay that amount to the employee organization; and 4) public school employers provide the exclusive representative of the employees with the home address of each member of a bargaining unit. The test claim regulations further required the public school employer to file an alphabetical list containing the names and job titles or classifications of the persons employed in the unit within 20 days after a petition is filed to rescind or reinstate an agency fee arrangement.

The Commission concluded that some of the activities did impose a reimbursable state-mandated program on public school employers, as follows:

- deducting the amount of the fair share service fee and paying that amount to the employee organization;
- providing the exclusive representative of a public employee with the home address of each member of a bargaining unit; and
- timely filing with PERB an alphabetical list containing the names and job titles or classifications of the persons employed in the unit.

Claimant's Position

The claimant states that there are "substantial activities and costs," that are "well in excess of $200.00 per year," which will be undertaken by local governments to comply with the test claim statutes and regulations. [22] These costs are "costs mandated by the State" under article XIII B, section 6 of the California Constitution, and Government Code sections 17500 et seq.

Claimant asserts that costs for the following activities will be incurred and are reimbursable:

1. Engage in separate agency shop negotiations for up to 30 days, pursuant to Government Code section 3502.5, subdivision (b), and title 8, California Code of Regulations, section 32990, subdivisions (a) and (e).
2. Process agency shop petitions, pursuant to Government Code section 3502.5, subdivision (b), and Department of Industrial Relations (hereafter "DIR") website.
3. Participate in meetings with petitioning union to discuss jointly selecting a neutral person or entity to conduct the agency shop election, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
4. Participate in meetings with such neutral person or entity, or the State Conciliation Service (hereafter the "Election Supervisor"), and the petitioning union, and endeavor to reach an agreement, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.

[22] At the time the test claim was filed, Government Code section 17564, subdivision (a), stated that the no test claim or reimbursement claim shall be made unless the claim exceeds $200. That section was subsequently modified in Statutes 2002, chapter 1124, to increase the minimum to $1,000. If this test claim is approved, any reimbursement claims must exceed $1,000.

5. Compile and provide the Election Supervisor the necessary unit employee information to verify the 30 percent showing of interest, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
6. Post and distribute notices of election, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
7. Compile and provide appropriate payroll records for the Election Supervisor, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
8. Make available employees to serve as voting place observers, pursuant to Government Code section 3502.5, subdivision (b), and DIR website.
9. Staff, prepare for, and represent the agency in administrative or court proceedings regarding disputes as to management, supervisory and confidential designations (which are excluded from agency shop arrangements), pursuant to Government Code section 3502.5, subdivisions (b) and (e), and procedures of the State Mediation and Conciliation Service.
10. Provide staffing to institute and administer procedures for agency fee deductions and transmittal to union, pursuant to Government Code sections 3502.5, subdivision (b), and 3508.5, subdivisions (b) and (c).
11. Institute and administer procedures and documentation for in lieu fee payments of conscientious objectors, and transmittal to appropriate charities, pursuant to Government Code section 3502.5, subdivisions (b) and (c).
12. Negotiate with the union concerning the above two procedures, and represent the agency in the event of PERB intervention regarding disputes, pursuant to Government Code section 3502.5, subdivision (b).
13. Process agency shop rescission petitions, pursuant to Government Code section 3502.5, subdivision (d).
14. Participate in PERB's rulemaking process relating to implementation of its jurisdiction under the test claim legislation, pursuant to Government Code section 3509, subdivisions (a), (b), and (c), and PERB's website.
15. Develop and provide training in PERB's rules, procedures and decisions for agency supervisory and management personnel and attorneys.
16. Respond to appeals made to the PERB of agency actions regarding unit issues, representation matters, recognition, elections and unfair practice determinations, pursuant to Government Code section 3509, subdivisions (b) and (c), and title 8, California Code of Regulations, sections 60000 and 60010.
17. Respond to, or file, unfair labor practice charges, pursuant to Government Code section 3509, subdivision (b), and title 8, California Code of Regulations, sections 32450, 32455, 32602, 32603, 32615, 32620, 32621, 32625, 32644, 32646, 32647, and 32661.
18. Participate in PERB's investigation of charges, pursuant to title 8, California Code of Regulations, sections 32149, 32162, 32980, and 60010.

19. Prepare for hearings before PERB Administrative Law Judges including, but not limited to the preparation of briefs, documentation, exhibits, witnesses and expert witnesses, pursuant to title 8, California Code of Regulations, sections 32150, 32160, 32164, 32165, 32190, 32205, 32210, 32212, 32647, and 60040.
20. Present the agency's case before the PERB's Administrative Law Judge, including expert witness fees, increased overtime costs for employee witnesses, closing brief, costs of transcripts and travel expenses, pursuant to title 8, California Code of Regulations, sections 32170, 32175, 32176, 32178, 32180, 32190, 32206, 32648, 32649, 32207, 32209, 32230, 32680, 60041, and 60050.
21. Represent the agency at proceedings that appeal PERB Administrative Law Judge decisions to the Board itself, including travel expenses, pursuant to title 8, California Code of Regulations, sections 32200, 32300, 32310, 32315, 32320, 32360, 32370, 32375, 32410, 32635, and 60035.
22. Prepare for and represent the agency at appeals of final PERB decisions to superior and appellate courts, pursuant to title 8, California Code of Regulations, section 32500.
23. Prepare for and represent the agency in superior and appellate court proceedings regarding litigation over the test claim legislation's ambiguity and scope, as well as the parameters of the jurisdiction of the PERB.

Claimants, City of Sacramento and County of Sacramento, filed comments on November 19, 2002, in response to the Department of Finance's comments of August 30, 2002. Claimant City of Sacramento filed comments in response to the draft staff analysis, and claimant County of Sacramento filed comments in response to the Department of Finance's comments of November 13, 2006. The issues raised in those comments are addressed in the following analysis.

Position of Department of Finance

The Department of Finance states that there are not any state-reimbursable costs resulting from the test claim statutes, for the following reasons:

- The test claim statutes do not create a new program or higher level of service since, pursuant to the language of the statutes, the duties of the local agency employer representatives are "substantially similar to the duties and responsibilities required under existing collective bargaining enforcement procedures and therefore the costs incurred by the local agency employer representatives in performing those duties and responsibilities under this chapter are not reimbursable as state-mandated costs." Duties that the agencies already perform under the existing process include responding to unfair labor practice charges, compiling payroll and personnel records, and participating in meetings and negotiations with unions.
- Many of the activities listed in the test claim are discretionary and therefore do not qualify as reimbursable state-mandated costs, such as creating and providing training on the PERB rules and regulations, processing agency shop petitions, participating in PERB's rulemaking process, or appealing PERB decisions.
- The test claim statutes provide for offsetting savings to local agencies since the provisions shift local employers from a process wherein they rely on the court system

to litigate unfair labor practice charges to a process where they would rely on PERB for those types of decisions. The costs that the employers would incur through the process with PERB would have been incurred if the unfair labor practice claims were still being litigated in the court system. To the extent that PERB settles claims before they ever reach a courtroom, the provisions within this chapter would result in savings to the public agencies.

The Department of Finance provided additional comments on December 18, 2002, in response to claimant's rebuttal of November 19, 2002, and in response to the draft staff analysis. The issues raised in those comments are addressed in the following analysis.

COMMISSION FINDINGS

The courts have found that article XIII B, section 6 of the California Constitution[23] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[24] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[25] A test claim statutes or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[26] In addition, the required activity or task must be new, constituting a "new program," and it must create a "higher level of service" over the previously required level of service.[27]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a

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[23] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[24] *Department of Finance v. Commission on State Mandates* (*Kern High School Dist.*) (2003) 30 Cal.4th 727, 735.

[25] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[26] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[27] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.*); *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

state policy, but does not apply generally to all residents and entities in the state.[28] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[29] A "higher level of service" occurs when there is "an increase in the actual level or quality of governmental services provided."[30]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[31]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[32] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[33]

The analysis addresses the following issues:

- Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?
- Do the activities mandated by the test claim statutes and regulations constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?
- Do the activities mandated by the test claim statutes and regulations impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Issue 1: Are the test claim statutes and regulations subject to article XIII B, section 6 of the California Constitution?

A. Do the Test Claim Statutes or Regulations Mandate Any Activities?

In order for a test claim statute or executive order to impose a reimbursable state-mandated program under article XIII B, section 6, the language must mandate an activity or task upon

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[28] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*Los Angeles*); *Lucia Mar, supra,* 44 Cal.3d 830, 835).

[29] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[30] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877.

[31] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[32] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[33] *County of Sonoma, supra,* 84 Cal.App.4th 1264, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

local governmental agencies. If the language does not mandate or require local agencies to perform a task, then article XIII B, section 6 is not triggered.[34]

The claimant is requesting reimbursement for activities related to: 1) participation in PERB's rulemaking process to implement the test claim statutes; 2) representing the agency in court regarding litigation over the test claim statutes' ambiguity and scope; 3) agency shop arrangements; 4) agency shop rescissions; 5) dues or service fee deductions; 6) in lieu fee payments; 7) PERB jurisdiction and administrative hearings; and 8) representing the agency in court appeals of final PERB decisions.

In the following analysis, where the plain language of the test claim statutes or regulations does not require a particular activity, but such activity might reasonably stem from an activity approved for reimbursement by the Commission, the Commission can consider claimant's request for reimbursement for those activities at the Parameters and Guidelines stage to determine whether they are reasonable methods of complying with the mandate pursuant to title 2, California Code of Regulations, section 1183.1, subdivision (a)(4).

Rulemaking and Litigation Activities Regarding the Test Claim Statutes and Regulations

The Commission finds that participation in PERB's rulemaking process to implement the test claim statutes and representing the agency in litigation over "ambiguity" in the test claim statutes *are not* activities required by the test claim statutes or regulations. Participation in these activities is discretionary on the part of the local public agency.

Claimant argues that without participation of the employers in the rulemaking process, the regulations would not have addressed the needs of the employers and would have been crafted with only the input of the various unions, resulting in needless expense to all local government employers. Nevertheless, the plain language of the test claim statutes contains no provision requiring local agencies to participate in the rulemaking process, nor to litigate the test claim statutes. Therefore, rulemaking participation and litigation costs are not subject to, or reimbursable pursuant to, article XIII B, section 6.

Agency Shop Arrangement Activities
(Gov. Code, § 3502.5, subds. (b) & (e))

The test claim statutes modified Government Code section 3502.5 to add a new method for creating an agency shop arrangement. Subdivision (b) states that, in addition to being established through negotiation between the local public agency employer and a public employee organization pursuant to subdivision (a), an agency shop arrangement shall be placed in effect upon a signed petition of 30 percent of the employees in a bargaining unit requesting both an agency shop agreement and an election to implement an agency fee arrangement, and the approval of a majority of employees who cast ballots in favor of the agreement. The petition for the agreement may only be filed after the employee organization has requested the public agency employer to negotiate on an agency shop arrangement, and the parties have had 30 calendar days to attempt good faith negotiations in an effort to reach agreement.[35]

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[34] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783 *(City of Merced)*.

[35] Government Code section 3502.5, subdivision (b).

Subdivision (e) provides that agency shop arrangements are not applicable to management, confidential, or supervisory employees.[36]

For agency shop arrangements established pursuant to subdivision (b), the election is conducted by a neutral third party jointly selected by the local public agency employer and the employee organization.[37] Where the employer and employee organization cannot agree on a neutral third party, the Department of Industrial Relations, Division of Conciliation, shall conduct the election.[38]

Claimant is requesting reimbursement for: 1) engaging in separate agency shop negotiations for up to 30 days; 2) processing agency shop petitions; 3) participating in meetings with the petitioning union to discuss jointly selecting a neutral person or entity to conduct the agency shop election; 4) participating in meetings with the neutral person or entity, or the State Conciliation Service (Election Supervisor), to reach agreement; 5) compiling and providing the Election Supervisor the necessary unit employee information to verify the 30 percent showing of interest; 6) posting and distributing notices of election; 7) compiling and providing appropriate payroll records for the Election Supervisor; and 8) making employees available to serve as voting place observers. Claimant is also seeking reimbursement for staffing, preparing for, and representing the local public agency in administrative or court proceedings regarding disputes as to management, supervisory and confidential designations, which are excluded from agency shop arrangements.

The plain language of the test claim statutes and regulations regarding subdivision (b) agency shop arrangements *does not* require public agency employers to engage in separate agency shop negotiations for up to 30 days. The test claim statutes state that "[t]he petition [for the agency shop arrangement] may only be filed after the recognized employee organization has requested the public agency to negotiate on an agency shop arrangement and, beginning seven working days after the public agency received this request, the two parties *have had 30 calendar days* to attempt good faith negotiations in an effort to reach agreement." (Emphasis added.) This language does not mandate the filing of a petition or party negotiations.

Claimant states that for the public agency employer to fail to participate in good faith negotiations during the 30-day period is an unfair labor practice, citing title 8, California Code of Regulations, section 32603, subdivision (c), which states it shall be an unfair labor practice for a public agency to "[r]efuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507." Section 3505 requires the local public agency to meet and confer in good faith regarding wages, hours and other terms and conditions of employment. Nevertheless, for the reasons stated below, the Commission finds that the test

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[36] Government Code section 3502.5, subdivision (e), formerly subdivision (c); that provision was subsequently amended to delete confidential and supervisory employees (Stats. 2003, ch. 311), but the amendment was not pled in the test claim and thus staff makes no findings with regard to it.

[37] *Ibid.*

[38] *Ibid.*

claim statutes *do not* require the local public agency employer to engage in agency shop negotiations.

The Third Reading Analysis of Senate Bill No. 739 – the test claim statutes – provide the following statements:

> 1. Some public agency employers unfairly withhold or refuse agreement on agency fee arrangements despite a significant interest demonstrated by employees.
>
> 2. The existing MMBA provisions are said to provide employers with an unfair veto authority over such arrangements.
>
> 3. This bill provides employees with an alternative process to obtain an agency fee agreement through a fair, democratic process.[39]

The California Attorney General has interpreted Government Code section 3502.5, subdivision (b), in an opinion finding that the Department of Industrial Relations may conduct an agency shop election during the term of an existing memorandum of understanding (MOU) with an existing agency shop provision if that provision is first rescinded or removed.[40] Citing the Senate Rules Committee Analysis for the test claim statutes, noted above, the Attorney General stated: "It is clear from the legislative history of section 3502.5 that the employee election procedures of subdivision (b) were added to the statute to deal with situations *where the negotiated MOU procedures specified in subdivision (a) proved to be unsuccessful.*" (Emphasis added.)[41] Opinions of the Attorney General, while not binding, are entitled to great weight, and in the absence of controlling authority, these opinions are persuasive 'since the legislature is presumed to be cognizant of that construction of the statute.' [42]

Claimant states in its comments that staff should "consider the fact that agency shop arrangements are no longer just the product of MOU negotiations, but under the terms of the test claim legislation, can be raised at any time during the term of an MOU. This new mandate vests unions with that right, and requires good faith negotiations in a manner and at a time that had never existed prior to the test claim legislation."[43] However, the subdivision (a) agency shop provisions have been in effect since 1981, and nothing in those preexisting provisions restricted negotiations to the time period of MOU negotiations.

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[39] Senate Rules Committee, Office of Senate Floor Analyses, Third Reading Analysis of Senate Bill Number 739 (1999-2000 Regular Session), as amended May 13, 1999, Page 3.

[40] 86 Ops. Cal. Atty. Gen. 169.

[41] *Id.* at page 4.

[42] *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist.* (1987) 194 Cal.App.3rd 243, 251.

[43] Comments on Draft Staff Analysis submitted by City of Sacramento, claimant, on November 9, 2006.

Thus, in accordance with the Attorney General's opinion, the employer-employee negotiations referenced in subdivision (b) are the same negotiations that would occur under subdivision (a), but subdivision (b) merely establishes a date when the employee organization may file the agency shop petition. If the public agency employer refused to negotiate with the employee organization on an agency shop agreement, any resulting "unfair labor practice" would stem from subdivision (a) rather than subdivision (b), the test claim statutes.

Therefore, the Commission finds that the activity of engaging in agency shop negotiations is not required of the public agency employer as a result of the test claim statutes.

The Commission further finds that none of the other activities claimed regarding subdivision (b) agency shop arrangements[44] are required by the test claim statutes or regulations, since, as noted below, no other document that could be considered an "executive order" has been pled indicating that any of those other activities are required.

Government Code section 17553, subdivision (b), states that:

> All test claims shall be filed on a form prescribed by the commission and shall contain at least the following elements and documents:
>
> (1) A written narrative that identifies the specific sections of statutes or executive orders alleged to contain a mandate ...
>
> (3) (A) The written narrative shall be supported with copies of all of the following:
>
> (i) The test claim statute that includes the bill number or executive order, alleged to impose or impact a mandate.

The test claim form filed by claimants does not include a cite to a statute, regulation or executive order requiring the local public agency employer to perform any activities with regard to agency shop elections. Page 6 of the test claim makes a reference to the Department of Industrial Relations (DIR) website, at http://www.dir.ca.gov/csmcs/ase-sb739.html. As of October 5, 2006, that DIR website displays "Procedures for mandated agency shop elections," last updated April 2005. No actual document from the website was filed with the test claim, however, and the website reference itself cannot be considered a "document" filed with the test claim, pursuant to section 17553, subdivision (b)(3). Since those procedures from the website – that may otherwise be expected of public agency employers with regard to subdivision (b) agency shop elections – were not pled, the Commission does not have jurisdiction to make any findings with regard to them.

In comments on the draft staff analysis, claimant asserts that the public agency employer must process agency shop petitions, since "[o]nly the employer possesses the records necessary for compiling the needed information concerning unit employees, in order to ascertain whether the 30% requirement has been met, and to makeup the required lists of qualified voters."

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[44] To the extent that any activities claimed here could result from charges filed with PERB, those activities are addressed under the "PERB Jurisdiction and Administrative Hearings (Gov. Code, § 3509)" heading, *infra*.

However, claimant still has not pled a "document" upon which the Commission has jurisdiction to make a finding as to whether these activities are state-mandated.[45]

Accordingly, the Commission finds that Government Code section 3502.5, subdivision (b), does not impose any state-mandated activities that are subject to article XIII B, section 6.

Agency Shop Rescission Activities
(Gov. Code, § 3502.5, subd. (d))

Government Code section 3502.5, subdivision (d), provides that an agency shop arrangement may be rescinded by a majority vote of all the employees in the unit pursuant to procedures specified or other procedures negotiated by the local public agency employer and the recognized employee organization. Pursuant to the test claim statutes, the agency shop rescission provisions are now "also applicable to an agency shop agreement placed in effect pursuant to subdivision (b)."

Claimant is requesting reimbursement for "processing" agency shop rescission petitions. Although there is no specific requirement in the test claim statutes or regulations to "process" agency shop rescission petitions, the test claim regulations contain one provision regarding agency shop rescissions. Title 8, California Code of Regulations, section 61610, states the following:

> Within 20 days following the filing of the petition to rescind an agency shop agreement or provision, the public agency shall file with the [PERB] regional office an alphabetical list containing the names and job titles or classifications of the persons employed in the unit described in the petition as of the last date of the payroll period immediately preceding the date the petition was filed, unless otherwise directed by the Board.

However, title 8, California Code of Regulations, section 61000, states that sections 61000 et seq. are applicable "only where a public agency has adopted such provisions as its local rules or where all parties to a representation case agree to be bound by the applicable PERB Regulations." Thus, any activities in those regulations flow from the discretionary act of adopting them or agreeing to be bound by them, and do not constitute state-mandated activities.[46]

Therefore, Government Code section 3502.5, subdivision (d), does not impose any state-mandated activities that are subject to article XIII B, section 6.

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[45] At the hearing, claimants provided a copy of the "Procedures for mandated agency shop elections" from the DIR website, dated December 2, 2006, which has been placed in the record. No amendment to the test claim was filed and thus the Commission did not have jurisdiction to make any findings on the information provided.

[46] Title 8, California Code of Regulations, section 61000 has been amended since the test claim was filed. However, the amended regulations were not pled and are not addressed in this analysis.

Dues or Service Fee Deductions
(Gov. Code, § 3508.5, subd. (b))

Test claim statute Government Code section 3508.5, subdivision (b), states that "[a] public employer shall deduct the payment of dues or service fees to a recognized employee organization as required by an agency shop arrangement between the recognized employee organization and the public employer."

The claimant is requesting reimbursement for costs to provide staffing to institute and administer procedures for agency fee deductions and their transmittal to the union for agency shop arrangements established pursuant to Government Code section 3502.5, subdivision (b), negotiate with the union concerning those procedures, and represent the agency in the event of PERB intervention regarding disputes.

The Commission finds that the plain language of the statutes requires only that the local public agency cause the dues or service fees to be deducted from the affected employees' wages and transmitted to the union. There is no requirement in the test claim statutes or regulations requiring the agency to institute and administer "procedures," negotiate with the union concerning those procedures, or represent the agency in the event of PERB intervention.[47]

Thus, Government Code section 3508.5, subdivision (b), does impose a state-mandated activity on the local agency — causing the dues or service fees to be deducted and transmitted to the union — which is subject to article XIII B, section 6.

In Lieu Fee Payments
(Gov. Code,§ 3502.5, subd. (c))

Where an agency shop arrangement has been established, Government Code section 3502.5, subdivision (c), provides that employees who conscientiously object to joining or financially supporting public employee organizations shall not be required to join or financially support any public employee organization as a condition of employment. The test claim statutes made this existing provision applicable to agency shop arrangements established under Government Code section 3502.5, subdivision (b).

Conscientious objectors *may* be required to pay sums equal to the dues, initiation or agency shop fees to a nonreligious, nonlabor charitable fund, in lieu of fees paid to the employee organization. Proof of such payments, if they are required, "shall be made on a monthly basis to the public agency as a condition of continued exemption from the requirement of financial support to the public employee organization."

The claimant is requesting reimbursement for costs to institute and administer procedures and documentation for in lieu fee payments of conscientious objectors and their transmittal to appropriate charities, negotiate with the union concerning those procedures, and represent the agency in the event of PERB intervention regarding disputes.

Agency shop arrangements can be established under subdivision (b) without the local public agency employer's approval. Although the employee holding a conscientious objection "*may*

[47] To the extent that any activities claimed here could result from charges filed with PERB, those activities are addressed under the "PERB Jurisdiction and Administrative Hearings (Government Code section 3509)" heading, *infra*.

be required" to make in lieu fee payments, under subdivision (b) agency shop arrangements, that requirement would be established by the employee organization and covered employees, with no discretion on the part of the local public agency employer. Therefore, activities required because of an in lieu fee payment provision of a subdivision (b) agency shop arrangement would not be discretionary.

Based on the plain language of the test claim statutes and regulations, the only activity required of the local public agency employer is to receive the required monthly "proof" of in lieu fee payments. The Department of Finance asserts that since the test claim statutes do not require the local public agency to take any action once the monthly "proof" is received, it disagrees with the finding that such receipt is a state-mandated reimbursable activity. Nevertheless, the verb "receive" is defined as "to take or acquire (something given, offered, or transmitted.),[48] and the Commission finds that "receiving proof of such payments" does constitute an actual activity required by the state of the local public agency employer.

The other activities claimed are not required by the statutes or regulations, and, as a result, are not state-mandated activities.[49]

Thus, Government Code section 3502.5, subdivision (c), does impose a state-mandated activity on the local agency — receiving monthly proof of in lieu fee payments — which is subject to article XIII B, section 6.

PERB Jurisdiction and Administrative Hearings
(Gov. Code, § 3509)

The test claim statutes added provisions granting the PERB jurisdiction over disputes arising under the MMBA, including enforcing and applying local rules and regulations adopted by a local public agency. Government Code section 3509 states:

> (a) The powers and duties of [PERB] described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c).
>
> (b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 shall be processed as an unfair practice charge by [PERB]. [PERB] shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.
>
> (c) [PERB] shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

In its quasi-judicial capacity to resolve employer-employee disputes, PERB has several powers and duties, including the ability to "hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and ... to issue subpoenas duces tecum to require

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[48] The American Heritage Dictionary, New College Edition, 1979, page 1087.

[49] To the extent that any activities claimed here result from any charges filed with PERB, those activities are addressed under the "PERB Jurisdiction and Administrative Hearings (Government Code section 3509)" heading, *infra*.

the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction."[50]

As a result of the test claim statutes, regulations setting forth PERB procedures were modified to reflect their applicability to MMBA disputes. These regulations set forth detailed procedures for conducting initial administrative hearings and administrative appeals of those decisions to the five-member PERB itself, including such matters as time and manner of filing complaints, investigations, subpoenas, depositions, conduct of hearings, rules of evidence, briefs, oral arguments, transcripts, decisions, reconsiderations and appeals.[51]

A complaint under MMBA can be made as an unfair labor practice charge or a request for PERB to review a local public agency employer's action concerning a unit determination, representation, recognition or elections.

The claimant is seeking reimbursement for costs to: 1) respond to appeals made to the PERB of agency actions regarding unit issues, representation matters, recognition, elections and unfair practice determinations; 2) respond to, or file, unfair labor practice charges; 3) participate in PERB's investigation of charges; 4) prepare for hearings before PERB Administrative Law Judges including, but not limited to, the preparation of briefs, documentation, exhibits, witnesses and expert witnesses; 5) present the agency's case before the PERB's Administrative Law Judge, including expert witness fees, increased overtime costs for employee witnesses, closing brief, costs of transcripts and travel expenses; 6) represent the agency at proceedings that appeal PERB Administrative Law Judge decisions to the Board itself, including travel expenses; and 7) develop and provide training in PERB's rules, procedures and decisions for agency supervisory and management personnel, and attorneys.

For the reasons stated below, the Commission finds that the local public agency employer is required to engage in the activities set forth in the PERB procedures when cases are filed with PERB by an entity other than the public agency employer. However, the Commission finds that where a local public agency employer *initiates* a charge or appeal with PERB, that decision is discretionary and thus does not mandate any of the PERB procedures.

Claimant argues that where PERB errs in the interpretation of a law or its application to the facts in a given situation to the detriment of the employer, the employer has no choice but to appeal its decisions; similarly, the employer has no choice but to respond to any union appeal of a PERB decision. Claimant also argues that, in coming under the jurisdiction of PERB, the employer now has no choice but to file an unfair labor practice if the union is engaging in conduct which constitutes a violation of MMBA. The types of actions which can be undertaken by the union, which constitute unfair labor practices and are illegal under MMBA, "include such concerted activities as refusals to perform all required job duties, slow downs, sick outs, rolling strikes and work stoppages."[52]

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[50] Government Code section 3541.3, subdivision (h).

[51] Title 8, California Code of Regulations, sections 31001 et seq.

[52] Comments on Draft Staff Analysis, submitted by claimant City of Sacramento on November 9, 2006, page 3.

Claimant further states that:

> Illegal concerted activities threaten public health, safety and welfare, if for example, emergencies are not promptly responded to; if garbage piles up and is not collected; if sewage is not properly treated and disposed of; if public assistance is not administered and paid as required; and if payroll, accounts payable and accounts receivable are not processed. Furthermore, it is disruptive to agencies if a union were to intimidate or coerce an employee because of the exercise of his or her rights guaranteed by Government Code, section 3502 or any local rule.
>
> Public health and safety can be seriously undermined if a union engages in unfair labor practices which go unchecked. Just as any violation of the MMBA by an employer constitutes an unfair labor practice charge, so too does any violation of the MMBA by an employee organization. This is not the type of conduct which should be countenanced by a finding of 'voluntariness' on the part of the Commission.[53]

The Department of Finance asserts that the public agency employer's PERB activities are discretionary, however, based on the case of *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805 (*County of Los Angeles II).* That case, in interpreting the holding in *Lucia Mar,*[54] noted that where local entities have alternatives under the statute other than paying the costs in question, the costs do not constitute a state mandate. Finance argues that, in this case, the claimant has "alternatives available in that it may choose to argue an affected case in front of the PERB, it may externally develop a settlement, or it can try to resolve the employment issue internally. Only when the claimant chooses to engage the case within PERB's jurisdiction [which includes responding to charges and appeals filed with PERB] does the claimant then fall within the requirements of that process."[55]

The plain language of the statutes and regulations does not require the local public agency employer to *initiate* charges or appeals to PERB. The cases have found that, in the absence of strict legal compulsion, a local government entity might be "practically" compelled to take an action thus triggering costs that would be reimbursable. The case of *San Diego Unified School Dist.* addressed the compulsion issue in the context of student expulsions. There, the court found that in the absence of legal compulsion, compulsion might nevertheless be found when a school district exercised it discretion in deciding to expel a student for a serious offense to other students or property, in light of the state constitutional requirement to provide safe schools.[56]

Here, claimant is seeking reimbursement for costs to file unfair labor practice charges with PERB, or appeal decisions of PERB, claiming it has no choice in the matter when the union engages in such concerted activities as refusals to perform all required job duties, slow downs, sick outs, rolling strikes and work stoppages, because the public health and safety is at risk.

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[53] *Ibid.*

[54] *Lucia Mar, supra,* 44 Cal.3d 830.

[55] Comments from Department of Finance, submitted December 20, 2002, page 2.

[56] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, at page 887, footnote 22.

This argument falls short of the circumstances discussed in *San Diego Unified School Dist*, where the constitutional requirement for safe schools might practically compel the school district to expel a student. And since the public agency employer has alternatives to initiating an unfair labor practice or filing an appeal with PERB, such as resolving employment issues internally or developing settlements, the *County of Los Angeles II* case is applicable to find that no mandate exists. Moreover, the Supreme Court in *San Diego Unified School Dist.* underscored the notion that a state mandate is found when the state, rather than a local official, has made the decision to require the costs to be incurred.[57] In this case, the state has not required the local public agency employer to file any charge or appeal with PERB.

Thus, the Commission finds that where a *local public agency employer* files a charge or appeal with PERB, that decision is *discretionary*, and the PERB procedures are only triggered because of the employer's discretionary decision to bring the case forward.

However, since cooperation with PERB and its subpoena powers is needed to resolve MMBA disputes adjudicated by PERB, the local public agency employer does not have any alternatives and is required to engage in the activities set forth in the PERB procedures when such disputes are filed with PERB by an entity other than the local public agency employer.

Therefore, the Commission finds that only the following events trigger the requirement for the local public agency employer to participate and respond in accordance with the PERB procedures: 1) an unfair labor practice charge, or a request to review a local public agency employer's action concerning a unit determination, representation, recognition or election, is filed with PERB by an entity *other than the local public agency employer*; 2) a decision by a PERB agent, PERB Administrative Law Judge, or the five-member PERB is appealed by an entity *other than the local public agency employer*; or 3) the local public agency employer is ordered by PERB to join in a matter. Accordingly, the following activities are state-mandated, and are subject to article XIII B, section 6:

a. procedures for filing documents or extensions for filing documents with PERB (Cal. Code Regs., tit.8, §§ 32132, 32135);

b. proof of service (Cal. Code Regs., tit. 8, § 32140);

c. responding to subpoenas and investigative subpoenas (Cal. Code Regs., tit. 8, §§ 32149, 32150);

d. conducting depositions (Cal. Code Regs., tit. 8, § 32160);

e. participating in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070); and

f. filing and responding to written motions in the course of the hearing (Cal. Code Regs., tit. 8, § 32190).

As noted above, any action by the local public agency initiating a case or amending it, or an appeal of a decision by a PERB agent, PERB Administrative Law Judge, or the PERB itself, is

[57] *Id.* at page 880.

discretionary and therefore not required. Accordingly, the following activities initiated by the local public agency are *not* state-mandated activities:

- file an unfair practice charge (Cal. Code of Regs., tit. 8, §§ 32602, 32604, 32615, 32621, 32625)
- appeal of a ruling on a motion (Cal. Code of Regs., tit. 8, § 32200);
- amendment of complaint (Cal. Code of Regs., tit. 8, §§ 32625, 32648);
- appeal of an administrative decision, including request for stay of activity and appeal of dismissal (Cal. Code of Regs., tit. 8, §§ 32350, 32360, 32370, 32635, and 60035);
- statement of exceptions to Board agent decision (Cal. Code of Regs., tit. 8, § 32300);
- request for reconsideration (Cal. Code of Regs., tit. 8, § 32410); and
- request for injunctive relief (Cal. Code of Regs., tit. 8, § 32450).

Furthermore, costs for related expert witness services, travel expenses and PERB training are not required by the test claim statutes or regulations and, thus, are not state-mandated activities.

Court Appeals of Final PERB Decisions
(Tit. 8, Cal. Code Regs., § 32500)

Section 32500, subdivision (a), states that "[a]ny party in a representation case by the Board itself ... may file a request to seek judicial review within 20 days following the date of service of the decision." Subdivision (b) states that "[a]ny party shall have 10 days following the date of service of the request to file a response."

Claimant is requesting reimbursement for costs to prepare for and represent the agency in superior and appellate courts regarding appeals of final PERB decisions. The plain language of the test claim statutes and regulations does not require the local public agency employer to perform any activities with regard to superior or appellate court appeals of final PERB decisions. Therefore, these costs are not subject to article XIII B, section 6.

Summary of State-Mandated Activities

In summary, the Commission finds the following activities are state-mandated, and therefore subject to article XIII B, section 6:

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code § 3508.5, subd. (b))
2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5. (Gov. Code § 3502.5, subd. (c))
3. Follow PERB procedures in responding to charges or appeals filed with PERB, by an entity *other than* the local public agency employer, concerning an unfair labor practice,

a unit determination, representation by an employee organization, recognition of an employee organization, or an election. Mandated activities are:

a. procedures for filing documents or extensions for filing documents with PERB (Cal. Code Regs., tit.8, §§ 32132, 32135);

b. proof of service (Cal. Code Regs., tit. 8, § 32140);

c. responding to subpoenas and investigative subpoenas (Cal. Code Regs., tit. 8, §§ 32149, 32150);

d. conducting depositions (Cal. Code Regs., tit. 8, § 32160);

e. participating in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070); and

f. filing and responding to written motions in the course of the hearing (Cal. Code Regs., tit. 8, § 32190).

B. Do the Mandated Activities Constitute a Program?

The courts have held that the term "program" within the meaning of article XIII B, section 6 means a program that carries out the governmental function of providing a service to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. [58]

Here, the activities mandated by the test claim statutes and regulations constituted modifications to employer-employee relations under the MMBA. The provisions are applicable to "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public corporation and every town, city, county, city and county and municipal corporation ..." and thus impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Therefore, the mandated activities constitute a "program" within the meaning of article XIII B, section 6.

Issue 2: Do the activities mandated by the test claim statutes and regulations constitute a "new program or higher level of service" within the meaning of article XIII B, section 6 of the California Constitution?

A test claim statute or executive order imposes a "new program or higher level of service" when the mandated activities: a) are new in comparison with the pre-existing scheme; and b) result in an increase in the actual level or quality of governmental services provided by the local public agency.[59] The first step in making this determination is to compare the mandated activities with the legal requirements in effect immediately before the enactment of the test claim statutes and regulations.

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[58] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56 (*County of Los Angeles).*

[59] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 877; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

Prior to 2001, the MMBA contained provisions for an agency shop arrangement to be formed when an agreement was negotiated between the local public agency employer and the recognized employee organization.[60] The test claim statutes provided additional authorization for formation of an agency shop without a negotiated agreement between a local public agency employer and a recognized organization, and made the existing agency shop rescission provisions applicable to the new type of agency shop arrangement.[61] Thus, mandated activities related to the second category of agency shop formation, and rescission of such agency shop arrangements, are new in comparison to the pre-existing scheme.

Prior to 2001, the MMBA provided that nothing could affect the right of a public employee to authorize deduction of employee organization dues from his or her wages.[62] The test claim statutes *require* a local public agency employer to deduct the payment of dues or service fees to a recognized employee organization from the employee's wages pursuant to an agency shop arrangement,[63] regardless of how such arrangement is formed. These required deductions are new in comparison to the pre-existing scheme.

Prior to 2001, disputes arising under the MMBA were dealt with via local public agency rules adopted under MMBA, and any appeals were made in the courts. The test claim statutes brought MMBA disputes under the jurisdiction of PERB,[64] and thus local public agency employers are now subject to the procedures enacted by PERB for dispute resolution. Since these PERB dispute resolution procedures are now applicable to local public agency employers subject to MMBA, the activities required are new in comparison to the pre-existing scheme.

The Department of Finance points out that the test claim statutes provided specific language expressing the Legislature's intent that since the duties are similar to requirements in existing law, the statutes do not create a reimbursable state mandate. The language states:

> The Legislature finds and declares that the duties and responsibilities of local agency employer representatives under this chapter are substantially similar to the duties and responsibilities required under existing collective bargaining enforcement procedures and therefore the costs incurred by the local agency employer representatives in performing those duties and responsibilities under this chapter are not reimbursable as state-mandated costs.[65]

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[60] Government Code section 3502.5, subdivision (a).

[61] Government Code section 3502.5, subdivisions (b) and (d).

[62] Government Code section 3508.5, subdivision (a).

[63] Government Code section 3508.5, subdivision (b).

[64] Government Code section 3509.

[65] Government Code section 3500, subdivision (b).

However, courts have stated that "legislative disclaimers, findings and budget control language are not determinative to a finding of a state mandated reimbursable program ..."[66] Moreover, the courts have determined that:

> [T]he statutory scheme contemplates that the Commission [on State Mandates], as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. Thus, any legislative findings are irrelevant to the issue of whether a state mandate exists ...[67]

Therefore, the Legislature's findings that the test claim statutes do not impose state-mandated costs may not be relied upon by the Commission as a basis for its conclusion.

The Department contends that the duties already performed by local public agencies under the existing process include responding to unfair labor practice charges, compiling payroll and personnel records, and participating in meetings and negotiations with unions. The Commission does not dispute that some similar activities may have been performed under the existing process. However, many of those activities were previously triggered for different purposes, i.e., for *negotiated* agency shop arrangements, and performed in a different forum, i.e., the courts. Therefore, as set forth above, the Commission finds that there are specific activities that are newly mandated by the test claim statutes and regulations.

Furthermore, since the mandated activities require the local agency to perform new tasks in service of improving local public agency employer-employee relations, the new activities do result in an increase in the actual level of services provided by the local public agency.

Accordingly, the Commission finds that the activities mandated by test claim statutes and regulations constitute a "new program or higher level of service" on local agencies within the meaning of article XIII B, section 6.

Issue 3: Do the activities mandated by the test claim statutes and regulations impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

For the mandated activities to impose a reimbursable, state-mandated program, two additional elements must be satisfied. First, the activities must impose costs mandated by the state pursuant to Government Code section 17514. Second, the statutory exceptions to reimbursement listed in Government Code section 17556 cannot apply.

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant alleged in the test claim that the costs for activities necessary to comply with the test claim statutes and regulations are "well in excess of $200 per year."[68]

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[66] *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, citing *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 541.

[67] *County of Los Angeles, supra,* 32 Cal.App.4th 805, 819.

[68] At the time the test claim was filed, Government Code section 17564, subdivision (a), stated that the no test claim or reimbursement claim shall be made unless the claim exceeds $200.

Thus, there is evidence in the record, signed under penalty of perjury, that there are increased costs as a result of the test claim statutes and regulations.

Furthermore, for the reasons stated below, the Commission finds that none of the statutory exceptions to reimbursement listed in Government Code section 17556 are applicable. Government Code section 17556 states that:

> The commission shall not find costs mandated by the state, as defined in Section 17514, in any claim submitted by a local agency ..., if, after a hearing, the commission finds that:
>
> ...
>
> (e) The statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies ... that result in no net costs to the local agencies ..., or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate.

The Department of Finance asserts that the test claim statutes provide for offsetting savings to local agencies since the provisions shift local employers from a process wherein they rely on the court system to litigate unfair labor practice charges to a process where they would rely on PERB for those types of decisions; thus, the costs that the employers would incur through the process with PERB would have been incurred if the unfair labor practice claims were still being litigated in the court system. Additionally, to the extent that PERB settles claims before they ever reach a courtroom, the provisions would result in savings to the public agencies.

Claimant contends, however, that there is no merit to the Department's statement that PERB settling claims before they ever reach a courtroom would result in savings to the public agencies, because this conjecture disregards the fact that a union facing the prospect of formal, more costly court proceedings could just as likely be a more compelling inducement for settling claims. Moreover, under PERB's regulations, settlement conferences occur only after the agency participates in the investigative process and responds to the unfair practice charge.

In response, the Department asserts that the PERB administrative process truncates the claimant's participation and provides operational savings through a faster adjudication, whereas, in comparison, a court process could take years to finalize. Since the claimant has not provided any statistical, fiscal, or numerical data showing case cost trends evidencing otherwise, the Department's position regarding offsetting savings continues to have merit.

The legislative history indicates that one factor in adopting the test claim statutes was the fact that, at the time, MMBA had no effective enforcement procedures except for time-consuming and expensive court action.[69] The proponents of the bill argued that "[o]ne of the basic principles of an effective collective bargaining law should be to provide for enforcement by an

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That section was subsequently modified in Statutes 2002, chapter 1124, to increase the minimum to $1,000. If this test claim is approved, any reimbursement claims must exceed $1,000.

[69] Senate Bill 739, Bill Analysis, Assembly Committee on Appropriations, August 9, 2000, hearing, page 2.

administrative agency with expertise in labor relations," and the appropriate role for courts is to serve as an appellate body.[70] Thus, there could be savings using the PERB process.

However, other than the above-noted speculations, there is no evidence in the record to support the notion that "[t]he statute, executive order, or an appropriation in a Budget Act or other bill provides for offsetting savings to local agencies ... that result in no net costs to the local agencies ..., or includes additional revenue that was specifically intended to fund the costs of the state mandate in an amount sufficient to fund the cost of the state mandate."

As a final matter, any cost savings must be analyzed in light of Government Code section 17517.5, which states that "'[c]ost savings authorized by the state' means any decreased costs that a local agency ... realizes as a result of any statute enacted or any executive order adopted that permits or requires the discontinuance of or a reduction in the level of service of an existing program that was mandated before January 1, 1975." Here, although MMBA disputes were resolved in the courts prior to 1975, there was no state-mandated activity regarding court resolution prior to 1975. Thus, the Commission finds Government Code section 17517.5 is inapplicable for this analysis.

Accordingly, the Commission finds that the activities mandated by the test claim statutes and regulations, as set forth above, impose "costs mandated by the state" within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.

CONCLUSION

The Commission finds that the test claim statutes and regulations impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution, and Government Code section 17514, for the following activities:

1. Deduct from employees' wages the payment of dues or service fees required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5, and transmit such fees to the employee organization. (Gov. Code § 3508.5, subd. (b).)
2. Receive from the employee any proof of in lieu fee payments made to charitable organizations required pursuant to an agency shop arrangement that was established under subdivision (b) of Government Code section 3502.5. (Gov. Code § 3502.5, subd. (c).)
3. Follow PERB procedures in responding to charges filed with PERB, by an entity *other than* the local public agency employer, concerning an unfair labor practice, a unit determination, representation by an employee organization, recognition of an employee organization, or an election. Mandated activities are:
   a. procedures for filing documents or extensions for filing documents with PERB (Cal. Code Regs., tit.8, §§ 32132, 32135 (Register 2001, No. 49));
   b. proof of service (Cal. Code Regs., tit. 8, § 32140 (Register 2001, No. 49));
   c. responding to subpoenas and investigative subpoenas (Cal. Code Regs., tit. 8, §§ 32149, 32150 (Register 2001, No. 49));

[70] *Ibid.*

d. conducting depositions (Cal. Code Regs., tit. 8, § 32160 (Register 2001, No. 49));

e. participating in hearings and responding as required by PERB agent, PERB Administrative Law Judge, or the five-member PERB (Cal. Code Regs., tit. 8, §§ 32168, 32170, 32175, 32176, 32180, 32205, 32206, 32207, 32209, 32210, 32212, 32310, 32315, 32375, 32455, 32620, 32644, 32649, 32680, 32980, 60010, 60030, 60050, and 60070 (Register 2001, No. 49)); and

f. filing and responding to written motions in the course of the hearing (Cal. Code Regs., tit. 8, § 32190 (Register 2001, No. 49)).

The City of Los Angeles, the County of Los Angeles, and peace officers as defined in Penal Code section 830.1 are not subject to PERB jurisdiction.[71] Any other statute, regulation or executive order that is not addressed above does not constitute a reimbursable state-mandated program pursuant to article XIII B, section 6 of the California Constitution or Government Code section 17514.

[71] Government Code sections 3509, subdivision (d), and 3511.

Adopted: 10/22/80
Amended: 8/19/81
Amended: 3/17/83
Amended: 9/29/83
Amended: 12/15/83
Amended: 6/27/85
Amended: 10/20/88
Amended: 7/22/93
Amended: 8/20/98
Amended: 1/27/00
Amended: 1/29/10

AMENDMENT TO PARAMETERS AND GUIDELINES

Statutes 1975, Chapter 961,
Statutes 1991, Chapter 1213,

Collective Bargaining

and

Collective Bargaining Agreement Disclosure
05-PGA 48 (CSM 97-TC-08, 98-4425-PGA-12)

This amendment is effective beginning with claims filed for the
July 1, 2005 through June 30, 2006 period of reimbursement

An act to repeal Article 5 (commencing with Section 13080) of Chapter 1 of Division 10 of the Education Code, and to add Chapter 10.7 (commencing with Section 3540) to Division 4 of Title 1 of the Government Code, relating to public educational employment relations, and making an appropriation. This bill, which was operative July 1, 1976, repealed the Winton Act and enacted provisions to meet and negotiate, thereby creating a collective bargaining atmosphere for public school employers. Chapter 1213, Statutes of 1991 added section 3547.5 to the Government Code. Government Code section 3547.5 requires school districts to publicly disclose major provisions of a collective bargaining agreement after negotiations, but before the agreement becomes binding.

A. Operative Date of Mandate

The provisions relating to the creation, certain duties of, and appropriations for the Public Employment Relations Board were operative on January 1, 1976. The provisions relating to the organizational rights of employees, the representational rights of employee organizations, the recognition of exclusive representatives, and related procedures were operative on April 1, 1976. The balance of the added provisions were operative on July 1, 1976.

The provisions relating to Collective Bargaining Agreement Disclosure added by Chapter 1213, Statutes of 1991 were operative on January 1, 1992. The California Department of Education issued Management Advisory 92-01 dated May 15, 1992, to establish the public disclosure format for school district compliance with the test claim statute.

B. Period of Claim

This amendment is effective beginning with claims filed for the July 1, 2005 through June 30, 2006 period of reimbursement.

Only costs incurred after January 1, 1978 may be claimed. The initial claim should have included all costs incurred for that portion of the fiscal year from January 1, 1978, to June 30, 1978.

Pursuant to language included in the 1980-81 budget, claims shall no longer be accepted for this period. All subsequent fiscal year claims should be filed with the State Controller's Office for processing.

The test claim on Chapter 1213, Statutes of 1991 was filed with the Commission on December 29, 1997. Accordingly, the period of reimbursement for the provisions relating to disclosure begins July 1, 1996. Only disclosure costs incurred after July 1, 1996 may be claimed.

C. Mandated Cost

Public school employers have incurred costs by complying with the requirements of Section 3540 through 3549.1 established by Chapter 961, Statutes of 1975. In addition, some costs have been incurred as a result of compliance with regulations promulgated by the Public Employment Relations Board (PERB). Since these activity costs (referred to collectively as "Rodda Act" activities and costs in this document), in many respects, simply implement the original legislation, it is intended that these parameters and guidelines have embodied those regulations or actions taken by PERB prior to December 31, 1978.

D. County Superintendent of Schools Filing

If the County Superintendent of Schools files a claim on behalf of more than one school district, the costs of the individual school district must be shown separately.

E. Governing Authority

The costs for salaries and expenses of the governing authority, for example the School Superintendent and Governing Board, are not reimbursable. These are costs of general government as described by the federal guideline entitled "Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government," ASMB C-10.

F. Certification

The following certification must accompany all claims:

I DO HEREBY CERTIFY:

THAT Section 1090 to 1096, inclusive, of the Government Code and other applicable provisions of the law have been complied with; and

THAT I am the person authorized by the local agency to file claim for funds with the State of California.

_____Signature of Authorized Representative

Date

_____Title Telephone Number

G. Claim Components (Reimbursable Costs)

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct based upon personal knowledge." Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

Reimbursable activities mandated by Chapter 961, Statutes of 1975 and Chapter 1213, Statutes of 1991 are grouped into seven components, G1 through G7. The cost of activities grouped in components G1, G2, and G3 are subject to offset by the historic cost of similar Winton Act activities as described in H2.

1. Determination of appropriate bargaining units for representation and determination of the exclusive representatives.

   a. Unit Determination: Explain the process for determining the composition of the certificated employee council under the Winton Act, and the process for determining appropriate bargaining units including the determination of management, supervisory and confidential employees, under Chapter 961, Statutes of 1975, if such activities were performed during the fiscal year being claimed.

   b. Determination of the Exclusive Representative: Costs may include receipt and posting of the representation and decertification notices and, if necessary, adjudication of such matters before the PERB.

   c. Show the actual increased costs including salaries and benefits for employer representatives and/or necessary costs for contracted services for the following functions:

      (1) Development of proposed lists for unit determination hearings if done during the fiscal year being claimed. Salaries and benefits must be shown as described in Item H3.

      (2) Representation of the public school employer at PERB hearings to determine bargaining units and the exclusive representative. Actual preparation time will be reimbursed. Salaries and benefits must be shown as described in Item H3.

      (3) If contracted services are used for either (a) or (b) above, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

      (4) Indicate the cost of substitutes for release time for employer and exclusive bargaining unit witnesses who testify at PERB hearings. The job classification of the witnesses and the date they were absent must also be submitted. Release time for employee witnesses asked to attend the PERB hearing by bargaining units will not be reimbursed.

      (5) Identify the travel costs for employer representatives to any PERB hearing. Reimbursement shall reflect the rate specified by the regulations governing employees of the local public school employer.

      (6) Cost of preparation for one transcript per PERB hearing will be reimbursed.

2. Elections and decertification elections of unit representatives are reimbursable in the event the Public Employment Relations Board determines that a question of representation exists and orders an election held by secret ballot.

   a. Submit with your claim any Public Employment Relations Board agreements or orders which state how the election must be held.

   b. If a precinct voting list was required by PERB, indicate the cost of its development. Salaries and benefits must be shown as described in Item H3.

   c. The salary and benefits of a school employer representative, if required by PERB for time spent observing the counting of ballots, will be reimbursed. The representatives' salary must be shown as described in Item H3.

3. Negotiations: Reimbursable functions include -- receipt of exclusive representative's initial contract proposal, holding of public hearings, providing a reasonable number of copies of the employer's proposed contract to the public, development and presentation of the initial district contract proposal, negotiation of the contract, reproduction and distribution of the final contract agreement.

   a. Show the costs of salaries and benefits for employer representatives participating in negotiations. Contracted services will be reimbursed. Costs for maximum of five public school employer representatives per unit, per negotiation session will be reimbursed. Salaries and benefits must be shown as described on Page 7, Item H3.

   b. Show the costs of salaries and benefits for employer representatives and employees participating in negotiation planning sessions. Contracted services for employer representatives will be reimbursed. Salaries and benefits must be shown as described in Item H3.

   c. Indicate the cost of substitutes for release time of exclusive bargaining unit representatives during negotiations. Give the job classification of the bargaining unit representative that required a substitute and dates the substitute worked. Substitute costs for a maximum of five representatives per unit, per negotiation session will be reimbursed. The salaries of union representatives are not reimbursable.

   d. Reasonable costs of reproduction for a copy of the initial contract proposal and final contract, which is applicable and distributed to each employer representative (i.e. supervisory, management, confidential) and a reasonable number of copies for public information will be reimbursed. Provide detail of costs and/or include invoices. Costs for copies of a final contract provided to collective bargaining unit members are not reimbursable.

   e. If contract services are used for a. and/or b. above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

f. A list showing the dates of all negotiation sessions held during the fiscal year being claimed must be submitted.

4. Impasse Proceedings

a. Mediation

(1) Costs for salaries and benefits for employer representative personnel are reimbursable. Contracted services will be reimbursed. Costs for a maximum of five public school employer representatives per mediation session will be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Indicate the costs of substitutes for the release time of exclusive bargaining unit representatives during impasse proceedings. The job classification of the employee witnesses and the date they were absent shall be indicated. Costs for a maximum of five representatives per mediation session will be reimbursed.

(3) Renting of facilities will be reimbursed.

(4) Costs of the mediator will not be reimbursed.

(5) If contract services are used under 1, contract invoices must be submitted with the claim. Contract costs must be shown as described in Item H5.

b. Fact-finding publication of the findings of the fact-finding panel. (To the extent fact-finding was required under the Winton Act during the 1974-75 fiscal year, costs are not reimbursable.)

(1) All costs of the school employer panel representative shall be reimbursed. Salaries and benefits must be shown as described in Item H3.

(2) Fifty percent of the costs mutually incurred by the fact-finding panel shall be reimbursed. This may include substitutes for release time of witnesses during fact-finding proceedings, and the rental of facilities required by the panel.

(3) Special costs imposed on the public school employer for the development of unique data required by a fact-finding panel will be reimbursed. Describe the special costs and explain why this data would not have been required by a fact-finding panel under the Winton Act. Salaries and benefits must be shown as described in Item H3.

5. Collective Bargaining Agreement Disclosure

Disclosure of collective bargaining agreement *after* negotiation and *before* adoption by governing body, as required by Government Code section 3547.5 and California State Department of Education Management Advisory 92-01 (or subsequent replacement), attached to the amended Parameters and Guidelines. Procedures or formats which

exceed those or which duplicate activities required under any other statute or executive order are not reimbursable under this item.

a. Prepare the disclosure forms and documents, as specified.

b. Distribute a copy of the disclosure forms and documents, to board members, along with a copy of the proposed agreement, as specified.

c. Make a copy of the disclosure forms and documents and of the proposed agreement available to the public, prior to the day of the public meeting, as specified.

d. Training employer's personnel on preparation of the disclosure forms and documents, as specified.

e. Supplies and materials necessary to prepare the disclosure forms and documents, as specified.

For 5. a., b., and c., list the date(s) of the public hearing(s) at which the major provisions of the agreement were disclosed in accordance with the requirements of Government Code section 3547.5 and Department of Education Advisory 92-01 (or subsequent replacement).

6. Contract administration and adjudication of contract disputes either by arbitration or litigation. Reimbursable functions include grievances and administration and enforcement of the contract.

a. Salaries and benefits of employer personnel involved in adjudication of contract disputes. Contracted services will be reimbursed. Salaries and benefits must be shown as described in Item H3.

b. Indicate substitutes necessary for release time of the representatives of an exclusive bargaining unit during adjudication of contract disputes. The job classification of the employee witnesses and the dates they were absent shall also be indicated.

c. Reasonable costs incurred for a reasonable number of training sessions held for supervisory and management personnel on contract administration/interpretation of the negotiated contract are reimbursable. Contract interpretations at staff meetings are not reimbursable. Personal development and informational programs, i.e., classes, conferences, seminars, workshops, and time spent by employees attending such meetings are not reimbursable. Similarly, purchases of books and subscriptions for personal development and information purposes are not reimbursable. Salaries and benefits must be shown as described in Item H3.

d. The cost of one transcript per hearing will be reimbursed.

e. Reasonable public school employer costs associated with a contract dispute which is litigated are reimbursable, as follows:

1. Reasonable public school employer costs associated with issues of contract disputes which are presented before PERB are reimbursable.

2. Reasonable public school employer cost of litigation as a defendant in the court suit involving contract disputes may be reimbursable.

3. Where the public school employer is the plaintiff in a court suit to appeal a PERB ruling, costs are reimbursable only if the public school employer is the prevailing party (after all appeals, final judgment).

4. No reimbursement is allowed where the public school employer has filed action directly with the courts without first submitting the dispute to PERB, if required.

5. No reimbursement shall be provided for filing of amicus curiae briefs.

f. Expert witness fees will be reimbursed if the witness is called by the public school employer.

g. Reasonable reproduction costs for copies of a new contract which is required as a result of a dispute will be reimbursed.

h. If contract services are used under "a" above, copies of contract invoices must be submitted with your claim. Contract costs must be shown as described in Item H5.

i. Public school employer's portion of arbitrators' fees for adjudicating grievances, representing 50% of costs, will be reimbursed.

7. Unfair labor practice adjudication process and public notice complaints.

a. Show the actual costs for salaries and benefits of employer representatives. Services contracted by the public school employer are reimbursable. Salaries and benefits must be shown as described in Item H3.

b. Indicate cost of substitutes for release time for representatives of exclusive bargaining units during adjudication of unfair practice charges.

c. The cost of one transcript per PERB hearing will be reimbursed.

d. Reasonable reproduction costs will be reimbursed.

e. Expert witness fees will be reimbursed if the witness is called by the public school employer.

f. If contract services are used under "a" above, contract invoices must be submitted. Contract costs must be shown as described in Item H5.

g. No reimbursement for an appeal of an unfair labor practice decision shall be allowed where the Public Employee Relations Board is the prevailing

party.

h. No reimbursement for filing of amicus curiae briefs shall be allowed.

H. Supporting Data for Claims--Report Format for Submission of Claim.

1. Description of the Activity: Follow the outline of the claim components. Cost must be shown separately by component activity. Supply workload data requested as part of the description to support the level of costs claimed. The selection of appropriate statistics is the responsibility of the claimant.

2. Quantify "Increased" Costs: Public school employers will be reimbursed for the "increased costs" incurred as a result of compliance with the mandate.

a. For component activities G1, G2, and G3:

1. Determination of the "increased costs" for each of these three components requires the costs of current year Rodda Act activities to be offset [reduced] by the cost of the base-year Winton Act activities. The Winton Act base-year is generally fiscal year 1974-75.

Winton Act base-year costs are adjusted by the Implicit Price Deflator prior to offset against the current year Rodda Act costs for these three components. The Implicit Price Deflator shall be listed in the annual claiming instructions of the State Controller.

2. The cost of a claimant's current year Rodda Act activities are offset [reduced] by the cost of the base-year Winton Act activities either: by matching each component, when claimants can provide sufficient documentation to segregate each component of the Winton Act base-year activity costs; or, by combining all three components when claimants cannot satisfactorily segregate each component of Winton Act base-year costs.

b. For component activities G4, G6, and G7:

All allowable activity costs for these three Rodda Act components are "increased costs" since there were no similar activities required by the Winton Act; therefore, there is no Winton Act base-year offset to be calculated.

BASE YEAR	ADJUSTMENT
1974-1975	1.490 1979-80 FY
"	1.560 1980-81 FY
"	1.697 1981-82 FY
"	1.777 1982-83 FY
"	1.884 1983-84 FY

3. Salary and Employees' Benefits: Show the classification of the employees involved, amount of time spent, and their hourly rate. The worksheet used to compute the hourly salary rate must be submitted with your claim. Benefits are

reimbursable. Actual benefit percent must be itemized. If no itemization is submitted, 21 percent must be used for computation of claim costs. Identify the classification of employees committed to functions required under the Winton Act and those required by Chapter 961, Statutes of 1975.

4. Services and Supplies: Only expenditures which can be identified as a direct cost as a result of the mandate can be claimed.

5. Professional and Consultant Services: Separately show the name of professionals or consultants, specify the functions the consultants performed relative to the mandate, length of appointment, and the itemized costs for such services. Invoices must be submitted as supporting documentation with your claim. The maximum reimbursable fee for contracted services is $135 per hour. Annual retainer fees shall be no greater than $135 per hour. Reasonable expenses will also be paid as identified on the monthly billings of consultants. However, travel expenses for consultants and experts (including attorneys) hired by the claimant shall not be reimbursed in an amount higher than that received by State employees, as established under Title 2, Div. 2, Section 700ff, CAC.

6. Allowable Overhead Cost: School districts must use the Form J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

   County Offices of Education must use the Form J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

   Community College Districts must use one of the following three alternatives:

   - A Federally-approved rate based on OMB Circular A-21;
   - The State Controller's FAM-29C which uses the CCFS-311; or
   - Seven percent (7%).

I. Record Retention

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[1] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section G, must be retained during the period subject to audit. If the Controller has initiated an audit during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

[1] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

MMBA FACTFINDING REQUEST

DO NOT WRITE IN THIS SPACE: Case No.: Date Filed:

INSTRUCTIONS: A request for factfinding pursuant to Government Code section 3505.4 must be filed with the appropriate regional office (see PERB Regulation 32075). Proof of service must accompany the request.

1. **EMPLOYER**

Name: City of Glendora

Address: 116 E. Foothill Blvd.
Glendora, CA

Agent to be contacted:

Name: Victoria Cross

Title: HR Director

Agency/Firm:

Address: 116 E. Foothill Blvd.
Glendora, CA

Telephone: 626-914-8204

E-mail Address: vcross@ci.glendora.ca.us

2. **EXCLUSIVE REPRESENTATIVE**

Name: Glendora Municipal Employees' Assn.

Address: c/o Wendell Phillips 33173 Mulholland Hwy
Malibu, CA 90265

Agent to be contacted:

Name: Wendell Phillips

Title: General Counsel

Union/Firm: GMEA

Address: 33173 Mulholland Hwy.
Malibu, CA 90265

Telephone: 310-697-6964

E-mail Address: wphillipsesq@gmail.com

3. TITLE/DESCRIPTION OF ESTABLISHED UNIT

Glendora Municipal Employees' Bargaining Unit

4. TYPE OF DISPUTE (e.g., initial contract, successor contract, reopeners)

Impasse - Successor Contract

5. STATUS OF NEGOTIATIONS/MEET AND CONFER

(a) Date impasse was declared by a party/parties: 6-11-2015

(b) Date a mediator was appointed (if applicable):

DECLARATION

The parties have been unable to effect a settlement. Therefore, pursuant to PERB Regulation 32802, we request that the parties' differences be submitted to a factfinding panel.

NAME OF AUTHORIZED REPRESENTATIVE: Wendell Phillips

SIGNATURE OF AUTHORIZED REPRESENTATIVE: _____

Title: GMEA General Counsel

Date: GMEA General Counsel

(Attach a completed Proof of Service form.)

Los Angeles Regional Office
700 N. Central Avenue, Suite 200
Glendale, CA 91203-3219
(818) 551-2822

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3198

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
(510) 622-1016

Revised 1/12

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Los Angeles, State of CA. I am over the age of 18 years. The name and address of my residence or business is Phillips & Rickards 33173 Mulholland Hwy., Malibu, CA 90265

On 6-16-2015 (Date), I served the MMBA Factfinding Request (Description of document(s))

(Description of document(s) continued)

on the parties listed below (include name, address and, where applicable, fax number) by (check the applicable method or methods):

___ placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid;

___ personal delivery;

x ___ facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

(Include here the name, address and, where applicable, fax number of the Respondent and any other parties served.)

Victoria Cross
HR Director
City of Glendora
116 E. Foothill Blvd.
Glendora, CA
vcross@ci.glendora.ca.us
626-914-8221

Melanie Chaney - legal counsel for city
Liebert Cassidy
6033 West Century Blvd.
Los Angeles, CA 90045
310-337-0837

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on 6-16-2015 (Date), at Malibu (City) CA (State).

Mary Dee Rickards
(Type or print name)

(Signature)

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On June 23, 2016, I served the:

> **Test Claim Filing; Notice of Complete Test Claim Filing; and Schedule for Comments**
> *Local Public Employee Organizations: Impasse Procedures*, 15-TC-01
> Government Code Sections 3505.4, 3505.5, and 3505.7;
> Statutes 2011, Chapter 680 (AB 646)
> City of Glendora, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on June 23, 2016 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 6/22/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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DEPARTMENT OF FINANCE
EDMUND G. BROWN JR. ▪ GOVERNOR
915 L STREET ■ SACRAMENTO CA ■ 95814-3706 ■ WWW.DOF.CA.GOV

RECEIVED
July 25, 2016
Commission on
State Mandates

July 22, 2016

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed the test claim submitted by the City of Glendora (claimant) for Claim No. 15-TC-01, "Local Agency Employee Organizations: Impasse Procedures." Commencing on page 5 of the test claim, the claimant identified various alleged activities as new state reimbursable activities.

Prior laws specified that if a public agency and an employee organization fail to reach agreement, the two parties may agree on the appointment of a mediator at a shared cost. If the parties reached an impasse, the public agency may implement its last, best, and final offer. Public Employment Relations Board (PERB) previously oversaw the fact-finding process for higher education and public education employers and employee organizations. The following comments are submitted for your review:

1) Alleged activities 2, 3, 5, and 6 on page 5 of the test claim are not new requirements. While the claimant identifies these as new activities, the requirements referenced by the claimant were required by prior law and are therefore, not a new program or higher level of service.

2) Alleged activities 1, 9, and 10 are discretionary for the following reasons:

   - "The agency must notice impasse hearing if delay in factfinding request." The test claim statute does not require the local agency to provide notice of any hearings. Additionally, as detailed below, this alleged activity may arise from a discretionary action and would also be discretionary and not reimbursable.
   - "The agency must hold a public impasse hearing, if it chooses to impose its last, best offer." The test claim statute does not require the agency to implement its last, best, and final offer. Rather the test claim statute allows the agency to implement the last, best, and final offer if no agreement is reached. Since the agency is not required to implement the last, best, and final offer, this alleged activity is discretionary and not reimbursable.
   - "The agency shall meet and confer with union and submit/resubmit last, best offer." As mentioned above, because the agency is not required to implement the last, best, and final offer, activities that arise from the discretionary action taken by the agency are also discretionary and not reimbursable.

3) Alleged activities 4 and 8 on page 5 of the test claim are not reimbursable because they are not new or increased programs or levels of service. The Commission has previously found that a "program" is defined as a new requirement that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies to implement a state policy. The "activities" identified by the claimant are straight costs that the test claim legislation indicates are to be borne by the local agency. These costs alone are not reimbursable.

As a result of our review, Finance has concluded that the test claim statutes do not result in a reimbursable state mandate for nine of the ten activities identified by the claimant. If the Commission reaches the same conclusion at its hearing on the matter, the nature and extent of and specific activities required can be addressed in the parameters and guidelines, which will be developed for the program. Furthermore, Finance may submit additional comments when relevant information becomes available.

If you have any questions regarding this letter, please contact Mary Halterman, Principal Program Budget Analyst, at (916) 445-3274.

Sincerely,

Justyn Howard
Program Budget Manager

Attachments

Attachment A

DECLARATION OF DANIELLE BRANDON
DEPARTMENT OF FINANCE
CLAIM NO. 15-TC-01

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

July 22, 2016
At Sacramento, CA

Danielle M Brandon
Danielle Brandon

Attachment B

DECLARATION OF MARY HALTERMAN
DEPARTMENT OF FINANCE
CLAIM NO. 15-TC-01

1. I am currently employed by the State of California, Department of Finance (Finance), am familiar with the duties of Finance, and am authorized to make this declaration on behalf of Finance.

2. I certify under penalty of perjury that the facts set forth in the foregoing are true and correct of my own knowledge except as to the matters therein stated as information or belief and, as to those matters, I believe them to be true.

7/22/16
At Sacramento, CA

Mary Halterman
Mary Halterman

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

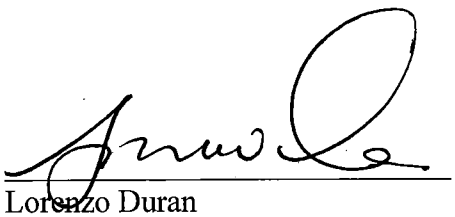
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On July 25, 2016, I served the:

DOF Comments
Local Public Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Sections 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 25, 2016 at Sacramento, California.



Lorenzo Duran
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 7/13/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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Exhibit C

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STATE MANDATED COST

RECEIVED
August 24, 2016
Commission on State Mandates

August 24, 2016

Ms. Heather Halsey
Executive Director
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814

Dear Ms. Halsey:

As an "Interested Party" Nichols Consulting has reviewed both the test claim submitted by the City of Glendora for Claim No. 15-TC-01, " Local Agency Employee Organizations: Impasse Procedures" and also the Department of Finance's (DOF) letter dated July 22, 2016 (received by the Commission on State Mandates on July 25, 2016) regarding the same subject matter.

The following are our comments regarding the test claim and letter.

Prior Laws with PERB – HEERA, EERA and MMBA

In their letter, DOF alleges many of the activities identified by the City of Glendora do not result in a reimbursable state mandate. In fact, in the second paragraph of their letter, DOF asserts the following:

> "Prior laws specified that if a public agency and an employee organization fail to reach agreement, the two parties may agree on the appointment of a mediator at a shared cost. If the parties reached an impasse, the public agency may implement its last, best, and final offer. Public Employment Relations Board (PERB) previously oversaw the fact-finding process for higher education and public education employers and employee organizations."

Although it is true that Public Employment Relations Board (PERB) has previously and still currently oversees both the Higher Education Employment Relations Act (HEERA) and also the Education Employment Relations Act (EERA a.k.a. "Rodda Act") neither of these labor acts affect Cities, Counties and Special Districts (Locals).

HEERA specifically involves labor relations between the public institutions of higher education and their employees and covers the employees of the University of California, Hastings College of the Law, and the California State University. EERA applies only to school districts (K-12) and community college districts. In fact, school & college districts have been able to file for their reimbursable "Rodda Act" costs through the State Mandated Cost reimbursement process (Claim No. CSM 4425) and these costs have been claimable to school & college districts dating back to January 1978.

Locals have never been able to claim reimbursable costs under the Rodda Act as the EERA does not apply to them. Instead, the Meyers-Milias-Brown Act (MMBA) is applicable to Locals as it corresponds to employer-employee relations between local public agencies and their employees. A State-mandated cost example of this relationship is the reimbursable program, "Local Government Employment Relations" Claim No. 01-TC-30.

The test claim statute for "Local Government Employment Relations" amended MMBA by establishing an additional method for creating an agency shop arrangement, and expanded the jurisdiction of PERB to include resolving disputes and enforcing the statutory duties and rights of those public employers and employees subject to the MMBA. As such, only Locals are eligible claimants for this program under these expanded provisions of the MMBA.

Mediation Sessions and Mediator Costs are not alleged

As referenced earlier, the DOF letter states the following "the two parties may agree on the appointment of a mediator at a shared cost." This is a very confusing reference made by DOF since the test claim legislation (Assembly Bill 646 – Atkins) involves fact-finding and makes no reference to mediation costs or the shared cost of a mediator. Perhaps DOF is confusing the enacted version of AB 646 with an earlier version containing mediation language (AB 646 – Amended in Assembly March 23, 2011)? In the March 23, 2011 amended version, the mediation language was stricken from later versions of the bill. Lastly and more importantly, the City of Glendora does not appear to allege reimbursement for costs related to mediation in the test claim.

With the above in mind, I am uncertain how DOF has supported its assertion the activities alleged by the City of Glendora "are not new requirements or increased programs, or levels of service" as both of the Labor Acts referenced by DOF (HEERA & EERA) are inapplicable and the activities identified by DOF involving mediation are not alleged by Glendora.

If you have any questions regarding this letter, please feel free to contact me at (916) 455-3939 or via e-mail at andy@nichols-consulting.com. Thank you.

Sincerely,

Andy Nichols
Nichols Consulting

Attachments

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

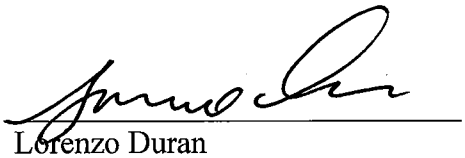
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 25, 2016, I served the:

Nichols Consulting Rebuttal Comments
Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Section 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

By making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 25, 2016 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/16/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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September 15, 2016

RECEIVED
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VIA EMAIL & U.S. MAIL
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Heather Halsey
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Re: ***Claimant City of Glendora's Rebuttal to Department of Finance's July 22, 2016 Comments re Local Agency Employee Organizations: Impasse Procedures, Claim No. 15-TC-01***
Client-Matter: GL050/051

Dear Ms. Halsey,

The City of Glendora, claimant in the above-referenced matter, submits the following rebuttal to the Department of Finance's July 22, 2016 comments concerning the test claim. As explained below, the Department's comments reflect a fundamental misunderstanding of the changes that AB 646 made to the Meyers-Milias-Brown Act ("MMBA").

Background

The MMBA governs labor relations between local public agencies and employee organizations. (Gov. Code § 3500, et seq.) The MMBA defines the term "public agency" as encompassing every "town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." (Gov. Code § 3501(c); *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630 & fn. 4.)

Prior to January 1, 2012, the MMBA ***did not*** require local public agencies to participate in factfinding procedures with a recognized employee organization. Although the MMBA specifically allowed local public agencies to adopt their own impasse procedures, it did not require the adoption of such procedures. (Gov. Code § 3507; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, p.33.) It also did not dictate what provisions must be included in those procedures if the agency adopted impasse procedures. (Gov. Code § 3507; *City and County of San Francisco* (2006) PERB Dec. No. 1890-M, p. 8.)

Instead, the MMBA merely required that local public agencies "refrain from making unilateral changes in employees' wages and working conditions until the employer and employee

association have bargained to impasse." (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal. 4th 525, 537 [28 Cal. Rptr. 2d 617, 869 P.2d 1142]; superseded by statute on other grounds as recognized in *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077.) Once the parties reached a proper impasse, the local public agency was free to "implement its last, best, and final offer." (Gov. Code §§ 3505.4, 3507; *County of Sonoma* (2010) PERB Dec. No. 2100-M, p. 13; *City of Clovis* (2009) PERB Dec. No. 2074-M, p.5, fn.5.)

In October 2011, however, Governor Brown signed AB 646 into law. AB 646 changed the MMBA significantly by establishing new ***mandatory*** factfinding procedures, effective January 1, 2012. (Gov. Code §§ 3505.4, 3505.5, 3505.7.) Under these new procedures, a local public agency is no longer free to implement its last, best and final offer after the parties reach a proper impasse. Instead, it is now statutorily required to submit to factfinding whenever a recognized employee organization makes a timely request for factfinding following a proper declaration of impasse. (Gov. Code § 3505.4(a); 8 C.C.R. § 32802(a).)[1] As long as the recognized employee organization makes a request for factfinding within the 30-45 day time-period following the appointment of a mediator, or if mediation is not used, within 30 days of the written declaration of impasse by either party, a local public agency has no choice but to submit to factfinding. (Gov. Code § 3505.4.)

Since AB 646 went into effect, PERB has confirmed that "Factfinding ***imposes a new process*** on the parties in MMBA jurisdictions." (*County of Fresno* (2014) PERB Order No. Ad-414-M p. 15, emphasis added.)

Rebuttal to Department Comment 1

The Department contends that activities 2, 3, 5 and 6 are not reimbursable because they are not new requirements. Those specific activities were identified as follows:

Activity 2: Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of the member.

Activity 3: If chairperson is not approved by other party, agency must select a different chairperson.

Activity 5: The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)

[1] As set forth in Government Code section 3505.4, only the exclusive representative can request factfinding, and a local public agency has no right to demand factfinding.

Activity 6: The agency shall participate in all factfinding hearings.

The Department's claim that these activities are not reimbursable because they did not impose new requirements is wrong.

As demonstrated above, at no point prior to January 1, 2012 did the MMBA ever ***require*** local public agencies to engage in factfinding.[2] Prior to AB 646, if a public agency and a union reached an impasse in their negotiations, the MMBA allowed the parties to mutually agree to mediation, but did not require the parties to engage in factfinding or any other impasse procedure. (*San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th, 1, 9 [200 Cal.Rptr.3d 629], citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25–26; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4.)

Thus, contrary to what the Department claims (incorrectly), prior to AB 646, the MMBA did ***not*** require the City of Glendora to:

- Select a person to serve as its panel member on a factfinding panel;
- Engage in a selection process with any recognized employee organizations to select a chairperson for the factfinding panel;
- Review and produce documents in response to a factfinding panel's subpoena; or
- Submit to a factfinding hearing.

The City of Glendora was not required to engage in any of these activities because the MMBA did not require factfinding. (*County of Contra Costa* (2014) PERB Order No. 410-M, p.33.)

Accordingly, "but for" the imposition of factfinding by AB 646, local public agencies, including the City of Glendora, would not have incurred any costs associated with the now-mandated factfinding.

To the extent the Department is relying upon impasse procedures set forth in other labor relations statutes governing public sector collective bargaining in California, its reliance on those statutes is misplaced. As the Sixth District Court of Appeal recently explained, while "[s]everal California statutes applicable to different kinds of public employees contain mandatory

[2] The factfinding panel which presided over the factfinding hearing on the impasse between the City of Glendora and the Glendora Municipal Employees Association noted in the factfinding report the following: "Prior to 2012, the only impasse resolution under the Meyers-Milias-Brown Act (the State law governing cities, counties and special districts) was for voluntary mediation. However, in 2012 the State of California enacted AB 646 (now Government Code Sections 3505.4-3505.7) which establishes a fact finding process and lays out a set of 8 criteria to be used by the fact finding panel." (See "Factfinding Report & Recommendations, PERB Case.# LA-IM-179-M, August 24, 2015" at p. 2, attached hereto as Exhibit A.)

procedures for identifying and resolving a bargaining impasse, usually requiring mediation," the MMBA is not one of them. (*Santa Clara County Correctional Peace Officers' Association v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.) That same court, in a footnote, also noted the following:

> Former section 3505.4 was repealed and replaced amidst a number of amendments to the MMBA effective on January 1, 2012. Assembly Bill No. 646 (2011–2012 Reg. Sess.) repealed and replaced section 3505.4 and added sections 3505.5 and 3505.7. The nonexistence of mandatory impasse procedures in the MMBA is what prompted the author of Assembly Bill No. 646 to propose this new legislation. (Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011–2012 Reg. Sess.) as amended Mar. 23, 2011, at <(http:// info.sen.ca.gov/pub/11– 12/bill/asm/ab_0601– 0650/ab_646_ cfa_20110503_104246_ asm_comm.html)> [as of June 26, 2012].) (*Santa Clara County Correctional, supra*, at 1034-1035, fn.5.)

Clearly, if the MMBA required factfinding prior to January 1, 2012, there would have been no need for the Legislature to repeal the prior section 3505.4, and replace it with a new section 3505.4, or add a new section 3505.5 or 3505.7.

Thus, because the MMBA did not require factfinding prior to January 1, 2012, the Department's comments against reimbursement lack merit, and the activities identified above are reimbursable.

Rebuttal to Department Comment 2

The Department contends that activities 1, 9, and 10 are discretionary and thus not reimbursable. Those specific activities were identified as follows:

Activity 1: The agency must notice impasse hearing if delay in factfinding request.

Activity 9: The agency must hold a public impasse hearing if it chooses to impose its last, best and final offer.

Activity 10: The agency shall meet and confer with union and submit/resubmit last, best offer.

The Department's claim that these activities are not reimbursable because the City of Glendora had the discretion to either perform or not perform these activities is incorrect.

As a result of the changes made by AB 646, the MMBA now states that a public agency "that is not required to proceed to interest arbitration may, ***after holding a public hearing***

regarding the impasse, implement its last, best, and final offer." (Gov. Code § 3505.7, emphasis added.) The Department's claim that the holding of a public hearing is optional is wrong.

As evidenced by the clear language of the statute itself, the public hearing does not concern the implementation of the local public agency's last, best and final offer, but concerns "***the impasse***" between the local public agency and the recognized employee organization in negotiations. (Gov. Code § 3505.7.) This public hearing regarding the impasse occurs only after the public agency has made the factfinding panel's "findings and recommendations publicly available" for at least 10 days. (Gov. Code §§ 3505.5(a), 3505.7.) Thus, the purpose of the public hearing regarding the impasse is for the public agency to receive and consider public comments regarding the impasse ***before*** it makes any decision regarding any subsequent implementation. (*County of Fresno* (2014) PERB Order No. Ad-414-M, p. 14, citing *Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461 [Brown Act is intended to facilitate public participation in all phases of local government decision-making].)

Since the public agency is required to hold this public hearing before it renders a decision on implementation, the notice and hearing requirements are not discretionary, but mandatory. The local public agency has no choice but to hold this public hearing so it can receive public comment ***before*** making any decision to implement its last, best and final offer. Prior to January 1, 2012, local public agencies were not required to hold a public hearing ***regarding the impasses*** reached with their employee organizations.

Thus, because the MMBA did not mandate public hearings regarding impasses in negotiations prior to January 1, 2012, the Department's comments against reimbursement lack merit, and the activities identified above are reimbursable.

Rebuttal to Department Comment 3

The Department contends that activities 4 and 8 are not reimbursable because they do not provide any new or increased programs or levels of service. Those specific activities were identified as follows.

Activity 4: PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.

Activity 8: The agency shall pay for half of the costs of the factfinding.

The Department's contention that these activities do not provide any new programs or level of service is wrong.

Under the California Constitution, "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of such program or increased level of service." (Cal. Const. Art. XIII.B, § 6.) The Constitution, therefore, imposes

on the State an obligation to reimburse local agencies for the cost of most programs and services they are required to provide pursuant to State mandate provided that those local agencies were not under a preexisting duty to fund the activity. (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 328.)

A "program" is defined as that which carries out the "governmental function of providing services to the public, ***or*** laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1189 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56], emphasis added.) A program is "new" if the local government had not previously been required to institute it. (*Ibid.*)

While AB 646 did not increase the level of services provided to the public, it did establish a new law which imposed unique requirements on local public agencies that do not apply generally to all residents or entities in California. (*Id.*) For instance, the MMBA mandates that the cost of the panel chairperson be equally divided between the local public agency and the recognized employee organization, regardless of whether PERB or the parties select the chairperson. (Gov. Code § 3505.5(b) and (c); *County of Contra Costa* (2014) PERB Order No. Ad-410-M, p.29.) In contrast, under both the Educational Employment Relations Act ("EERA") and the Higher Education Employment Relations Act ("HEERA'), the Board pays the cost of the chairperson selected. (*Id.*; Gov. Code §§ 3548.3(b); 3593(b).) The MMBA now also requires that the local public agency share in any mutually-incurred costs associated with the factfinding, as well as any individually-incurred costs associated with its panel member. (Gov. Code § 3505.5(d).) Prior to AB 646 going into effect, local public agencies, and in particular the City of Glendora, did not incur such costs.

Likewise, although the National Labor Relations Act ("NLRA") (which governs labor relations over certain private sector employers) requires private sector employers and their recognized employee organizations to bargain in good faith, it does not mandate that the parties participate in factfinding. (29 U.S.C. § 151, et seq.) Instead, if the parties are unable to reach an agreement despite good faith bargaining, the private sector employer may declare impasse and impose its last offer to the union. (*NLRB v. Unbelievable, Inc.,*. (9th Cir. 1995) 71 F.3d 1434, 1440; *Southwest Forest Indus., Inc. v. NLRB* (9th Cir. 1988) 841 F.2d 270, 27.)

That was the same process applicable to local public agencies, including the City of Glendora, under the MMBA prior to January 2012. But once the changes mandated by AB 646 went into effect, local public agencies had no choice but to submit to mandatory factfinding once impasse was declared and the recognized employee organization timely requested factfinding. (Gov. Code § 3505.4(a).) A local public agency is also now prohibited from imposing its last, best, and final offer until it first publishes the factfinding report for a minimum of 10 days, and then holds a public hearing regarding the impasse; procedures not previously required by the MMBA. (Gov. Code § 3505.7.)

Had the City of Glendora not been forced to comply with the factfinding mandates established by AB 646, it would not have been required to share the costs of the panel chairperson or any other mutually-incurred costs associated with the factfinding. It also could have avoided its individually-incurred costs since there would have been no need to participate in factfinding, no need to publish the factfinding panel's report, and no need to hold a public hearing regarding the impasse. But because AB 646, codified at Government Code sections 3505.4, 3505.5, and 3505.7, mandated that the City of Glendora submit to factfinding, the City had no choice but to incur such costs once the Glendora Municipal Employees Association made a timely request for factfinding.

Thus, the Department's comments against reimbursement lack merit, and the activities identified above are reimbursable.

Conclusion

As noted above, the Department's reasons for denying the City of Glendora's reimbursable activities lack merit and are based on a fundamental misunderstanding of how the MMBA dealt with impasses prior to January 1, 2012. The City of Glendora has demonstrated why these activities are reimbursable, and respectfully requests that the Commission on State Mandates approves its request.

If you have any questions regarding the above, please feel free to contact me or my colleague Melanie Chaney at (310) 981-2000. We can also be reached by email at aguzman@lcwlegal.com and mchaney@lcwlegal.com.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Adrianna E. Guzman

AEG:lb

Enclosures:
Exhibit A – Factfinding Report
Exhibit B – Compendium of Cited Authority

DECLARATION

I, Adrianna Guzman, am an attorney with the law firm of Liebert Cassidy Whitmore, Claimant City of Glendora's designated representative in this matter. I declare under penalty of perjury that the statements made in this Rebuttal are true and complete to the best of my knowledge, information and belief and that this declaration was executed on September 15, 2016 at 6033 W. Century Blvd., Suite 500, Los Angeles, California.

Adrianna E. Guzman

CITY OF GLENDORA'S SUPPORTING DOCUMENTS

Exhibit A

City of Glendora and Glendora Municipal Employees Association
Fact-finding Report & Recommendations, PERB Case # LA-IM-179-M
August 24, 2015

This Fact-Finding involves an impasse over the terms of a successor agreement between the City of Glendora and the Glendora Municipal Employees Association. The Panel Members were Ralph Royds for the Association, and Bruce Barsook for the City. Tony Butka was jointly selected as the neutral Chair by a PERB Appointment letter dated June 25, 2015.

A hearing was held at the Glendora City Hall on Thursday, July 23, 2015, where all parties were represented by counsel and afforded an opportunity to introduce evidence, testimony, and argument as to their respective positions. A number of stipulations were agreed to by the parties at hearing.

Background Information

Glendora is located in the San Gabriel mountain foothills, and was historically known for Sunkist Growers as well as a number of private military academies. The City currently has in excess of 50,000 residents, and is renown for it's excellent educational system

Glendora has 8 departments, including a Police Department and Water Department, with approximately 250 employees. The City was hard-struck by first the economic meltdown of 2007/08, and then the elimination of all Community Redevelopment Agencies by the State of California in 2012. As with most California municipalities, it has been a long and difficult road back to economic stability.

The Current Dispute & Issues

The Glendora Municipal Employee's Association represents approximately 100 of the some 250 City employees, and is the largest of the City's four bargaining units.

The last agreement between the parties ran from July 1, 2013 through January 31, 2015. Negotiations for a successor agreement started in October of 2014 through May 2015. The City issued a Last, Best & Final offer on May 18, 2015. The Association membership rejected the offer, and the Association requested Factfinding from PERB by letter of May 29,2015.

At hearing, there was consensus that six (6) issues are in dispute for a successor agreement:

(1) Term
(2) Base Salary Increase
(3) Flexible Benefit Plan
(4) Retiree Medical Insurance Contributions
(5) "Timely" Evaluations
(6) Movement between Level 1 and Level 2 Classifications

Statutory Criteria

Prior to 2012, the only impasse resolution under the Meyers-Milias-Brown Act (the State law governing cities, counties, and special districts) was for voluntary mediation. However, in 2012 the State of California enacted **AB 646** (now Government Code Sections 3505.4 – 3505.7) which establishes a fact finding process and lays out a set of 8 criteria to be used by the fact finding panel. Those criteria are listed in Section 3505.4(d) and provde as follows:

"(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following Criteria:
(1) State and federal laws that are applicable to the employer.
(2) Local rules, regulations, or ordinances.
(3) Stipulations of the parties.
(4) The interests and welfare of the public and the financial ability of the public agency.
(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
(6) The consumer price index for goods and services, commonly known as the cost of living.
(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations."

Final Positions of the Parties -

Term - While there was agreement that both parties would like a three year term, it seems that the differences between the two sides on other issues, particularly salary,

are so great that unless substantial movement is made by one or both parties on these other issues, a multiyear agreement is unlikely. Given those circumstances, the parties may need to consider other alternatives to the three year term they both agree to.

Base Salary Increase - Money is generally the biggest sticking point, and this factfinding is no exception. Here it seems that we have a tale of two cities, which illustrates how far apart the parties really are in obtaining a multiyear agreement.

The Association's position is that these employees have gone without a raise for some six years, including staffing reductions & furloughs. Therefore, the argument goes, in better economic times they should be rewarded for their stick-to-it spirit and deserve a substantial pay increase. To help the Panel in their deliberations, the Association provided us with a set of nine (9) Proposed Findings, eight of which pertain to salary increases (No's 1-8).

The City's position is that although the economic environment has improved since the Great Recession, the City is not yet out of the woods; the City needs to continue to be financially prudent and live within its means. The City asserts that it needs to strive to maintain fiscal discipline through compliance with City Council policies, such as a balanced budget, mandatory reserves, GASBY requirement policies, and not paying for ongoing expenses out of 'one-time' money. The City also asserts that it also needs to anticipate increased retirement costs, and that undefined costs associated with mandates pose future financial challenges. Under these circuimstances, the City argues that, their Last, Best and Final offer is the best that can be done, particularly where, as here, the offer is the same one accepted by the City's other three bargaining units.

The relative positions of the parties on salaries highlights these stark differences; the City proposes 5.25% over three years, with 2% effective February 1st for 2015 while the Association proposes 5% per year for each of the three years.

These are not differences that lend themselves to mutually acceptable solutions, as we say in the trade.

Flexible Benefit Plan - The Association proposed a change of increasing the Flexible Benefit Plan to increase the monthly medical premium reimbursements by $50/month.

Although the City initially proposed increases over the life of the agreement which would not have been subject to a 'cash out' provision, it later changed its position, and instead put all of the proposed compensation costs into its salary offer. The City's position is now to retain current contract amounts.

Retiree Medical Insurance Contributions:- The City proposed a $50/month increase in retiree medical insurance contributions for 2015. While the Association rejected the proposal, there was no counterproposal.

Lack of Timely Evaluations - The Association proposed that any employee not receiving a timely performance evaluation would automatically become "Meets Standards". This is evidently linked to merit raises under the Agreement. The City rejected the Association proposal, simply saying that issues relating to timelieness should be reporter to HR for follow-up.

Level I to Level II Positions - Basically the Association is proposing that for positions in a class series, such as Librarian I and Librarian II, that the City designate the Level I position as an entry level position, and the Level II position as the journey level position, with automatic advancement after two years. The City rejected the proposal, claiming that it wants to retain discretion to determine service levels and classification requirements.

Analysis

Clearly, salaries are the "800 pound Gorilla" preventing an agreement between the parties. And underneath that disagreement are some fairly fundamental differences in analyzing the City's budgets. The Association argues that the issue isn't "ability to pay" but rather priorities. The Association implicitly asserts that adherence to the City's various financial principles, eg. (1) a balanced budget (2) setting a goal of a 1-2% budget surplus each year, (3) setting a goal of general fund reserve levels of 45% mandatory Reserve requirement , and (4) Five (5) year budget forecasting, makes it impossible for them to get significant salary increases.

While one can sympathize with employees' desire for a significant raise after many years of belt tightening, here's the problem; there is absolutely nothing in the Meyers-Milias-Brown Act which restricts the ability of elected officials to establish policies regarding financial prudence (balanced budgets, prudent reserves, etc.). Those decisions are political decisions expressly reserved to the elected officials of the City by state law and recognized by AB 646 as factors to consider by the fact finding panel in determining what recommendations to make. Section 3505.4(d)(2) and (4) provide that the panel shall consider "local rules" as well as the "interests and welfare of the public and the financial ability of the public agency." While it is understandable that the Association is unpersuaded by the City's position, their Last, Best & Final offer is consistent with the City's adopted financial policies.

However, there are two other considerations which should be included by any factfinding panel in a factfinding report and recommendations:

5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees

performing similar services in comparable public agencies, and

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

While the public agency is not obligated to base its pay proposals on these criteria, these criteria should be included in any factfinding report and recommendations, and it is arguably crucial marketplace information that any agency should be aware of.

This record is virtually devoid of objective information regarding either of these two criteria. And there is reason for their inclusion in the Act -- they are fundamental in the establishment and maintenance of a rational classification/compensation system.

In this particular case, they could provide valuable information as to how other agencies handle merit system increases, whether or not other agencies in fact have merit increases or simple step & column systems, and give a clue as to how significant or insignificant an issue the proposal about timely evaluations really is.

Further, in the benchmarking process it becomes clear as to what if any classifications are subject to "pairing", or automatic movement between levels.

Finally, in examining the total compensation practices of similar agencies, it will become quickly apparent as to how other cities handle retiree health & welfare, benefits including best practices on buybacks and related provisions, as well as overall benefit costs.

The Associations claims that Department Heads and the City Manager made out much better than bargaining unit employees in compensation during the last several years. In contrast, the City argued that the Association was offered and rejected multi-year deals similar to those given to other groups. However, we do not need to determine the accuracy of either party's claims because how the City treats other units/groups vs. bargaining unit employees is, as stated previously, a political decision of the elected Council. There is no direct comparison requirement in labor law that mandates everyone being treated equally.

While one can certainly sympathize with the perception of disparate treatment, and recognize the emotional effect that it has on employees, these feelings do not provide a path under the MMBA criteria to make a recommendation that the troops get the same deal as other bargaining units/groups.

RECOMMENDATIONS

Based on the probability that a multiyear agreement is not likely, and in the spirit that a factfinding process is after all designed to bring the parties closer together towards an agreement, the following is recommended:

1) Term - Approximately 18 months. The parties should consider adopting a contract term that more closely follows the budget cycle of July 1 – June 30th. While finances remain as tight as they are, this will allow the Association to receive the benefit of projected revenue increases sooner rather than later, and align Association negotiations with those of the units/groups it perceives to be treated more generously than it has been treated. It will also allow the City to plan for expenditures at the same time it creates a budget and negotiates with other units/groups.

2) Wages - 2.25% for 2015, which is similar to the increase given to the other bargaining units in the City (and who agreed to multi-year agreements to get this salary increase).

3) Flexible Benefit Plan - No change, the same as for other bargaining units in the City;

4) Retiree Medical Insurance Contribution - No Change

5) Timely Evaluation, should be monitored during the remainder of the MOU with the Association encouraged to bring any problems to HR as soon as they occur. If problems remain unresolved by the end of the MOU, this matter can be addressed as a part of successor negotiations

6) Level I and Level II - No change, as there is insufficient data as to current practices.

Submitted,

Tony Butka, Chair

Ralph Royds, Association Member

Bruce Barsook, City Member

Exhibit B

Compendium of Authorities In Support of City of Glendora's Rebuttal

Federal Cases: **TAB**

State Cases:

PERB Cases:

Federal Statute:

State Authorities:

Exhibit 1

***NLRB v. Unbelievable, Inc.,*. (9th Cir. 1995)**
71 F.3d 1434, 1440

one else who is present intends to sell drugs, is insufficient to establish membership in a conspiracy. *See United States v. Rork*, 981 F.2d 314, 316 (8th Cir.1992).

[6, 7] Viewed in the light most favorable to the verdict, the evidence shows that a conspiracy to distribute marijuana clearly existed; this Shoffner does not dispute. The evidence also shows that Shoffner knowingly became part of the conspiracy. "Once the existence of a conspiracy is established, even slight evidence connecting a defendant to the conspiracy may be sufficient to prove the defendant's involvement." *Agofsky*, 20 F.3d at 870 (internal quotations and citations omitted). Shoffner travelled from Kentucky to Missouri to help transport 250 of the 500 pounds of marijuana that Clark arranged to purchase (Clark needed a second vehicle to transport such a large amount of marijuana). Shoffner was present at the hotel meeting where the plan to transport the marijuana to Kentucky was discussed, Shoffner approved the quality of the sample marijuana offered to him, and Shoffner knowingly drove one of the vehicles in the caravan toward the marijuana warehouse in Illinois around 1:00 a.m. on March 11, 1993, to assist in transporting the 500 pounds of marijuana. Additionally, Shoffner's intent, motive, knowledge, and absence of mistake are established by his prior dealing in large quantities of marijuana. We cannot conclude that no reasonable jury could have found Shoffner guilty beyond a reasonable doubt of the crime of conspiracy to distribute marijuana. Accordingly, the district court did not err in denying Shoffner's motions for judgment of acquittal.

III. CONCLUSION.

The district court did not err by admitting the Rule 404(b) evidence of the appellant's prior conviction, and the district court did not err by denying Shoffner's motions for judgment of acquittal. Accordingly, we affirm the judgment of the district court.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

Beverage Dispensers' Union, Local 165, Hotel Employees & Restaurant Employees International Union, AFL–CIO, Petitioner–Intervenor,

v.

UNBELIEVABLE, INC., d/b/a Frontier Hotel & Casino, Respondent.

No. 93–70236.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted January 9, 1995.

Memorandum Filed Sept. 6, 1995.

Order and Opinion Filed Dec. 1, 1995.

Union filed unfair labor practice charges with National Labor Relations Board (NLRB) which filed complaint against employer. After administrative law judge (ALJ) found that employer engaged in unfair labor practices and issued cease and desist order, NLRB affirmed ALJ's decision. NLRB petitioned for enforcement of its order and union intervened with both parties seeking sanctions on appeal. The Court of Appeals, Tashima, District Judge, sitting by designation, held that: (1) employer engaged in unfair labor practices by eavesdropping on private conversations between employees and union representative; (2) employer's ejection of union representatives constituted unfair labor practice; (3) employer illegally issued new set of disciplinary rules and regulations without notifying union or providing it with opportunities to bargain over them; (4) employer terminated pension fund contributions without giving union prior notice or opportunity to bargain; (5) union did not waive its right to bargain over pension contributions; and (6) NLRB and union were entitled to attorney fees and double costs for frivolous appeal.

Ordered enforced with sanctions.

1. Administrative Law and Procedure ⚖791, 796

Labor Relations ⚖677.1, 680

Court of Appeals will uphold decisions of National Labor Relations Board (NLRB) if its findings of fact are supported by substantial evidence and if it correctly applied law.

2. Administrative Law and Procedure ⚖791

Labor Relations ⚖680

Substantial evidence test for reviewing decisions by National Labor Relations Board (NLRB) is essentially case-by-case analysis requiring review of whole record.

3. Statutes ⚖219(8)

Court of Appeals will defer to interpretation of National Labor Relations Board (NLRB) of NLRA if it is reasonably defensible. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 151 et seq.

4. Labor Relations ⚖556

Substantial evidence supported decision by National Labor Relations Board (NLRB) that employer engaged in unfair labor practices by eavesdropping on private conversations between employees and union representative; employer's security chief eavesdropped on conversation between union representative and employee in employee breakroom, area union representatives were authorized to visit under collective bargaining agreement, and shortly thereafter expelled representative from employer's premises on basis of what he heard. National Labor Relations Act, § 8(a)(1), as amended, 29 U.S.C.A. § 158(a)(1).

5. Labor Relations ⚖557

Substantial evidence supported National Labor Relations Board (NLRB) finding that employer's ejection of union representative from employer's premises constituted unfair labor practice as it violated employees' contractually granted access to their bargaining representative; union representatives were operating within terms of collective bargaining agreement when they visited employer's premises and their expulsion constituted unilateral change of agreement. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

6. Labor Relations ⚖261

Contractual provision for union access is term and condition of employment that survives expiration of collective bargaining contract. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

7. Labor Relations ⚖178

Providing union representatives access to employer's premises constitutes mandatory subject of bargaining which requires notice to union and opportunity to bargain prior to any change. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

8. Labor Relations ⚖367

Employer's ejection of union representatives from employer's premises interfered with union-related communications in violation of NLRA. National Labor Relations Act, § 8(a)(1), as amended, 29 U.S.C.A. § 158(a)(1).

9. Labor Relations ⚖393

Findings by National Labor Relations Board (NLRB) that employer unilaterally promulgated new disciplinary rules were supported by substantial evidence; employer issued new set of 63 rules and regulations to employees without notifying union or providing it with opportunity to bargain over them and employer's argument that five new rules did not involve material changes were frivolous. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

10. Labor Relations ⚖264

Unilateral change in work rules constitutes breach of bargaining obligation, even after collective bargaining agreement has expired. National Labor Relations Act, § 8(a)(1, 5), as amended, 29 U.S.C.A. § 158(a)(1, 5).

11. Labor Relations ⚖393

Findings by National Labor Relations Board (NLRB) that employer illegally terminated pension fund contributions without giving union prior notice or opportunity to bargain was supported by substantial evidence; pension fund contribution issue was never

discussed during bargaining or during negotiations leading up to impasse on other issues, employee never indicated that it proposed changes in pension and employer was not free to unilaterally end payment of pension benefits. Labor Management Relations Act, 1947, § 302(c)(5), 29 U.S.C.A. § 186(c)(5).

12. Labor Relations ⇐393

Employer has duty to refrain from unilaterally changing terms of employment without first bargaining.

13. Labor Relations ⇐393

After impasse, employer may unilaterally impose changes in terms and conditions of employment, only if those changes were reasonably comprehended in employer's previous proposals to union.

14. Labor Relations ⇐393

Finding by National Labor Relations Board (NLRB) that employer did not establish clear and unmistakable waiver of right to bargain by union inaction regarding pension fund contribution issue was supported by substantial evidence; union indicated that it would discuss issue of pension but employer's representatives never responded.

15. Labor Relations ⇐671

Court of Appeals gives substantial deference to National Labor Relations Board (NLRB) when it defines scope of duty to bargain by defining part of process that collective bargaining must follow.

16. Labor Relations ⇐176

To establish waiver of right to bargain by union inaction, employer must first show that union had clear notice of employer's intent to institute change sufficiently in advance of actual implementation so as to allow reasonable opportunity to bargain about change and employer must show that union failed to make timely bargaining requests before change was implemented.

17. Labor Relations ⇐176

Waiver of right to bargain by union in action must be clear and unmistakable.

18. Federal Civil Procedure ⇐2840

Appeal of unfair labor practices action was frivolous, and, thus, National Labor Relations Board (NLRB) and union were entitled to attorney fees and double costs to be imposed against employer and its former legal counsel with both parties being jointly and severally liable. 28 U.S.C.A. § 1912; F.R.A.P.Rule 38, 28 U.S.C.A.

19. Federal Civil Procedure ⇐2839

Appeal is frivolous for purposes of determining attorney fees and double costs when results are obvious or arguments are wholly without merit. 28 U.S.C.A. § 1912; F.R.A.P.Rule 38, 28 U.S.C.A.

20. Federal Civil Procedure ⇐2840

Union-intervenor may recover attorney fees and double costs under rule allowing attorney fees and double costs for prevailing party where appeal is frivolous. 28 U.S.C.A. § 1912; F.R.A.P.Rule 38, 28 U.S.C.A.

21. Federal Civil Procedure ⇐2846

Employer's counsel, who was substituted as counsel after employee's reply brief was filed in appeal of unfair labor practices charge, was not liable for sanctions of attorney fees and double costs imposed on employer and his former counsel; although new counsel petitioned for leave to file supplemental brief, counsel attempted to improve original briefs and withdrew one of employer's frivolous arguments. 28 U.S.C.A. § 1912; F.R.A.P.Rule 38, 28 U.S.C.A.

Frederick C. Havard, National Labor Relations Board, Washington, DC, for the petitioner.

Barry S. Jellison, Michael T. Anderson, Davis, Cowell & Bowe, San Francisco, California, for intervenor Beverage Dispensers' Union, Local 165, Hotel & Restaurant Employees International Union, AFL-CIO.

James J. Meyers, Jr., Meyers, Merrill, Schultz & Wolds, San Francisco, California; Michael A. Taylor, Ogletree, Deakins, Nash, Smoak & Stewart, Washington, DC, for respondent Unbelievable, Inc.

Petition for Enforcement of an Order of the National Labor Relations Board.

Before: GOODWIN and SCHROEDER, Circuit Judges, and TASHIMA, District Judge.*

ORDER

The Memorandum disposition filed September 6, 1995, is amended as follows:

[Editor's Note: Amendments incorporated for purposes of publication].

The request for publication is granted and the Memorandum disposition, filed September 6, 1995, as amended, is redesignated as an authored Opinion by Judge Tashima.

OPINION

TASHIMA, District Judge:

The National Labor Relations Board ("Board") petitions for enforcement of its order finding that respondent Unbelievable, Inc. d/b/a Frontier Hotel & Casino ("Frontier") violated § 8(a)(1) and (a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1) and (5), by conducting surveillance on and ejecting Union representatives, unilaterally imposing new rules on employee conduct and unilaterally ceasing to pay pension fund contributions. We have jurisdiction under 29 U.S.C. § 160(e) and we grant the petition to enforce.

FACTUAL AND PROCEDURAL BACKGROUND

Frontier owns a hotel in Las Vegas, where the disputed events occurred. The hotel's previous owner entered into a collective bargaining agreement ("CBA") with the Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (the "Union"). Frontier acquired the hotel in July, 1988, adopted the CBA, and honored it through its expiration in June, 1989, and thereafter. On February 26, 1990, bargaining between Frontier and the Union to reach a new CBA reached an impasse, when Frontier implemented its "Last, Best and Final Proposal" (the "Final Offer") to the Union.

After the CBA expired, Frontier engaged in certain activities which were alleged to have violated the NLRA, including eavesdropping and conducting private surveillance on employees, ejecting Union representatives, unilaterally issuing new rules and ceasing to pay pension fund contributions.

The Union filed charges with the Board on November 16, 1989, July 17, 1990, October 4, 1990, and October 23, 1990. The Regional Director of the Board subsequently filed complaints against Frontier, which were tried before an Administrative Law Judge (the "ALJ"). The ALJ found that Frontier had engaged in the alleged unfair labor practices and issued an order for Frontier to cease and desist from such activities. Frontier filed exceptions to that decision. A three-member panel of the Board affirmed the ALJ's decision in a Decision and Order issued on December 7, 1992. 309 NLRB No. 120. Pursuant to 29 U.S.C. § 160(e), the Board petitioned this court for enforcement of its order. The Union intervened on appeal on behalf of the Board. Both the Board and the Union also seek sanctions on appeal.

Frontier, represented by its counsel Joel I. Keiler ("Keiler"), filed both an opening and reply brief, challenging all of the Board's rulings. In addition, Frontier argued that the ALJ should have recused himself for bias against both Frontier and this court. Subsequently, Frontier obtained new counsel, Ogletree, Deakins, Nash, Smoak & Stewart, and Meyers, Merrill, Schultz & Wolds, who moved for leave to file a supplemental brief, and to strike references to the motion to disqualify the ALJ. A motions panel denied the request to file a supplemental brief, and referred the motion to strike to this panel for resolution.

For the reasons given below, we affirm the Board's order in all respects, deny Frontier's

* Hon. A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

motion to strike, and impose sanctions against Frontier and its former counsel, Keiler.

DISCUSSION

Standard of Review

[1–3] We will uphold decisions of the Board if its findings of fact are supported by substantial evidence and if it correctly applied the law. *NLRB v. General Truck Drivers, Local No. 315*, 20 F.3d 1017 (9th Cir.), *cert. denied*, — U.S. —, 115 S.Ct. 355, 130 L.Ed.2d 310 (1994); *NLRB v. O'Neill*, 965 F.2d 1522, 1526 (9th Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 2995, 125 L.Ed.2d 689 (1993). " 'The substantial evidence test is essentially a case-by-case analysis requiring review of the whole record.' " *General Truck Drivers*, 20 F.3d at 1021 (quoting *Turcios v. INS*, 821 F.2d 1396, 1398 (9th Cir.1987)). We will defer to the Board's interpretation of the NLRA if it is reasonably defensible. *General Truck Drivers*, 20 F.3d at 1017.

Surveillance and Ejection of Union Representatives

The first issue raised is whether Frontier's ejection of Union representatives was lawful.

[4] The Board accepted the ALJ's finding that Frontier engaged in unfair labor practices by eavesdropping on private conversations between employees and Union representative Roxanna Tynan ("Tynan") in violation of § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). Our review of the record finds substantial factual support for these findings. On October 20, 1989, Frontier security chief Michael Kluge ("Kluge") eavesdropped on a conversation between Tynan and an employee in the employee break room, an area Union representatives were authorized to visit under the CBA. Kluge shortly thereafter expelled Tynan from the hotel premises on the basis of what he heard of the conversation.

We do not accept Frontier's paradoxically self-incriminating argument that the issue of surveillance is barred by the NLRA's six-month statute of limitations, § 10(b), 29 U.S.C. § 160(b), because it had engaged in surveillance of Tynan as early as February, 1989, more than six months prior to the filing of the charge of unlawful surveillance on November 16, 1989. Although the surveillance began more than six months before the charge was filed, the record is clear that the surveillance continued up to October 20, 1989, less than a month before filing of the charge. Frontier's statute of limitations argument is frivolous.

[5] The Board also upheld the ALJ's finding that Frontier's ejection of Union representatives constituted an unfair labor practice by violating the employees' contractually granted access to their bargaining representatives, in violation of § 8(a)(1) and (a)(5) of the NLRA, 29 U.S.C. § 158(a)(5) and (a)(1). We agree.

[6, 7] Article 4 of the expired CBA provided access to Union representative "to see that this Agreement is being enforced." A contractual provision for Union access, such as Article 4, is a term and condition of employment that survives the expiration of the contract. *See, Facet Enters., Inc. v. NLRB*, 907 F.2d 963, 983 (10th Cir.1990); *NLRB v. Great Western Coca-Cola Bottling Co.*, 740 F.2d 398, 403–404 (5th Cir.1984). Providing Union representatives access to the employer's premises constitutes a mandatory subject of bargaining which requires notice to the Union and an opportunity to bargain prior to any change. *Facet Enters.*, 907 F.2d at 983. The findings that the Union representatives were operating within the terms of the CBA when they visited the hotel are supported by substantial evidence. Thus, their expulsion constituted a unilateral change of the CBA.

Extensive testimony supports the ALJ's finding that Frontier expelled Union representatives on either the flimsiest of grounds or no grounds at all. Among the evidence on which the ALJ relied was the ejection of Union representative Tynan, discussed above, after Frontier unlawfully eavesdropped on her conversation with an employee. On November 22, 1989, Frontier's personnel director ejected Union representative Michelle Viela, on the sole ground that Frontier was "just taking a hard stand." On

October 22, 1990, Union representative Hattie Canty ("Canty") was ejected for "harassing" two non-union employees. Frontier based its decision to expel Canty on reports from the employees that she had asked them if they were happy with certain benefits. We agree with the ALJ that these reports were unremarkable, and not a proper basis for ejection of Union representatives.

[8] In addition to the contractual violation, the ALJ found that the ejection of representatives interfered with union-related communications in violation of § 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1). *See Harvey's Wagon Wheel, Inc.*, 236 N.L.R.B. 1670, 1978 WL 7669 (1978). This constitutes an additional, independent rationale for the Board's findings and renders all of Frontier's arguments futile. We conclude that in regard to surveillance and ejection of Union representatives, the Board's decision was supported by substantial evidence, and that it correctly applied the law.

Promulgation of New Rules

[9, 10] On July 1, 1990, the Hotel issued a new set of 63 rules and regulations to employees without notifying the Union or providing it with an opportunity to bargain over them. The Board agreed with the ALJ that Frontier unilaterally promulgated new disciplinary rules in violation of § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1). A unilateral change in work rules constitutes a breach of the bargaining obligation, even after the CBA has expired. *See, Alfred M. Lewis, Inc. v. NLRB*, 587 F.2d 403, 408 (9th Cir.1978); *NLRB v. Miller Brewing Co.*, 408 F.2d 12, 14 (9th Cir.1969).

In its briefs, Frontier took issue with the ALJ's findings, arguing in particular that five of the new rules did not involve "a material, a substantial, and a significant" change. *Peerless Food Products*, 236 N.L.R.B. 161, 1978 WL 7691 (1978). At oral argument, Frontier's new counsel conceded significant differences in three of the new rules, and argued only that new rules 40 and 42 did not represent substantial changes. We find no merit in Frontier's argument as to these two rules.

New rule 40 requires employees suspected of being under the influence of drugs or alcohol to undergo a medical examination or be terminated immediately. The old rules said nothing about a medical examination. They merely prohibited employees from reporting to work under the influence of liquor, narcotics or drugs. We find it incredible that Frontier would argue that the added requirement that employees subject themselves to medical examination on threat of termination is only an insubstantial change in the rules. The argument is frivolous.

In its opening brief, Frontier argues that new Rule 42 is merely a restatement of contract article 6.01(b). Frontier's argument is inaccurate and appears purposely designed to mislead the court. New Rule 42 prohibits the unauthorized posting, distributing or circulating or any written materials in the working area. Contract article 6.01(b) pertains to drug and alcohol abuse. The two provisions have nothing to do with one another.

Frontier's arguments are meritless. The Board's finding that Frontier unilaterally promulgated new disciplinary rules in violation of § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1), is supported by substantial evidence and is affirmed.

Pension Contributions

Under Article 27 of the expired CBA, Frontier was required to make contributions to an employee pension fund. During negotiations over a new agreement, Article 27 was never an issue. Frontier's Final Offer presented on February 5, 1990, by its then attorney Kevin Efroymson ("Efroymson"), explicitly provided that there shall be "no change" from Article 27. A subsequent implementation letter sent by Efroymson following impasse contained no references to changes in Article 27.

On May 10, 1990, Keiler sent a letter to the Union notifying it that the pension plan was being discontinued as of June 2. On May 24, 1990, the Union responded in a letter explaining that it had not been advised that Keiler represented Frontier, and that the Union would respond to his letter if it received such notification. Keiler did not respond to that letter. Frontier terminated

pension contributions in June. The Board and the ALJ found that Frontier violated § 8(a)(5) and (1) of the NLRA, 29 U.S.C. § 158(a)(5) and (1), by unilaterally discontinuing its contributions to the pension fund.

[11, 12] Frontier argues incorrectly that it had to stop payments to the pension trust once the CBA expired and negotiations stopped upon impasse, pursuant to § 302 of the Labor–Management Relations Act, 29 U.S.C. § 186(c)(5), which requires a written agreement with the employer, before the employer can make any contribution to an employee trust fund. An employer has a duty to refrain from unilaterally changing the terms of employment without first bargaining. *Carter v. CMTA–Molders & Allied Health & Welfare Trust*, 736 F.2d 1310, 1313 (9th Cir.1984). Frontier's continuing contributions to the pension fund after the CBA expired were not only legal, they were required.

Moglia v. Geoghegan, 403 F.2d 110 (2d Cir.1968), *cert. denied*, 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969), upon which Frontier relies, does not compel us to hold otherwise. In *Moglia*, the court held that contributions to the pension trust were illegal because no CBA had ever been signed. *Id.* at 116. However, this circuit has consistently refused to apply *Moglia* in cases such as the instant one, where a CBA was signed but has expired.[1] *See, e.g., Carter*, 736 F.2d at 1313; *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 n. 2 (9th Cir.1981). In the case at bench, a prior CBA had been honored by Frontier and, though the CBA expired, the parties never engaged in bargaining regarding pension benefits.

[13] We agree with the Board's finding that Frontier terminated pension fund contributions without giving the Union prior notice or an opportunity to bargain. Frontier argues that it did not have to give notice to the Union, however, because impasse had been reached. After an impasse, an employer may unilaterally impose changes in terms and conditions of employment, only if those changes were reasonably comprehended in the employer's previous proposals to the union. *Southwest Forest Indus., Inc. v. NLRB*, 841 F.2d 270, 273 (9th Cir.1988); *Peerless Roofing*, 641 F.2d at 735. However, no impasse was reached over Article 27, because it was never raised as an issue during bargaining. During the negotiations leading up to the February 1990 impasse, Frontier never indicated that it proposed changes in the Pensions Article.

Frontier presented no evidence whatsoever that changes in the Pension Plan were reasonably comprehended in its proposals before impasse. To the contrary, substantial evidence supports the finding that changes to the Pension Plan were not reasonably comprehended in Frontier's previous proposals—indeed, were not comprehended at all. Frontier's Final Offer explicitly provided that there shall be no change from Article 27 of the CBA. The subsequent implementation letter sent by Efroymson after impasse contained no reference to changes in Article 27. Efroymson himself testified that if an article was not being changed, it was not included in the implementation letter. Thus, Frontier's decision to end pension fund contributions could not have been contemplated from its previous proposals, and Frontier was not free unilaterally to end the payment of pension benefits. *Id.*

[14, 15] As a last resort, Frontier argues that the Union waived its right to bargain over the proposed change through inaction. We give "substantial deference" to the Board when it "defines the scope of the duty to bargain by defining part of the process that collective bargaining must follow." *Stone Boat Yard v. NLRB*, 715 F.2d 441, 444 (9th Cir.1983), *cert. denied*, 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984).

[16, 17] To establish waiver of the right to bargain by union inaction, the employer must first show that the union had "clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable

1. At least one decision of this court has distinguished *Moglia* as a private dispute that did not involve collective bargaining issues or national labor policy. *Peerless Roofing Co., Ltd. v. NLRB*, 641 F.2d 734, 736 n. 2 (9th Cir.1981).

opportunity to bargain about the change." *American Distrib. Co. v. NLRB,* 715 F.2d 446, 450 (9th Cir.1983) (citations omitted), *cert. denied,* 466 U.S. 958, 104 S.Ct. 2170, 80 L.Ed.2d 553 (1984). In addition, the employer must show that "the union failed to make a timely bargaining request before the change was implemented." *Id.* (citations omitted). The waiver of a protected right must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983). Here, Frontier bore the burden of proving that the Union clearly and unmistakably waived its right to bargain over the proposed pension plan change. Frontier cannot argue credibly that it has met this burden.

Frontier's entire argument rests on unsupported testimony by Keiler that Frontier had informed the Union prior to his May 10 letter that he was representing Frontier. Under Frontier's theory, because the Union must have known Keiler was representing Frontier, the Union's May 24 letter requesting confirmation of his status as Frontier's counsel was merely an obstructionist tactic. Frontier argues that because the Union did not request bargaining right then, it forever waived its right to bargain on the pension issue.

However, as the Board noted, Keiler testified that he was not present when Frontier's owners allegedly told the Union of Keiler's representation and he did not know how it happened. The ALJ and the Board rejected Keiler's unsupported testimony, and we find no reason to question their decision. In its May 24 letter the Union said it would respond to Keiler's letter if it received confirmation that he represented Frontier. Thus, the Union indicated a willingness to discuss the issue of the pension. Keiler never responded to this request.

On these facts, it is incredible for Frontier to argue that it established a clear and unmistakable waiver by the Union. The Board's findings are supported by substantial evidence and are affirmed.

Motion to Strike References to Bias of ALJ

In its opening and reply briefs, filed by Keiler, Frontier argued that the ALJ should have recused himself for bias against Frontier and the Ninth Circuit. Subsequently, Frontier's new counsel requested leave of the Court to withdraw the motion to disqualify the ALJ and to strike all references to that motion.

We deny Frontier's motion to strike. While we find absolutely no substance to Frontier's claims of bias on the part of the ALJ, we agree with the Board and the Union that Frontier's motion to strike is a last ditch effort to sanitize the record. Frontier's motion to strike underlines the frivolous nature of its original allegations of bias, which, as discussed below, form one of the bases for sanctions against Frontier and Keiler.

Rule 38 Sanctions

[18–20] Both the Board and the Union request sanctions against Frontier in the form of attorneys' fees and double costs. Where this court determines that an appeal is frivolous, it may, in its discretion, award the prevailing party damages for delay and double costs. Fed.R.App.P. 38; 28 U.S.C. § 1912. An appeal is frivolous when the results are obvious or the arguments are wholly without merit. *NLRB v. Catalina Yachts,* 679 F.2d 180, 182 (9th Cir.1982) (citations omitted). A union-intervenor may recover attorneys' fees and double costs under Rule 38. *See, NLRB v. Limestone Apparel Corp.,* 705 F.2d 799, 800 (6th Cir.1982).

This entire appeal was frivolous. As discussed above, substantial evidence existed on the record to support the Board's holding that Frontier engaged in the charged unfair labor practices. Indeed, the evidence is overwhelming. Further, the legal arguments advanced and the legal authority cited are largely inapposite.

[21] Accordingly, we conclude that both the Board and the Union are entitled to attorneys' fees and double costs. Frontier and its original counsel on appeal, Keiler, are jointly and severally liable. *First Investors Corp. v. American Capital Fin. Servs., Inc.,* 823 F.2d 307, 310 (9th Cir.1987). We decline to impose sanctions of Frontier's new counsel, who were substituted as counsel after Frontier's reply brief was filed. Although

Frontier's new counsel petitioned for leave to file a supplemental brief, we do not find that their request was frivolous. Indeed, they attempted to improve the original briefs filed by Keiler by withdrawing one of Frontier's frivolous arguments—its efforts to disqualify the ALJ. *See, Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1417 (9th Cir.1990), *cert. denied*, 498 U.S. 1109, 111 S.Ct. 1019, 112 L.Ed.2d 1100 (1991).

The amount of the award for attorneys' fees and double costs incurred on appeal shall be established by a supplemental order upon submissions by the Board, the Union and Frontier, in accordance with Fed. R.App.P. 39(d) and Ninth Circuit Rule 39–1.

The Board's petition to enforce its order is granted. The Board and the Union are granted 28 days from the date of the filing of this memorandum in which to file with the clerk their statements of costs and attorney fees in this court. Frontier and Keiler are granted 14 days in which to file any objection. Thereafter this panel will enter a judgment for attorneys' fees and double costs.

ORDER ENFORCED WITH SANCTIONS.

UNITED STATES of America, Plaintiff–Appellee,

v.

Anthony BARONE, Defendant–Appellant.

No. 93–10415.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 12, 1994.

Decided Nov. 3, 1994.

As Amended Dec. 18, 1995.

Defendant was convicted of conspiracy and uttering forged securities in the United States District Court for the District of Nevada, Lloyd D. George, Chief Judge, and defendant appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that fact that victims operated in interstate commerce was insufficient to establish that nonexistent, shell companies upon whose accounts forged securities were drawn were "organizations" which affected interstate commerce, within meaning of statute of conviction.

Reversed.

See Also: Opinion, 39 F.3d 981, superseded.

1. Criminal Law ⇐1139

Jurisdiction is legal question which is ordinarily reviewed de novo.

2. Forgery ⇐16

Nonexistent shell companies on whose accounts checks were drawn in course of scheme to utter forged securities were not "organizations" whose activities affected interstate commerce within meaning of statute making it federal offense to utter, with intent to deceive, forged security of organization, as only effect on interstate commerce resulted from passage of forged securities to victim which operated in interstate commerce; intent of statute was to tie interstate jurisdictional element to interstate effect of organization's operations, not its offense conduct. 18 U.S.C.A. § 513(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐16

Entities can only constitute "organizations," for purpose of statute making it federal offense to utter, with intent to deceive, forged security of organization, if their activities, apart from uttering of forged securities, affect interstate commerce. 18 U.S.C.A. § 513(a).

4. Forgery ⇐16

Defendants' alleged acts of travelling interstate and purchasing goods that had crossed state lines as part of scheme to utter forged securities were not sufficient to establish that nonexistent shell companies, on

Exhibit 2

Southwest Forest Indus., Inc. v. NLRB (9t Cir. 1988)
841 F.2d 270

841 F.2d 270
United States Court of Appeals,
Ninth Circuit.

SOUTHWEST FOREST INDUSTRIES, INC.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

Nos. 86-7137, 86-7177.
|
Argued and Submitted July 6, 1987.
|
Decided March 1, 1988.

The National Labor Relations Board found that employer had committed unfair labor practices by unilaterally implementing changes in terms and conditions of employment, and employer petitioned for review. Board cross-applied for enforcement of its order. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) employer's three-day notice of its intent to unilaterally implement changes not proposed during bargaining after reaching impasse was unfair labor practice, and (2) proper remedy was restoration of status quo, where there was evidence that, if union had been given sufficient notice of plan changes, it would have exercised its right to negotiate.

Employer's petition for review denied; Board's cross application for enforcement granted.

Attorneys and Law Firms

***271** John H. Stephens, Cox, Castle & Nicholson, Los Angeles, Cal., for petitioner.

Howard E. Perlstein, NLRB, Washington, D.C., for respondent.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before BROWNING, Chief Judge, FLETCHER and POOLE, Circuit Judges.

Opinion

FLETCHER, Circuit Judge:

Southwest Forest Industries Inc. (Southwest) petitions for review of an unfair labor practice order issued by the National Labor Relations Board (the Board). The Board cross-applies for enforcement of its order. The Board found that Southwest had violated sections 8(a)(1) and (5) of the National Labor Relations Act (the Act), 29 U.S.C. §§ 158(a)(1) and (5), in unilaterally ***272** implementing changes in terms and conditions of employment. The Board ordered the reinstatement of the *status quo ante* until the parties bargained in good faith to impasse. We enforce the Board's order.

BACKGROUND

Graphic Communications Union District Council # 1, Local 388 (the Union) and Southwest mutually agreed to extend their collective bargaining agreement beyond its June 15, 1983 termination date, subject to cancellation on 30 days notice by either party. On August 22, 1983, the Union notified Southwest that it would terminate the collective bargaining agreement effective September 23.[1] After unsuccessful negotiations in August and September, all employees went out on strike on September 23.

On November 23, Southwest contacted the federal mediator and asked him to arrange a meeting with the Union. The mediator contacted the Union but was advised that the Union would not agree to meet unless Southwest dropped its proposals on union security and health care. The Board's General Counsel concedes that as of November 23 the parties were at an impasse. On November 28, Southwest delivered a letter to the Union, notifying it of Southwest's intent to hire permanent replacements, proposing a wage reduction in some job classifications, and suggesting that it would also make unspecified changes in job conditions. The Union did not contact Southwest in response to this letter. Most striking employees, however, reported for work on November 30.

On December 2, Southwest delivered an "Interim Policy Manual" (IPM) to the Union without an explanatory cover letter. Most of Southwest's employees received a copy of the IPM on December 5, the same date on which Southwest implemented the IPM. The employment conditions described in the IPM differed significantly from those under the expired collective bargaining agreement and from Southwest's previous proposals to the Union.[2] The Union did not request a delay in the implementation of the IPM or request bargaining over the changes set forth in the IPM. Rather, on December 6, the Union filed unfair labor practices charges with the Board

based on Southwest's failure to negotiate prior to implementing the changes.

On February 3, 1984, the Regional Office of the NLRB informed Southwest that it would file a complaint against it. At a meeting on February 4, 1984, Southwest asked the Union to state its position with respect to the changes reflected in the IPM. The Union refused to do so because it had not seen the unfair labor practice complaint. At a meeting on March 15, 1984, the Union offered to negotiate a settlement of the unfair labor practice complaint, but refused to negotiate the changes contained in the IPM. Southwest has made several subsequent offers to negotiate, but the Union has not responded.

An Administrative Law Judge (ALJ) heard the charge on October 2, 1984. The ALJ found that Southwest violated sections 8(a)(1) and (5) of the Act in its unilateral implementation of changes in terms and conditions of employment without first affording ***273** the Union an opportunity to bargain. The ALJ did not order a *status quo ante* remedy because he concluded that "irrespective of any opportunity to bargain, the Union would not have resumed bargaining." Both parties filed exceptions to the ALJ's decision. The Board affirmed the ALJ's finding that Southwest had violated sections 8(a)(1) and (5) of the Act, but modified the ALJ's order by requiring a restoration of the *status quo* from December 1983 until such time as the parties bargain in good faith to a new agreement or impasse. Southwest filed a timely petition for review, and the Board timely cross-petitioned for enforcement of its order.

STANDARD OF REVIEW

On review in this court, the National Labor Relations Board's findings of fact are conclusive if supported by substantial evidence on the record considered as a whole. *NLRB v. Auto Fast Freight, Inc.,* 793 F.2d 1126, 1128 (9th Cir.1986); 29 U.S.C. § 160(e). "The Board's [remedial] order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Fibreboard Paper Prods. Corp. v. NLRB,* 379 U.S. 203, 216, 85 S.Ct. 398, 406, 13 L.Ed.2d 233 (1964) (quoting *Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 540, 63 S.Ct. 1214, 1218-19, 87 L.Ed. 1568 (1943)).

DISCUSSION

I. *Refusal to Bargain Violation*

[1] [2] [3] Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Until the parties bargain to an impasse, an employer's unilateral change in the terms and conditions of employment constitutes a refusal to bargain. *NLRB v. Katz,* 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962); *Auto Fast Freight,* 793 F.2d at 1129. An employer must maintain the *status quo* after the expiration of the collective bargaining agreement until a new agreement is reached or until the parties bargain in good faith to impasse. *NLRB v. Carilli,* 648 F.2d 1206, 1214 (9th Cir.1981). Where, as in this case, an impasse is reached, "the employer may unilaterally impose changes in the terms of employment *if* the changes were reasonably comprehended in the terms of its contract offers to the union." *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund,* 827 F.2d 491, 496 (9th Cir.1987) (emphasis added). Unilateral changes not comprehended in pre-impasse proposals constitute a refusal to bargain in violation of sections 8(a)(5) and (1) of the Act. *Id.; Peerless Roofing Co. v. NLRB,* 641 F.2d 734, 735 (9th Cir.1981).

[4] It is undisputed that the changes made by Southwest were not on the bargaining table prior to impasse. Southwest contends, however, that the Union failed to respond to any of its bargaining overtures after receiving notice of the changes and that this failure resulted in a waiver of the Union's statutory right to bargain prior to implementation. The Union cannot be found to have waived its bargaining rights unless the notice it received provided adequate time to consider and respond to Southwest's proposals. *See M.A. Harrison Mfg. Co.,* 253 NLRB 675, 676 (1980), *enf'd,* 682 F.2d 580 (6th Cir.1982) (three day interval between announcement and institution of unilateral change inadequate opportunity to bargain); *City Hospital of E. Liverpool, Ohio,* 234 NLRB 58, 59 (1978) (three weeks notice sufficient).

[5] Substantial evidence in the record before the Board supports the Board's finding that Southwest did not afford the Union a meaningful opportunity to bargain about the changes before instituting them. The only change that Southwest's previous proposal-contained in its letter of November 28, 1983-set forth specifically was Southwest's intent to revise the existing wage rates for unskilled employees. Southwest first announced the numerous changes at issue here in the IPM that it

delivered on December 2 and implemented ***274** on December 5. The IPM was 18 pages long and did not readily reveal what proposals, if any, differed from Southwest's previous offer.

In light of the many changes proposed in the IPM, three days notice was insufficient notice to permit Southwest unilaterally to implement the changes. The Board could reasonably conclude that the Union did not have adequate notice of the changes Southwest wished to implement to formulate a response. Because Southwest did not provide the Union with the opportunity to bargain, *see Auto Fast Freight,* 793 F.2d at 1131, the Union's failure to act did not constitute a waiver of its right to bargain under the Act. *See Stone Boat Yard v. NLRB,* 715 F.2d 441, 444 (9th Cir.1983), *cert. denied,* 466 U.S. 937, 104 S.Ct. 1910, 80 L.Ed.2d 459 (1984). Accordingly, we affirm the Board's finding that Southwest's implementation of unilateral changes in the terms of employment violated sections 8(a)(5) and (1) of the Act.

II. *Status Quo Ante Remedy*

When an employer violates section 8(a)(5) in unilaterally altering conditions of employment, the Board typically orders a restoration of the *status quo ante* running from the date of the violation until such time in the future as the parties negotiate in good faith to a new agreement or an impasse. *NLRB v. Cauthorne,* 691 F.2d 1023, 1025 (D.C. Cir.1982). Here, however, the ALJ determined that a make-whole remedy was not appropriate based on his finding that, even absent Southwest's unfair labor practice, the Union would not have resumed bargaining. The Board rejected the ALJ's finding as "purely speculative" and ordered the *status quo* restored.

[6] We find no basis for disagreement with the Board. It is by no means certain that, had the Union been given sufficient notice of Southwest's planned changes, it would have sat passively by rather than exercising its right to negotiate. The fact that an impasse had been reached in November 1983 over the issues of union security and health care does not support the conclusion that the Union would have refused to discuss other proposed changes, particularly when its refusal could permit unilateral implementation. *See Auto Fast Freight,* 793 F.2d at 1129. Furthermore, the record shows that, on February 10, 1984, the Union indicated its willingness to reopen negotiations following resolution of the unfair labor practice dispute. We conclude that substantial evidence supports the Board's finding that the question of whether the Union was willing to reopen negotiations is amenable only to speculation.

Southwest contends that the Board's remedial order is at odds with Circuit Court precedent. The first case Southwest cites is *Rayner v. NLRB,* 665 F.2d 970 (9th Cir.1982). In *Rayner,* the employer, which had never adhered to the terms of its collective bargaining agreement, notified the Union more than three months prior to the agreement's expiration that it was willing to negotiate a new contract. 665 F.2d at 973. The Union rejected the offer to negotiate. *Id.* This court refused to enforce the portion of the Board's remedy that held the employer to the terms of the expired contract past its expiration date. This was because the employer had given timely notice that the contract would terminate and that the agreement would be modified. *Id.* at 977. *Rayner* stands for the proposition that a union may waive its right to bargain if it fails to respond to good faith bargaining overtures, provided the opportunity for response is adequate. Certainly three months notice is sufficient. What distinguishes this case from *Rayner* is the fact that Southwest did *not* provide the Union with timely notice or the opportunity to negotiate the post-expiration modifications. *Reynor,* thus, is inapposite here.

Second, Southwest relies on *NLRB v. Cauthorne,* 691 F.2d 1023 (D.C. Cir.1982). The *Cauthorne* court held that if, *following* an employer's illegal unilateral action, the parties bargain to impasse, restoration of the *status quo* may not be ordered beyond the date impasse is reached. 691 F.2d at 1026. The court distinguished the facts in *Cauthorne* from the "usual case" in which "no substantial bargaining has occurred between the parties after the employer's unilateral change," and in which "consequently the typical make-whole order ***275** runs from the date of the unilateral change until the employer and union negotiate a new agreement or reach an impasse." *Id.* at 1025. *Cauthorne* only serves to support the Board's order here, for this is the "usual case." Southwest and the Union engaged in no substantial bargaining following the unilateral changes and thus could not have reached an impasse. The remedy ordered by the Board is the one *Cauthorne* approves under these circumstances.

The Board's power to restore the *status quo ante* as a means to ensure meaningful bargaining is well recognized. *See Fibreboard Paper Prods. Corp.,* 379 U.S. at 217, 85 S.Ct. at 406. Indeed, to deny the Union a make-whole remedy would permit Southwest "to retain the fruits of unlawful action" and render the guarantees embodied in the National Labor Relations Act "meaningless." *NLRB v. Warehousemen's Union Local 17,* 451 F.2d 1240, 1243 (9th Cir.1971). In sum we find that the Board's order is supported by substantial evidence and serves to effectuate the policies of the Act.

Accordingly, the Southwest's petition for review is DENIED, and the Board's cross-application for enforcement is GRANTED.

All Citations

841 F.2d 270, 127 L.R.R.M. (BNA) 2913, 56 USLW 2555, 108 Lab.Cas. P 10,358

Footnotes

1 All dates refer to the calendar year 1983, unless otherwise noted.

2 The IPM differed from Southwest's previous proposal in the following respects:
(a) The IPM made no provisions for the position of working foreman.
(b) The IPM made no provision for the position of pallet hard forklift operator and pallet yard helper.
(c) The IPM provided for a reduced hourly wage rate for employees in the bundler position.
(d) The IPM provided for reduced hourly wage rates for employees in unskilled classifications.
(e) The IPM contained a new management's rights policy.
(f) The IPM reduced the number of paid holidays.
(g) The IPM provided for a new industrial injury policy.
(h) The IPM did not provide for union bulletin boards, union representatives, shop committees, grievance committees and joint conciliation committees.
(i) The IPM changed the method for computing overtime for employees.
(j) the IPM changed the vacation policies.

End of Document

Exhibit 3

***Bagley v. City of Manhattan Beach* (1976)**
18 Cal.3d 22

18 Cal.3d 22, 553 P.2d 1140, 132 Cal.Rptr. 668, 93 L.R.R.M. (BNA) 2435, 79 Lab.Cas. P 53,874

BARRY BAGLEY et al., Plaintiffs and Appellants,
v.
CITY OF MANHATTAN BEACH et al., Defendants and Respondents.

L.A. No. 30523.
Supreme Court of California
September 16, 1976.

SUMMARY

A city council of a general law city refused to place on the ballot an initiative measure which provided the unresolved disputes between the city and the recognized firemen's employee organization should be submitted to arbitration, and that the arbitrator's award should be final and binding. In a mandate action, the trial court refused to compel the council to place the measure on the ballot, concluding the proposed measure was invalid. (Superior Court of Los Angeles County, No. C76275, Campbell M. Lucas, Judge.)

The Supreme Court affirmed, holding that the Legislature had placed the power to determine salaries in a general law city in the city council (Gov. Code, § 36506), which precluded delegation of that power to an arbitrator. The court further held since the city possessed no power under state law to provide for arbitration of wage rates, such power could not be created by local initiative.

In Bank. (Opinion by Clark, J., with Wright, C. J., McComb, Sullivan and Richardson, JJ., concurring. Separate dissenting opinion by Mosk, J., with Tobriner, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

([1a], [1b])
Municipalities § 74--Officers, Agents, and Employees--Compensation--Arbitration.
Under the clear language of Gov. Code, § 36506, requiring compensation of all appointive officers and employees to be fixed by the city council of a general law city by ordinance or resolution, a general law city had no power to permit fixing of compensation by administrative order or by arbitrator's award. Accordingly, the city properly refused to place on the ballot an initiative measure which would have provided that unresolved disputes between the city and the firemen's employee organization should be submitted to arbitration, and his award should be final and binding; since the city possessed no power under state law to provide for arbitration of wage rates, such power could not be created by local initiative.

[See **Cal.Jur.2d,** Municipal Corporations, § 337; **Am.Jur.2d,** Municipal Corporations, Counties, and Other Political Subdivisions, § 258.]

([2])
Statutes § 3--Performance of Public Duty.
When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization.

([3])
Initiative and Referendum § 15--Local Elections--Initiative--Adoption of Ordinances.
A city ordinance proposed by initiative must constitute such legislation as the legislative body of such city has the power to enact under the law granting, defining and limiting the powers of such body.

COUNSEL
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Attorney (Pismo Beach), as Amici Curiae on behalf of Defendants and Respondents.

CLARK, J.

After the City Council of the City of Manhattan Beach refused to place an initiative measure on the ballot, petitioners sought a writ of mandate to compel the council to do so. The trial court denied relief, and petitioners appeal.

The proposed initiative measure provides that unresolved disputes between the city and the recognized firemen's employee organization shall be submitted to arbitration and that the arbitrator's award shall be final and binding. The arbitration requirement applies not only to unresolved disputes pertaining to the interpretation or application of contracts but also to all disputes as to wages, hours, and terms of employment.

Denying the writ, the superior court concluded the proposed measure is invalid because (1) the Legislature placed the power to determine salaries in a general law city in the city council, precluding delegation to an arbitrator and (2) there are no safeguards in the proposed initiative to prevent abuse of the arbitrator's power. ([1a]) We affirm the judgment on the first ground, finding it unnecessary to reach the second.

Government Code section 36506, dealing with general law cities, provides: "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees."

The language in the statute is clear. It requires compensation be fixed by the city council by ordinance or resolution; the language does not permit fixing of compensation by administrative order or by arbitrator's award.

([2]) When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization. (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923-924 [120 Cal.Rptr. 707, 534 P.2d 403]; ***25** *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144 [89 Cal.Rptr. 620, 474 P.2d 436].)

Although standards might be established governing the fixing of compensation and the city council might delegate functions relating to the application of those standards, the ultimate act of applying the standards and of fixing compensation is legislative in character, invoking the discretion of the council. (*City and County of San Francisco v. Cooper, supra*, 13 Cal.3d 898, 919-921; *Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 634, 637 [12 Cal.Rptr. 671, 361 P.2d 247]; *City and County of S.F. v. Boyd* (1943) 22 Cal.2d 685, 689-690 [140 P.2d 666]; *Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal.App.3d 518, 532 [106 Cal.Rptr. 441]; *Collins v. City & Co. of S. F.* (1952) 112 Cal.App.2d 719, 730-731 [247 P.2d 362]; *Spencer v. City of Alhambra* (1941) 44 Cal.App.2d 75, 77 [111 P.2d 910].) As such, and because the language of the statute is not merely clear, but redundant (cf. *Geiger v. Board of Supervisors* (1957) 48 Cal.2d 832, 838 [313 P.2d 545]), the city council may not delegate its power and duty to fix compensation.

Examination of the history of other legislation relating to general law city employees confirms that we should apply the plain language of Government Code section 36506 literally. The Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510), which applies to local government employees and deals with public employee organizations and labor relations, seeks to provide "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov. Code, § 3500.) Although there is provision for a written memorandum of understanding by employee organizations and *representatives* of a negotiating public agency, the act expressly provides that the memorandum "shall not be binding" but shall be presented to the governing body of the agency or its statutory representative for determination, thus reflecting the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others. (Gov. Code, § 3505.1; see *City and County of San Francisco v. Cooper, supra*, 13 Cal.3d 898, 926-928 [under the Winton Act involving school labor relations, written memorandum of understanding is not binding, the school board retaining ultimate authority].)

Moreover, the Meyers-Milias-Brown Act provides for negotiation and *permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration.* (***26** Gov. Code, §§ 3505, 3505.2; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4 [116 Cal.Rptr. 507, 526 P.2d 971]; *Alameda County Employees' Assn. v. Alameda County, supra*, 30 Cal.App.3d 518, 533-534.) Similarly, Labor Code sections 1960-1963 permit firefighters to form unions and to present grievances but do not authorize arbitration.

Probably no issue in recent years has been presented to the Legislature more frequently than proposed arbitration of public employee salaries, including firemen's. (Assem. Bill Nos. 1781, 1724, 119, 86 (1975-1976 Reg. Sess.); Sen. Bill Nos. 1310, 1294, 275, 4 (1975-1976 Reg. Sess.); Assem. Bill Nos. 3666, 1243, 33 (1973-1974 Reg. Sess.); Sen. Bill No. 32 (1973-1974 Reg. Sess.); Sen. Bill Nos. 1440, 1424 (1972 Reg. Sess.); Sen. Bill No. 333 (1971 Reg. Sess.); Assem. Bill No. 98 (1970 Reg. Sess.); Sen. Bill Nos. 1294, 1293 (1970 Reg. Sess.); Assem. Bill No. 1400 (1969 Reg. Sess.); Assem. Bill No. 1935 (1967 Reg. Sess.); Assem. Bill Nos. 3084, 2500 (1963 Reg. Sess.).) But no such bill has become law.

Petitioner's reliance on *Kugler v. Yocum* (1968) 69 Cal.2d 371 [71 Cal.Rptr. 687, 445 P.2d 303], is misplaced. The case involved the sufficiency of standards necessary to a valid delegation of legislative power in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body. Here legislative intent limiting delegability is clear.

The language of Government Code section 36506, the provisions of the Meyers-Milias-Brown Act, and the Legislature's repeated refusal to enact any law permitting general law cities to fix salaries by arbitration compel the conclusion that the Legislature intends the city council of a general law city to fix compensation, precluding the fixing of compensation by arbitrator.

([3]) It has long been settled that a city ordinance proposed by initiative "must constitute such legislation as the legislative body of such ... city has the power to enact under the law granting, defining and limiting the powers of such body. [Citations.]" (*Hurst* v. *City of Burlingame* (1929) 207 Cal. 134, 140 [277 P. 308].) ([1b]) The city ***27** possessing no power under existing state statute to provide for arbitration of wage rates, such power cannot be created by local initiative.[1]

The judgment is affirmed.

Wright, C. J., McComb, J., Sullivan, J., and Richardson, J., concurred.

MOSK, J.

I dissent.

Under the principles enunciated by this court in *Kugler* v. *Yocum* (1968) 69 Cal.2d 371 [71 Cal.Rptr. 687, 445 P.2d 303], the proposed initiative should not be banned, as an improper delegation of power, from consideration by the electorate.

In divining a legislative intent to preclude the local use of arbitration for resolution of labor disputes, the majority appear to employ two theories. First, they seem to conclude that whenever a discretionary power is granted to one body, any infringement on that authority, of whatever extent or effect, is per se an improper delegation of power. (*Ante*, p. 24.) Second, in the majority view, the Legislature has expressly voiced hostility to any arbitration ordinance. The former conclusion is incorrect under relevant case law, the latter as a matter of statutory interpretation.

As for the first rationale, the majority position is contradicted by *Kugler v. Yocum, supra*, in which we upheld a proposed ordinance decreeing that the salaries of Alhambra firefighters shall be no less than the average wage of firefighters employed by the City of Los Angeles and those working for Los Angeles County. The majority vainly attempt to distinguish *Kugler* because it involved a chartered city and thus was decided "in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body." (*Ante*, p. 26.)

On the contrary, at the time of the proposed ordinance in *Kugler*, the Alhambra City Charter provided, in a manner similar to Government Code section 36506, on which the majority rely, that "The [city] council ... shall have power to organize the fire division and ... establish the number of its members and the amount of their salaries ...." (*Kugler, supra*, 69 Cal.2d at p. 374, fn. 1.) As a charter provision has all the force of state law within a chartered city (*Bruce v. Civil Service Board* (1935) 6 Cal.App.2d 633, 636 [45 P.2d 419]), pursuant to the majority's reasoning ***28** we could have held simply that the terms of the Alhambra Charter precluded the proposed ordinance. Instead, we proceeded to scrutinize the ordinance in order to ascertain whether it contained safeguards sufficient to insure that the fundamental policy decisions regarding wages would be made by the city council, not by extraneous forces. (*Kugler, supra*, 69 Cal.2d 371, 376.) We declared, "Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse. Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative

character of the process of reaching legislative decision." (*Id.* at p. 384.)

Yet the majority imperiously label a legislative enactment an unlawful delegation without ascertaining the extent of the delegation or the availability of standards and safeguards to prevent its abuse. This result cannot be justified on the simplistic ground that the Legislature granted the city council power to fix wages. In *Kugler* and in every California case confronting the issue of unlawful delegation, a power has been granted by statute or the Constitution to one body and then delegated some aspect to another entity. Yet unless the delegation removes *all* authority from the group originally directed to exercise that power (see *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923-924 [120 Cal.Rptr. 707, 534 P.2d 403]), courts have analyzed the delegation to determine whether fundamental policy-making power has been maintained by the legislative body originally designated to exercise it. (See, e.g., *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 816 [114 Cal.Rptr. 577, 523 P.2d 617]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 369 [55 Cal.Rptr. 23, 420 P.2d 735]; *Gaylord v. City of Pasadena* (1917) 175 Cal. 433, 437 [166 P. 348].)

In the present case, Government Code section 36506 states only that, "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees." The proposed initiative would not divest the council of that designated power; indeed, the arbitrator's award could be implemented only by a council ordinance. Of course, the initiative would, in many instances, inhibit the council from unilaterally pronouncing decisions regarding wages, as would, for example, any collective bargaining with the firefighters. Because of this potential infringement, we should analyzed the initiative in the manner undertaken ***29** by *Kugler*. But it is heroic and unprecedented to conclude that grants of power to one body absolutely preclude any appropriate referral of aspects of that power to another entity. (See *Eastlake* v. *Forest City Enterprises, Inc.* (1976) 426 U.S. 668 [49 L.Ed.2d 132, 96 S.Ct. 2358].)

As for the other point relied upon by the majority - the Legislature expressly intended to prohibit local arbitration ordinances - little persuasive support is offered. Government Code section 36506, as we have seen, does not, by its terms, prohibit arbitration or other reasonable means to resolve labor disputes. The majority can find no legislative history to suggest that the section was intended to be anything other than it facially appears to be: a general grant of power to a local government.

The majority also rely on the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.). It is true that the act does not compel local governments to submit to arbitration, but the majority misreads the statute to conclude that the act prohibits municipalities from arbitrating. The act establishes certain minimum procedures that must be undertaken by public employers and employees. They must meet and confer with each other and bargain in good faith. (Gov. Code, § 3505.) If they reach an agreement, they must prepare a memorandum of agreement (§ 3505.1). The Legislature's directive that the agreement shall not be binding reflects a reluctance to impose arbitration on unwilling municipalities, not a repudiation of local arbitration ordinances voluntarily adopted.

This is made clear in other provisions of the act. Section 3500 provides: "Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter." The act thus allows local governments to maintain their own procedures, consistent with the purposes of the act. (*Ball v. City Council* (1967) 252 Cal.App.2d 136, 143 [60 Cal.Rptr. 139]; Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 725.) As the act is designed to provide reasonable dispute-solving mechanisms, section 3500 seems to permit such procedures as arbitration. ***30**

Also significant are sections 3505 and 3507. The former provides that the bargaining process "should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance ...." Section 3507 allows a public agency to adopt "additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment." Taken together, these provisions indicate that the Meyers-Milias-Brown Act expresses no marked hostility, but benign neutrality toward local use of arbitration procedures.

Also lending dubious credence to the majority conclusion is the reference to defeat of various public employment bills in the Legislature. (*Ante*, p. 26.) As we observed recently in *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 418 [128 Cal.Rptr. 183, 546

P.2d 687], "At best, 'Legislative silence is a Delphic divination.'" In these circumstances, even the Oracle of Delphi would have difficulty in finding legislative hostility to local use of arbitration. Of the 22 bills cited by the majority, 14 would have required as a matter of state law public employers and employees to submit to arbitration of wage disputes. Obviously, the defeat of a bill to establish state-imposed arbitration requirements does not signify legislative opposition to voluntary local decisions to adopt arbitration. Six of the bills would have imposed mandatory mediation and fact-finding, while at the same time providing for arbitration of disputes revolving around interpretations of existing agreements, an area entirely different from arbitration of wage disputes. One of the remaining two measures cryptically stated, without further explanation, "Upon failure to reach agreement, the difference may be referred to voluntary arbitration." (Assem. Bill No. 3084 (1963) Reg. Sess.).) Only 1 of the 22 bills was at all relevant to our problem. That measure purported to amend the Meyers-Milias-Brown Act to provide that any arbitration procedures adopted by local agencies would be governed by the Code of Civil Procedure sections regarding arbitration. (Assem. Bill No. 3666 (1973-1974 Reg. Sess.).) The bill, thus, did not propose allowing local governments to use arbitration, but assumed that the power already existed.

In short, from the standpoint of case law and legislative history, the majority have erred in concluding that the Legislature expressly intended to prevent adoption of arbitration to resolve labor disputes.

But the initiative must still be examined to determine whether it constitutes an improper delegation of power. As stated, the keys to this ***31** determination are whether the legislative body retains the fundamental policy-making decision and whether there are sufficient safeguards in the initiative to prevent abuse of authority. (*Kugler v. Yocum* (1968) *supra*, 69 Cal.2d 371, 381-382.)

Our analysis in *Kugler* aids us in ascertaining when a delegation of power amounts to an abdication of the legislative policy-making role in labor matters. In approving in that case the proposed ordinance pegging wages of Alhambra firefighters to their counterparts in Los Angeles, we stated, "Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the 'fundamental issue'; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative delegation ... the implementation of the policy by reference to Los Angeles is not the delegation of it." (*Id.* at p. 377.)

Similarly, the initiative in question here does not strip policy-making powers from the legislative body of Manhattan Beach. The proposed ordinance makes a fundamental policy determination, i.e., that impasses in labor disputes involving firefighters shall be resolved not by the present adversary method, with its potential for disruption of essential services, but by a mutual reasoned appeal to an impartial arbitrator. Also, it sets forth detailed procedures concerning the selection of the arbitrator and guidelines governing his decisions. Referring disputes to an arbitrator so selected and directed, like the pegging of wages to those prevalent in Los Angeles in *Kugler*, is not delegating but implementing policy-making.

Further, the proposed ordinance contains safeguards sufficient to prevent abuse of the grant of authority; indeed it appears to be less susceptible to abuse than the proposal approved by this court in *Kugler*.

First, the present initiative, unlike the ordinance in *Kugler*, contemplates reference to an agency beyond the control of the city council only when all else fails. In most circumstances, the firefighters and the city council will continue to reach agreements based on normal collective bargaining. Only when an impasse is reached will there be resort to arbitration. While it may be suggested that the availability of a compulsory arbitration alternative will discourage serious compromising by disputants, it is equally likely that the potential of an adverse binding arbitration award will encourage each side to be conciliatory. In Michigan, where compulsory arbitration is available to resolve police ***32** and firefighter labor disputes, during a 15-month period 224 disputes were settled by the parties and only 105 went to arbitration; of the latter, 17 were settled before final determination by the arbitrator. (McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector* (1972) 72 Colum.L.Rev. 1192, 1210 (hereinafter cited as McAvoy).)

Another safeguard inherent in the present initiative is the potentiality of court review of an arbitrator's decision. Under Code of Civil Procedure section 1286.2, a court must vacate an arbitration award if, inter alia, the arbitrator exceeds his powers or his award is tainted with corruption, fraud, misconduct, or procedural irregularities. While courts will not usually examine the merits of an arbitration decision (*Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332* (1974) 40 Cal.App.3d 431, 437 [114 Cal.Rptr. 909]), the prospect of judicial review on the grounds listed in section 1286.2

should deter any untoward tendency of an arbitrator to rule capriciously. Indeed, the Oregon Supreme Court has held that the existence of an appeals procedure in itself may constitute an adequate safeguard against administrative abuse. (*Warren v. Marion County* (1960) 222 Ore. 307 [353 P.2d 257, 261-262], cited with approval in *Kugler* at pp. 381-382 of 69 Cal.2d.)

Most significantly, the present initiative purports to afford protection to the municipal fisc. In this regard, the city and amici claim, in a strictly policy argument, that the imposition of arbitration will inevitably lead to exorbitant labor settlements and skyrocketing taxes. Implicit in their contention is a marked antipathy to arbitrators as being biased and irresponsible, particularly in matters affecting city treasuries. No authority in support of such apprehension is offered. On the contrary, this court has recognized arbitration to be a time-honored, respected method of settling labor disputes. In *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 622 [116 Cal.Rptr. 507, 526 P.2d 971], a case involving a charter amendment providing for arbitration of disputes between firefighters and a city, we declared that "state policy in California 'favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization.'"

Again, a comparison with *Kugler* is appropriate. There we approved the proposed ordinance even though it linked firefighter salaries in Alhambra, population 64,500, with those paid in Los Angeles, where ***33** 2,743,500 people lived at the time. (69 Cal.2d at p. 385, Burke, J., dissenting.) While Los Angeles may have had greater tax resources to pay salary increases than Alhambra and a tradition of providing some of the highest salaries in the state, we reasoned that the proposed parity plan contained safeguards because "Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra." (69 Cal.2d 371, 382.)

The arbitration provisions in the present case contain a number of financial safeguards. In contrast to the *Kugler* initiative, the ordinance here in question sets no floor for salaries. Although the arbitrator will not be directly responsible to the electorate, the city will share an equal role with the employees in selecting him. While the salary level in *Kugler* was to be determined solely by one index - the wages paid by Los Angeles - the Manhattan Beach arbitrator must weigh a number of factors. The initiative requires the arbitrator not only to consider the cost of living and existing salaries and benefits in other communities, but also "the interest and welfare of the public; [and] the availability and sources of funds to defray the cost of any changes in wages, hours and conditions of employment." As one commentator has suggested, in reference to a provision in a Nebraska statute similar to the quoted clauses, "Such a formulation avoids the possibility of an award that would necessitate increased taxes, employee lay-offs or reduced municipal services." (McAvoy, at p. 1200.)

For the foregoing reasons I conclude that the proposed initiative is not an unconstitutional delegation of power. The people of the city should not be denied the right to determine by democratic vote how their city government is to resolve labor disputes.

I would reverse the judgment.

Tobriner, J., concurred. ***34**

Footnotes

1 Although *Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608, approved arbitration procedures adopted by initiative, Vallejo is a chartered city - not a general law city subject to Government Code section 36506.

End of Document

Exhibit 4

Chaffee v. San Francisco Library Commission **(2004)**
115 Cal.App.4th 461

115 Cal.App.4th 461
Court of Appeal, First District, Division 2, California.

James CHAFFEE, Plaintiff and Appellant,
v.
SAN FRANCISCO LIBRARY COMMISSION et al.,
Defendants and Respondents.

No. A102550.
|
Jan. 29, 2004.

Synopsis
Background: An individual filed a complaint seeking injunctive and declaratory relief against a city library commission and its commissioners, alleging a violation of state and local public meeting statutes. The Superior Court, City and County of San Francisco, No. 408077, David A. Garcia, J., granted summary judgment for the commission and commissioners, and the individual appealed.

[Holding:] The Court of Appeal, Ruvolo, J., held that: library commission was not required by state or local public meeting statutes, in continuing a regularly scheduled public meeting for a second session to consider a single agenda, to provide a general public comment period at each session of the continued public meeting.

Affirmed.

Attorneys and Law Firms

**337 *464 Robert J. Moskowitz, for Appellant.

Dennis J. Herrera, City Attorney, Wayne K. Snodgrass, Rafal Ofierski, K. Scott Dickey, Deputy City Attorneys, for Respondents.

RUVOLO, J.

I.

INTRODUCTION

Appellant James Chaffee appeals from a judgment granting respondents' motion for summary judgment. We disagree with appellant that the Ralph M. Brown Act (Gov.Code, § 54950 et seq.)[1] (the Brown Act) and the San Francisco Sunshine Ordinance **338 of 1999 (S.F.Admin.Code, ch. 67) (the Sunshine Ordinance) require that a general public comment[2] period be provided at *each* session of a continued public meeting held to consider a single published agenda. Accordingly, we affirm.

II.

FACTS AND PROCEDURAL HISTORY

On May 16, 2002, the San Francisco Library Commission (Library Commission) held its regularly scheduled meeting.[3] Commissioners Bautista, Chin, Higueras, and Steiman were present. The agenda for the May 16th meeting was posted on May 12, 2002, and included the following items: (1) Approval of the April 18, 2002 Minutes (Action); (2) Bond Program Manager's Report (Discussion); (3) Art Enrichment Program (Action); (4) Design Excellence Program (Discussion); (5) Site Acquisition: Portola Branch (Action); (6) Library 2002/2003 Budget Update (Action); (7) Public Comment (Discussion); and (8) Adjournment (Action). The agenda also noted that public comment would be taken before or during the Library Commission's consideration of each agenda item. During the May 16th session, *465 President Higueras announced that due to the potential loss of quorum by 5:30 p.m. that day, he would reorder the taking up of agenda items.[4] The commission announced the three agenda items to be considered that day (agenda items (1), (3), and (5)), and proceeded to hear public comment on each item. President Higueras then announced that, as the commission was losing its quorum, the remaining business of the meeting would be continued to Tuesday, May 21, 2002. The meeting was adjourned at 5:27 p.m.

On May 17, 2002, the Library Commission issued the notice and the agenda for the continued portion of the May 16th meeting, and posted both at the door of the main library's Koret Auditorium, where the second

session of the continued meeting would be held. The agenda for the continued May 16th meeting only listed the remaining items not heard at the first and in the new order as announced by President Higueras on May 16th: (1) Bond Program Manager's Report (Discussion); (2) Design Excellence Program (Discussion); (3) Library 2002/ 2003 Budget Update (Action); (4) Public Comment (Discussion); and (5) Adjournment (Action). Also on May 17, 2002, appellant filed a complaint seeking injunctive and declaratory relief against the commission and commissioners Higueras, Steiman, Chin, and Bautista alleging that the parties violated the Brown Act and the Sunshine Ordinance. Appellant sought a permanent injunction requiring the Library Commission and its members to provide for public comment at all meetings, and declaratory relief stating that the Brown Act and the Sunshine Ordinance require general public comment at all regular meetings. Appellant also filed an ex parte application for a temporary restraining order on May 20, 2002, which the trial court denied.

At the continued meeting on Tuesday, May 21, 2002, the same commissioners present at the May 16th meeting heard the **339 remaining agenda items. At this session public comment was allowed on each remaining agenda item, and a general public comment period was also held at the conclusion of meeting, but before adjournment.

Appellant filed a motion for preliminary injunction on July 26, 2002, which the trial court denied. Thereafter, respondents filed a summary judgment motion, which was granted. This timely appeal followed.

III.

DISCUSSION

[1] Appellant argues that the Brown Act and the Sunshine Ordinance require that members of the public be given an opportunity to comment generally on *466 matters within the jurisdiction of a legislative body at *each session* of that body's public meetings, in addition to being allowed comment on specific agenda items. Hence, appellant claims respondents violated both statutes when the Library Commission adjourned and continued its May 16, 2002 meeting without giving him an opportunity to make general public comment. This is so, he argues, notwithstanding that he was allowed to make comments on every agenda item taken up at the May 16th meeting, in addition to being allowed to comment on the remaining agenda items, and to make general public comments, at the continued May 21st meeting session.

[2] On appeal from a grant of summary judgment, we exercise our independent judgment in determining whether there are triable issues of material fact and whether the moving party is entitled to judgment as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334–335, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) Summary judgment is properly granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493 (*Aguilar*).) In moving for summary judgment, a defendant may show that one or more elements of the cause of action cannot be established by the plaintiff or that there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (*o*)(2); *Aguilar, supra,* 25 Cal.4th at p. 849, 107 Cal.Rptr.2d 841, 24 P.3d 493.) Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. (*Ibid.*) The plaintiff may not rely upon the mere allegations or denials of his pleadings to show that a triable issue of material fact exists but instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. (*Ibid.*)

The moving party must support the motion with evidence including affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. (Code Civ. Proc., § 437c, subd. (b); *Aguilar, supra,* 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) Similarly, any adverse party may oppose the motion and " 'where appropriate,' " may present evidence including affidavits, declarations, admissions to interrogatories, depositions, and matters of which judicial notice must or may be taken. (*Ibid.*) In ruling on the motion, the court must consider all of the evidence and all of the inferences reasonably drawn therefrom (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra,* 25 Cal.4th at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493), and view such evidence and inferences in the light most favorable to **340 the opposing party. (*Aguilar, supra,* at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

*467 Appellant makes no reference in his brief to any material disputed issue of fact in this case.[5] Therefore, our independent review of the summary judgment turns solely on an interpretation of the law. More specifically, we are called upon to interpret sections 54950 et seq. and San Francisco Administrative Code chapter 67 as applied to

the May 16th and May 21st Library Commission meetings, and determine whether general public comment is required at both the original and the continued session of those assemblies.

Section 54954.3, subdivision (a) provides in pertinent part, "[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public ... that is within the subject matter jurisdiction of the legislative body...." Similarly, San Francisco Administrative Code section 67.15, subdivision (a) provides, "[e]very agenda for regular meetings shall provide an opportunity for members of the public to directly address a policy body on items of interest to the public that are within policy body's subject matter jurisdiction...."

Appellant urges us to interpret these laws to mean that there must be general public comment allowed at every *session* when a public body meets, in addition to allowing comment on specific agenda items. Appellant argues that because a continued meeting is a separate and regular meeting under sections 54952.2, subdivision (a), and 54955, and respondents failed to provide for a general public comment period at both "meetings," respondents violated both the Brown Act and the Sunshine Ordinance.[6] We disagree.

[3] [4] In determining the meaning of a statute, we are guided by settled principles of statutory interpretation. "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the ***468** purpose of the law. [Citations.]" (*People v. Pieters* (1991) 52 Cal.3d 894, 898, 276 Cal.Rptr. 918, 802 P.2d 420 (*Pieters*).) To determine this intent, we begin by examining the words of the statute. (*Ibid.*) We must follow the construction that "comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." ****341** (*People v. Jenkins* (1995) 10 Cal.4th 234, 246, 40 Cal.Rptr.2d 903, 893 P.2d 1224.) Further, we must read every statute, " 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' " (*Pieters, supra,* 52 Cal.3d at p. 899, 276 Cal.Rptr. 918, 802 P.2d 420, quoting *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 814, 114 Cal.Rptr. 577, 523 P.2d 617.)

Here, the words of both public meeting statutes are clear: "[e]very *agenda* for regular meetings shall provide an opportunity for members of the public to directly address a legislative body on any item of interest to the public ... that is within the subject matter jurisdiction of the legislative body ...." (§ 54954.3, subd. (a), italics added; see S.F. Admin. Code, § 67.15, subd. (a).) The Library Commission provided for general public comment during the second day of its two-day meeting held to consider a single agenda. Thus, the commission fully complied with the plain meaning requirements of both section 54954.3 and San Francisco Administrative Code section 67.15.

If we were to accept appellant's interpretation of the statute requiring general public comment at every session or "meeting" of a public body, and not for every "agenda," we would render the Legislature's use of the word "agenda" mere surplusage. (See *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330, 87 Cal.Rptr.2d 423, 981 P.2d 52 ["[S]ignificance must be given to every word in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage"].)

[5] In addition, construing section 54954.3 and San Francisco Administrative Code section 67.15 to require a single general public comment period where a public body meets in multiple sessions to consider its agenda is fully consonant with the plain meaning of the applicable open government statutes and avoids absurd results. The Brown Act's statement of intent provides: "In enacting this chapter, the Legislature finds and declares that the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly. [¶] The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining ***469** informed so that they may retain control over the instruments they have created." (§ 54950.) The Brown Act is intended to ensure the public's right to attend public agency meetings to facilitate public participation in all phases of local government decisionmaking, and to curb misuse of the democratic process by secret legislation of public bodies. (*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 293, 81 Cal.Rptr.2d 456.)

When the Brown Act and the Sunshine Ordinance are read in their entirety, we conclude that the lawmaking bodies clearly contemplated circumstances in which continuances and multiple sessions of meetings to consider a published agenda would be required, and thus

they mandated that a single general public comment period be provided *per agenda,* in addition to public comment on each agenda item as it is taken up by the body. For example, section 54955.1 allows for any hearing by a legislative body of a local agency to be continued in the manner set forth in section 54955. Section 54955 provides that less than a quorum may adjourn from time ****342** to time and a copy of the order or notice of adjournment shall be conspicuously posted on or near the door of the place where the meeting was held within 24 hours after the time of the adjournment. In addition, section 54954.2, subdivision (b)(3) mandates that action on continued agenda items must occur within five calendar days of the meeting at which the continuance is called. Similarly, San Francisco Administrative Code section 67.15, subdivision (e) states that continuances shall be announced at beginning of meeting, or soon thereafter, while section 67.7, subdivision (e)(2) prevents policy bodies from taking action on items not appearing on posted agenda if less than two-thirds of members are present.

The Library Commission fully adhered to the language of these enactments and the Legislature's intent embedded in the statutes by hearing public comment on every agenda item taken up at the May 16th meeting. When the commission then lost its quorum, and in accordance with sections 54955, 54955.1, and 54954.2, subdivision (b)(3) and San Francisco Administrative Code sections 67.15, subdivision (e), and 67.7, subdivision (e)(2), the meeting on the May 16th agenda was continued for a period not to exceed the prescribed five-day limit with notice of the continued hearing time and date posted on the door of the meeting place within 24 hours. Further, the commission provided public comment on every remaining agenda item at the session held on May 21st, including providing for general public comment. Thus, the Library Commission did all that was required under both the plain meaning of pertinent provisions of the Brown Act and the Sunshine Ordinance, and in accordance with the Legislature's purpose in facilitating and providing for public participation in legislative decisionmaking.

***470** Therefore, we conclude that respondents were entitled to judgment as a matter of law.

IV.

DISPOSITION

The judgment is affirmed.

We concur: HAERLE, Acting P.J., and LAMBDEN, J.

All Citations

115 Cal.App.4th 461, 9 Cal.Rptr.3d 336, 04 Cal. Daily Op. Serv. 889, 2004 Daily Journal D.A.R. 1125

Footnotes

1 Unless otherwise indicated, further statutory references are to the Government Code.

2 For simplicity, we will refer to the type of additional public comment at issue in this appeal as "general public comment."

3 Respondents' request for judicial notice of meeting minutes, which was taken under submission pursuant to this court's order dated October 1, 2003, is hereby granted.

4 President Higueras reordered the taking of agenda items as follows: (2) was changed to (4), (3) to (2), (4) to (5), (5) to (3), followed by items (6) through (8) in the original posted order.

5 Although appellant disputes whether the Library Commission's choice of the order with which to proceed with agenda items at the May 16th meeting was not really the "most pressing" in appellant's statement of disputed facts, we find that this "disputed" fact is not material to the cause of action for relief because neither the Brown Act nor the Sunshine Ordinance requires that agenda items be put in any specific order. (See § 54950 et seq.; see also S.F. Admin. Code, ch. 67.) Further, appellant's only other "disputed" fact relevant to this appeal is that "[t]he adjournment of defendant library commission on May 16, 2002 was not unexpected or due to any emergency or situation beyond the commission's control." Again, this point is not material because there is no requirement in either the Brown Act or the Sunshine Ordinance necessitating such conditions for adjournment and continuance. (See § 54950 et seq.; see also

S.F. Admin. Code, ch. 67.)

6 Although appellant contends that "the actions of defendants violated the law by refusing to allow public comment that is mandated by both ... the 'Brown Act' ... and ... the 'Sunshine Ordinance,' " appellant fails to provide us with any argument relating to *how* respondents have violated the Sunshine Ordinance. Nevertheless, because of the textual similarity of the two public meeting statutes, we will also address any potential Sunshine Ordinance violations.

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Exhibit 5

Claremont Police Officers Assn. v. City of Claremont (2006)
39 Cal.4th 623

[84] Defendant contends that the trial court did not independently reweigh the evidence in mitigation and aggravation or determine in its own judgment that the evidence presented at trial supported death. He infers that the court could not have done so, because in ruling on the motion the judge, who is required by section 190.4, subdivision (e) to "state on the record the reasons for his findings," did so by reading into the record a typescript some 14 pages in length, which had been prepared by the prosecutor. The judge's use of the prosecutor's language does not support the inference that defendant draws. Before stating his assessment of the evidence, the judge outlined his legal duty to review the evidence and to make an independent determination that it was appropriate to impose the death penalty. Accordingly, we reject defendant's contention that the judge was either unaware of, or did not fulfill, his obligation to conduct a review of the evidence presented at trial and to make an independent determination of the propriety of the jury's verdict of death.

Defendant complains that the trial court erred by relying on an irrelevant fact when it stated that defendant lacked "any good reason" to kill victims Bettancourt, a drug customer, and Morris, who was "friendly and non-threatening." Because the circumstances of the crime (§ 190.3, subd. (a)) are an appropriate statutory factor, defendant's claim fails.

[85] In ruling on a motion to modify, " '[t]he trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether in the judge's independent judgment, *the weight of the evidence supports the jury verdict.* [Citations.]' " (*People v. Guerra* (2006) 37 Cal.4th 1067, 1161, 40 Cal.Rptr.3d 118, 129 P.3d 321.)

Defendant also argues that by attributing defendant's lack of a prior felony conviction to his young age—18 at the time of the murders—the trial court effectively denied defendant the benefit of both those mitigating factors. (§ 190.3, factors (c) & (i).) Although the court noted that defendant had no prior felony convictions as an adult, it also pointed out that defendant had only been an adult for six months, but in that period defendant had committed three murders. Accordingly, the court found defendant's youth a factor that was "only minimally mitigating." Thus, the court independently reweighed factors (c) and (i), but found they added little to the mitigation side of the scale.

VI. Disposition

The judgment is affirmed. Defendant's request for a stay of execution is denied.

GEORGE, C.J., BAXTER, WERDEGAR, CHIN, MORENO, and CORRIGAN, JJ., concur.

39 Cal.4th 623

47 Cal.Rptr.3d 69

CLAREMONT POLICE OFFICERS ASSOCIATION, Plaintiff and Appellant,

v.

CITY OF CLAREMONT et al., Defendants and Respondents.

No. S120546.

Supreme Court of California.

Aug. 14, 2006.

Background: Police officers association sought a writ of mandate challenging city's policy requiring officers to record race and ethnicity of persons subject to vehicle stop but not arrested or cited. The Superior Court, Los Angeles County, No. KS007219, Conrad Richard Aragon, J., denied the petition. Association appealed. The Court of Appeal reversed, and the Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holding: The Supreme Court, Chin, J., held that city was not required, under

Meyers–Milias–Brown Act (MMBA), to meet and confer with association concerning implementation of racial profiling policy.

Judgment of the Court of Appeal reversed, and matter remanded.

Moreno, J., filed a concurring opinion in which Kennard, J., joined.

Opinion, 5 Cal.Rptr.3d 326, superseded.

1. Labor and Employment ⚿1115

Even if the public employer and the public employee organization meet and confer on specified issues of employment, as required by the Meyers–Milias–Brown Act (MMBA), they are not required to reach an agreement because the employer has the ultimate power to refuse to agree on any particular issue. West's Ann.Cal.Gov.Code §§ 3504, 3505.

2. Labor and Employment ⚿1115, 1482(2)

"Good faith" under Meyers–Milias–Brown Act (MMBA) provision requiring public employer and public employee organization to meet and confer on specified issues of employment, requires a genuine desire to reach agreement. West's Ann.Cal.Gov.Code §§ 3504, 3505.

See publication Words and Phrases for other judicial constructions and definitions.

3. Labor and Employment ⚿1128

Notwithstanding broad language in Meyers–Milias–Brown Act (MMBA) provision defining "scope of representation" for public employee organizations, to require an employer to bargain, its action or policy must have a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees. West's Ann.Cal. Gov.Code § 3504.

4. Labor and Employment ⚿1115

Even if a public employer's action or policy has a significant and adverse effect on the employees' bargaining unit's wages, hours, and working conditions, the employer may be excepted from bargaining requirements of the Meyers–Milias–Brown Act (MMBA) under the Act's exclusion for "merits, necessity, or organization" of any service or activity provided by law. West's Ann.Cal. Gov.Code § 3504.

5. Labor and Employment ⚿1115, 1124

If a public employer's action is taken pursuant to a fundamental managerial or policy decision, it is within the "scope of representation" under the bargaining requirements of the Meyers–Milias–Brown Act (MMBA) only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. West's Ann. Cal.Gov.Code §§ 3504, 3505.

6. Labor and Employment ⚿1115

To determine whether a public employer's action requires it to meet and confer with employee organization under Meyers–Milias–Brown Act (MMBA), courts apply three-part inquiry: first, it asks whether management action has significant and adverse effect on wages, hours, or working conditions of bargaining-unit employees, and if not, there is no duty to meet and confer, second, it asks whether significant and adverse effect arises from implementation of fundamental managerial or policy decision, and if not, meet-and-confer requirement applies, and third, if both factors are present, courts apply balancing test under which action is within scope of representation only if employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question. West's Ann.Cal.Gov.Code §§ 3504, 3505.

7. Labor and Employment ⚿1124

City was not required, under Meyers–Milias–Brown Act (MMBA), to meet and confer with police officers association concerning implementation of city's racial profiling study requiring officers to record race and ethnicity of persons subject to vehicle stop but not arrested or cited; implementation of study did not have a significant and adverse effect on the officers' working conditions as study required only slightly more information than arrest or citation report, requiring only about

two minutes. West's Ann.Cal.Gov.Code §§ 3504, 3505.

See 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 577; Cal. Jur. 3d, Public Officers and Employees, §§ 233, 234.

Lackie & Dammeier, Dieter C. Dammeier and Michael A. Morguess, Upland, for Plaintiff and Appellant.

Rains, Lucia & Wilkinson and Alison Berry Wilkinson, Pleasant Hill, for Peace Officers Research Association of California's Legal Defense Fund as Amicus Curiae on behalf of Plaintiff and Appellant.

Liebert Cassidy Whitmore, Richard M. Kreisler, Los Angeles, Mark H. Meyerhoff; Best Best & Krieger, Jeffrey V. Dunn, Sonia R. Carvalho, Irvine and Sandra M. Schwarzmann for Defendants and Respondents.

Alan L. Schlosser, Mark Schlosberg, San Francisco; and Peter Eliasberg, Los Angeles, for American Civil Liberties Union Foundation of Northern California and American Civil Liberties Union Foundation of Southern California as Amici Curiae on behalf of Defendants and Respondents.

Jeffrey Kightlinger, Henry Barbosa, Henry Torres, Jr.; Atkinson, Andelson, Loya, Ruud & Romo, James F. Baca, Warren S. Kinsler, Nate Kowalski and Joshua E. Morrison, Cerritos, for Metropolitan Water District of Southern California as Amicus Curiae on behalf of Defendants and Respondents.

Meyers, Nave, Riback, Silver & Wilson, Andrea J. Saltzman and Arthur A. Hartinger, Oakland, for League of California Cities as Amicus Curiae on behalf of Defendants and Respondents.

CHIN, J.

In this case, we consider a provision of the Meyers–Milias–Brown Act (MMBA) (Gov. Code,[1] § 3500 et seq.), which governs labor-management relations at the local government level. Section 3505 mutually obligates a public employer and an employee organization to meet and confer in good faith about a matter within the "scope of representation" concerning, among other things, "wages, hours, and other terms and conditions of employment" (§ 3504). A fundamental managerial or policy decision, however, is outside the scope of representation (§ 3504), and is excepted from section 3505's meet-and-confer requirement.

For reasons that follow, we conclude that there is a distinction between an employer's fundamental managerial or policy decision and the implementation of that decision. To determine whether an employer's action implementing a fundamental decision is subject to the meet-and-confer requirement (§ 3505), we employ the test found in our decision in *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 660, 224 Cal.Rptr. 688, 715 P.2d 648 (*Building Material*).

Applying that test to the case at hand, we reverse the judgment of the Court of Appeal.

I. Factual and Procedural Background

Plaintiff Claremont Police Officers Association (Association) is an employee organization representing public employees of defendant City of Claremont (City), including police officers and recruits, police agents, communication officers, record clerks, jailors and parking enforcement officers. In May 2000, the City's police department (Department) implemented a tracking program to determine if police officers were engaging in racial profiling. The Association, as the "[r]ecognized employee organization," [2] did not request to meet and confer with the City beforehand. Under the program, if an officer stopped a vehicle or person without issuing a citation or making an arrest, the officer was required to radio the Department with information about the stop, including the person's race. The program lasted one year.

1. All further statutory references are to the Government Code unless otherwise indicated.

2. A "[r]ecognized employee organization" is "an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency." (§ 3501, subd. (b).)

After the City's police commission concluded that the data collected in the pilot tracking program was insufficient to determine whether officers engaged in racial profiling, the commission appointed a subcommittee and advisory panel to prepare a further study. In February 2002, the police commission adopted the subcommittee's recommendation that the Department implement a "Vehicle Stop Data Collection Study" (Study), which is at issue in this case. This Study required officers on all vehicle stops to complete a preprinted scantron form called a "Vehicle Stop Data Form" (Form). The Form included questions regarding the "driver's perceived race/ethnicity," and the "officers' prior knowledge of driver's race/ethnicity." On average, the Form takes two minutes to complete, and an officer may complete between four and six Forms for each 12–hour shift. Each Form is traceable to the individual officer making the stop. The Study was to last 15 months, commencing July 1, 2002.

In April 2002, the Association requested that the City meet and confer regarding the Study because it asserted "the implementation of policy and procedures in regards to this area falls under California Government Code section 3504." On April 11, 2002, the City gave written notice disagreeing that the Study fell within the scope of representation under section 3504. On June 27, 2002, the Department informed officers it would implement the Study effective July 1, 2002. On July 11, 2002, the Association filed a petition for writ of mandate to compel the City and the Department not to implement the Study until they meet and confer in good faith under the MMBA.

On August 22, 2002, the superior court denied the petition. In its detailed statement of findings and conclusions, the court concluded, among other things, that the Study did not substantially affect the terms and conditions of the Association members' employment, and that "given the de minimis impact upon workload, and the predominantly policy directed objectives of the Study, . . . the Study falls primarily within management prerogatives under § 3504, and is not a matter within the scope of representation requiring compliance with the meet and confer provisions of the MMBA."

The Court of Appeal reversed. While it concluded the City's decision to take measures to combat the practice of racial profiling and the public perception that it occurs is "a fundamental policy decision that directly affects the police department's mission to protect and to serve the public," the Court of Appeal held that "the decision precisely *how to implement* that fundamental policy, however, involves several variables affecting law enforcement officers and is not itself a fundamental policy decision." [3] The Court of Appeal explained that "the vehicle stop policy significantly affects officers' working conditions, particularly their job security and freedom from disciplinary action, their prospects for promotion, and the officers' relations with the public. Racial profiling is illegal. [Fn. omitted.] An officer could be accused of racial profiling and subjected to disciplinary action, denial of promotion, or other adverse action based in part on the information collected under the new policy. For this reason, the manner that the information is collected and the accuracy of the data and data analysis are matters of great concern to the association's members."

We granted review.

II. Discussion

A. Background of the MMBA

[1, 2] The MMBA applies to local government employees in California. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4, 116 Cal.Rptr. 507, 526 P.2d 971 (*Fire Fighters Union*).) [4] "The MMBA

3. Although the Court of Appeal appeared at times to construe the City's fundamental decision as the decision to undertake measures against the practice of racial profiling, on the one hand, and the implementation of that decision as the adoption of the Study, on the other, neither of the parties adopts such a broad construction; nor do we. (See *post*, 47 Cal.Rptr.3d at pp. 75–76, 139 P.3d at pp. 537–538.)

4. The MMBA has its roots in the 1961 enactment of the George Brown Act, which originally appeared as sections 3500 through 3509. (See Stats.1961, ch.1964, pp. 4141–4143.) "The legislative revisions of 1968 and 1971 reserved those

has two stated purposes: (1) to promote full communication between public employers and employees, and (2) to improve personnel management and employer-employee relations. (§ 3500.) To effect these goals the act gives local government employees the right to organize collectively and to be represented by employee organizations (§ 3502), and obligates employers to bargain with employee representatives about matters that fall within the 'scope of representation.' (§§ 3504.5, 3505.)" (*Building Material, supra,* 41 Cal.3d at p. 657, 224 Cal.Rptr. 688, 715 P.2d 648.) The duty to meet and confer in good faith is limited to matters within the "scope of representation": the public employer and recognized employee organization have a "mutual obligation personally to meet and confer promptly upon request by either party ... and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." (§ 3505.) Even if the parties meet and confer, they are not required to reach an agreement because the employer has "the ultimate power to refuse to agree on any particular issue. [Citation.]" (*Building Material, supra,* 41 Cal.3d at p. 665, 224 Cal.Rptr. 688, 715 P.2d 648.) However, good faith under section 3505 "requires a genuine desire to reach agreement." (*Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25, 129 Cal.Rptr. 126.)

1. "Scope of representation"

Section 3504 defines "scope of representation" to include "all matters relating to employment conditions and employer-employee relations, including, but not 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." (Italics added.) The definition of "scope of representation" and its exception are "arguably vague" and "overlapping." (*Building Material, supra,* 41 Cal.3d at p. 658, 224 Cal.Rptr. 688, 715 P.2d 648; *Fire Fighters Union, supra,* 12 Cal.3d at p. 615, 116 Cal.Rptr. 507, 526 P.2d 971.) "'[W]ages, hours and working conditions,' which, broadly read could encompass practically any conceivable bargaining proposal; and 'merits, necessity or organization of any service' which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion." (*Fire Fighters Union, supra,* 12 Cal.3d at p. 615, 116 Cal.Rptr. 507, 526 P.2d 971.)

[3] Courts have interpreted "wages, hours, and other terms and conditions of employment," which phrase is not statutorily defined, to include the transfer of bargaining-unit work to nonunit employees (*Building Material, supra,* 41 Cal.3d at p. 659, 224 Cal.Rptr. 688, 715 P.2d 648; *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 119, 119 Cal.Rptr. 182); mandatory drug testing of employees (*Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 530, 280 Cal.Rptr. 206 (*Holliday*)); work shift changes (*Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 487, 195 Cal.Rptr. 206); and the adoption of a disciplinary rule prohibiting use of city facilities for personal use (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 165 Cal.Rptr. 908). Notwithstanding section 3504's broad language, to require an employer to bargain, its action or policy must have "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." (*Building Material, supra,* 41 Cal.3d at pp. 659–660, 224 Cal.Rptr. 688, 715 P.2d 648.)

2. "Merits, necessity or organization"

[4] Even if an employer's action or policy has a significant and adverse effect on the bargaining unit's wages, hours, and working conditions, the employer may be excepted from bargaining requirements under the "merits, necessity, or organization" language

sections for the Meyers–Milias–Brown Act, and reenacted the George Brown Act, now limited to the relationship between the state government and state employees, as Government Code sections 3525–3536." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 335, fn. 5, 124 Cal.Rptr. 513, 540 P.2d 609.)

of section 3504. (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.) This exclusionary language, which was added in 1968, was intended to "forestall any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions." (*Fire Fighters Union, supra,* 12 Cal.3d at p. 616, 116 Cal.Rptr. 507, 526 P.2d 971; Stats.1968, ch. 1390, § 4, p. 2727.) "Federal and California decisions both recognize the right of employers to make unconstrained decisions when fundamental management or policy choices are involved." (*Building Material, supra,* 41 Cal.3d at p. 663, 224 Cal.Rptr. 688, 715 P.2d 648; *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 937, 143 Cal.Rptr. 255 (*Berkeley Police Assn.*) ["To require public officials to meet and confer with their employees regarding fundamental policy decisions such as those here presented, would place an intolerable burden upon fair and efficient administration of state and local government"]; see also *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 678–679, 101 S.Ct. 2573, 69 L.Ed.2d 318 (*First National Maintenance*).)

Such fundamental managerial or policy decisions include changing the policy regarding a police officer's use of deadly force (*San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 947, 144 Cal.Rptr. 638 (*San Jose Peace Officer's Assn.*)), permitting a member of the citizen's police review commission to attend police department hearings regarding citizen complaints and sending a department member to review commission meetings (*Berkeley Police Assn., supra,* 76 Cal.App.3d 931, 143 Cal.Rptr. 255), and, in the context of private labor relations, closing a plant for economic reasons (*N.L.R.B. v. Royal Plating & Polishing Co.* (3d Cir.1965) 350 F.2d 191, 196 (*Royal Plating*)).

B. Distinction Between an Employer's Fundamental Decision and the Implementation and Effects of That Decision

Both parties agree that the City's decision to take measures against racial profiling, specifically its decision to implement the Study as a necessary first step, is a fundamental managerial or policy decision. Racial profiling, which has been defined as "the practice of detaining a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped" (Pen.Code, § 13519.4, subd. (e)), is expressly prohibited by statute (*id.,* subd. (f)), and by the Department's policy.[5] The Legislature has made clear that the practice of racial profiling "presents a great danger to the fundamental principles of a democratic society. It is abhorrent and cannot be tolerated." (Pen.Code, § 13519.4, subd. (d)(1).) The City's decision to implement the Study was made in hopes to "improve relations between the police and the community and establish the Claremont Police Department as an open and progressive agency committed to being at the forefront of the best professional practices in law enforcement." (See *Building Material, supra,* 41 Cal.3d at p. 664, 224 Cal.Rptr. 688, 715 P.2d 648 [matters relating to "the betterment of police-community relations ... are of obvious importance, and directly affect the quality and nature of public services"]; *Berkeley Police Assn., supra,* 76 Cal.App.3d at p. 937, 143 Cal.Rptr. 255 [same]; see also *San Jose Peace Officer's Assn., supra,* 78 Cal.App.3d at p. 946, 144 Cal.Rptr. 638 ["the use of force policy is as closely akin to a managerial decision as any decision can be in running a police department"].) Thus, the Association concedes that the City "may have the right to unilaterally decide to implement a racial profiling study."

However, the Association maintains that the Study's implementation and effects involve many factors that are distinct from the City's fundamental decision to adopt the Study. These factors include, on the one hand, determining the methodology used in collecting the data, and on the other, determining the effects or use of the Study's data, i.e., whether the data would be used only for

5. The Department's policy provides: "Officers shall stop persons on the basis of all available information, not solely on the basis of race or ethnicity." (Dept. Rules & Regs., § 1.030.3.05.)

study purposes, whether results based on the analyzed data or results regarding individual officers would be made public, whether and under what circumstances the results could be used against officers (including imposing discipline or denying promotions), and what the implications are for officers' privacy and the potential for self-incrimination. The Association concludes that meeting and conferring on the Study's implementation and effects will not directly interfere with the City's right to exercise its managerial prerogative. The Association contends that although *Building Material* is distinguishable, it "completely recognizes this 'dichotomy.' "

The City, however, counters that the Court of Appeal misinterpreted section 3504 and calls this dichotomy "unprecedented." It maintains that a public employer's fundamental decision and the implementation of that decision "are integral to the nature of the public agency and are thus, *equally excluded* from the bargaining process under Section 3504." The City's amicus curiae, League of California Cities (League), argues that drawing an implementation distinction is both "artificial and unworkable" because "[i]t is pointless to adopt a policy if it cannot be implemented." According to the League, the Association's contention begs the question "how the City could implement the Study and collect the data if it were not known *how* the data would be collected and *how* it would be used." Another amicus curiae, Metropolitan Water District of Southern California, adds that "the policy and its implementation cannot be severed and analyzed separately. Rather, the former is interwoven with the latter, such that a decision to compel negotiation of the implementation would inevitably compel negotiation of the policy decision itself."

At the outset, we agree with the Association that there is a long-standing distinction under the National Labor Relations Act (NLRA) between an employer's unilateral management decision and the *effects* of that decision (29 U.S.C. § 158(d)), the latter of which are subject to mandatory bargaining. (*First National Maintenance, supra,* 452 U.S. at pp. 681–682, 101 S.Ct. 2573; *id.* at p. 677, fn. 15, 101 S.Ct. 2573; *Kirkwood Fabricators, Inc. v. N.L.R.B.* (8th Cir.1988) 862 F.2d 1303, 1306 ["Requiring effects bargaining maintains an appropriate balance between an employer's right to close its business and an employee's need for some protection from arbitrary action"].) In other words, although "an employer has the right unilaterally to decide that a layoff is necessary, he must bargain about such matters as the timing of the layoffs and the number and identity of employees affected. [Citation.]" (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 64, 151 Cal.Rptr. 547, 588 P.2d 249 [discussing cases under the NLRA]); see also 1 Chin et al., Cal Practice Guide: Employment Litigation (The Rutter Group 2005) ¶¶ 6:80–6:84, p. 6–11 [discussing effects bargaining under NLRA].) For example, matters deemed subject to effects bargaining include severance pay, vacation pay, seniority, and pensions. (*N.L.R.B. v. Transmarine Navigation Corporation* (9th Cir.1967) 380 F.2d 933, 939; *Royal Plating, supra,* 350 F.2d at p. 196 [union must have "opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision"].)

We agree with the City, however, that the issue before us is whether it was compelled to meet and confer with the Association before it required officers on their vehicle stops to fill out the Forms as part of the Study. Based on the limited record before us, there is no evidence regarding what effects would result from implementing the Study; for instance, whether the data collected and later analyzed will result in discipline if an officer is found to have engaged in racial profiling,[6]

6. Regarding any discipline that may result from an officer's failure to properly fill out the Form, the superior court found that "officers are already subject to discipline for not completing required reports." For purposes of the issue here, we conclude this type of discipline is distinguishable from any possible discipline which may be imposed if an officer is found to have engaged in racial profiling. (See *Berkeley Police Assn., supra,* 76 Cal.App.3d at p. 938, 143 Cal. Rptr. 255 [no change in working conditions where officers "were working under these rules and conditions even prior to the challenged practices"].)

or whether the City will publicize the Study's raw data. It is also not clear from the record what exact methodology the City has adopted to analyze the collected data to determine any racial profiling. Nor can we say that racial profiling studies have been so historically associated with employee discipline that their implementation invariably raises disciplinary issues. (Cf. *Holliday, supra*, 229 Cal.App.3d at p. 540, 280 Cal.Rptr. 206 [various details of implementing mandatory drug-testing policy subject to meet-and-confer requirement].) Thus, we do not decide the issue whether the City was required to meet and confer with the Association over any effects resulting from the City's decision to implement the Study. (See *Fibreboard Corp. v. NLRB* (1964) 379 U.S. 203, 223, 85 S.Ct. 398, 13 L.Ed.2d 233 (*Fibreboard*) (conc. opn. of Stewart, J.) [an "extremely indirect and uncertain" impact on job security may alone suffice to conclude such decisions do not concern conditions of employment].)

We disagree with the City's amici curiae that drawing a distinction between an employer's fundamental managerial or policy decision and the implementation of that decision, as a general matter, would be impossible or impractical. The reality is that "practically every managerial decision has some impact on wages, hours, or other conditions of employment." (*Westinghouse Electric Corporation v. N.L.R.B.* (4th Cir.1967) 387 F.2d 542, 548.) Indeed, section 3504 of the MMBA codifies the unavoidable overlap between an employer's policymaking discretion and an employer's action impacting employees' wages, hours, and working conditions. (See *ante*, 47 Cal.Rptr.3d at p. 74, 139 P.3d at p. 536; *Building Material, supra*, 41 Cal.3d at p. 657, 224 Cal.Rptr. 688, 715 P.2d 648; *Fire Fighters Union, supra*, 12 Cal.3d at p. 615, 116 Cal.Rptr. 507, 526 P.2d 971.) As we shall explain in greater detail below, while drawing a distinction may sometimes be difficult, the alternative—which would risk sheltering any and all actions that flow from an employer's fundamental decision from the duty to meet and confer—is contrary to established case law. (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648; see also *First National Maintenance, supra*, 452 U.S. at p. 686, 101 S.Ct. 2573.) Although *Building Material* did not specifically decide the issue, our decision, as the City acknowledges, expressly contemplates that the implementation of an employer's fundamental decision ("action ... taken pursuant to a fundamental managerial or policy decision"), is a separate consideration for purposes of section 3505's meet-and-confer requirement. (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.)

Instead, we turn our focus to the City's implementation of the Study, requiring officers to fill out the Forms in order to collect data on possible racial profiling.

C. The Applicable Test

Emphasizing that the Court of Appeal erroneously created an "automatic presumption that a meet and confer is required if implementation of a fundamental decision significantly affects the terms and conditions of employment," the City urges that our decision in *Building Material, supra*, 41 Cal.3d 651, 224 Cal.Rptr. 688, 715 P.2d 648, requires us to perform a balancing test that also considers the employer's need for unencumbered decisionmaking. If the balance weighs in favor of the employer, there is no need to bargain even if the employer's action has a significant and adverse impact on the employees' working conditions. The Association counters that *Building Material's* balancing test would apply only to the fundamental decision itself and not to its implementation or its effects.

In *Building Material, supra*, 41 Cal.3d 651, 224 Cal.Rptr. 688, 715 P.2d 648, the City and County of San Francisco unilaterally eliminated two bargaining unit positions and reorganized and reclassified duties of hospital truck drivers who were members of the Building Material and Construction Teamsters' Union, Local 216 (Union). The city transferred certain work duties to new positions that were not in the Union's bargaining unit. (*Building Material, supra*, 41 Cal.3d at p. 655, 224 Cal.Rptr. 688, 715 P.2d 648.) The Union requested to meet and confer with city agencies regarding the city's action;

however, the request was denied on grounds that this matter was not within the meet-and-confer obligations under the MMBA. (*Building Material, supra,* 41 Cal.3d at p. 656, 224 Cal.Rptr. 688, 715 P.2d 648.)

After reviewing the background and purposes of the MMBA (*Building Material, supra,* 41 Cal.3d at pp. 657–660, 224 Cal.Rptr. 688, 715 P.2d 648), we concluded that the city was required to meet and confer (§ 3505) with the Union because the city's transfer of duties to a non-bargaining unit had a significant and adverse effect on the bargaining unit's wages, hours, and working conditions. (*Building Material, supra,* 41 Cal.3d at pp. 663–664, 224 Cal.Rptr. 688, 715 P.2d 648.) We rejected the city's assertion that its action was exempted as a fundamental policy decision because it concerned the effective operation of local government. (*Id.* at p. 664, 224 Cal.Rptr. 688, 715 P.2d 648.) The "decision to reorganize certain work duties was hardly 'fundamental.' It had little, if any, effect on public services. Rather, it primarily impacted the wages, hours, and working conditions of the employees in question and thus was a proper subject for mandatory collective bargaining. Indeed, defendants' claim to the contrary is in conflict with the statutory framework of the MMBA: any issue involving wages, for example, would affect the cost of government services, but such matters are specifically included in the scope of representation as defined in section 3504." (*Ibid.*)

[5] Going on to explain that an employer's fundamental decision may have a significant and adverse effect on the bargaining unit's wages, hours, or working conditions (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648), we considered whether "an action . . . taken pursuant to a fundamental managerial or policy decision" may be within the scope of representation (§ 3504), and thus subject to a duty to meet and confer. (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.) As relevant here, such an action would encompass an employer's steps to implement the details of the fundamental decision. Under that circumstance, a balancing test would apply: "If an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648, citing *First National Maintenance, supra,* 452 U.S. at p. 686, 101 S.Ct. 2573; see *Berkeley Police Assn., supra,* 76 Cal.App.3d at p. 937, 143 Cal.Rptr. 255; see also *San Francisco Fire Fighters Local 798 v. Board of Supervisors* (1992) 3 Cal.App.4th 1482, 1494, 5 Cal.Rptr.2d 176 (*San Francisco Fire Fighters*).)

The high court applied a similar balancing test in *First National Maintenance, supra,* 452 U.S. 666, 101 S.Ct. 2573. While recognizing an employer's "freedom to manage its affairs unrelated to employment," the high court balanced the competing interests to determine whether mandatory bargaining was required when a fundamental management decision directly impacted employment. (*First National Maintenance, supra,* 452 U.S. at p. 677, 101 S.Ct. 2573.) The high court concluded: "[I]n view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." (*Id.* at p. 679, 101 S.Ct. 2573; see also *id.* at p. 686, 101 S.Ct. 2573.) In discussing the issues subject to collective bargaining (*id.* at p. 676, 101 S.Ct. 2573), the high court explained that employers' management decisions may range from having "only an indirect and attenuated impact on the employment relationship," to being "almost exclusively 'an aspect of the relationship' between employer and employee," to having "a direct impact on employment" though the decision is " 'not in [itself] primarily about conditions of employment. . . .' " (*Id.* at pp. 676–677, 101 S.Ct. 2573, brackets in *First National Maintenance;* see also *Fibreboard, supra,* 379 U.S. at p. 223, 85 S.Ct. 398 (conc. opn. of Stewart, J.).)

The balancing test under *Building Material*, which has been described as a "fluid standard" (*San Francisco Fire Fighters, supra*, 3 Cal.App.4th at p. 1494, 5 Cal.Rptr.2d 176), properly considers the competing interests while furthering the MMBA's neutral purpose to "promote communication between public employers and employees and to improve personnel management. (§ 3500.)" (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648; see also *First National Maintenance, supra*, 452 U.S. at pp. 680–681, 101 S.Ct. 2573 [NLRA "is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved"].) We conclude it applies to determine whether management must meet and confer with a recognized employee organization (§ 3505) when the implementation of a fundamental managerial or policy decision significantly and adversely affects a bargaining unit's wages, hours, or working conditions.

In view of the vast range of management decisions and to give guidance on whether a particular matter is subject to a duty to meet and confer (§ 3505) under *Building Material, supra*, 41 Cal.3d at page 660, 224 Cal. Rptr. 688, 715 P.2d 648, we find instructive the high court's observation that "[t]he concept of mandatory bargaining is premised on the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole. [Citations.] This will be true, however, only if the subject proposed for discussion is amenable to resolution through the bargaining process." (*First National Maintenance, supra*, 452 U.S. at p. 678, 101 S.Ct. 2573, fn. omitted.) To that end, when balancing competing interests a court may also consider whether "the transactional cost of the bargaining process outweighs its value. [Citations.]" (*Social Services Union v. Board of Supervisors* (1978) 82 Cal.App.3d 498, 505, 147 Cal.Rptr. 126 (*Social Services Union*) [discussing NLRA].) We believe this "transactional cost" factor is not only consistent with the *Building Material* balancing test, but its application also helps to ensure that a duty to meet and confer is invoked only when it will serve its purpose.

[6] In summary, we apply a three-part inquiry. First, we ask whether the management action has "a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees." (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.) If not, there is no duty to meet and confer. (See § 3504; see also *ante*, 47 Cal.Rptr.3d at pp. 74–75, 139 P.3d at pp. 536–537.) Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then, as in *Building Material*, the meet-and-confer requirement applies. (*Building Material, supra*, 41 Cal.3d at p. 664, 224 Cal.Rptr. 688, 715 P.2d 648.) Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test. The action "is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648.) In balancing the interests to determine whether parties must meet and confer over a certain matter (§ 3505), a court may also consider whether the "transactional cost of the bargaining process outweighs its value." (*Social Services Union, supra*, 82 Cal.App.3d at p. 505, 147 Cal.Rptr. 126.)

Next, we apply the foregoing standard to the facts of this case to determine whether the City was required to meet and confer (§ 3505) with the Association before implementing the Study.

D. Application to the Present Case

[7] Applying the test under *Building Material*, we conclude that the implementation of the Study did not have a significant and adverse effect on the officers' working conditions. (*Building Material, supra*, 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d

648.) The record reflects that "[i]n those cases resulting in citation or arrest, the Study requires slightly more information to be collected by the officer than required in completing the citation or arrest report." Based on "undisputed evidence," the superior court determined that officers may complete a Form in about two minutes and may complete between four and six such Forms in a 12–hour shift. The superior court concluded that the impact on the officers' working conditions was de minimis. We agree and conclude the City was not required to meet and confer (§ 3505) with the Association before implementing the Study. Because there was no significant and adverse effect, we need not balance the City's need for unencumbered decisionmaking—in this case, its policymaking prerogative to eliminate the practice and perception of racial profiling and to determine the best means for doing so—against the benefit to employer-employee relations from bargaining about the subject. (*Building Material, supra,* 41 Cal.3d at p. 660, 224 Cal.Rptr. 688, 715 P.2d 648; see also *First National Maintenance, supra,* 452 U.S. at p. 686, 101 S.Ct. 2573.)

In conclusion, we emphasize the narrowness of our holding. In determining that the City was not required to meet and confer with the Association before implementing the Study, we do not decide whether such a duty would exist should issues regarding officer discipline, privacy rights, and other potential effects (see *ante,* 47 Cal.Rptr.3d at pp. 76–77, 139 P.3d at pp. 538–539), arise after the City implements the Study. Based on the record, that question is not before us.

III. Disposition

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with our opinion.

WE CONCUR: GEORGE, C.J., KENNARD, BAXTER, WERDEGAR, MORENO, and CORRIGAN, JJ.

Concurring Opinion by MORENO, J.

I agree with the majority's narrow holding that the City of Claremont (City) need not meet and confer regarding its decision to conduct a racial profiling study and to adopt a particular data collection method in implementing the study, and that we need not consider other issues raised by the Claremont Police Officers Association (Association). As the majority states: "Based on the limited record before us, there is no evidence regarding what effects would result from implementing the Study; for instance, whether the data collected and later analyzed will result in discipline if an officer is found to have engaged in racial profiling, or whether the City will publicize the Study's raw data. It is also not clear from the record what exact methodology the City has adopted to analyze the collected data to determine any racial profiling. Nor can we say that racial profiling studies have been so historically associated with employee discipline that their implementation invariably raises disciplinary issues. (Cf. *Holliday* [*v. City of Modesto* (1991)] 229 Cal.App.3d [528,] 540 [280 Cal. Rptr. 206] [various details of implementing mandatory drug-testing policy subject to meet-and-confer requirement].) Thus, we do not decide the issue whether the City was required to meet and confer with the Association over any effects resulting from the City's decision to implement the Study." (Maj. opn., *ante,* 47 Cal.Rptr.3d at pp. 76–77, 139 P.3d at pp. 538–539, fn. omitted.) Instead, the majority opinion addresses only "the City's implementation of the Study, requiring officers to fill out the Forms in order to collect data on possible racial profiling." (*Id.* at p. 77, 139 P.3d at p. 539.)

That having been said, it is no doubt true that the study results may potentially be used to discipline police officers or may have other adverse employment consequences for them, because racial profiling is a serious form of police misconduct. In my view, the use of the study as an additional basis for discipline would give rise to a duty on the City's part to meet and confer with the Association. The City's adoption of a new basis for disciplining police officers goes to the heart of officers' employment security, and is therefore one of the critical "terms and conditions of employment" at the core of Government Code section 3504. (See *Fire*

Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 618, 116 Cal.Rptr. 507, 526 P.2d 971.) Although the City plainly has the authority and responsibility to discipline officers who persistently engage in racial profiling, its unfettered right to do so does not outweigh the Association's interest in ensuring, through negotiations with the City, that any such discipline follows due process and that the study results have been accurately and fairly analyzed.

I CONCUR: KENNARD, J.

Exhibit 6

Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd. **(2005) 35 Cal.4th 107**

35 Cal.4th 1072
29 Cal.Rptr.3d 234

COACHELLA VALLEY MOSQUITO AND VECTOR CONTROL DISTRICT, Plaintiff and Appellant,

v.

CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD, Defendant and Respondent;

California School Employees Association et al., Real Parties in Interest.

No. S122060.

Supreme Court of California.

June 9, 2005.

Background: A mosquito and vector control district petitioned for a writ of prohibition or mandate directing the Public Employment Relations Board (PERB) to dismiss a complaint the PERB issued on behalf of the California School Employees Association (CSEA) and against the district for unfair practices in violation of the Myers-Milias-Brown Act (MMBA). The Superior Court, Riverside County, No. INC26814, Charles Everett Stafford, Jr., J., denied the petition, and the district appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

Holdings: The Supreme Court, Kennard, J., held that:

(1) district was excused from exhausting administrative remedies;

(2) six-month limitations period applied to MMBA unfair practices charges filed with PERB; and

(3) shortened limitations period applied retroactively provided parties were given reasonable time in which to file.

Judgment of the Court of Appeal affirmed.

Opinion, 7 Cal.Rptr.3d 444, superseded.

1. Administrative Law and Procedure ⚿229

In general, a party must exhaust administrative remedies before resorting to the courts.

2. Administrative Law and Procedure ⚿229

Under exhaustion of administrative remedies rule, an administrative remedy is "exhausted" only upon termination of all available, nonduplicative administrative review procedures.

See publication Words and Phrases for other judicial constructions and definitions.

3. Administrative Law and Procedure ⚿229

The exhaustion of administrative remedies doctrine is principally grounded on concerns favoring administrative autonomy, i.e., courts should not interfere with an agency determination until the agency has reached a final decision, and judicial efficiency, i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary.

4. Administrative Law and Procedure ⚿229

The exhaustion of administrative remedies requirement applies to defenses as well as to claims for affirmative relief.

5. Administrative Law and Procedure ⚿229

One exception to the exhaustion of administrative remedies doctrine is where exhaustion would be futile; this exception requires that the party invoking the exception can positively state that the agency has declared what its ruling will be on a particular case.

6. Labor and Employment ⚿1861

Futility exception to exhaustion of administrative remedies doctrine did not excuse failure of mosquito and vector control district to exhaust its administrative remedies before seeking judicial remedies, on both jurisdictional and limitations grounds, concerning unfair practices complaint that California Public Employment Relations Board (PERB) filed under Meyers–Milias–Brown Act (MMBA), even though PERB had declared in other cases that three-year limitation period applied to MMPA unfair practices charges,

rather than six months as district contended; for exception to apply, district was required to show PERB's ruling on entire case, not only on limitations defense. West's Ann.Cal. Gov.Code § 3500 et seq.

7. Administrative Law and Procedure ⚿229

To apply the futility exception to the exhaustion of administrative remedies, it is not sufficient that a party can show what the agency's ruling would be on a particular issue or defense; rather, the party must show what the agency's ruling would be on a particular case.

8. Labor and Employment ⚿1861

Mosquito and vector control district was excused from exhausting its administrative remedies with California Public Employment Relations Board (PERB) by claiming that PERB lacked authority, by virtue of alleged limitations period, to rule on complaint of unfair practices under Myers-Milias-Brown Act (MMBA) by California School Employees Association (CSEA) limitations period.

9. Administrative Law and Procedure ⚿229

Under an exception to the exhaustion of administrative remedies doctrine, exhaustion may be excused when a party claims that the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties.

10. Administrative Law and Procedure ⚿229

In deciding whether to entertain a claim that an administrative agency lacks jurisdiction before the agency proceedings have run their course, and therefore party is excused from exhausting administrative remedies, a court considers three factors: the injury or burden that exhaustion will impose, the strength of the legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue.

11. Labor and Employment ⚿1115, 1488

The duty to bargain under the Myers-Milias-Brown Act (MMBA), which governs collective bargaining and employer-employee relations for most California local public entities, requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse. West's Ann.Cal.Gov. Code § 3505.

12. Labor and Employment ⚿1920

Six-month limitations period, rather than three-year period generally applied to court actions to enforce state labor laws, applies to Myers-Milias-Brown Act (MMBA) unfair practices charges filed with Public Employment Relations Board (PERB); although limitations period is not expressed in legislative act transferring jurisdiction of enforcement of MMBA claims to PERB, six-month period is in harmony with other public employment relations statutory schemes. West's Ann. Cal.Gov.Code § 3509; West's Ann.Cal.C.C.P. § 338(a).

See 2 Witkin, Summary of Cal. Law (9th ed. 1987) Agency and Employment, § 456B; Cal. Jur. 3d, Public Officers and Employees, § 225 et seq.

13. Statutes ⚿181(1), 184

When engaged in statutory construction, the court's goal is to ascertain the intent of the enacting legislative body so that the court may adopt the construction that best effectuates the purpose of the law.

14. Statutes ⚿220

The presumption of legislative acquiescence in prior judicial decisions is not conclusive in determining legislative intent.

15. Administrative Law and Procedure ⚿311

The statutes of limitations set forth in the Code of Civil Procedure do not apply to administrative proceedings.

16. Statutes ⚿223.1

Courts do not construe statutes in isolation; rather, they construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided.

17. Labor and Employment ⚿1432

Legislation transferring jurisdiction of enforcement of Myers-Milias-Brown Act

(MMBA) unfair practices charges from courts to Public Employment Relations Board (PERB) as of July 1, 2001, thereby shortening limitations period from three years to six months applies retroactively to MMBA unfair practice charges based on conduct that occurred before July 1, 2001, provided that parties are given a reasonable time in which to file such charges with the PERB; thus, for MMBA unfair practices occurring before July 1, 2001, charge filed with PERB is timely if brought within three years of occurrence of unfair practice, or within six months of July 1, 2001, whichever was sooner.

18. Limitation of Actions ⚖6(1)

Legislation that shortens a limitations period is considered procedural and is applied retroactively to preexisting causes of action, so long as parties are given a reasonable time in which to sue.

19. Limitation of Actions ⚖6(1)

When necessary to provide a reasonable time to sue, a shortened limitations period may be applied prospectively so that it commences on the effective date of the statute, rather than on the date the cause of action accrued.

Lisa Garvin Copeland, Palm Desert, for Plaintiff and Appellant.

Jack L. White, City Attorney (Anaheim), and Carol J. Flynn, Assistant City Attorney for the Cities of Anaheim, Carlsbad, Indian Wells, Monterey, Redlands, San Buenaventura, San Luis Obispo, San Pablo, Santa Paula, Walnut Creek, the California Association of Sanitation Agencies, the Orange County Vector Control District and the Sunline Transit Agency as Amici Curiae on behalf of Plaintiff and Appellant.

Ben Allamano for Mosquito and Vector Control Association of California as Amicus Curiae on behalf of Plaintiff and Appellant.

Robert Thompson, Sacramento, and Kristin L. Rosi for Defendant and Respondent.

Rothner, Segall & Greenstone, Glenn Rothner, Emma Leheny and Jean Shin, Pasadena, for American Federation for State, County and Municipal Employees Union, AFL–CIO as Amicus Curiae on behalf of Defendant and Respondent.

Michael R. Clancy, Madalyn J. Frazzini and Sonja J. Woodward, San Jose, for Real Party in Interest and Respondent California School Employees Association.

No appearances for Real Parties in Interest and Respondents Ramon C. Gonzalez, Mike Martinez, Jeffrey Garcia and Virginia Sanchez.

KENNARD, J.

The Meyers–Milias–Brown Act (Gov.Code, §§ 3500–3511; hereafter the MMBA) governs collective bargaining and employer-employee relations for most California local public entities, including cities, counties, and special districts. Before July 1, 2001, an employee association claiming a violation of the MMBA could bring an action in superior court. (See *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 541–542, 28 Cal.Rptr.2d 617, 869 P.2d 1142.) Effective July 1, 2001, however, the Legislature vested the California Public Employment Relations Board (PERB) with exclusive jurisdiction over alleged violations of the MMBA.[1] (Gov.Code, § 3509, added by Stats.2000, ch. 901, § 8.) In making this fundamental change, the Legislature did not specify a limitations period for making an MMBA unfair practice charge to the PERB. Under every other public employment law subject to the PERB's jurisdiction, however, the Legislature has expressly designated six months as the limitations period for making an unfair practice charge. (See Gov.Code, §§ 3514.5, subd. (a), 3541.5, subd. (a), 3563.2, subd. (a), 71639.1, subd. (c), 71825, subd. (c); Pub. Util.Code, § 99561.2, subd. (a).)

The main issue here is whether the limitations period for making an MMBA unfair practice charge to the PERB is three years, which the PERB insists was the generally

1. Exempt from the PERB's jurisdiction under the MMBA are peace officers, management employees, the City of Los Angeles, and the County of Los Angeles. (Gov.Code, §§ 3509, subds.(d)-(e), 3511.)

accepted limitations period for an MMBA cause of action filed in superior court (see *Giffin v. United Transportation Union* (1987) 190 Cal.App.3d 1359, 1365, 236 Cal. Rptr. 6 [holding that three years is the statute of limitations for an alleged violation of state labor law, without mentioning the MMBA]), or six months, which is the limitations period for all other unfair practice charges subject to the PERB's jurisdiction. We conclude the limitations period is six months.

This case presents two additional issues. One issue, which we address first, is whether this action is barred by the doctrine requiring exhaustion of administrative remedies. On this issue, we conclude that the failure to exhaust administrative remedies is excused because this action challenges the PERB's jurisdiction and raises issues of law with broad public importance. The other issue concerns retroactive application of the shortened limitations period. On this issue, we conclude that the shortened limitations period applies retroactively, but also that when an unfair practice charge is based on conduct before the effective date of the shortened limitations period, the charge is timely if filed within three years of the alleged unfair practice or before January 1, 2002, whichever occurs sooner.

Because the Court of Appeal's judgment is consistent with these conclusions, we affirm.

I. Facts and Procedural Background

On July 6, 2001, the California School Employees Association (CSEA) filed an MMBA unfair practice charge with the PERB against the Coachella Valley Mosquito and Vector Control District (District), a special district (see Health & Saf.Code, § 2000 et seq. [formerly § 2200 et seq.]) subject to the MMBA. The CSEA amended the charge on August 29, 2001. In the amended charge, the CSEA, as the exclusive employee representative of a bargaining unit of the District's employees, alleged that the District had discriminated against several CSEA-represented employees for their participation in negotiations for a memorandum of understanding, interfered with the rights of additional unit members by threatening disciplinary action if they engaged in activity protected under the MMBA, and unilaterally changed the means by which employees' annual performance evaluations were prepared and administered. On October 23, 2001, the PERB issued a complaint against the District on these allegations, alleging that the District had committed specified unfair practices on various dates between December 1999 and July 2001.

On November 13, 2001, the District filed an answer to the complaint and a motion to dismiss it. In the motion, the District argued that the PERB lacked jurisdiction over alleged MMBA violations occurring before July 1, 2001, and that six months was the limitations period for an MMBA unfair practice charge. On December 5, 2001, the PERB's board agent denied the motion to dismiss.

The District objected to the board agent's ruling and requested a ruling by the PERB itself. Under a PERB regulation, however, the PERB does not review a board agent's interim ruling unless the agent joins in the party's request for review. (Cal.Code Regs., tit. 8, § 32200.) On January 3, 2002, the board agent refused to join in the District's request.

On January 9, 2002, the District petitioned the superior court for writs of mandate and prohibition, naming the CSEA and certain District employees as real parties in interest and arguing that the PERB lacked jurisdiction to issue the complaint.[2] After the PERB filed preliminary opposition, the superior court issued an order to show cause. Both the CSEA and the PERB then filed formal opposition in which they argued, among other things, that the District's action was barred because the administrative proceedings had not concluded and therefore the District had not exhausted its administrative remedies. The superior court held a brief hearing, after which it denied the petition, concluding that the District was not required

2. Final decisions of the PERB are now reviewable by a writ petition filed directly in the Court of Appeal, rather than in the superior court. (Gov. Code, § 3509.5, subd. (b), added by Stats.2002, ch. 1137, § 3.)

to exhaust its administrative remedies before challenging the PERB's jurisdiction, that the PERB had jurisdiction over alleged MMBA violations occurring before July 1, 2001, that the limitations period for alleging these violations was three years, and that the PERB therefore had jurisdiction over each unfair practice alleged in the complaint.

The District appealed from the superior court's judgment denying the petition. In May 2002, while the appeal was pending, the District and the CSEA executed a settlement agreement covering the merits of the unfair practices charge, the CSEA withdrew the charge, and the PERB complaint was dismissed. Although the settlement had rendered it moot, the appeal nonetheless proceeded, and all parties joined in urging the Court of Appeal to issue a decision on the merits. The court granted requests for judicial notice of various legislative history documents. On December 9, 2003, the court issued its decision.

The Court of Appeal held: (1) Because the appeal presented issues of broad public interest that were likely to recur, the court could properly resolve those issues even though the case had become moot;[3] (2) the District's action was not barred by the rule requiring exhaustion of administrative remedies because exhaustion would have been futile; (3) the PERB had jurisdiction to issue a complaint based on unfair practices occurring before July 1, 2001;[4] (4) the limitations period for an MMBA unfair practice charge filed with the PERB is six months; and (5) to prevent unfair retroactive application of the shortened limitations period, charges based on unfair practices occurring before July 1, 2001, were timely if filed with the PERB within three years of their occurrence or before January 1, 2002, whichever occurred first. Applying these holdings to the facts, the Court of Appeal concluded that the CSEA's unfair practice charge was timely filed as to all of the alleged unfair practices, and therefore it affirmed the trial court's judgment.

This court granted the PERB's petition for review.

II. Exhaustion of Administrative Remedies

[1, 2] In general, a party must exhaust administrative remedies before resorting to the courts. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292, 109 P.2d 942; see *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1148, 43 Cal.Rptr.2d 693, 899 P.2d 79.) Under this rule, an administrative remedy is exhausted only upon "termination of all available, nonduplicative administrative review procedures." (*California Correctional Peace Officers Assn. v. State Personnel Bd., supra*, at p. 1151, 43 Cal.Rptr.2d 693, 899 P.2d 79; see also *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 933, 16 Cal.Rptr.3d 849, 94 P.3d 1055 [exhaustion requires agency decision of " 'entire controversy' "]; *People v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 124, 3 Cal.Rptr.3d 429 [administrative process must " ' "run its course" ' "]; *Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432, 95 Cal.Rptr. 860 [exhaustion requires "a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings"].)

[3, 4] "The exhaustion doctrine is principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)."

3. We agree with the Court of Appeal that this case poses issues of broad public interest that are likely to recur, and we conclude that the Court of Appeal did not abuse its discretion in deciding to resolve those issues even though this case has become moot. (See *Cadence Design Systems, Inc. v. Avant! Corp.* (2002) 29 Cal.4th 215, 218, fn. 2, 127 Cal.Rptr.2d 169, 57 P.3d 647; *Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 172, 126 Cal.Rptr.2d 727, 56 P.3d 1029; *People v. Cheek* (2001) 25 Cal.4th 894, 897–898, 108 Cal.Rptr.2d 181, 24 P.3d 1204; *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 829, fn. 4, 50 Cal.Rptr.2d 101, 911 P.2d 1.)

4. No party has challenged this holding.

(*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 391, 6 Cal.Rptr.2d 487, 826 P.2d 730; accord, *Jonathan Neil & Assoc., Inc. v. Jones, supra,* 33 Cal.4th at p. 932, 16 Cal.Rptr.3d 849, 94 P.3d 1055; see also *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501, 87 Cal.Rptr.2d 702, 981 P.2d 543.) The exhaustion requirement applies to defenses as well as to claims for affirmative relief (*Styne v. Stevens* (2001) 26 Cal.4th 42, 57, 109 Cal.Rptr.2d 14, 26 P.3d 343; see *Top Hat Liquors v. Department of Alcoholic Beverage Control* (1974) 13 Cal.3d 107, 110, 118 Cal. Rptr. 10, 529 P.2d 42), and we have described exhaustion of administrative remedies as "a jurisdictional prerequisite to resort to the courts" (*Abelleira v. District Court of Appeal, supra,* 17 Cal.2d at p. 293, 109 P.2d 942; accord, *Styne v. Stevens, supra,* at p. 56, 109 Cal.Rptr.2d 14, 26 P.3d 343; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 70, 99 Cal.Rptr.2d 316, 5 P.3d 874).

[5] The doctrine requiring exhaustion of administrative remedies is subject to exceptions. (*Public Employment Relations Bd. v. Superior Court* (1993) 13 Cal.App.4th 1816, 1827, 17 Cal.Rptr.2d 323.) Under one of these exceptions, "[f]ailure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile." (*Jonathan Neil & Assoc., Inc. v. Jones, supra,* 33 Cal.4th at p. 936, 16 Cal.Rptr.3d 849, 94 P.3d 1055; see also *Honig v. Doe* (1988) 484 U.S. 305, 327, 108 S.Ct. 592, 98 L.Ed.2d 686.) "The futility exception requires that the party invoking the exception 'can positively state that the [agency] has declared what its ruling will be on a particular case.' " (*Jonathan Neil & Assoc., Inc. v. Jones, supra,* at p. 936, 16 Cal.Rptr.3d 849, 94 P.3d 1055; see also *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89, 61 Cal.Rptr.2d 134, 931 P.2d 312; *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal. App.4th 677, 691, 67 Cal.Rptr.2d 323.)

[6] Here, the Court of Appeal concluded that the futility exception excused the District's failure to exhaust its administrative remedies because the PERB had held, in other cases, that all MMBA unfair practice charges filed with the PERB on and after July 1, 2001, are subject to the three-year limitations period in Code of Civil Procedure section 338. Therefore, the PERB had declared what its ruling would be on the limitations issue, even though it had not reviewed the board agent's ruling in this particular matter.

[7] That analysis is flawed. For the futility exception to apply, it is not sufficient that a party can show what the agency's ruling would be on a particular *issue or defense.* Rather, the party must show what the agency's ruling would be " 'on a particular *case.*' " (*Jonathan Neil & Assoc., Inc. v. Jones, supra,* 33 Cal.4th at p. 936, 16 Cal. Rptr.3d 849, 94 P.3d 1055, italics added.) This follows from the exhaustion doctrine itself, which "precludes review of an intermediate or interlocutory action of an administrative agency." (*Alta Loma School Dist. v. San Bernardino County Com. on School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 554, 177 Cal.Rptr. 506; see also *McHugh v. County of Santa Cruz* (1973) 33 Cal.App.3d 533, 538–539, 109 Cal.Rptr. 149 [exhaustion doctrine "requires that a party must not only initially raise the issue in the administrative forum, but he must proceed through the entire proceeding to a final decision on the merits of the entire controversy"].)

Here, it is not sufficient that we know what the PERB's final ruling would have been on the District's limitations defense. For the futility exception to apply, the District must show how the PERB would have ruled on the CSEA's unfair practices charge. Had the administrative proceeding run its course, the District might have prevailed on some procedural ground other than expiration of the limitations period, or it might have prevailed on the merits. Thus, the District did not show that further administrative proceedings would have been futile because the outcome of those proceedings was known in advance.

[8, 9] Although we do not agree with the Court of Appeal's reasoning, we agree with its conclusion that the District was excused from exhausting its administrative remedies with the PERB. Under another exception, exhaustion of administrative remedies may

be excused when a party claims that "the agency lacks authority, statutory or otherwise, to resolve the underlying dispute between the parties." (*Edgren v. Regents of University of California* (1984) 158 Cal.App.3d 515, 521, 205 Cal.Rptr. 6; see also *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, 798, 322 P.2d 449; *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 360, 13 Cal.Rptr.3d 107; *Buckley v. California Coastal Com.* (1998) 68 Cal.App.4th 178, 191, 80 Cal.Rptr.2d 562; *People ex rel. Dept. of Conservation v. Triplett* (1996) 48 Cal.App.4th 233, 258, 55 Cal.Rptr.2d 610.)

Here, the limitations issue implicates the PERB's administrative authority or jurisdiction because the District contends that the applicable limitations period for MMBA unfair practice charges is found in Government Code section 3541.5, subdivision (a), which states that the PERB "shall not ... [¶] ... [i]ssue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Under this provision, expiration of the six-month limitation period deprives the PERB of authority to issue a complaint.

[10] In deciding whether to entertain a claim that an agency lacks jurisdiction before the agency proceedings have run their course, a court considers three factors: the injury or burden that exhaustion will impose, the strength of the legal argument that the agency lacks jurisdiction, and the extent to which administrative expertise may aid in resolving the jurisdictional issue. (*Public Employment Relations Bd. v. Superior Court, supra,* 13 Cal.App.4th at p. 1830, 17 Cal.Rptr.2d 323.)

Here, in regard to the first factor, the District did not show that it would suffer any unusual or irreparable injury if it were required to litigate the CSEA's unfair practices charge to completion before obtaining a judicial resolution of the jurisdictional limitations issues. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269, 258 Cal.Rptr. 66 [administrative remedy not inadequate "merely because additional time and effort would be consumed by its being pursued through the ordinary course of the law"].) But the District is not the only party affected by this issue, and there is a significant public interest in obtaining a definitive resolution of this fundamental legal question. (See *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 170–171, 6 Cal.Rptr.2d 714 [exhaustion excused because of urgent need of judicial determination]; see also *Lindeleaf v. Agricultural Labor Relations Bd.* (1986) 41 Cal.3d 861, 871, 226 Cal.Rptr. 119, 718 P.2d 106 [exhaustion excused when case raises "important questions of public policy"]; *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 Cal.App.4th 587, 615, 114 Cal.Rptr.2d 412 [same].) So the first factor weighs in favor of judicial intervention.

In regard to the second factor, as explained more fully in the next part of this opinion, the District makes a strong and ultimately persuasive argument that the proper limitations period is six months and not, as the PERB has ruled, three years. Thus, the second factor also weighs in favor of excusing exhaustion. Finally, in regard to the third factor, judicial intervention at this stage will not deny us the benefit of the PERB's administrative expertise; the issues are purely legal and of a kind within the expertise of courts, and we have received the benefit of the PERB's views on the issues through its briefs in this court. Accordingly, we conclude that all three factors favor judicial intervention. Thus, the administrative jurisdiction exception to the exhaustion doctrine applies, and the District's failure to exhaust administrative remedies is excused.

III. Statute of Limitations

To determine the limitations period for an unfair practice charge to the PERB alleging an MMBA violation, we begin by reviewing the history of the MMBA and of the PERB.

A. The MMBA

In 1961, the Legislature enacted the George Brown Act (Stats.1961, ch.1964, pp. 4141–4143), which for the first time recognized the rights of state and local public employees to organize and to have their rep-

resentatives meet and confer with their public agency employers over wages and working conditions. In 1968, the Legislature went a step further by enacting the MMBA (Stats.1968, ch. 1390, pp. 2725–2729), which "authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 331, 124 Cal.Rptr. 513, 540 P.2d 609, fn. omitted; see also *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780–781, 35 Cal.Rptr.2d 814, 884 P.2d 645.) Although the MMBA covered most employees of local public entities, it did not include school districts' employees. (Stats.1968, ch. 1390, § 2, p. 2726; see *Glendale City Employees' Assn., Inc. v. City of Glendale, supra,* at p. 331, fn. 1, 124 Cal.Rptr. 513, 540 P.2d 609.) State employees were excluded from the MMBA in 1971. (Stats.1971, ch. 254, § 2, p. 402.)

[11] The MMBA imposes on local public entities a duty to meet and confer in good faith with representatives of recognized employee organizations, in order to reach binding agreements governing wages, hours, and working conditions of the agencies' employees. (Gov.Code, § 3505.) "The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse...." (*Santa Clara County Counsel Attys. Assn. v. Woodside, supra,* 7 Cal.4th at p. 537, 28 Cal.Rptr.2d 617, 869 P.2d 1142.)

This court has observed that the MMBA was "[a] product of political compromise," that its provisions "are confusing, and, at times, contradictory," and that it "furnishes only a 'sketchy and frequently vague framework of employer-employee relations for California's local governmental agencies.'" (*International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 197, 193 Cal.Rptr. 518, 666 P.2d 960.) In *Glendale City Employees' Assn., Inc. v. City of Glendale, supra,* 15 Cal.3d 328, 124 Cal.Rptr. 513, 540 P.2d 609, this court resolved one of the MMBA's ambiguities by holding that a written agreement (commonly termed a memorandum of understanding) entered into under the MMBA becomes binding and enforceable when the public agency employer ratifies it. (At p. 332.) Answering another important question, we held that counties with civil service systems are not exempt from the MMBA's meet-and-confer requirement. (*Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 62–65, 151 Cal.Rptr. 547, 588 P.2d 249.)

When the Legislature enacted the MMBA in 1968, it had not yet created the PERB, and it did not include in the MMBA any provisions expressly authorizing either administrative or judicial proceedings to enforce its provisions. Resolving the resulting uncertainty regarding methods of enforcement, this court in 1994 concluded that MMBA-created rights and duties were enforceable by a traditional mandate action under Code of Civil Procedure section 1085. (*Santa Clara County Counsel Attys. Assn. v. Woodside, supra,* 7 Cal.4th at p. 539, 28 Cal.Rptr.2d 617, 869 P.2d 1142.)

Although no published appellate decision ever expressly determined what statute of limitations applied to a mandate action to enforce MMBA-created rights and duties, a Court of Appeal held that the three-year statute of limitations in subdivision (a) of Code of Civil Procedure section 338 (hereafter section 338(a)) applied to an action to enforce a "state labor law." (*Giffin v. United Transportation Union, supra,* 190 Cal.App.3d at p. 1364, 236 Cal.Rptr. 6.) The parties here appear to agree that, before the Legislature vested the PERB with exclusive jurisdiction over MMBA unfair practice charges, the three-year period specified in section 338(a) applied to a traditional mandate action brought in superior court alleging an unfair practice under the MMBA.

B. The PERB

The history of the PERB begins in 1975, when the Legislature adopted the Educational Employment Relations Act (Gov.Code, §§ 3540–3549.3; hereafter the EERA), which governs employer-employee relations for

public schools (kindergarten through high school) and community colleges. (Stats.1975, ch. 961, § 2, pp. 2247–2263.) As part of this new statutory scheme, the Legislature created the Educational Employment Relations Board (EERB), "an expert, quasi-judicial administrative agency modeled after the National Labor Relations Board, to enforce the act." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 177, 172 Cal.Rptr. 487, 624 P.2d 1215.) The Legislature vested the EERB with authority to adjudicate unfair labor practice charges under the EERA. (See Stats.1975, ch. 961, § 2, pp. 2249–2252.)

The Legislature structured the EERA with the intention that it would eventually be expanded to incorporate other public employees. Thus, the EERA contains a declaration of purpose that includes this paragraph: "It is the further intention of the Legislature that any legislation enacted by the Legislature governing employer-employee relations of other public employees shall be incorporated into this chapter to the extent possible. The Legislature also finds and declares that it is an advantageous and desirable state policy to expand the jurisdiction of the board created pursuant to this chapter to cover other public employers and their employees, in the event that this legislation is enacted, and if this policy is carried out, the name of the Educational Employment Relations Board shall be changed to the 'Public Employment Relations Board.'" (Gov.Code, § 3540.)[5]

Two years later, in 1977, the Legislature enacted the State Employer–Employee Relations Act (Gov.Code, §§ 3512–3524) to govern relations between the state government and certain of its employees. (Stats.1977, ch. 1159, § 4, pp. 3751–3760.) It was later renamed, and its official name is now the Ralph C. Dills Act (hereafter the Dills Act). (Stats. 1986, ch. 103, § 1, p. 237.) Despite the declaration of purpose two years earlier in the EERA, the Legislature did not incorporate the Dills Act into the EERA, instead enacting it as a separate chapter in the Government Code preceding the EERA. The Legislature did, however, expand the jurisdiction of the EERB to include adjudication of unfair practice charges under the Dills Act, and as a result the EERB was renamed the PERB. (See Gov.Code, §§ 3513, subd. (h), 3514.5, as added by Stats.1977, ch. 1159, §§ 6–7, pp. 3761–3763.)

Since 1977, the PERB's jurisdiction has continued to expand as the Legislature has enacted new employment relations laws covering additional categories of public agencies and their employees. In 1978, the Legislature enacted the Higher Education Employer–Employee Relations Act (Gov.Code, §§ 3560–3599; hereafter the HEERA) to govern labor relations within the University of California, the California State University, and Hastings College of the Law. (Stats.1978, ch. 744, § 3, pp. 2312–2333.) In 2000, the Legislature not only brought the MMBA within the PERB's jurisdiction (Stats.2000, ch. 901, § 8), it also enacted the Trial Court Employment Protection and Governance Act (Gov.Code, §§ 71600–71675; hereafter the TCEPGA) to govern labor relations and other employment matters within the state's trial courts. (Stats.2000, ch. 1010, § 14.) In 2002, the Legislature enacted the Trial Court Interpreter Employment and Labor Relations Act (Gov.Code, §§ 71800–71829; hereafter the TCIERA) to govern labor relations and employment matters for trial court interpreters. (Stats.2002, ch. 1047, § 2.) In 2003, the Legislature enacted the Los Angeles County Metropolitan Transit Authority Transit Employer–Employee Relations Act (Pub. Util.Code, §§ 99560–99570.4; hereafter the TERA) to govern labor relations for a public transit district. (Stats.2003, ch. 833, § 1.)

In enacting the HEERA, the TCEPGA, the TCIERA, and the TERA, the Legislature followed the pattern set by the Dills Act. It did not incorporate the new laws' substantive provisions into the EERA; instead, it enacted the HEERA, the TCEPGA, and the TCIERA as separate chapters within the Government Code and the TERA as a chapter within the Public Utilities Code. But the Legislature expanded the PERB's jurisdiction to cover unfair labor practices alleged under each of these labor relations laws.

5. The chapter referred to in the quoted portion of the statute is chapter 10.7 of division 4 of title 1 of the Government Code. It includes Government Code sections 3540 to 3549.3.

(Gov.Code, §§ 3563, 71639.1, 71825; Pub. Util.Code, § 99561.)

In each of these six public employment relations laws—the Dills Act, the EERA, the HEERA, the TCEPGA, the TCIERA, and the TERA—the Legislature has expressly and separately specified a six-month limitations period for filing unfair practice charges with the PERB.[6] (Gov.Code, §§ 3514.5, subd. (a), 3541.5, subd. (a), 3563.2, subd. (a), 71639.1, subd. (c), 71825, subd. (c); Pub. Util. Code, § 99561.2, subd. (a).) Thus, the EERA provides: "Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not ... [¶] ... [i]ssue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." (Gov.Code, § 3541.5, subd. (a).)[7] The other provisions express the six-month limitations period in identical words.[8]

C. Analysis

[12, 13] As the parties recognize, determining what limitations period applies to an MMBA unfair practice charge requires construction of the relevant statutes. When engaged in statutory construction, our goal is "to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law." (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715, 3 Cal. Rptr.3d 623, 74 P.3d 726.)

The Court of Appeal here concluded that the six-month limitations period in Government Code section 3541.5, a provision of the EERA, applies also to unfair practice charges filed with the PERB under the MMBA. The PERB argues, instead, that because the Legislature did not specify a limitations period when it vested the PERB with jurisdiction over MMBA unfair practice charges, it must have intended to continue the existing three-year statute of limitations that had applied to actions filed in superior court. The PERB invokes the rule of statutory construction that when the Legislature amends a statute without altering parts of the statute that have previously been judicially construed, the Legislature is deemed to have been aware of and to have acquiesced in the previous judicial construction. (See *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, 2 Cal.Rptr.3d 699, 73 P.3d 554; *People v. Masbruch* (1996) 13 Cal.4th 1001, 1007, 55 Cal.Rptr.2d 760, 920 P.2d 705.)

[14] But "[t]he presumption of legislative acquiescence in prior judicial decisions is not

6. Six months is also the limitations period for an unfair practice charge to the Agricultural Labor Relations Board. (Lab.Code, § 1160.2.)

7. This language tracks the wording of the National Labor Relations Act. (See 29 U.S.C. § 160(b) ["no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made"].)

8. Although the six public employment relations laws all contain the same six-month limitations period, they differ in regard to tolling provisions. The HEERA and the TERA do not contain express tolling provisions. (Gov.Code, § 3563.2, subd. (a); Pub. Util.Code, § 99561.2, subd. (a).) But the four other laws contain variously worded provisions for tolling the six-month limitations period while a party exhausts other remedies. Both the Dills Act and the EERA provide that "[t]he board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery." (Gov.Code, §§ 3514.5, subd. (a), 3541.5, subd. (a).) The TCEPGA provides that "if the rules and regulations adopted by a trial court require exhaustion of a remedy prior to filing an unfair practice charge or the charging party chooses to exhaust a trial court's remedy prior to filing an unfair practice charge, the six-month limitation set forth in this subsection shall be tolled during such reasonable amount of time it takes the charging party to exhaust the remedy, but nothing herein shall require a charging party to exhaust a remedy when that remedy would be futile." (Gov.Code, § 71639.1, subd. (c).) The TCIERA similarly provides that "if the rules and regulations adopted by a regional court interpreter employment relations committee require exhaustion of a remedy prior to filing an unfair practice charge or the charging party chooses to exhaust a regional court interpreter employment relations committee's remedy prior to filing an unfair practice charge, the six-month limitation set forth in this subsection shall be tolled during such reasonable amount of time it takes the charging party to exhaust the remedy, but nothing herein shall require a charging party to exhaust a remedy when that remedy would be futile." (Gov.Code, § 71825, subd. (c).)

conclusive in determining legislative intent" (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1156, 278 Cal.Rptr. 614, 805 P.2d 873), and there are several reasons not to apply the presumption here. First, as noted above, no published decision had ever expressly held that an action alleging an MMBA unfair practice was subject to the three-year statute of limitations in section 338(a). Although the Court of Appeal in *Giffin v. United Transportation Union, supra*, 190 Cal.App.3d 1359, 236 Cal.Rptr. 6, had held that three years was the statute of limitations for an alleged violation of a state labor law, its opinion did not mention the MMBA, much less construe it. The case did not concern an employer's unfair labor practice, but an alleged breach of the duty of fair representation. The employing public agency was the Southern California Rapid Transit District, which was governed by its own specific labor relations law (Pub.Util.Code, §§ 30750–30756), and thus not subject to the MMBA. Therefore, this decision supports, at best, only a weak inference that the Legislature understood there was an existing three-year limitations period for an action alleging an MMBA unfair practice.[9]

Moreover, other MMBA actions filed in superior court were subject to other statutes of limitation. In *Anderson v. Los Angeles County Employee Relations Com.* (1991) 229 Cal.App.3d 817, 280 Cal.Rptr. 415, for example, a county employee asserted that an employee organization had violated the MMBA by denying him reinstatement after it had expelled him from membership. (*Id.* at pp. 819–822, 280 Cal.Rptr. 415.) The employee first complained to the Los Angeles County Employee Relations Commission; when it ruled against him, he petitioned the superior court for a writ of administrative mandate. (*Id.* at pp. 822–823, 280 Cal.Rptr. 415.) The statute of limitations for filing an administrative mandate petition is 90 days, not three years. (Code Civ. Proc., § 1094.6, subd. (b).) Therefore, the PERB is incorrect in asserting that *all* MMBA violation cases filed in superior court were subject to a three-year statute of limitations.

[15] Second, the statutes of limitations set forth in the Code of Civil Procedure, including the three-year period in section 338(a), do not apply to administrative proceedings. (*City of Oakland v. Public Employees' Retirement System* (2002) 95 Cal.App.4th 29, 47–48, 115 Cal.Rptr.2d 151; *Robert F. Kennedy Medical Center v. Department of Health Services* (1998) 61 Cal.App.4th 1357, 1361–1362, 72 Cal.Rptr.2d 180; *Little Company of Mary Hospital v. Belshé* (1997) 53 Cal.App.4th 325, 329, 61 Cal.Rptr.2d 626; *Bernd v. Eu* (1979) 100 Cal.App.3d 511, 515, 161 Cal.Rptr. 58.) The PERB concedes this point and does not argue that section 338(a) applies to MMBA unfair practice charges filed with the PERB. Instead, the PERB argues that the Legislature's silence should be construed as indicating its intent that the three-year limitations period should continue, *even though its statutory basis would no longer exist.*

We view this suggested inference as implausible and unsupported. As we have remarked, "[i]n the area of statutory construction, an examination of what the Legislature has done (as opposed to what it has left undone) is generally the more fruitful inquiry." (*Harris v. Capital Growth Investors XIV, supra*, 52 Cal.3d at p. 1156, 278 Cal.Rptr. 614, 805 P.2d 873.) Here, what the Legislature did was to remove from the courts their initial jurisdiction over MMBA unfair practice charges. Assuming the Legislature was aware that a three-year limitations period had applied to traditional mandate actions filed in superior court to enforce the MMBA, we assume also that the Legislature was aware that section 338(a)'s three-year period was forum specific—that is, it applied only to judicial proceedings. By changing the forum—vesting an administrative agency (the PERB) rather than the courts with initial jurisdiction over MMBA

9. The PERB directs our attention to *Key v. Housing Authority of the City of Oakland* (N.D.Cal. Mar. 8, 1994, No. C 93-1880 BAC) 1994 WL 90182, a federal district court order dismissing a complaint on the ground it was filed beyond the applicable limitation date. The order does not mention the MMBA, and it was not reported in the Federal Supplement. Therefore, it is unlikely that members of the Legislature were aware of it or had it in mind when they voted in 2000 to bring the MMBA within the PERB's jurisdiction.

charges—the Legislature abrogated the three-year statute of limitations under section 338(a), and we assume that this abrogation was intentional and not inadvertent.

[16] Finally, and perhaps most importantly, we do not construe statutes in isolation; rather, we construe every statute with reference to the whole system of law of which it is a part, so that all may be harmonized and anomalies avoided. (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 222, 17 Cal. Rptr.3d 842, 96 P.3d 141; *Mejia v. Reed* (2003) 31 Cal.4th 657, 663, 3 Cal.Rptr.3d 390, 74 P.3d 166.) The MMBA, which we construe here, is part of a larger system of law for the regulation of public employment relations under the initial jurisdiction of the PERB. The PERB suggests no way in which MMBA unfair practice charges differ from unfair practice charges under the other six public employment relations laws within the PERB's jurisdiction—the Dills Act, the EERA, the HEERA, the TCEPGA, the TCIERA, and the TERA—so as to justify a limitations period that is *six times longer* than the six months allowed under each of these other laws. The PERB suggests no rational ground upon which the Legislature could have decided to treat MMBA unfair practices charges so differently in regard to the limitations period. We find it reasonable to infer that the Legislature intended no such anomaly, and that it intended, rather, a coherent and harmonious system of public employment relations laws in which all unfair practice charges filed with the PERB are subject to the same six-month limitations period.

The PERB relies also on the rule of statutory construction that when the Legislature uses a critical word or phrase in one statute, the omission of that word or phrase in another statute dealing with the same general subject generally shows a different legislative intent. (See *In re Young* (2004) 32 Cal.4th 900, 907, 12 Cal.Rptr.3d 48, 87 P.3d 797.) Thus, the PERB argues that because the Legislature included an express six-month limitation period in every other public employment relations law under the PERB's jurisdiction, the omission of an express six-month limitation period in the MMBA is compelling evidence of a different legislative intent. We would agree if there were any plausible ground for the Legislature to draw such a distinction, or, in other words, if this line of reasoning did not lead to an inexplicable anomaly. The rule that the PERB cites is merely one of several guides to statutory construction; it applies generally but not universally, and we do not find it helpful or controlling here.

The PERB argues that nothing in the language of the MMBA supports an inference that the Legislature intended a six-month limitations period for an MMBA unfair practice charge. But Government Code section 3509, which vests the PERB with jurisdiction over MMBA matters, states in subdivision (b) that "[a] complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 *shall be processed as an unfair practice charge by the board.*" (Italics added.) This language is appropriately read as referring to and incorporating an existing body of law concerning the manner in which the PERB processes unfair practice charges, including the limitations period for unfair practices charged under the three other then-existing public employment relations laws—the EERA, the Dills Act, and the HEERA. The Legislature's later adoption of a six-month limitations period for the TCEPGA, the TCIERA, and the TERA is further evidence that the Legislature regards six months as an appropriate limit for bringing an unfair practice charge under each of the various schemes governing employer-employee relations in state and local government, all of which are now under the PERB's jurisdiction.

The PERB argues that Government Code section 3509, subdivision (b), which requires the PERB to "apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter," should be construed as requiring the PERB to continue applying the three-year statute of limitations previously applied to judicial proceedings to enforce the MMBA. (See also Gov. Code, § 3510, subd. (a) ["The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and

in accordance with judicial interpretations of this chapter."].) This provision is most reasonably construed as incorporating existing judicial interpretations of substantive provisions of the MMBA, including what constitutes an unfair labor practice, but not as incorporating judicial decisions prescribing the procedures that were deemed suitable to *judicial* enforcement proceedings. In any event, there was no existing judicial precedent on the appropriate limitations period for an MMBA unfair practice charge to the PERB.

We have reviewed the documents judicially noticed by the Court of Appeal relating to Senate Bill 739 (1999–2000 Reg. Sess.), the legislation that vested the PERB with jurisdiction over MMBA unfair practice charges. (See *Dowhal v. SmithKline Beecham Consumer Healthcare* (2004) 32 Cal.4th 910, 922, fn. 4, 12 Cal.Rptr.3d 262, 88 P.3d 1 [documents that the Court of Appeal has judicially noticed become part of the record on appeal]; *Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal.4th 483, 502, fn. 22, 66 Cal.Rptr.2d 304, 940 P.2d 891; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274, fn. 7, 41 Cal.Rptr.2d 220, 895 P.2d 56.) We find nothing in those documents to cause us to alter our conclusion that the Legislature intended a six-month limitations period for an MMBA unfair practice charge to the PERB. The topic of a limitations period for an unfair practice charge is not discussed in any of the legislative documents, nor do the documents suggest that the Legislature regarded the MMBA as differing from other public employment labor laws under the PERB's jurisdiction in a manner that would require or justify a substantially longer limitations period.

IV. Retroactivity

[17] The PERB and the CSEA argue that if, as we have concluded, transfer of initial jurisdiction over MMBA unfair practice charges from the superior courts to the PERB shortened the limitations period from three years to six months, this shortened period may not be applied retrospectively to unfair practices occurring before July 1, 2001, the legislation's effective date or, indeed, to any unfair practice occurring before the Court of Appeal's decision.

[18, 19] Legislation that shortens a limitations period is considered procedural and is applied retroactively to preexisting causes of action, so long as parties are given a reasonable time in which to sue. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437, 186 Cal.Rptr. 228, 651 P.2d 815; *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122–123, 47 P.2d 716; *Carlson v. Blatt* (2001) 87 Cal. App.4th 646, 650–651, 105 Cal.Rptr.2d 42.) When necessary to provide a reasonable time to sue, a shortened limitations period may be applied prospectively so that it commences on the effective date of the statute, rather than on the date the cause of action accrued. (*Rubinstein v. Barnes* (1987) 195 Cal.App.3d 276, 281–282, 240 Cal.Rptr. 535; *Niagara Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40, 42–43, 44 Cal.Rptr. 889.)

Applying these legal principles, the Court of Appeal in this case concluded that the legislation vesting PERB with jurisdiction over MMBA unfair practice charges, effective July 1, 2001, shortened the applicable limitations period from three years to six months. This shortened limitations period applies retroactively to MMBA unfair practice charges based on conduct that occurred before July 1, 2001, provided that parties are given a reasonable time in which to file such charges with the PERB. Concluding that six months was a reasonable time in this context, the Court of Appeal held that for MMBA unfair practices occurring before July 1, 2001, a charge filed with the PERB was timely if brought within three years of the occurrence of the unfair practice, or within six months of July 1, 2001 (in other words, before January 1, 2002), whichever was sooner. We agree that this is a correct application of the controlling legal principles.

The PERB and the CSEA argue in substance that the Court of Appeal's holding retroactively extinguishes existing unfair practice claims because parties had no notice of the six-month limitations period until the Court of Appeal issued its decision. This assertion erroneously assumes that the Court of Appeal, rather than the Legislature, short-

ened the limitations period to six months and that this shortened limitations period took effect only when the Court of Appeal issued its decision. To the contrary, the Legislature established the six-month limitations period, effective July 1, 2001. After that date, there was no valid legal basis for any party, or for the PERB, to rely on the previous three-year limitations period, which had applied to judicial actions to enforce the MMBA. In determining the applicable limitations period, the Court of Appeal merely decided a legal question; it did not change any settled rule on which parties could reasonably have relied. (See *Brennan v. Tremco Inc.* (2001) 25 Cal.4th 310, 318, 105 Cal. Rptr.2d 790, 20 P.3d 1086.) Its holding, which we adopt, did not constitute an unfair retroactive change in the law.

V. Disposition

The Court of Appeal's judgment is affirmed.

WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, BROWN and MORENO, JJ.

35 Cal.4th 1094

29 Cal.Rptr.3d 249

Philip Le FRANCOIS et al., Plaintiffs and Appellants,

v.

Prabhu GOEL et al., Defendants and Respondents.

No. S126630.

Supreme Court of California.

June 9, 2005.

As Modified June 10, 2005.

Background: The Superior Court of Santa Clara County, No. CV787632, Robert A. Baines, J., granted defendants' motion for summary judgment after motion had been denied by another judge, and entered judgment for defendants. Plaintiffs appealed. The Court of Appeal affirmed; 14 Cal. Rptr.3d. 321.

Holding: The Supreme Court granted review, superseding the opinion of the Court of Appeal, and in an opinion by Chin, J., held that statutes dealing with reconsideration of rulings may constitutionally limit the parties' ability to file repetitive motions, but not the trial court's ability, on its own motion, to reconsider its prior interim orders so it may correct its own errors; disapproving *Scott Co. v. United States Fidelity & Guaranty Ins. Co.*, 107 Cal. App.4th 197, 132 Cal.Rptr.2d 89; *Wozniak v. Lucutz*, 102 Cal.App.4th 1031, 126 Cal. Rptr.2d 310; *Kollander Construction, Inc. v. Superior Court*, 98 Cal.App.4th 304, 119 Cal.Rptr.2d 614; *Blake v. Ecker*, 93 Cal. App.4th 728, 113 Cal.Rptr.2d 422; and *Remsen v. Lavacot*, 87 Cal.App.4th 421, 104 Cal.Rptr.2d 612.

Reversed and remanded.

Concurring and dissenting opinion by Kennard, J.

Opinion 14 Cal.Rptr.3d. 321, superseded.

1. Constitutional Law ⇐52

The Legislature generally may adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not defeat or materially impair a court's exercise of its constitutional power or the fulfillment of its constitutional function. West's Ann.Cal. Const. Art. 3, § 3.

2. Constitutional Law ⇐52

The separation of powers test applicable to statutes restricting trial courts' reconsideration of rulings is that the Legislature may regulate the courts' inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts' exercise of that power. West's Ann.Cal. Const. Art. 3, § 3. West's Ann.Cal. C.C.P. §§ 437c(f)(2), 1008.

Exhibit 7

County of Los Angeles v. Commission on State Mandates
(2003)
110 Cal.App.4th 1176

110 Cal.App.4th 1176
Court of Appeal, Second District, Division 7, California.

COUNTY OF LOS ANGELES, Plaintiff and Respondent,
v.
COMMISSION ON STATE MANDATES, Defendant and Appellant;
Department of Finance, Real Party in Interest and Appellant.

No. B156870.
|
July 28, 2003.

Synopsis
Background: County petitioned for writ of mandate, seeking to vacate decision of the Commission on State Mandates which denied county's test claim for costs associated with statute requiring local law enforcement officers to participate in two hours of domestic violence training. The Superior Court, Los Angeles County, No. BS06497, Dzintra I. Janavs, J., granted the petition. Commission appealed.

[Holding:] The Court of Appeal, Muñoz (Aurelio), J., sitting by assignment, held that statute did not mandate any increased costs and thus Commission was not required to reimburse county for its costs.

Reversed with directions.

Attorneys and Law Firms

****422 *1178** Paul M. Starkey, Camille Shelton, Sacramento, and Katherine Tokarski, for Defendant and Appellant Commission on State Mandates.

Bill Lockyer, Attorney General, Andrea Lynn Hoch, Senior Assistant Attorney General, Louis R. Mauro and Catherine M. Van Aken, Supervising Deputy Attorneys General and Geoffrey L. Graybill, Deputy Attorney General, for Real Party in Interest and Appellant Department of Finance.

Lloyd W. Pellman, County Counsel and Stephen R. Morris, Principal Deputy County Counsel, for Plaintiff and Respondent County of Los Angeles.

Opinion

MÚNOZ (AURELIO), J.*

A 1995 amendment to Penal Code section 13519[1] requires local law enforcement officers to participate in two hours of domestic violence training. The issue on appeal is whether this amendment resulted in a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for the time spent by local law enforcement officers in such domestic violence training, although such officers were already required to spend 24 hours in continuing education training and the domestic violence training could be included within this total.

This administrative mandamus proceeding was commenced by the County of Los Angeles (County) on a "test claim" filed with and denied by the ***1179** Commission on State Mandates (Commission) for the County's costs incurred pursuant to section 13519. The trial court found that California Constitution article XIII B, section 6 required the state to reimburse the County for domestic violence training because the County's needs and priorities might be detrimentally affected when the state took away two hours of training by mandating that two specific hours of training occur. The trial court remanded the proceedings to the Commission to determine the amount of costs actually incurred by the County. We reverse.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Article XIII B, section 6 of the California Constitution provides: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service...." (Cal. Const., art. XIII B, § 6.) The Commission is charged with hearing and deciding local agency claims of entitlement to reimbursement under article XIII B, section 6. (Gov.Code, § 17551, subd. (a).) Pursuit of such a claim is the exclusive remedy for this purpose (Gov.Code, § 17552), but the Commission's decisions are subject to review by administrative mandamus, under Code of Civil Procedure section 1094.5. (Gov.Code, § 17559, subd.

(b).) A "test claim" is "the first claim, **423 including claims joined or consolidated with the first claim, filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state." (Gov.Code, § 17521; see also *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 328–329, 331–333, 285 Cal.Rptr. 66, 814 P.2d 1308.)

In 1995, section 13519, subdivision (e) was amended to provide: "(e) Each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence calls or incidents of domestic violence shall complete, every two years, an updated course of instruction on domestic violence that is developed according to the standards and guidelines developed pursuant to subdivision (d). The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government."[2]

*1180 Penal Code section 13510,[3] et seq. requires the State Commission on Peace Officer Standards and Training (POST) to promulgate regulations establishing minimum state standards relating to physical, mental, and moral fitness, and minimum training standards for law enforcement officers. Compliance with POST's requirements is voluntary. (Pen.Code, § 13510 et seq.) POST has a certification program for peace officers specified in sections 13510 and 13522 and for the California Highway Patrol. (Pen.Code, §§ 13510.1, subds.(a)-(c), 13510.3.)

On or about December 26, 1996, the County filed a "test claim"[4] pursuant to Government Code section 17522 with the Commission.[5] The test claim alleged that **424 neither local police officers nor their agencies were given any choice with respect to compliance with section 13519. However, in order to implement the training, the County was required to redirect its officers from their normal work in order to attend the two-hour domestic violence training. The County alleged this substitution of the work agenda of the state for that of the local government violated California Constitution article XIII B, section 6. Furthermore, the County pointed to language in *1181 Penal Code section 13519, subdivision (e), providing that, "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government entities."

The test claim alleged that although POST bore the cost of producing two-hour telecourses on domestic violence, POST did not provide for any local law enforcement salary reimbursement for attendance at any type of POST-certified training, including the state-mandated costs for domestic violence training. Adherence to POST standards is voluntary by local law enforcement agencies, but POST requires a minimum of 24 hours of training every two years, to be chosen from a menu of available courses. POST does not dictate the courses that must be taken. POST courses include training in, among other things: interviewing techniques for detectives, defensive weapons, CPR, conflict resolution, bicycle patrol, ritual crime and hate group offenders, vehicle pullover and approach, confessions, courtroom demeanor, electronic vehicle recovery systems, vehicle theft investigation, and cultural awareness.

The POST program gives local law enforcement agencies flexibility in choosing training programs to meet their differing needs. In addition to domestic violence training, certain other programs are legislatively mandated: dealing with the developmentally disabled/mentally ill training (implemented July 1992); high speed vehicle pursuits (implemented November 1994); first aid/CPR (a 21–hour initial course, with a 12–hour refresher course every three years); missing persons (implemented January 1989); racial and cultural diversity (implemented August 1983); sexual harassment (implemented November 1994); and sudden infant death syndrome (implemented July 1990). The time requirements for these other required courses vary. Some elective courses require 40 hours to complete.

However, the County alleged because there were no existing resources available for the domestic violence training, the annual training costs of the County were increased as a result of section 13519. The County Sheriff's Department incurred costs of $170,351.45 for domestic violence training for the fiscal year 1996–1997.

In support of its test claim, the County submitted legislative materials relating to section 13519. These included: A July 5, 1995 memorandum in which the Assembly Committee on Appropriations stated that Senate Bill No. 132, proposing the changes **425 to 13519, understood the "training requirement could have significant costs to local law enforcement in terms of expense and public safety, as most departments will be forced to backfill for offices while the officers are being trained or will have to forego the *1182 backfilling and have fewer offices on patrol. Any monetary costs incurred by local law enforcement for the officer backfilling would be state-reimbursable." The Committee noted that, "Although this bill states that the costs of the additional domestic violence training be absorbed by POST within

existing resources, the reality is that this bill would create additional non-absorbable costs to POST since POST will be unable to exclude one type of training in favor of the domestic violence training, and instead will have to add this training to their current curriculum. The current curriculum of POST training is just as important to the maintaining of public safety as is the additional domestic violence training."

In addition, the Department of Finance recognized the fiscal impact of section 13519 on local law enforcement agencies, and opposed the adoption of Senate Bill No. 132. Diane M. Cummins, Deputy Director of the State Department of Finance, wrote to Senator Diane Watson on April 20, 1995, that, "This bill also specifies that training required pursuant to this measure 'shall be funded from existing resources', as specified. In so specifying, this bill would also require law enforcement agencies to modify existing training programs by increasing training requirements. Finance believes this bill contains a local mandate without providing necessary funding, thereby being in conflict with the California Constitution, which requires the state to fund local mandate costs. Although there is no specific information available regarding the level of additional costs which would be imposed on law enforcement agencies, the Department of Finance is opposed to legislation which would result in additional General Fund expenditures, given the State's ongoing fiscal constraints." The Department of Finance recognized that, "Adding mandatory domestic violence training requirement would result in an additional unknown cost for specified state and local law enforcement agencies...."

Furthermore, Gretchen Fretter, Chair of the California Academy Directors' Association (an organization of training center directors and police academy managers throughout the state) wrote Senator Watson on March 9, 1995, to express the association's concerns with Senate Bill No. 132. Fretter's analysis indicated that the mandate would incur a $300,000 price tag for each training cycle. The California State Sheriffs' Association also wrote to express concerns about Senate Bill No. 132, including that POST estimated the domestic violence training would add costs to local agencies of at least $750,000 per year. Glen Fine, the Deputy Executive Director of POST, on July 11, 1997, wrote to the Department of Finance to inform it that POST understood that the author of Senate Bill No. 132 was aware of POST's training requirements of 24 hours every two years, and it was "the author's intent ... that domestic violence update training become a statutorily required priority for inclusion within this 24 hours of training every two years."

***1183** POST issued a bulletin in February 1996 advising local law enforcement agencies of the new domestic violence training requirement.

The Department of Finance contended that the Legislature intended the domestic violence continuing education and training to be funded from existing resources. The department also contended that POST, which was charged with developing training ****426** standards for local law enforcement agencies, provided over $21 million in existing state funds for domestic violence training. POST pointed out that the drafter of the statute recognized the 24 hours of continuing education every two years, and intended the domestic violence training to be a priority to be included within this 24–hour requirement.

At the hearing before the Commission on the test claim, representatives of the County testified that POST refused to pay for the programs, putting the burdens on local governments, and POST itself had estimated the annual cost of the program at $750,000. A representative of the Sheriff's Department (Captain Dennis Wilson) testified that of the 24 hours required, any combination of courses could be used to meet the requirement. However, inclusion of the domestic violence training would take away two of those hours of training, resulting in only 22 hours. The Sheriff's Department would conduct domestic violence training even in the absence of the mandate; indeed; the Sheriff's Department actually conducted about 72 hours of training per officer per year. There was no funding for any of this training. The Sheriff's Department has 8,200 sworn officers, and two hours of training per officer adds up to 16,400 hours, which translates to 10 full-time officers for a year. Without funding for the domestic violence training, the Sheriff's Department therefore would lose the time equivalent of 10 officers for a year. Taking officers off the street impacts upon crime.

Martha Zavala testified on behalf of the County that the domestic violence training could not merely be subsumed within the 24 hours already required. With the training mandates already required by POST which exceed the 24–hour minimum, adding the domestic violence training only further exceeds the minimum 24 hours. There is no room to carve it out. Meeting POST requirements is not really an option. Thus, both the Sheriff's Department and the County agree they are seeking reimbursement of the costs of the training and the cost of replacing the officers on the street while in training.

A representative of POST testified that what POST provides in reimbursement to local law enforcement agencies is a small percentage of the real costs incurred. Where the training involved is through a telecourse, POST provides no reimbursement. There has been no

increase in POST's budget since the amendment to section 13519. About 30 of the courses provided by POST are mandated training.

***1184** A representative of the Department of Finance testified that the Department believed section 13519 did not create state-mandated reimbursable program because the legislation indicated it was the Legislature's intent not increase the training costs of local government, and the training could be fit within the existing 24–hour requirements.

The Commission's staff prepared an analysis in advance of the hearing which found against the County. The "Staff Analysis" pointed out that section 13519 was originally added by chapter 1609, Statutes of 1984.[6] Originally, the statute required ****427** that POST develop and implement a basic course of instruction for the training of law enforcement officers in the handling of domestic violence complaints, with local law enforcement agencies encouraged, but not required, to provide updates. These provisions of the 1984 version were the subject of a test claim filed by the City of Pasadena in 1990. That claim was denied because the original statute did not require local agencies to implement or pay for a domestic violence training program, did not increase the minimum basic training course hours or advanced officer training hours, and did not require local agencies to provide domestic violence training pursuant to the POST skills and knowledge standards.

Legally, the Staff Analysis pointed out that in order for a statute to impose a reimbursable state-mandated program, the statutory language must (1) direct or obligate an activity or task upon local government entities, and (2) the required activity or task must be new or it must create an increased or higher level of service over the former required level of service. (See, e.g., *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202.) The Staff Analysis concluded that section 13519 did impose a new activity or program upon local law enforcement agencies. However, because the language of the statute requiring that the instruction be funded from existing resources, it was an open question whether the program imposed *mandated* costs. Because POST's minimum requirements remained at 24 hours before and after enactment of section 13519, there were no increased training hours and costs associated with the domestic violence training course. Instead, the course should be accommodated or absorbed by ***1185** local law enforcement agencies within their existing resources available for training. Thus, the Staff Analysis recommended denial of the test claim.

After the public hearings were held, the Commission adopted the findings of the Staff Analysis. The Commission issued its own statement of decision which substantially adopted the findings of the Staff Analysis.

Subsequently, the County filed a petition for writ of mandate with the trial court, seeking vacation of the Commission's decision. The County argued that the domestic violence training constituted a state-mandated reimbursable program because it (1) was mandatory, while the POST certification training was optional; and (2) the only way local agencies could avoid the costs of the new program would be to redirect their efforts from the training they were already providing as part of POST training, thereby losing flexibility to design programs to suit their own needs.

The Commission argued that the County's focus on "redirected" manpower costs was misplaced. Instead, the focus should be on whether the local law enforcement agencies actually experience increased expenditure of their tax revenues. (See, e.g., *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1283, 101 Cal.Rptr.2d 784.) In *County of Sonoma,* the court stated that California Constitution article XIII B, section 6 was designed to prevent the state from forcing programs on local governments, and such a forced program is one which results in "increased actual expenditures ****428** of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned with 'costs' incurred by local governments as a result of state-mandated programs, particularly when the costs of compliance with a new program restrict local spending in other areas." (*County of Sonoma,* at p. 1284, 101 Cal.Rptr.2d 784.) Because section 13519 did not require the County to incur "actual increased costs" because the domestic violence training could be subsumed within the 24–hour POST training requirement, no state reimbursement was required.

The Commission also argued the state had not required the County to incur increased training costs for salaries of officers to receive the two-hour training. POST's requirements did not change as a result of section 13519, and indeed, shortly after the enactment of section 13519, POST forwarded a bulletin to local law enforcement agencies suggesting they include domestic violence training within the 24–hour continuing training requirement.

***1186** The trial court heard argument, after which the trial court adopted its tentative statement of decision in which

it noted that, "Although it may be reasonable in some or even most cases for a deputy to eliminate an unrequired two-hour elective in favor of the required domestic violence instruction, what about cases where the County's needs and priorities would be affected detrimentally, if two hours of electives were taken away? At what point would additional mandated courses result in increased costs? [¶] The record also shows that, for some deputies, other state-required training already amounts to 24 hours or more per two-year period. For these deputies, the two hours of mandated domestic violence training cannot be accommodated by giving up other training but must be added on, for added cost. It appears that, if domestic violence instruction is to be funded from existing resources on a deputy-by-deputy basis, the County clearly does incur increased costs." The trial court granted the petition, and remanded the matter for consideration of the exact amount of increased costs.

DISCUSSION

I. STANDARD OF REVIEW.

[1] [2] [3] The determination whether the statute here at issue established a mandate under California Constitution article XIII B, section 6, is a question of law. (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Under Government Code section 17559,[7] administrative mandamus is the exclusive means to challenge a decision of the Commission on a subvention claim. (*Redevelopment Agency v. Commission on State Mandates* (1997) 55 Cal.App.4th 976, 980, 64 Cal.Rptr.2d 270.) "Government Code section 17559 governs the proceeding below and requires that the trial court review the decision of the Commission under the substantial evidence standard. Where the substantial evidence test is applied by the trial court, we are generally confined to inquiring whether substantial evidence supports the court's findings and judgment. [Citation.] However, we independently review the superior court's legal ****429** conclusions about the meaning and effect of constitutional and statutory provisions. [Citation.]" (*City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1810, 53 Cal.Rptr.2d 521.)

*1187 II. SECTION 13519'S IMPOSITION OF A DOMESTIC VIOLENCE TRAINING COURT IS NOT A STATE–MANDATED PROGRAM WITHIN THE MEANING OF CONSTITUTION ARTICLE XIII B, SECTION 6 BECAUSE IT DOES NOT CONSTITUTE AN "INCREASED LEVEL OF SERVICE."

[4] The Commission essentially makes two arguments. First, it contends that the County did not incur "increased costs." Reimbursement to the County under Constitution article XIII B, section 6 is not required unless there is a showing of actual increased costs mandated by the state. (See, e.g., *County of Los Angeles v. State of California, supra,* 43 Cal.3d at pp. 54–55, 233 Cal.Rptr. 38, 729 P.2d 202; *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 66–67, 266 Cal.Rptr. 139, 785 P.2d 522.) In *City of Sacramento,* the court explained that the statutory concept of "costs mandated by the state" and the constitutional concept of article XIII B, section 6, are identical. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 67, fn. 11, 266 Cal.Rptr. 139, 785 P.2d 522.) Because of this limited, rather than broad definition, of "costs mandated by the state," article XIII B, section 6 does not provide reimbursement for every single increased cost. Thus, the trial court's finding that reimbursement was required where a statute results in a "redirection of local effort" or a "detrimental change in a local agency's needs and priorities" is not supported by the law. Rather, it constitutes an inappropriate injection of an equitable standard into the analysis.

Secondly, the Commission argues that no "mandate" exists. To the contrary, substantial evidence supports its finding that section 13519 does not result in *increased* costs because nothing in the statute requires the County, or any other local law enforcement agency, to incur actual increased costs. The total number of hours required (the 24 minimum hours of POST training) did not increase because of the domestic violence training; rather, POST still requires 24 hours and in fact after the passage of section 13519, POST forwarded a bulletin to law enforcement agencies recommending that they include domestic violence training within the 24-hour continuing professional training requirement. Because the POST standards are voluntary, if a local law enforcement agencies adds two hours of domestic violence training to either the POST requirement or its own requirements, it is doing so at its own discretion.

In response, the County points out that the Commission's conclusion is based upon the erroneous premise that local law enforcement agencies could escape increased costs simply by dropping two hours of their existing POST training and substituting the new domestic violence training. However, the evidence in the legislative history indicates that this was not the intent of the Legislature when it was considering section 13519, nor was it the position of ***1188** the Department of Finance. The County

also contends that local law enforcement agencies incur costs when they sacrifice their existing training programs for the new domestic violence training. Although POST does not dictate those courses for which a local law enforcement agency must offer training and POST does pay for much of the training material, most of the cost of POST training is borne by the local law enforcement agencies in the form of personnel costs while deputies spend 24 hours of work time receiving **430 training. Furthermore, if a mere legislative directive to fund a new program with existing resources would let the state off the hook for reimbursement, then the constitutional rule of mandate reimbursement would be a nullity: any new state mandate can be funded by canceling other services. Because California Constitution article XIII B, section 6 was designed to prevent the elimination of the fiscal freedom of local governmental agencies to expend their limited available resources without being straightjacketed by state-mandated programs, the Commission's "within existing resources" rule would circumvent the purposes of article XIII B, section 6.

A. The Purposes of California Constitution Article XIII B, Section 6 Guide Our Analysis.

[5] In 1978, the voters approved Proposition 13, which added article XIII A to the California Constitution. Article XIII A "imposes a limit on the power of state and local governments to adopt and levy taxes. [Citation.]" (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486, 280 Cal.Rptr. 92, 808 P.2d 235.) In 1979, Proposition 4 added article XIII B to the Constitution, which imposed a complementary limit on governmental spending. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 574, 7 Cal.Rptr.2d 245, 828 P.2d 147.) These two constitutional provisions "work in tandem, together restricting California government's power both to levy and to spend for public purposes." (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.) Their goal is to protect citizens from excessive taxation and government spending. (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 61, 233 Cal.Rptr. 38, 729 P.2d 202.)

[6] California Constitution article XIII B, section 6, provides in relevant part: "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service." Article XIII B, section 6, prevents the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are "ill equipped" to assume increased financial responsibilities because of the taxing and spending limitations of articles XIII A and XIII B. (*County of Fresno v. State of California, supra,* 53 Cal.3d at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235.) Section 6 thus requires the state "to pay for any new *1189 governmental programs, or for higher levels of service under existing programs, that it imposes upon local governmental agencies. [Citation.]" (*Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1577, 15 Cal.Rptr.2d 547.)

[7] [8] [9] [10] [11] [12] [13] State mandate jurisprudence has established that in general, local agencies are not entitled to reimbursement of all increased costs mandated by state law, but only those resulting from a "new" program or an "increased level of service" imposed upon them by the state. (*Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835, 244 Cal.Rptr. 677, 750 P.2d 318.) A "program" is defined as a program which carries out the "governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state." (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.) A program is "new" if the local governmental entity had not previously been required to **431 institute it. (*City of San Jose v. State of California, supra,* 45 Cal.App.4th at p. 1812, 53 Cal.Rptr.2d 521.) State mandates are requirements imposed on local governments by legislation or executive orders. (*County of Los Angeles v. State of California, supra,* 43 Cal.3d at p. 50, 233 Cal.Rptr. 38, 729 P.2d 202.) Since the purpose of California Constitution article XIII B, section 6 is to avoid governmental programs from being forced on localities by the state, programs which are not unique to the government do not qualify; the programs must involve the provision of governmental services. (*City of Sacramento v. State of California, supra,* 50 Cal.3d at p. 68, 266 Cal.Rptr. 139, 785 P.2d 522.) Further, in order for a state mandate to be found, the local governmental entity must be required to expend the proceeds of its tax revenues. (*Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, supra,* 55 Cal.App.4th at p. 986, 64 Cal.Rptr.2d 270.) Lastly, there must be compulsion to expend revenue. (*City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 780, 783, 200 Cal.Rptr. 642 [revisions to Code of Civil Procedure required entities exercising the power of eminent domain to compensate businesses for lost goodwill did not create state mandate, because the power of eminent domain was discretionary, and need not be exercised at all]; *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 134 Cal.Rptr.2d 237, 68 P.3d

1203.) In *Lucia Mar,* the court explained article XIII B, section 6. "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' " (*Lucia Mar Unified School District v. Honig, supra,* 44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.)

However, in spite of all of the above, "increased level of service" is not defined in California Constitution article XIII B, section 6 or in the ballot materials. ***1190** (*Long Beach Unified School District v. State of California* (1990) 225 Cal.App.3d 155, 173, 275 Cal.Rptr. 449.) Furthermore, "Although a law is addressed only to local governments and imposes new costs on them, it may still not be a reimbursable state mandate." (*City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1197, 75 Cal.Rptr.2d 754.)

In *City of San Jose v. State of California, supra,* 45 Cal.App.4th 1802, 53 Cal.Rptr.2d 521, Government Code section 29550 authorized counties to charge cities and other local entities for costs of booking into county jails persons who had been arrested by employees of the cities and other entities. (45 Cal.App.4th at p. 1806, 53 Cal.Rptr.2d 521.) The State argued the measure merely reallocated booking costs, no shifting from state to local entities, therefore not within article XIII B, section 6. (45 Cal.App.4th at p. 1806, 53 Cal.Rptr.2d 521.) The city contended counties function as agents of the state, charged with enforcement of state's criminal laws; detaining and booking integral part of this process. (*Id.* at p. 1808, 53 Cal.Rptr.2d 521.) The Commission found maintenance of jails and detention of prisoners, had always been a local matter, and cities and counties were both forms of local government; therefore, there was no shift in costs between *state* and local entities.

Furthermore, the terms of Government Code section 29550 were discretionary, not mandatory. (*City of San Jose v. State of California, supra,* 45 Cal.App.4th at pp. 1808–1809, 53 Cal.Rptr.2d 521.) *City of San Jose* found no cost had been improperly transferred to the local government ****432** entities because the cost of capture, detention and housing of persons charged with crimes had traditionally been borne by the counties. (*Id.* at p. 1813, 53 Cal.Rptr.2d 521.) *City of San Jose* rejected the cities' argument that the county was acting as agent of the state because it was "not supported by recent case authority, nor does it square with definitions particular to subvention analysis." (*Id.* at p. 1814, 53 Cal.Rptr.2d 521.) California Constitution article XIII B treated cities and counties alike; Government Code section 17514 defines "costs mandated by the state" to mean any increased costs that a "local agency" is required to incur. Because both cities and counties were to be treated alike for purposes of subvention analysis, nothing in article XIII B, section 6 prohibits the shifting of costs between local government entities. (*City of San Jose,* at p. 1815, 53 Cal.Rptr.2d 521.)

In *County of Los Angeles v. State of California, supra,* 43 Cal.3d 46, 233 Cal.Rptr. 38, 729 P.2d 202, Labor Code sections 4453, 4453.1 and 4460, increased the maximum weekly wage upon which temporary and permanent disability indemnity was computed from $231 to $262.50 per week. In addition, Labor Code section 4702 increased certain death benefits from $55,000 to $75,000. The trial court held that because the changes did not exceed costs of living changes, they did not create an "increased level of service." (43 Cal.3d at p. 52, 233 Cal.Rptr. 38, 729 P.2d 202.) The County argued the terms of California Constitution article XIII B, section 6, do not contain an exception for increased costs which do not exceed the inflation rate. (43 Cal.3d at p. 53, 233 Cal.Rptr. 38, 729 P.2d 202.) The County relied on certain repealed Revenue and ***1191** Taxation Code definitions which had equated any program which imposed "additional costs" as being within the constitutional provision of "increased level of service." (*Id.* at p. 53, 233 Cal.Rptr. 38, 729 P.2d 202.) *County of Los Angeles* rejected this interpretation. "If the Legislature had intended to continue to equate 'increased level of service' with 'additional costs,' then the provision would be circular: 'costs mandated by the state' are defined as 'increased costs' due to an 'increased level of service,' which, in turn, would be defined as 'additional costs.' " (*Id.* at p. 55, 233 Cal.Rptr. 38, 729 P.2d 202.) An examination of the language of California Constitution article XIII B, section 6 shows that "by itself, the term 'higher level of service' is meaningless." *Id.* at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202. Rather, it must be read in conjunction with the phrase " 'new program.' " *Ibid.* "Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'programs.' " (*Ibid.*) By " 'program,' " the voters meant "programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, imposed unique requirements on local governments and do not apply generally to all residents and entities in the state." (*Ibid.*) 233 Cal.Rptr. 38, 729 P.2d 202.) The ballot materials provided that article XIII B, section 6 would "not allow the state government to *force programs* on local governments without the state paying for them." (43 Cal.3d at p. 56, 233 Cal.Rptr. 38, 729 P.2d 202.) "Laws of

general application are not passed by the Legislature to 'force' programs on localities." (*Id.* at p. 57, 233 Cal.Rptr. 38, 729 P.2d 202.) In light of this, "[t]he language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay ****433** for any incidental increase in local costs.... If the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word 'program' was being used in such a unique fashion." (*Id.* at p. 57, 233 Cal.Rptr. 38, 729 P.2d 202.) Therefore, there was no need to pay for increase in worker's compensation, because it is not a program administered by local agencies to provide service to the general public. Local government entities are indistinguishable in this respect from private employers. (*Id.* at pp. 57–58, 233 Cal.Rptr. 38, 729 P.2d 202.)

In *City of Sacramento v. State of California, supra,* 50 Cal.3d 51, 266 Cal.Rptr. 139, 785 P.2d 522, chapter 2 of Statutes of 1978 extended mandatory coverage under the state's unemployment insurance laws to include state and local governments and nonprofit organizations. *City of Sacramento* held there was no obligation on the part of the state to provide funds because there was no "unique" obligation imposed upon local governments, nor was there any requirement of new or increased governmental services. (50 Cal.3d at p. 57, 266 Cal.Rptr. 139, 785 P.2d 522.) As the court stated, the measure was adopted to conform California's system to federal laws. (*Id.* at p. 58, 266 Cal.Rptr. 139, 785 P.2d 522.) Because the measure required local governments to provide unemployment benefits to their own employees, the state had not compelled provision of a new or increased level of service to the public at the local level. Rather, it had merely required local government to provide the same benefits as private ***1192** employers. (*Id.* at p. 67, 266 Cal.Rptr. 139, 785 P.2d 522.) The purpose of California Constitution article XIII B, section 6 was to avoid governmental programs from being forced on localities by the state: Therefore, programs which are not unique to the government do not qualify. (50 Cal.3d at p. 67, 266 Cal.Rptr. 139, 785 P.2d 522.) The benefits at issue here have nothing to do with the provision of governmental services, and are therefore not within the scope of section 6. (50 Cal.3d at p. 68, 266 Cal.Rptr. 139, 785 P.2d 522.)

In *Lucia Mar Unified School District v. Honig, supra,* 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318, Education Code section 59300 required school districts to contribute part of the cost of educating pupils from the district at state schools for the severely handicapped. *Lucia Mar* held section 59300 constituted a "new" program of higher level of service because cost of program had been shifted from the state to a local entity. "The intent of the section would plainly be violated if the state could, while retaining administrative control of programs it has supported with state tax money, simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of [California Constitution] article XIIIB because the programs are not 'new.' " (44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.)

On the other hand, in *County of San Diego v. State of California, supra,* 15 Cal.4th 68, 61 Cal.Rptr.2d 134, 931 P.2d 312, pursuant to 1982 legislation, the state withdrew from counties Medi–Cal funding for medically indigent persons (MIP's). (*Id.* at pp. 79–80, 61 Cal.Rptr.2d 134, 931 P.2d 312.) To offset this change in coverage, the state set up an account as a mechanism to transfer state funds to counties to pay for Medi–Cal expenses, and sufficient funds had been available in this account to enable the state to fully fund San Diego County's Medi–Cal costs. (*Id.* at p. 80, 61 Cal.Rptr.2d 134, 931 P.2d 312.) However, in fiscal year 1990–1991, insufficient funds were available. (*Ibid.*) The state argued that no mandate for reimbursement existed because the counties had always borne the responsibility of paying for indigent medical care pursuant to Welfare & Institutions Code section 17000. (*County of San Diego,* at pp. 91–92, 61 Cal.Rptr.2d 134, 931 P.2d 312.) In finding ****434** reimbursement was mandated, the Supreme Court found that at the time California Constitution article XIII B, section 6 was enacted, the state was fully funding Medi–Cal for MIP's and the County bore no responsibility for those costs. (*County of San Diego,* at p. 93, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Thus, in enacting Medi–Cal, the Legislature had shifted the cost of indigent medical care from the counties to the state. (*Id.* at pp. 96–97, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Given this background, the Legislature excluded MIP's from Medi–Cal, knowing full well that it would trigger the counties' obligation to pay for medical care as providers of last resort. (*Id.* at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312.) Therefore, the 1982 legislation "mandated a ' "new program" ' on counties by 'compelling them to accept financial responsibility in whole or in part for a program,' i.e., medical care for adult MIP's, 'which was funded entirely by the state before the advent of article XIII B.' " (*County of San Diego v. State of California, supra,* 15 Cal.4th 68 at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312, citing *Lucia Mar Unified School District v. Honig, supra,* 44 Cal.3d at p. 836, 244 Cal.Rptr. 677, 750 P.2d 318.) Otherwise, " 'County taxpayers would be forced to accept new taxes or see the county ***1193** forced to cut existing programs further....' " (*County of San Diego v. State of*

California, supra, 15 Cal.4th 68 at p. 98, 61 Cal.Rptr.2d 134, 931 P.2d 312.)

The Commission relies heavily on *County of Sonoma v. Commission on State Mandates, supra,* 84 Cal.App.4th 1264, 101 Cal.Rptr.2d 784. In *County of Sonoma,* the challenged legislation added section 97.03 to the Revenue and Taxation Code, and reduced the amount of property tax revenue to be allocated to local government pursuant to a formula, allocating an equal portion to a "Educational Revenue Augmentation Fund (ERAF)" for distribution to school districts. (84 Cal.App.4th at pp. 1269–1270, 1275, 101 Cal.Rptr.2d 784.) The net effect of the legislation was to decrease counties' tax revenues, although school revenues remained stable, and satisfied the constitutional necessity of maintaining a minimum level of funding for schools pursuant to California Constitution article XIV, section 8. (84 Cal.App.4th at p. 1276, 101 Cal.Rptr.2d 784.) In *County of Sonoma,* the County argued that the reallocation of tax revenues constituted a state-mandated cost of a new program. (*Id.* at p. 1276, 101 Cal.Rptr.2d 784.) The court held that section 6 subvention was limited to "increases in actual costs." Because none of the County's tax revenues were expended, the legislation did not come within section 6. "Proposition 4 [the initiative enacting article XIII B] was aimed at controlling and capping government spending, not curbing changes in revenue allocations. Section 6 is an obvious [complement] to the goal of Proposition 4 in that it prevents the state from forcing extra programs on local governments in a manner that negates their careful budgeting of expenditures. A forced program that would negate such planning is one that results in increased actual expenditures of limited tax proceeds that are counted against the local government's spending limit. Section 6, located within a measure aimed at limiting expenditures, is expressly concerned when 'costs' incurred by local government as a result of state-mandated programs, particularly with the costs of compliance with a new program *restrict local spending in other areas.*" (84 Cal.App.4th at pp. 1283–1284, 101 Cal.Rptr.2d 784 (emphasis added).)

County of Sonoma discerned a further requirement of California Constitution article XIII B, section 6: that the costs incurred must involve programs previously funded exclusively by the state. In imposing this limitation, *County of Sonoma* relied on language in ****435** *County of San Diego v. State of California, supra,* 15 Cal.4th 68, 61 Cal.Rptr.2d 134, 931 P.2d 312 that "section 6 prohibits the state from shifting to counties the costs of state programs for which the state assumed complete financial responsibility before adoption of section 6." (*County of San Diego v. State of California, supra,* 15 Cal.4th 68 at p. 99, fn. 20, 61 Cal.Rptr.2d 134, 931 P.2d 312.) *County of Sonoma* determined that because the statute at issue only involved a reallocation of funds between entities already jointly responsible for providing a service (education), no state-mandated reimbursable program existed. (*County of Sonoma v. Commission on State Mandates, supra,* 84 Cal.App.4th at p. 1289, 101 Cal.Rptr.2d 784.)

[14] [15] [16] ***1194** Based upon the principles discernable from the cases discussed, we find that in the instant case, the legislation does not mandate a "higher level of service." In the case of an existing program, an increase in existing costs does not result in a reimbursement requirement. Indeed, "costs" for purposes of California Constitution article XIII B, section 6, does not equal every increase in a locality's budget resulting from compliance with a new state directive. Rather, the state must be attempting to divest itself of its responsibility to provide fiscal support for a program, or forcing a new program on a locality for which it is ill-equipped to allocate funding.

We agree that POST certification is, for all practical purposes, not a "voluntary" program and therefore the County must, in order to comply with section 13519, add domestic violence training to its curriculum. POST training and certification is ongoing and extensive, and local law enforcement agencies may chose from a menu of course offerings to fulfill the 24–hour requirement. Adding domestic violence training obviously may displace other courses from the menu, or require the adding of courses. Officer downtime will be incurred. However, merely by adding a course requirement to POST's certification, the state has not shifted from itself to the County the burdens of state government. Rather, it has directed local law enforcement agencies to reallocate their training resources in a certain manner by mandating the inclusion of domestic violence training.

Furthermore, the state has not shifted from itself the cost of a program previously administered and funded by the state. Instead, the state is requiring certain courses to be placed within an already existing framework of training. This loss of "flexibility" does not, in and of itself, require the County to expend funds that previously had been expended on the POST program by the state. Instead, "[t]he purpose for which state subvention of funds was created, to protected local agencies from having the state transfer its cost of government from itself to the local level, is therefore not brought into play" by a directive that POST-certified studies include domestic violence training. (*Redevelopment Agency of the City of San Marcos v. Commission on State Mandates, supra,* 55

Cal.App.4th at p. 986, 64 Cal.Rptr.2d 270.) Any increased costs are merely "incidental" to the cost of administering the POST certification.

[17] [18] While we are mindful that legislative disclaimers, findings and budget control language are not determinative to a finding of a state-mandated reimbursable program (*Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 541, 234 Cal.Rptr. 795), our interpretation is supported by the hortatory statutory language that, "The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase ****436** the annual training costs of local ***1195** government entities." (§ 13519.) Thus, while the County may lose some flexibility in tailoring its training programs, such loss of flexibility does not rise to the level of a state-mandated reimbursable program because the loss of flexibility is incidental to the greater goal of providing domestic violence training. Every increase in cost that results from a new state directive does not automatically result in a valid subvention claim where, as here, the directive can be complied with by a minimal reallocation of resources within the entity seeking reimbursement. Thus, while there may be a mandate, there are no increased costs mandated by section 13519.

DISPOSITION

The judgment of the trial court is reversed. The trial court is directed to enter a new and different judgment denying the County's petition for writ of mandate and reinstating the findings of the Commission.

We concur: PERLUSS, P.J., and WOODS, J.

All Citations

110 Cal.App.4th 1176, 2 Cal.Rptr.3d 419, 03 Cal. Daily Op. Serv. 6658, 2003 Daily Journal D.A.R. 8347

Footnotes

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

1 Hereafter section 13519.

2 The currently enacted version of this provision is found at section 13519, subdivision (g), and reads, "Each law enforcement officer below the rank of supervisor who is assigned to patrol duties and would normally respond to domestic violence calls or incidents of domestic violence shall complete, every two years, an updated course of instruction on domestic violence that is developed according to the standards and guidelines developed pursuant to subdivision (d). The instruction required pursuant to this subdivision shall be funded from existing resources available for the training required pursuant to this section. It is the intent of the Legislature not to increase the annual training costs of local government entities." (Stats.1998, ch. 701, § 1, designated the paragraph following subd. (a) as subd. (b) and redesignated the remaining subdivisions accordingly; in redesignated subd. (c), inserted par. (5), listing the signs of domestic violence as an instruction topic, and redesignated pars. (5) to (16) as pars. (6) to (17).)

3 Penal Code section 13510, subdivision (a), provides in relevant part: "For the purpose of raising the level of competence of local law enforcement officers, [POST] shall adopt, and may from time to time amend, rules establishing minimum standards relating to physical, mental, and moral fitness that shall govern the recruitment of any city police officers, peace officer members of a county sheriff's office, marshals or deputy marshals of a municipal court, peace officer members of a county coroner's office...."

4 The test claim also challenged the incident-reporting requirements of Penal Code section 13730, which imposed a new program upon local law enforcement agencies to include in the domestic violence incident report additional information regarding the use of alcohol and controlled substances by the alleged abuser, and any prior domestic violence responses to the same address. The County did not contest the Commission's outcome relating to this portion of the test claim, and therefore this issue is not before us on appeal.

5 In 1984, the Legislature created a statutory procedure for determining whether a statute imposes state-mandated costs on a local agency within the meaning of California Constitution article XII B, section 6. (See Gov.Code, § 17500 et

seq.) The local agency files a test claim with the Commission, which holds a public hearing and determines whether the statute mandates a new program or increased level of service. (Gov.Code, §§ 17521, 17551, 17555.) If the Commission finds that a claim is reimbursable, it then determines the amount of reimbursement. (Gov.Code, § 17557.) The local agency then follows statutory procedures to obtain reimbursement. (See Gov.Code, § 17558 et seq.) Where the Commission finds no reimbursable mandate, the local agency can challenge this finding by administrative mandate proceedings under Code of Civil Procedure section 1094.5. (See Gov.Code, § 17552 [these provisions "provide the sole and exclusive procedure by which a local agency ... may claim reimbursement for costs mandated by the state as required by Section 6"].)

6 The history of section 13519 is as follows: Added by Statutes 1984, chapter 1609, section 2, pages 5711–5713. Amended by Statutes 1985, chapter 281, section 1, pages 1305–1306, effective July 26, 1985; Statutes 1989, chapter 850, section 3; Statutes 1991, chapter 912 (Sen. Bill No. 421), section 1, pages 4086–4088; Statutes 1993, chapter 1098 (Assem. Bill No. 1268), section 8, pages 6162–6163; Statutes 1995, chapter 965 (Sen. Bill No. 132), section 1, pages 7377–7380; Statutes 1998, chapter 606 (Sen. Bill No.1880), section 13; Statutes 1998, chapter 701 (Assem. Bill No. 2172), section 1; Statutes 1999, chapter 659 (Sen. Bill No. 355), section 4. The 1995 amendment, at issue here, rewrote subdivision (e), which prior to amendment read: "(e) Forty thousand dollars ($40,000) is appropriated from the Peace Officers Training Fund [POST] in augmentation of Item 8120–001–268 of the Budget Act of 1984, to support the travel, per diem, and associated costs for convening the necessary experts." (Stats.1993, ch. 1098, § 8, p. 6188.)

7 Government Code section 17559, subd. (b), provides: "A claimant or the state may commence a proceeding in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure to set aside a decision of the commission on the ground that the commission's decision is not supported by substantial evidence. The court may order the commission to hold another hearing regarding the claim and may direct the commission on what basis the claim is to receive a rehearing."

End of Document

Exhibit 8

County of Los Angeles v. State of California (1987)
43 Cal.3d 46

43 Cal.3d 46, 729 P.2d 202, 233 Cal.Rptr. 38

COUNTY OF LOS ANGELES et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents.
CITY OF SONOMA et al., Plaintiffs and Appellants,
v.
THE STATE OF CALIFORNIA et al., Defendants and Respondents

L.A. No. 32106.
Supreme Court of California
Jan 2, 1987.

SUMMARY

The trial court denied a petition for writ of mandate to compel the State Board of Control to approve reimbursement claims of local government entities, for costs incurred in providing an increased level of service mandated by the state for workers' compensation benefits. The trial court found that Cal. Const., art. XIII B, § 6, requiring reimbursement when the state mandates a new program or a higher level of service, is subject to an implied exception for the rate of inflation. In another action, the trial court, on similar claims, granted partial relief and ordered the board to set aside its ruling denying the claims. The trial court, in this second action, found that reimbursement was not required if the increases in benefits were only cost of living increases not imposing a higher or increased level of service on an existing program. Thus, the second matter was remanded due to insubstantial evidence and legally inadequate findings. (Superior Court of Los Angeles County, Nos. C 424301 and C 464829, Leon Savitch and John L. Cole, Judges.) The Court of Appeal, Second Dist., Div. Five, Nos. B001713 and B003561 affirmed the first action; the second action was reversed and remanded to the State Board of Control for further and adequate findings.

The Supreme Court reversed the judgment of the Court of Appeal, holding that the petitions lacked merit and should have been denied by the trial court without the necessity of further proceedings before the board. The court held that when the voters adopted art. XIII B, § 6, their intent was not to require the state to provide subvention whenever a newly enacted statute results incidentally in some cost to local agencies, but only to require subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. Thus, the court held, reimbursement was not required by art. XIII B, § 6. Finally, the court held that no pro tanto repeal of Cal. Const., art. XIV, § 4 (workers' compensation), was intended or made necessary by the adoption of art. XIII B, § 6. (Opinion by Grodin, J., with Bird, C. J., Broussard, Reynoso, Lucas and Panelli, JJ., concurring. Separate concurring opinion by Mosk, J.)

HEADNOTES

Classified to California Digest of Official Reports

([1])
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Costs to Be Reimbursed.
When the voters adopted Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or increased cost of programs administered locally, and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities.

([2])
Statutes § 18--Repeal--Effect--"Increased Level of Service."
The statutory definition of the phrase "increased level of service," within the meaning of Rev. & Tax. Code, § 2207, subd. (a) (programs resulting in increased costs which local agency is required to incur), did not continue after it was specifically repealed, even though the Legislature, in enacting the statute, explained that the definition was declaratory of existing law. It is ordinarily presumed that the Legislature, by deleting an express provision of a statute, intended a substantial change in the law.

[See **Am.Jur.2d,** Statutes, § 384.]

([3])

Constitutional Law § 13--Construction of Constitutions--Language of Enactment.
In construing the meaning of an initiative constitutional provision, a reviewing court's inquiry is focused on what the voters meant when they adopted the provision. To determine this intent, courts must look to the language of the provision itself.

(4)
Constitutional Law § 13--Construction of Constitutions--Language of Enactment--"Program."
The word "program," as used in Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), refers to programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.

(5)
State of California § 12--Fiscal Matters--Appropriations--Reimbursement to Local Governments--Increases in Workers' Compensation Benefits.
The provisions of Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), have no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation benefits that employees of private individuals or organizations receive. Although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state- mandated programs or higher levels of service within the meaning of art. XIII B, § 6. Accordingly, the State Board of Control properly denied reimbursement to local governmental entities for costs incurred in providing state-mandated increases in workers' compensation benefits. (Disapproving *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], to the extent it reached a different conclusion with respect to expenses incurred by local entities as the result of a newly enacted law requiring that all public employees be covered by unemployment insurance.)

[See **Cal.Jur.3d,** State of California, § 78.]

(6)
Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts.
Controlling principles of construction require that in the absence of irreconcilable conflict among their various parts, constitutional provisions must be harmonized and construed to give effect to all parts.

(7)
Constitutional Law § 14--Construction of Constitutions--Reconcilable and Irreconcilable Conflicts--Pro Tanto Repeal of Constitutional Provision.
The goals of Cal. Const., art. XIII B, § 6 (reimbursement to local agencies for new programs and services), were to protect residents from excessive taxation and government spending, and to preclude a shift of financial responsibility for governmental functions from the state to local agencies. Since these goals can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, the adoption of art. XIII B, § 6, did not effect a pro tanto repeal of Cal. Const., art. XIV, § 4, which gives the Legislature plenary power over workers' compensation.

COUNSEL
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GRODIN, J.

We are asked in this proceeding to determine whether legislation enacted in 1980 and 1982 increasing certain workers' compensation benefit payments is subject to the command of article XIII B of the California Constitution that local government costs mandated by the state must be funded by the state. The County of Los Angeles and the

City of Sonoma sought review by this court of a decision of the Court of Appeal which held that state-mandated increases in workers' compensation benefits that do not exceed the rise in the cost of living are not costs which must be borne by the state under article XIII B, an initiative constitutional provision, and legislative implementing statutes.

Although we agree that the State Board of Control properly denied plaintiffs' claims, our conclusion rests on grounds other than those relied upon by the Court of Appeal, and requires that its judgment be reversed. ([1]) We conclude that when the voters adopted article XIII B, section 6, their intent was not to require the state to provide subvention whenever a newly enacted statute resulted incidentally in some cost to local agencies. Rather, the drafters and the electorate had in mind subvention for the expense or ***50** increased cost of programs administered locally and for expenses occasioned by laws that impose unique requirements on local governments and do not apply generally to all state residents or entities. In using the word "programs" they had in mind the commonly understood meaning of the term, programs which carry out the governmental function of providing services to the public. Reimbursement for the cost or increased cost of providing workers' compensation benefits to employees of local agencies is not, therefore, required by section 6.

We recognize also the potential conflict between article XIII B and the grant of plenary power over workers' compensation bestowed upon the Legislature by section 4 of article XIV, but in accord with established rules of construction our construction of article XIII B, section 6, harmonizes these constitutional provisions.

I

On November 6, 1979, the voters approved an initiative measure which added article XIII B to the California Constitution. That article imposed spending limits on the state and local governments and provided in section 6 (hereafter section 6): "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates: [¶] (a) Legislative mandates requested by the local agency affected; [¶] (b) Legislation defining a new crime or changing an existing definition of a crime; or [¶] (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." No definition of the phrase "higher level of service" was included in article XIII B, and the ballot materials did not explain its meaning.[1]

The genesis of this action was the enactment in 1980 and 1982, after article XIII B had been adopted, of laws increasing the amounts which ***51** employers, including local governments, must pay in workers' compensation benefits to injured employees and families of deceased employees.

The first of these statutes, Assembly, Bill No. 2750 (Stats. 1980, ch. 1042, p. 3328), amended several sections of the Labor Code related to workers' compensation. The amendments of Labor Code sections 4453, 4453.1 and 4460 increased the maximum weekly wage upon which temporary and permanent disability indemnity is computed from $231 per week to $262.50 per week. The amendment of section 4702 of the Labor Code increased certain death benefits from $55,000 to $75,000. No appropriation for increased state-mandated costs was made in this legislation.[2]

Test claims seeking reimbursement for the increased expenditure mandated by these changes were filed with the State Board of Control in 1981 by the County of San Bernardino and the City of Los Angeles. The board rejected the claims, after hearing, stating that the increased maximum workers' compensation benefit levels did not change the terms or conditions under which benefits were to be awarded, and therefore did not, by increasing the dollar amount of the benefits, create an increased level of service. The first of these consolidated actions was then filed by the County of Los Angeles, the County of San Bernardino, and the City of San Diego, seeking a writ of mandate to compel the board to approve the reimbursement claims for costs incurred in providing an increased level of service mandated by the state pursuant to Revenue and Taxation Code section 2207.[3] They also sought a declaration that because the State of California and the board were obliged by article XIII B to reimburse them, they were not obligated to pay the increased benefits until the state provided reimbursement.

The superior court denied relief in that action. The court recognized that although increased benefits reflecting cost of living raises were not expressly ***52** excepted from the requirement of state reimbursement in section 6 the intent of article XIII B to limit governmental expenditures to the prior year's level allowed local governments to make adjustment for changes in the cost of living, by increasing their own appropriations. Because the Assembly Bill No. 2750 changes did not exceed cost of living changes, they

did not, in the view of the trial court, create an "increased level of service " in the existing workers' compensation program.

The second piece of legislation (Assem. Bill No. 684), enacted in 1982 (Stats. 1982, ch. 922. p. 3363), again changed the benefit levels for workers' compensation by increasing the maximum weekly wage upon which benefits were to be computed, and made other changes among which were: The bill increased minimum weekly earnings for temporary and permanent total disability from $73.50 to $168, and the maximum from $262.50 to $336. For permanent partial disability the weekly wage was raised from a minimum of $45 to $105, and from a maximum of $105 to $210, in each case for injuries occurring on or after January 1, 1984. (Lab. Code, § 4453.) A $10,000 limit on additional compensation for injuries resulting from serious and willful employer misconduct was removed (Lab. Code, § 4553), and the maximum death benefit was raised from $75,000 to $85,000 for deaths in 1983, and to $95,000 for deaths on or after January 1, 1984. (Lab. Code, § 4702.)

Again the statute included no appropriation and this time the statute expressly acknowledged that the omission was made "[n]otwithstanding section 6 of Article XIIIB of the California Constitution and section 2231 ... of the Revenue and Taxation Code." (Stats. 1982, ch. 922, § 17, p. 3372.)[4]

Once again test claims were presented to the State Board of Control, this time by the City of Sonoma, the County of Los Angeles, and the City of San Diego. Again the claims were denied on grounds that the statute made no change in the terms and conditions under which workers' compensation benefits were to be awarded, and the increased costs incurred as a result of higher benefit levels did not create an increased level of service as defined in Revenue and Taxation Code section 2207, subdivision (a).

The three claimants then filed the second action asking that the board be compelled by writ of mandate to approve the claims and the state to pay them, and that chapter 922 be declared unconstitutional because it was not adopted in conformity with requirements of the Revenue and Taxation Code or ***53** section 6. The trial court granted partial relief and ordered the board to set aside its ruling. The court held that the board's decision was not supported by substantial evidence and legally adequate findings on the presence of a state-mandated cost. The basis for this ruling was the failure of the board to make adequate findings on the possible impact of changes in the burden of proof in some workers' compensation proceedings (Lab. Code, § 3202.5); a limitation on an injured worker's right to sue his employer under the "dual capacity" exception to the exclusive remedy doctrine (Lab. Code, §§ 3601-3602); and changes in death and disability benefits and in liability in serious and wilful misconduct cases. (Lab. Code, § 4551.)

The court also held: "[T]he changes made by chapter 922, Statutes of 1982 may be excluded from state-mandated costs if that change effects a cost of living increase which does not impose a higher or increased level of service on an existing program." The City of Sonoma, the County of Los Angeles, and the City of San Diego appeal from this latter portion of the judgment only.

II

The Court of Appeal consolidated the appeals. The court identified the dispositive issue as whether legislatively mandated increases in workers' compensation benefits constitute a "higher level of service" within the meaning of section 6, or are an "increased level of service"[5] described in subdivision (a) of Revenue and Taxation Code section 2207. The parties did not question the proposition that higher benefit payments might constitute a higher level of "service." The dispute centered on whether higher benefit payments which do not exceed increases in the cost of living constitute a higher level of service. Appellants maintained that the reimbursement requirement of section 6 is absolute and permits no implied or judicially created exception for increased costs that do not exceed the inflation rate. The Court of Appeal addressed the problem as one of defining "increased level of service."

The court rejected appellants' argument that a definition of "increased level of service" that once had been included in section 2231, subdivision (e) of the Revenue and Taxation Code should be applied. That definition brought any law that imposed "additional costs" within the scope of "increased level of service." The court concluded that the repeal of section 2231 in 1975 (Stats. 1975, ch. 486, § 7, pp. 999-1000) and the failure of the Legislature by statute or the electorate in article XIII B to readopt the ***54** definition must be treated as reflecting an intent to change the law. (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470 [128 Cal.Rptr. 1, 546 P.2d 289].)[6] On that basis the court concluded that increased costs were no longer tantamount to an increased level of service.

The court nonetheless assumed that an increase in costs mandated by the Legislature did constitute an increased level of service if the increase exceeds that in the cost of

living. The judgment in the second, or "Sonoma " case was affirmed. The judgment in the first, or "Los Angeles" case, however, was reversed and the matter "remanded" to the board for more adequate findings, with directions.[7]

III

The Court of Appeal did not articulate the basis for its conclusion that costs in excess of the increased cost of living do constitute a reimbursable increased level of service within the meaning of section 6. Our task in ascertaining the meaning of the phrase is aided somewhat by one explanatory reference to this part of section 6 in the ballot materials.

A statutory requirement of state reimbursement was in effect when section 6 was adopted. That provision used the same "increased level of service " phraseology but it also failed to include a definition of "increased level of service," providing only: "Costs mandated by the state' means any increased costs which a local agency is required to incur as a result of the following: [¶] (a) Any law ... which mandates a new program or an increased level of service of an existing program." (Rev. & Tax. Code § 2207.) As noted, however, the definition of that term which had been ***55** included in Revenue and Taxation Code section 2164.3 as part of the Property Tax Relief Act of 1972 (Stats. 1972, ch. 1406, § 14.7, p. 2961), had been repealed in 1975 when Revenue and Taxation Code section 2231, which had replaced section 2164.3 in 1973, was repealed and a new section 2231 enacted. (Stats. 1975. ch. 486, §§ 6 & 7, p. 999.)[8] Prior to repeal, Revenue and Taxation Code section 2164.3, and later section 2231, after providing in subdivision (a) for state reimbursement, explained in subdivision (e) that " "Increased level of service' means any requirement mandated by state law or executive regulation ... which makes necessary expanded or additional costs to a county, city and county, city, or special district." (Stats. 1972, ch. 1406, § 14.7, p. 2963.)

([2]) Appellants contend that despite its repeal, the definition is still valid, relying on the fact that the Legislature, in enacting section 2207, explained that the provision was "declaratory of existing law." (Stats. 1975, ch. 486, § 18.6, p. 1006.) We concur with the Court of Appeal in rejecting this argument. "[I]t is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law." (*Lake Forest Community Assn. v. County of Orange* (1978) 86 Cal.App.3d 394, 402 [150 Cal.Rptr. 286]; see also *Eu* v. *Chacon, supra*, 16 Cal.3d 465, 470.) Here, the revision was not minor: a whole subdivision was deleted. As the Court of Appeal noted, "A change must have been intended; otherwise deletion of the preexisting definition makes no sense."

Acceptance of appellants' argument leads to an unreasonable interpretation of section 2207. If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme. Since that definition has been repealed, an act of which the drafters of section 6 and the electorate are presumed to have been ***56** aware, we may not conclude that an intent existed to incorporate the repealed definition into section 6.

([3]) In construing the meaning of the constitutional provision, our inquiry is not focussed on what the Legislature intended in adopting the former statutory reimbursement scheme, but rather on what the voters meant when they adopted article XIII B in 1979. To determine this intent, we must look to the language of the provision itself. (*ITT World Communications, Inc. v. City and County of San Francisco* (1985) 37 Cal.3d 859, 866 [210 Cal.Rptr. 226, 693 P.2d 811].) In section 6, the electorate commands that the state reimburse local agencies for the cost of any "new program or higher level of service." Because workers' compensation is not a new program, the parties have focussed on whether providing higher benefit payments constitutes provision of a higher level of service. As we have observed, however, the former statutory definition of that term has been incorporated into neither section 6 nor the current statutory reimbursement scheme.

([4]) Looking at the language of section 6 then, it seems clear that by itself the term "higher level of service" is meaningless. It must be read in conjunction with the predecessor phrase "new program" to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing "programs." But the term "program" itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term - programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on

local governments and do not apply generally to all residents and entities in the state.

The concern which prompted the inclusion of section 6 in article XIII B was the perceived attempt by the state to enact legislation or adopt administrative orders creating programs to be administered by local agencies, thereby transferring to those agencies the fiscal responsibility for providing services which the state believed should be extended to the public. In their ballot arguments, the proponents of article XIII B explained section 6 to the voters: "Additionally, this measure: (1) Will not allow the state government to *force programs* on local governments without the state paying for them." (Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Spec. Statewide Elec. (Nov. 6, 1979) p. 18. Italics added.) In this context the phrase "to force programs on local governments" confirms that the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions peculiar to government, not ***57** for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities. Laws of general application are not passed by the Legislature to "force" programs on localities.

The language of section 6 is far too vague to support an inference that it was intended that each time the Legislature passes a law of general application it must discern the likely effect on local governments and provide an appropriation to pay for any incidental increase in local costs. We believe that if the electorate had intended such a far-reaching construction of section 6, the language would have explicitly indicated that the word "program" was being used in such a unique fashion. (Cf. *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449]; *Big Sur Properties v. Mott* (1976) 63 Cal.App.3d 99, 105 [132 Cal.Rptr. 835].) Nothing in the history of article XIII B that we have discovered, or that has been called to our attention by the parties, suggests that the electorate had in mind either this construction or the additional indirect, but substantial impact it would have on the legislative process.

Were section 6 construed to require state subvention for the incidental cost to local governments of general laws, the result would be far-reaching indeed. Although such laws may be passed by simple majority vote of each house of the Legislature (art. IV, § 8, subd. (b)), the revenue measures necessary to make them effective may not. A bill which will impose costs subject to subvention of local agencies must be accompanied by a revenue measure providing the subvention required by article XIII B. (Rev. & Tax. Code, §§ 2255, subd. (c).) Revenue bills must be passed by two-thirds vote of each house of the Legislature. (Art. IV, § 12, subd. (d).) Thus, were we to construe section 6 as applicable to general legislation whenever it might have an incidental effect on local agency costs, such legislation could become effective only if passed by a supermajority vote.[9] Certainly no such intent is reflected in the language or history of article XIII B or section 6.

([5]) We conclude therefore that section 6 has no application to, and the state need not provide subvention for, the costs incurred by local agencies in providing to their employees the same increase in workers' compensation ***58** benefits that employees of private individuals or organizations receive.[10] Workers' compensation is not a program administered by local agencies to provide service to the public. Although local agencies must provide benefits to their employees either through insurance or direct payment, they are indistinguishable in this respect from private employers. In no sense can employers, public or private, be considered to be administrators of a program of workers' compensation or to be providing services incidental to administration of the program. Workers' compensation is administered by the state through the Division of Industrial Accidents and the Workers' Compensation Appeals Board. (See Lab. Code, § 3201 et seq.) Therefore, although the state requires that employers provide workers' compensation for nonexempt categories of employees, increases in the cost of providing this employee benefit are not subject to reimbursement as state-mandated programs or higher levels of service within the meaning of section 6.

IV

([6]) Our construction of section 6 is further supported by the fact that it comports with controlling principles of construction which "require that in the absence of irreconcilable conflict among their various parts, [constitutional provisions] must be harmonized and construed to give effect to all parts. (*Clean Air Constituency* v. *California State Air Resources Bd.* (1974) 1 Cal.3d 801, 813-814 [114 Cal.Rptr. 577, 523 P.2d 617]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 596 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]; *Select Base Materials v. Board of Equal.* (1959) 51 Cal.2d 640, 645 [335 P.2d 672].)" (*Legislature* v. *Deukmejian* (1983) 34 Cal.3d 658, 676 [194 Cal.Rptr. 781, 669 P.2d 17].)

Our concern over potential conflict arises because article XIV, section 4,[11] gives the Legislature "plenary power, unlimited by any provision of ***59** this Constitution" over workers' compensation. Although seemingly unrelated to

workers' compensation, section 6, as we have shown, would have an indirect, but substantial impact on the ability of the Legislature to make future changes in the existing workers' compensation scheme. Any changes in the system which would increase benefit levels, provide new services, or extend current service might also increase local agencies' costs. Therefore, even though workers' compensation is a program which is intended to provide benefits to all injured or deceased employees and their families, because the change might have some incidental impact on local government costs, the change could be made only if it commanded a supermajority vote of two-thirds of the members of each house of the Legislature. The potential conflict between section 6 and the plenary power over workers' compensation granted to the Legislature by article XIV, section 4 is apparent.

The County of Los Angeles, while recognizing the impact of section 6 on the Legislature's power over workers' compensation, argues that the "plenary power" granted by article XIV, section 4, is power over the substance of workers' compensation legislation, and that this power would be unaffected by article XIII B if the latter is construed to compel reimbursement. The subvention requirement, it is argued, is analogous to other procedural ***60** limitations on the Legislature, such as the "single subject rule" (art. IV, § 9), as to which article XIV, section 4, has no application. We do not agree. A constitutional requirement that legislation either exclude employees of local governmental agencies or be adopted by a supermajority vote would do more than simply establish a format or procedure by which legislation is to be enacted. It would place workers' compensation legislation in a special classification of substantive legislation and thereby curtail the power of a majority to enact substantive changes by any procedural means. If section 6 were applicable, therefore, article XIII B would restrict the power of the Legislature over workers' compensation.

The City of Sonoma concedes that so construed article XIII B *would* restrict the plenary power of the Legislature, and reasons that the provision therefore either effected a pro tanto repeal of article XIV, section 4, or must be accepted as a limitation on the power of the Legislature. We need not accept that conclusion, however, because our construction of section 6 permits the constitutional provisions to be reconciled.

Construing a recently enacted constitutional provision such as section 6 to avoid conflict with, and thus pro tanto repeal of, an earlier provision is also consistent with and reflects the principle applied by this court in *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329 [178 Cal.Rptr. 801, 636 P.2d 1139]. There, by coincidence, article XIV, section 4, was the later provision. A statute, enacted pursuant to the plenary power of the Legislature over workers' compensation, gave the Workers' Compensation Appeals Board authority to discipline attorneys who appeared before it. If construed to include a transfer of the authority to discipline attorneys from the Supreme Court to the Legislature, or to delegate that power to the board, article XIV, section 4, would have conflicted with the constitutional power of this court over attorney discipline and might have violated the separation of powers doctrine. (Art. III, § 3.) The court was thus called upon to determine whether the adoption of article XIV, section 4, granting the Legislature plenary power over workers' compensation effected a pro tanto repeal of the preexisting, exclusive jurisdiction of the Supreme Court over attorneys.

We concluded that there had been no pro tanto repeal because article XIV, section 4, did not give the Legislature the authority to enact the statute. Article XIV, section 4, did not expressly give the Legislature power over attorney discipline, and that power was not integral to or necessary to the establishment of a complete system of workers' compensation. In those circumstances the presumption against implied repeal controlled. "It is well established that the adoption of article XIV, section 4 'effected a repeal *pro tanto*' of any state constitutional provisions which conflicted with that ***61** amendment. (*Subsequent Etc. Fund. v. Ind. Acc. Com.* (1952) 39 Cal.2d 83, 88 [244 P.2d 889]; *Western Indemnity Co.* v. *Pillsbury* (1915) 170 Cal. 686, 695, [151 P. 398].) A *pro tanto* repeal of conflicting state constitutional provisions removes 'insofar as necessary' any restrictions which would prohibit the realization of the objectives of the new article. (*Methodist Hosp. of Sacramento* v. *Saylor* (1971) 5 Cal.3d 685, 691-692 [97 Cal.Rptr. 1, 488 P.2d 161]; cf. *City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103, 115-117 [148 Cal.Rptr. 626, 583 P.2d 151].) Thus the question becomes whether the board must have the power to discipline attorneys if the objectives of article XIV, section 4 are to be effectuated. In other words, does the achievement of those objectives compel the modification of a power - the disciplining of attorneys - that otherwise rests exclusively with this court?" (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d 329, 343.) We concluded that the ability to discipline attorneys appearing before it was not necessary to the expeditious resolution of workers' claims or the efficient administration of the agency. Thus, the absence of disciplinary power over attorneys would not preclude the board from achieving the objectives of article XIV, section 4, and no pro tanto repeal need be found.

([7]) A similar analysis leads to the conclusion here that no pro tanto repeal of article XIV, section 4, was intended or made necessary here by the adoption of section 6. The goals of article XIII B, of which section 6 is a part, were to protect residents from excessive taxation and government spending. (*Huntington Park Redevelopment Agency* v. *Martin* (1985) 38 Cal.3d 100, 109-110 [211 Cal.Rptr. 133, 695 P.2d 220].) Section 6 had the additional purpose of precluding a shift of financial responsibility for carrying out governmental functions from the state to local agencies which had had their taxing powers restricted by the enactment of article XIII A in the preceding year and were ill equipped to take responsibility for any new programs. Neither of these goals is frustrated by requiring local agencies to provide the same protections to their employees as do private employers. Bearing the costs of salaries, unemployment insurance, and workers' compensation coverage - costs which all employers must bear - neither threatens excessive taxation or governmental spending, nor shifts from the state to a local agency the expense of providing governmental services.

Therefore, since the objectives of article XIII B and section 6 can be achieved in the absence of state subvention for the expense of increases in workers' compensation benefit levels for local agency employees, section 6 did not effect a pro tanto repeal of the Legislature's otherwise plenary power over workers' compensation, a power that does not contemplate that the Legislature rather than the employer must fund the cost or increases in ***62** benefits paid to employees of local agencies, or that a statute affecting those benefits must garner a supermajority vote.

Because we conclude that section 6 has no application to legislation that is applicable to employees generally, whether public or private, and affects local agencies only incidentally as employers, we need not reach the question that was the focus of the decision of the Court of Appeal - whether the state must reimburse localities for state-mandated cost increases which merely reflect adjustments for cost-of-living in existing programs.

V

It follows from our conclusions above, that in each of these cases the plaintiffs' reimbursement claims were properly denied by the State Board of Control. Their petitions for writs of mandate seeking to compel the board to approve the claims lacked merit and should have been denied by the superior court without the necessity of further proceedings before the board.

In B001713, the Los Angeles case, the Court of Appeal reversed the judgment of the superior court denying the petition. In the B003561, the Sonoma case, the superior court granted partial relief, ordering further proceedings before the board, and the Court of Appeal affirmed that judgment.

The judgment of the Court of Appeal is reversed. Each side shall bear its own costs.

Bird, C. J., Broussard, J., Reynoso, J., Lucas, J., and Panelli, J., concurred.

MOSK, J.

I concur in the result reached by the majority, but I prefer the rationale of the Court of Appeal, i.e., that neither article XIII B, section 6, of the Constitution nor Revenue and Taxation Code sections 2207 and 2231 require state subvention for increased workers' compensation benefits provided by chapter 1042, Statutes of 1980, and chapter 922, Statutes of 1982, but only if the increases do not exceed applicable cost-of-living adjustments because such payments do not result in an increased level of service.

Under the majority theory, the state can order unlimited financial burdens on local units of government without providing the funds to meet those burdens. This may have serious implications in the future, and does violence to the requirement of section 2231, subdivision (a), that the state reimburse local government for "all costs mandated by the state."

In this instance it is clear from legislative history that the Legislature did not intend to mandate additional burdens, but merely to provide a cost-of-living ***63** adjustment. I agree with the Court of Appeal that this was permissible.

Appellants' petition for a rehearing was denied February 26, 1987. ***64**

Footnotes

1 The analysis by the Legislative Analyst advised that the state would be required to "reimburse local governments for the cost of complying with 'state mandates.' 'State mandates' are requirements imposed on local governments by legislation or executive orders." Elsewhere the analysis repeats: "[T]he initiative would establish a requirement that the state provide funds to reimburse local agencies for the cost of complying with state mandates. ...
The one ballot argument which made reference to section 6, referred only to the "new program" provision, stating, "Additionally, this measure [¶] (1) will not allow the state government to force programs on local governments without the state paying for them."

2 The bill was approved by the Governor and filed with the Secretary of State on September 22, 1980. Prior to this, the Assembly gave unanimous consent to a request by the bill's author that his letter to the Speaker stating the intent of the Legislation be printed in the Assembly Journal. The letter stated: (1) that the Assembly Ways and Means Committee had recommended approval without appropriation on grounds that the increases were a result of changes in the cost of living that were not reimbursable under either Revenue and Taxation Code section 2231, or article XIII B; (2) the Senate Finance Committee had rejected a motion to add an appropriation and had approved a motion to concur in amendments of the Conference Committee deleting any appropriation.
Legislative history confirms only that the final version of Assembly Bill No. 2750, as amended in the Assembly on April 16, 1986, contained no appropriation. As introduced on March 4, 1980, with a higher minimum salary of $510 on which to base benefits, an unspecified appropriation was included.

3 The superior court consolidated another action by the County of Butte, Novato Fire Protection District, and the Galt Unified School District with that action. Neither those plaintiffs nor the County of San Bernardino are parties to the appeal.

4 The same section "recognized," however, that a local agency "may pursue any remedies to obtain reimbursement available to it" under the statutes governing reimbursement for state-mandated costs in chapter 3 of the Revenue and Taxation Code, commencing with section 2201.

5 The court concluded that there was no legal or semantic difference in the meaning of the terms and considered the intent or purpose of the two provisions to be identical.

6 The Court of Appeal also considered the expression of legislative intent reflected in the letter by the author of Assembly Bill No. 2750 (see fn. 2, *ante*). While consideration of that expression of intent may have been proper in construing Assembly Bill No. 2750, we question its relevance to the proper construction of either section 6, adopted by the electorate in the prior year, or of Revenue and Taxation Code section 2207, subdivision (a) enacted in 1975. (Cf. *California Employment Stabilization Co.* v. *Payne* (1947) 31 Cal.2d 210, 213-214 [187 P.2d 702].) There is no assurance that the Assembly understood that its approval of printing a statement of intent as to the later bill was also to be read as a statement of intent regarding the earlier statute, and it was not relevant to the intent of the electorate in adopting section 6.
The Court of Appeal also recognized that the history of Assembly Bill No. 2750 and Statutes 1982, chapter 922, which demonstrated the clear intent of the Legislature to omit any appropriation for reimbursement of local government expenditures to pay the higher benefits precluded reliance on reimbursement provisions included in benefit-increase bills passed in earlier years. (See e.g., Stats. 1973, chs. 1021 and 1023.)

7 We infer that the intent of the Court of Appeal was to reverse the order denying the petition for writ of mandate and to order the superior court to grant the petition and remand the matter to the board with directions to set aside its order and reconsider the claim after making the additional findings. (See Code Civ. Proc. § 1094.5, subd. (f).)

8 Pursuant to the 1972 and successor 1973 property tax relief statutes the Legislature had included appropriations in measures which, in the opinion of the Legislature, mandated new programs or increased levels of service in existing programs (see, e.g., Stats. 1973, ch. 1021, § 4, p. 2026; ch. 1022, § 2, p. 2027; Stats. 1976, ch. 1017, § 9, p. 4597) and reimbursement claims filed with the State Board of Control pursuant to Revenue and Taxation Code sections 2218-2218.54 had been honored. When the Legislature fails to include such appropriations there is no judicially enforceable remedy for the statutory violation notwithstanding the command of Revenue and Taxation Code section 2231, subdivision (a) that "[t]he state shall reimburse each local agency for all 'costs mandated by the state,' as defined in Section 2207" and the additional command of subdivision (b) that any statute imposing such costs "provide an appropriation therefor." (*County of Orange v. Flournoy* (1974) 42 Cal.App.3d 908, 913 [117 Cal.Rptr. 224].)

9 Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 228 [149 Cal.Rptr. 239, 583 P.2d 1281].)

10 The Court of Appeal reached a different conclusion in *City of Sacramento v. State of California* (1984) 156 Cal.App.3d 182 [203 Cal.Rptr. 258], with respect to a newly enacted law requiring that all public employees be covered by unemployment insurance. Approaching the question as to whether the expense was a "state mandated cost," rather than as whether the provision of an employee benefit was a "program or service" within the meaning of the Constitution, the court concluded that reimbursement was required. To the extent that this decision is inconsistent with our conclusion here, it is disapproved.

11 Section 4: "The Legislature is hereby *expressly vested with plenary power, unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury; full provision for adequate insurance coverage against liability to pay or furnish compensation; full provision for regulating such insurance coverage in all its aspects, including the establishment and management of a State compensation insurance fund; full provision for otherwise securing the payment of compensation and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the State government.
"The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.
"The Legislature shall have power to provide for the payment of an award to the state in the case of the death, arising out of and in the course of the employment, of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to employees of the employer.
"Nothing contained herein shall be taken or construed to impair or render ineffectual in any measure the creation and existence of the industrial accident commission of this State or the State compensation insurance fund, the creation and existence of which, with all the functions vested in them, are hereby ratified and confirmed." (Italics added.)

End of Document

Exhibit 9

Fire Fighters Union v. City of Vallejo (1974)
12 Cal.3d 608

12 Cal.3d 608, 526 P.2d 971, 116 Cal.Rptr. 507, 87 L.R.R.M. (BNA) 2453, 75 Lab.Cas. P 53,473

FIRE FIGHTERS UNION, LOCAL 1186, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, Plaintiff and Appellant,
v.
CITY OF VALLEJO et al., Defendants and Appellants

S.F. No. 23098.
Supreme Court of California
October 2, 1974.

SUMMARY

A union of city fire fighters won a writ of mandate directing the city to proceed to arbitration on issues of "Reduction of Personnel," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedures," pursuant to city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service." (Superior Court of Solano County, No. 53187, Ellis R. Randall, Judge.)

The Supreme Court modified the judgment, affirmed it as modified, and remanded the case to the superior court with directions to issue a writ of mandamus requiring the city to proceed to arbitrate the designated issues in accordance with the reviewing court's opinion. The "Reduction of Personnel" proposal was held to be arbitrable only insofar as it affects the working conditions and safety of the employees and the matters of seniority and reinstatement which are included in the proposal. The "Vacancies and Promotions" proposal was held to be arbitrable, but the arbitrators were directed to hear facts to determine whether the deputy fire chief's position is supervisory within the general principle excluding supervisory employees from bargaining units. The "Schedule of Hours" proposal was held to be arbitrable in full. And the "Constant Manning Procedures" proposal was held to be arbitrable to the extent that it affects the working conditions and safety of the employees.

In Bank. (Opinion by Tobriner, J., expressing the unanimous view of the court.) *609

HEADNOTES

Classified to California Digest of Official Reports

(1)
Labor § 114--Subjects of Collective Bargaining.
The Legislature, in excepting from the scope of bargaining in public employee labor matters the "merits, necessity, or organization" of any service or activity provided by law or executive order, as the limitation is expressed in Gov. Code, § 3504, apparently did not intend to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions, but intended thereby to forestall the inclusion of managerial policy decisions within such interests.

(2)
Municipal Corporations § 78--Charters--Construction--Collective Bargaining--National Labor Relations Act Analogies.
The bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment they may render in interpreting the scope of bargaining under a city charter granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service."

(3)
Labor § 190--Matters Arbitrable--Firefighters' Hours.
Under city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service," the issue of a schedule of hours by which the union proposed a maximum of 40 hours per week on 8-hour shifts, and 56 hours per week on 24-hour shifts was negotiable and arbitrable.

(4)
Labor § 185--Matters Arbitrable--Vacancies and Promotions.
Under city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service," the union's vacancies and

promotions proposal was arbitrable, inasmuch as it was concerned with fire fighters' job security and opportunities for advancement. However, in the absence of evidence before the reviewing court in mandamus proceedings as to whether a deputy fire chief's duties are supervisory, within the general principle excluding supervisory employees from bargaining units, the question whether the vacancies and promotions proposal applies to him was a matter for determination by the arbitrators.

([5])
Labor § 190--Matters Arbitrable--Wages, Hours and Working Conditions-- Firefighters' Manning Schedule.
Under city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service," a proposal that the manning schedule presently in effect with respect to fire fighters be continued for the term of the new agreement was arbitrable to the extent that it affects the working conditions and safety of the employees.

([6])
Labor § 190--Matters Arbitrable--Wages, Hours and Working Conditions-- Number of Firefighters.
Under city charter arbitration provisions granting city employees the right to bargain on "wages, hours and working conditions," but withholding that right as to matters involving the "merits, necessity or organization of any governmental service," the union's proposal which would require that the city bargain with respect to any decision to reduce the number of fire fighters was arbitrable only insofar as it affects the working conditions and safety of the remaining employees and the matters of seniority and reinstatement which are included in the proposal.

([7])
Labor § 111--Collective Bargaining--Public Policy.
State policy favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization.

[See **Cal.Jur.2d,** Labor, § 130; **Am.Jur.2d,** Labor and Labor Relations, § 1246.]

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TOBRINER, J.

In this case of first impression we must delineate the function of the court in interpreting a provision for arbitration in a city charter affecting public employees. Specifically we are asked, prior to the arbitration proceeding itself, to reconcile clauses which substantively overlap: a provision that grants city employees the right to bargain on "wages, hours and working conditions" but withholds that right as to matters involving the "merits, necessity or organization of any governmental service." As we shall explain, our attempt now to define the issues of arbitration so that they assume the shape of rigid categories would be to reach premature judgments without benefit of the factual foundations of an arbitral record and to impede the arbitration process itself. We therefore largely leave to the arbitrators the moulding and resolution of the issues, subject to the proviso that neither party may be bound by a decision in excess of the arbitrators' jurisdiction.

In 1971, during negotiations between representatives of the City of Vallejo and the Fire Fighters Union as to the terms of a new contract, the parties failed to agree on 28 issues. Pursuant to the process prescribed in the city charter, they submitted the disputed matters to mediation and fact finding. When these procedures failed to effect a resolution, the city agreed to submit 24 of the issues to arbitration but contended that four other issues, namely "Personnel Reduction," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure," involved the "merits, necessity or organization" of the fire fighting service and did not come under the arbitrable provisions. The city refused to accept the recommendations of the fact finding panel with respect to these issues or to submit them to arbitration.

On December 22, 1971, prior to the scheduled hearing before the board ***612** of arbitrators, the Fire Fighters Union filed a complaint in the Solano Superior Court

seeking mandate to compel the city to submit the four disputed issues to arbitration. The court found for the union on all the issues, stating: "[T]he evidence introduced here supports findings that the issues 'Reduction of Personnel,' 'Vacancies and Promotions,' 'Schedule of Hours' and 'Constant Manning Procedures,' are related to 'wages, hours and conditions of employment' .... [W]hile the issues might also apply to the exclusionary language 'but not on matters involving the merits, necessity or organization of any service or activity provided by law,' to so hold would be to defeat the overriding purpose of the Meyers-Milias-Brown Act and section 809 of the Vallejo charter, namely to provide peace and harmony with the city's public safety employees. The court cannot engage in judicial legislation and write into the Vallejo charter words or meaning that are not there." The court therefore ordered that a peremptory writ of mandate issue directing the city to proceed to arbitration on the disputed issues.[1] The city appeals.

The present controversy therefore involves an interpretation of the Vallejo City Charter provisions which govern public employee contract negotiations. The provisions for multi-level resolution of disputes at issue were drafted by a board of freeholders for incorporation in a new city charter in response to a strike by city police and fire fighters in July of 1969. These proposals, with the exception of a provision for final binding arbitration, were accepted by the city council and embodied in section 809 of the city charter. Section 809 sets up a "system of collective negotiating" and provides that city employees shall have the right to "negotiate on matters of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law. ..." The section further provides that if the parties cannot reach agreement, they must submit successively to mediation and fact finding.[2] ***613**

The arbitration provisions rejected by the city council were submitted to the citizens of Vallejo in a referendum in 1970 and approved. The electorate added to the city charter section 810 which provides that if representatives of the city and its employees do not reach agreement after the report of the fact finding committee under section 809, the issues upon which they fail to agree shall be submitted to binding arbitration.[3] ***614**

The scope of bargaining provision in the Vallejo City Charter in large measure parallels that set out in the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510).[4] Government Code section 3504 reads: "The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not 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." Therefore, interpretation of the scope of bargaining language in the Vallejo charter necessarily bears upon the meaning of the same language in the Meyers-Milias-Brown Act.[5]

In the instant case, as we have stated, we are called upon to render a preliminary decision as to the scope of the arbitration. The arbitration process, however, is an ongoing one in which normally an arbitrator, rather than a court, will narrow and define the issues, rejecting those matters over which he cannot properly exercise jurisdiction because they fall exclusively within the rights of management. As Professor Grodin has observed: "... collective bargaining and issues arbitration are together a dynamic process, in which the positions of the parties and their interaction with the arbitrator is in a state of constant flux. Proposals get modified and non-negotiable positions become negotiable as the parties sort out their priorities, develop ***615** understanding of the implications of their positions, and perceive alternative solutions which they may not previously have considered. To determine what is arbitrable and what is not against this changing context is a bit like trying a balancing act in the middle of a rushing torrent." (Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts* (1974) Cal. Pub. Employee Rel. No. 21, p. 17.)

To a large extent the rendition of the definitions involved in this case will be welded by the facts developed in arbitration itself. We put the proposition in these words in *Butchers' Union Local 229 v. Cudahy Packing Co.* (1967) 66 Cal.2d 925, 938 [59 Cal.Rptr. 713, 428 P.2d 849]: "Because arbitration substitutes for economic warfare the peaceful adjudication of disputes, and because controversy takes on ephemeral shapes and unforeseeable forms, courts do not congeal arbitration provisions into fixed molds but give them dynamic sweep." We therefore must be careful not to restrict unduly the *scope* of the arbitration by an overbroad definition of "merits, necessity or organization." Nor does this cautious judicial approach expose the city to an excessive assertion of the arbitrators' jurisdiction; the city council *after* the rendition of the award may reject any award that invades its authority over matters involving "merits, necessity or organization" since the charter itself limits the scope of the arbitration decision to that which is "consistent with applicable law."[6]

With this caveat in mind, we approach the specific

problem of reconciling the two vague, seemingly overlapping phrases of the statute: "wages, hours and working conditions," which, broadly read could encompass practically any conceivable bargaining proposal; and "merits, necessity or organization of any service" which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion.

In attempting to reconcile these provisions, we note that the phrase "wages, hours and other terms and conditions of employment" in the MMBA was taken directly from the National Labor Relations Act[7] (hereinafter ***616** NLRA). (See Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 749.) The Vallejo charter only slightly changed the phrasing to "wages, hours and working conditions." A whole body of federal law has developed over a period of several decades interpreting the meaning of the federal act's "wages, hours and other terms and conditions of employment."

In the past we have frequently referred to such federal precedent in interpreting parallel language in state labor legislation. Thus, for example, in *Englund* v. *Chavez* (1972) 8 Cal.3d 572, 576 [105 Cal.Rptr. 521, 504 P.2d 457], we determined the reach of the California Jurisdictional Strike Act in part by reference to judicial construction of similar language in the National Labor Relations Act. Similarly, in *Petri Cleaners, Inc. v. Automotive Employees, etc., Local No. 88* (1960) 53 Cal.2d 455, 459 [2 Cal.Rptr. 470, 349 P.2d 76], we referred to judicial interpretation of the "interfere with, restrain and coerce" language in section 8(a)(1) and (2) of the NLRA to aid us in interpreting the meaning of "interfered with, dominated or controlled" in Labor Code section 1117.

The origin and meaning of the second phrase - excepting "merits, necessity or organization" from the scope of bargaining - cannot claim so rich a background. ([1]) Apparently the Legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions.

Although the NLRA does not contain specific wording comparable to the "merits, necessity or organization" terminology in the city charter and the state act, the underlying fear that generated this language - that is, that wages, hours and working conditions could be expanded beyond reasonable boundaries to deprive an employer of his legitimate management prerogatives - lies imbedded in the federal precedents under the NLRA. As a review of federal case law in this field demonstrates, the trepidation that the union would extend its province into matters that should properly remain in the hands of employers has been incorporated into the interpretation of the scope of "wages, hours and terms and conditions of employment."[8] ***617** Thus, because the federal decisions effectively reflect the same interests as those that prompted the inclusion of the "merits, necessity or organization" bargaining limitation in the charter provision and state act, the federal precedents provide reliable if analogous authority on the issue.

The City of Vallejo objects to the use of NLRA precedents because of the alleged differences between employment relations in the public and private sectors. Although we recognize that there are certain basic differences between employment in the public and private sectors,[9] the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions.[10] ([2]) We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter.

We now turn to an analysis of the specific bargaining proposals which are at issue here.

1. *Schedule of Hours*

([3]) The issue of Schedule of Hours by which the union proposed a maximum of 40 hours per week for fire fighters on 8-hour shifts and 56 hours per week for fire fighters on 24-hour shifts is clearly negotiable and arbitrable despite the city's argument that it involves the "organization" of the fire service. The Vallejo charter provides explicitly that city employees shall have the right to bargain on matters of wages, *hours* and working conditions; ***618** furthermore, working hours and work days have been held to be bargainable subjects under the National Labor Relations Act. In *Meat Cutters v. Jewel Tea* (1965) 381 U.S. 676, 691 [14 L.Ed.2d 640, 650, 85 S.Ct. 1596] the United States Supreme Court held that the limitation of butchers' work hours to the period of 9 a.m. to 6 p.m. was a mandatory subject of bargaining. The city cites no authority to the contrary. Accordingly, we conclude that Schedule of Hours is a negotiable issue.

2. *Vacancies and Promotions*

([4]) The union's Vacancies and Promotions proposal concerns fire fighters' job security and opportunities for advancement and therefore relates to the terms and conditions of their employment. (Cf. *District 50, United Mine Workers, Local 13942 v. N.L.R.B.* (4th Cir. 1966) 358 F.2d 234.) Similar proposals for union hiring hall arrangements have been held to involve terms and conditions of employment under the National Labor Relations Act and to constitute mandatory subjects of bargaining. (*N.L.R.B. v. Tom Joyce Floors, Inc.* (9th Cir. 1965) 353 F.2d 768, 771.)

The city contends that this proposal may not apply to appointment or promotion to the position of deputy fire chief. Although the Vallejo charter does not contain any provision for determining the proper bargaining unit, supervisory or managerial employees are routinely excluded from the bargaining units under the National Labor Relations Act. (*N.L.R.B. v. Gold Spot Dairy, Inc.* (10th Cir. 1970) 432 F.2d 125; see *N.L.R.B. v. Bell Aerospace Co.* (1974) 416 U.S. 267 [40 L.Ed.2d 134, 94 S.Ct. 1757]; by analogy, we conclude that under the charter the union can claim no right to bargain as to supervisory positions.

We are presented with no facts which disclose whether the deputy fire chief's duties are supervisory; his title alone does not constitute a sufficient basis for excluding him from the bargaining unit. We therefore conclude that this issue should be submitted to the arbitrators who will hear the facts which will enable them to determine whether the deputy fire chief's duties are indeed supervisory. If so, the union's Vacancies and Promotions proposal does not apply to him or his position because he is not a member of the bargaining unit.

3. *Constant Manning Procedure*

An examination of this issue illustrates the wisdom of judicial self-restraint in attempting pre-arbitral definitions of the scope of arbitration. Apparently the union originally sought to add one engine company and to increase the personnel assigned to the existing engine companies. If these ***619** union demands required the building of a new fire house or the purchase of new equipment, they could very well intrude upon management's role of formulating policy. In view of the union's counterclaim that such a station and equipment were necessary for the safety of the men, this issue could have presented a complex problem. But the very flow of the proceedings washed away these questions because the union altered its position and accepted the recommendation of the fact finding committee "that the manning schedule presently in effect be continued without change during the term of the new Memorandum of Agreement." Hence we do not face the problem of whether the construction of a new fire house and the purchase of new equipment would intrude upon managerial prerogatives of policy making.

Although the city challenges even the limited status quo version of the manpower issue, contending that the fact finding ruling involves the "merits" and "organization" of the fire department and is therefore excluded from the scope of bargaining, we cannot conclude at this stage that the manpower proposal is necessarily nonarbitrable.

The city argues that manpower level in the fire department is inevitably a matter of fire prevention policy, and as such lies solely within the province of management. If the relevant evidence demonstrates that the union's manpower proposal is indeed directed to the question of maintaining a particular standard of fire prevention within the community, the city's objection would be well taken.

The union asserts, however, that its current manpower proposal is not directed at general fire prevention policy, but instead involves a matter of workload and safety for employees, and accordingly falls within the scope of negotiation and arbitration. Because the tasks involved in fighting a fire cannot be reduced, the union argues that the number of persons manning the fire truck or comprising the engine company fixes and determines the amount of *work* each fire fighter must perform. Moreover, because of the hazardous nature of the job, the union also claims that the number of persons available to fight the fire directly affects the *safety* of each fire fighter.

([5]) Insofar as the manning proposal at issue does in fact relate to the questions of employee workload and safety, decisions under the National Labor Relations Act fully support the union's contention that the proposal is arbitrable. First the federal authorities uniformly recognize "workload"[11] ***620** issues as mandatory subjects of bargaining whose determination may not be reserved to the sole discretion of the employer. (See, e.g., *Gallenkamp Stores Co.* v. *N.L.R.B.* (9th Cir. 1968) 402 F.2d 525, 529, fn. 4.) Thus, for example, in *Beacon Piece Dyeing & Finishing Co., Inc.* (1958) 121 N.L.R.B. 953, 954, 956, the National Labor Relations Board held that an employer could not unilaterally increase an employee's workload by assigning to him the operation of an extra machine. Similarly, the courts have recognized rules and practices affecting employees safety as mandatory

subjects of bargaining since they indirectly concern the terms and conditions of his employment. (*N.L.R.B.* v. *Gulf Power Company* (5th Cir. 1967) 384 F.2d 822.)

Moreover, a recent California public employment case, *Los Angeles County Employees Assn. Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1 [108 Cal.Rptr. 625], affords additional support for the union's position. In interpreting the scope of bargaining language in the Meyers-Milias-Brown Act - language which, as pointed out earlier, largely parallels the scope of negotiation provision under the Vallejo City Charter - the *Los Angeles County Employees* court held that the county was required to negotiate with the union with respect to the size of the caseloads carried by social service eligibility workers. Because the caseload, i.e., "workload," of the social workers effectively determined the number of these workers needed to service the recipients of aid, bargaining over the size of caseloads in *Los Angeles County Employees* was in reality comparable to bargaining over "manning" levels.[12] In the case before us, the union claims that the fire fighters, like the Los Angeles social workers, are essentially demanding a particular workload but have framed their demand in terms of "manning," that is the number of people available to fight each fire.

Given the parties' divergent characterizations of the instant manpower proposal, either one of which may well be accurate, we believe the proper course must be to submit the issue to the arbitrators so that a factual record may be established. The nature of the evidence presented to the arbitrators should largely disclose whether the manpower issue primarily involves the workload and safety of the men ("wages, hours and working conditions") ***621** or the policy of fire prevention of the city ("merits, necessity or organization of any governmental service"). On the basis of such a record, the arbitrators can properly determine in the first instance whether or not, and to what extent, the present manpower proposal is arbitrable.

Furthermore, the parties themselves, or the arbitrators, in the ongoing process of arbitration, might suggest alternative solutions for the manpower problem that might remove or transform the issue. Indeed, the union in the instant case has already abandoned one position and assumed another. These are the elements and considerations that argue against preliminary court rulings that would dam up the stream of arbitration by premature limitations upon the process, thwarting its potential destination of the resolution of the issues. Hence we hold that the charter provision as to "merits, necessity or organization" of the service does not at this time preclude the arbitration of the union proposal that the manning schedule presently in effect be continued for the term of the new agreement.

4. *Personnel Reduction*

([6]) Finally, the union advanced a Personnel Reduction proposal which would require that the city bargain with the union with respect to any decision to reduce the number of fire fighters. Under the proposal, any reduction would be on a least-seniority basis, and no new employees could be hired until all those laid off were given an opportunity to return. The city objects to that part of the proposal requiring bargaining on a decision to reduce personnel and contends that any such matter is not negotiable because it involves the merits, necessity or organization of the fire fighting service.

A reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service.

Thus cases under the NLRA indicate that an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the *timing* of layoffs and the *number* and *identity* of the employees affected. (*N.L.R.B. v. United Nuclear Corporation* (10th Cir. 1967) 381 F.2d 972.) In some situations, such as that in which a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and lay off employees is subject to bargaining. (*Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203 [13 L.Ed.2d 233, 85 S.Ct. 398, 6 A.L.R.3d 1130].) The fact, however, that the decision to lay off results ***622** in termination of one or more individuals' employment is not *alone* sufficient to render the decision itself a subject of bargaining. (*N.L.R.B.* v. *Dixie Ohio Express Co.* (6th Cir. 1969) 409 F.2d 10.)

On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal.

Our conclusion that the issues of Personnel Reduction, Vacancies and Promotions, Schedule of Hours and Constant Manning Procedure, except as limited above, involve the wages, hours or working conditions of fire

fighters and are negotiable requires in the context of this suit that the City of Vallejo submit these issues to arbitration. We in no way evaluate the merit of the union proposals, but hold only that under the Vallejo charter they are arbitrable.

Such a result comports with the strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration. ([7]) We have declared that state policy in California "favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization." (*Posner* v. *Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 180 [14 Cal.Rptr. 297, 363 P.2d 313].) In this case the voters of the City of Vallejo similarly declared that they consider arbitration to be the most appropriate means of resolving labor disputes. Through section 810 the citizens of Vallejo delegated to a board of arbitrators the power to render a final and binding decision in labor disputes "to the extent permitted by law" after considering "all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition."[13]

At the same time Vallejo voters provided that any employee who participated in a strike against the city should be automatically terminated. (§ 810.) Thus, the employee's *quid pro quo* for this no-strike provision consisted ***623** of the arbitrability of all disputes (see *Boys Markets v. Clerks Union* (1970) 398 U.S. 235 [26 L.Ed.2d 199, 90 S.Ct. 1583]); the arbitration and no-strike provisions were interdependent. Any interpretation of the Vallejo charter which improperly failed to require arbitration on the full range of negotiable issues would not only erroneously curtail arbitration but would invite the very labor strife which the charter provisions seek to prevent.

For the foregoing reasons we dispose of the issues as follows: (1) The Schedule of Hours proposal must be submitted to arbitration in full. (2) The proposal as to Vacancies and Promotions is arbitrable. The arbitrators shall additionally hear the facts to determine whether the position of deputy fire chief is a supervisory one and thus excluded from the bargaining unit. If so, the Vacancies and Promotions proposal cannot apply to the deputy fire chief position. (3) The proposal that the manning schedule presently in effect be continued without change during the term of the new agreement is arbitrable to the extent that it affects the working conditions and safety of the employees. (4) As to Personnel Reduction, the proposal to reduce personnel is arbitrable only insofar as it affects the working conditions and safety of the remaining employees. Matters of seniority and reinstatement included in the Personnel Reduction proposal are arbitrable.

We affirm the judgment as herein modified and remand the case to the superior court with directions to issue a writ of mandamus requiring the City of Vallejo to proceed to arbitrate the issues of "Reduction of Personnel," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure" in accordance with this opinion. Each party shall bear its own costs on appeal.

Wright, C. J., McComb, J., Mosk, J., Burke, J., Sullivan, J., and Clark, J., concurred. ***624**

Footnotes

1 The court rejected the union's contention that the California Arbitration Act, Code of Civil Procedure section 1280 et seq., applied to this dispute, holding that it had no jurisdiction under the arbitration act and could not issue an order to arbitrate. The court upheld the writ of mandate to compel the city to arbitrate, however, because the union had no other plain, speedy and adequate remedy. Since the union did not initially seek an order to arbitrate under section 1281.2 of the act, but proceeded in the superior court with a petition for writ of mandate, we need not resolve the issue of the applicability of the California Arbitration Act.

2 Section 809 provides: "Consistent with applicable law, the City Council shall by ordinance provide a system of collective negotiating to include:
"a. It shall be the right of City employees individually or collectively to negotiate on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law, or on any matter arising out of Sections 803(n) or 803(o) of this Charter.
"b. The City Council shall direct the City Manager and/or his designated representative(s) to negotiate in good faith with recognized employee organizations.
"c. Agreements reached between City representatives authorized in (b) above and the representatives of recognized employee organizations shall be submitted in writing to the City Council for its approval, modification, or rejection.
"d. There shall be established a timetable for the total process of collective negotiations, including mediation and fact finding, as herein provided, which will, if successful, assume a final agreement between the parties no less than 45 days before the end of the current fiscal year.

"e. If, after a period of time to be set forth in the ordinance, no agreement can be reached between City representatives authorized in (b) above and the representatives of recognized employee organizations or if the City Council refuses to ratify the agreement arrived at or modifies such agreement in any manner unacceptable to said employee organizations, the parties shall request the State Conciliation Service, or other available impartial third-party mediation service mutually acceptable to the parties, to provide a mediator in accordance with its usual procedures.
"f. If no agreement between the parties has been reached within 10 days after the date for start of mediation, a fact-finding committee of three shall be appointed to deal with the disputed issues. One member of the fact-finding committee shall be appointed by the City Council, one member shall be appointed by the recognized employee organization, and those two appointed shall name a third, who shall be the chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation service. The fact-finding committee shall make public its report, with recommendations, within 30 days. The Council shall then promptly consider and act upon the report."

3 Section 810 provides: "Consistent with applicable law, the ordinance adopted by the Council under Section 809 shall in addition include a requirement that if the parties do not reach agreement within 10 days after the report and recommendations of the fact-finding committee, the issues shall be submitted to arbitration. The Board of Arbitrators shall be composed of three persons; one appointed by the City Council, one appointed by the recognized employee organization, and those two appointed shall appoint a third, who shall be chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation Service. No member of the fact-finding committee shall be a member of the Board of Arbitrators. The arbitrators shall consider all factors relevant to the isues from the standpoint of both the employer and the employee, including the City's financial condition. To the extent permitted by law, the decision of a majority of the Board of Arbitrators shall be final and binding upon the parties. The cost of arbitration shall be borne equally by all parties.
"The Council shall also provide in said ordinance that any employee who fails to report for work without good and just cause during negotiations or who participates in strike against the City of Vallejo will be considered to have terminated his employment with the City, and the Council shall have no power to provide, by reinstatement or otherwise, for the return or reentry of said employee into the City service except as a new employee who is employed in accordance with the regular employment practices of the City in effect for the particular position of employment."

4 The Meyers-Milias-Brown Act [hereinafter MMBA] applies to all local government employees in California. It provides for negotiation ("meet and confer") and mediation but not fact-finding or binding arbitration. (Gov. Code, §§ 3505 and 3505.2.)

5 The meaning of the scope of bargaining language in the Vallejo charter does not differ from the meaning of such language in the MMBA because of the existence of dispute resolution provisions in the charter not present in the MMBA. The essential difference between the bargaining rights afforded Vallejo employees and those afforded local government employees in general under the MMBA relates only to the *remedies* available when negotiation breaks down and *not* to the scope of negotiation required.
The charter provides that "[i]t shall be the right of City employees ... to *negotiate* on *matters* of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity. ..." (Italics added.) If no agreement is reached on *these matters*, they must be submitted to mediation, then fact-finding, then arbitration. The matters which are submitted to the three levels of dispute resolution are those upon which the parties *negotiate* but do not reach agreement. There is nothing in either section 809 or 810 which can be interpreted to exclude any matters which are subject to negotiation from subsequent submission to mediation, fact-finding and arbitration. Therefore interpretation of the scope of negotiation under the Vallejo charter is necessarily an interpretation of the scope of arbitration.

6 California authorities establish that after an arbitration decision has been rendered, judicial review is available to determine whether the arbitrators have exceeded their powers. (See, e.g., *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 691 [72 Cal. Rptr. 880, 446 P.2d 1000]; *National Indemnity Co. v. Superior Court* (1972) 27 Cal.App.3d 345, 349 [103 Cal.Rptr. 606]; *Firestone Tire & Rubber Co. v. United Rubber Workers* (1959) 168 Cal.App.2d 444, 449 [335 P.2d 990]; *Flores* v. *Barman* (1955) 130 Cal.App.2d 282, 287 [279 P.2d 81]; *Drake v. Stein* (1953) 116 Cal.App.2d 779, 785 [254 P.2d 613].)

7 The NLRA provides that "to bargain collectively is ... to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ...." (29 U.S.C. § 158(d)).

8 Thus federal cases have held an employer need not bargain about a decision to shut down one of its plants for economic reasons (*N.L.R.B. v. Royal Plating & Polishing Co.* (3d Cir. 1965) 350 F.2d 191), nor about a decision based on economic considerations alone to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner (*N.L.R.B. v. Transmarine Navigation Corporation* (9th Cir. 1967) 380 F.2d 933).

Furthermore, a decision to relocate the employer's plant to another location for economic reasons has been held "clearly within the realm of managerial discretion" and not subject to bargaining on the union's demand (*N.L.R.B. v. Rapid Bindery, Inc.* (2d Cir. 1961) 293 F.2d 170, 176).

9 See generally Shaw & Clark, *Practical Differences Between Public & Private Sector Collective Bargaining* (1972) 19 U.C.L.A.L.Rev. 867; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Report of the Western Assembly on Collective Bargaining in American Government (1972) pages 4-5; *Project: Collective Bargaining and Politics in Public Employment* (1972) 19 U.C.L.A.L.Rev. 887.

10 The Assembly Advisory Council on Public Employee Relations reached the same conclusion after studying arguments of alleged differences between the public and private sectors. (Final Rep., p. 139, Mar. 15, 1973.) Furthermore, we applied private sector precedent in interpreting another aspect of the MMBA in *Social Workers' Union, Local 535 v. Alameda Welfare Dept.* (1974) 11 Cal.3d 382 [113 Cal.Rptr. 461, 521 P.2d 453].

11 In the private sector employees rarely seek higher "manning" levels but instead usually frame similar demands in terms of reducing "workload." In one case, however, a union did phrase its proposal in "manning" terms, demanding an increase in the number of employees assigned to operate a specific 10-inch mill. The National Labor Relations Board found the proposal to constitute a mandatory subject of bargaining. (*Timken Roller Bearing Co.* (1946) 70 N.L.R.B. 500, 504-505, revd. on other grounds (6th Cir. 1947) 161 F.2d 949.)

12 The city argues that the *Los Angeles County Employees* case is distinguishable from the instant matter because it only concerned the "negotiability" of the caseload issue and not its "arbitrability." As noted above (see fn. 5, *supra*), however, under the charter provision at issue in this case, the *scope* of negotiation and the *scope* of arbitration are identical.

13 An amicus has contended that the disputed issues are not arbitrable because submission of them to arbitration constitutes an unconstitutional delegation of legislative power. Arbitration of public employment disputes has been held constitutional by state supreme courts in *State v. City of Laramie* (Wyo. 1968) 437 P.2d 295 and *City of Warwick v. Warwick Regular Firemen's Ass'n* (1969) 106 R.I. 109 [256 A.2d 206].
To the extent that the arbitrators do not proceed beyond the provisions of the Vallejo charter there is no unlawful delegation of legislative power.

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Exhibit 10

Kinlaw v. State of California (1991)
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hicle. Yet it cannot be rationally argued that a car two miles from its driver is within the driver's "immediate presence," that is, in an area in which the driver could exercise physical control over the vehicle.

Still another example reveals the defects of the majority's approach. Let us assume that the victim and defendant had merely decided to go for a walk, and that a third party stole the car from the lot where it was parked when the victim was a quarter-mile away. The victim, who was walking away from the car and down a narrow trail with defendant at the time of the theft, would not have known the car was gone until he returned. In other words, in all probability the car would not have been within the victim's sensory perception at the time it was taken. If the "immediate presence" requirement of the robbery statute is not tested by sensory perception, however, then it is difficult to see what it means. For instance, defendant and his companions could have walked with the victim not a quarter-mile, but a mile, or three miles, or five, and apparently the immediate presence requirement would still be met under the majority's approach. The majority's "relative proximity" theory thus nullifies the statutory requirement of immediate presence.

Second, the majority finds the immediate presence requirement of the robbery statute satisfied on a "luring away" theory. Under the majority's approach, robbery is committed when the defendant "uses peaceful means to move the victim away from a place where the victim could physically protect the property, then employs force or fear upon the victim in order to make good the theft or escape." (Maj. opn., *ante*, at p. 47 of 285 Cal.Rptr., p. 1289 of 814 P.2d.)

This approach presumes that the elements of robbery can occur over a theoretically limitless time span. But less than 10 months ago, the members of this court unanimously agreed that the term immediate presence means "an area over which the victim, *at the time force or fear was employed*, could be said to exercise some physical control." (*People v. Hayes, supra*, 52 Cal.3d at p. 627, 276 Cal.Rptr. 874, 802 P.2d 376, italics added.) The majority's conclusion in this case—that a defendant who lures the victim away from the immediate presence of the property, then employs force or fear, can be guilty of robbery—directly conflicts with this unambiguous language from our recent decision in *Hayes*.

The majority correctly finds that the evidence supports a conclusion that the key to the victim's car was taken from his person by means of force or fear. But because, as the majority observes, we cannot be certain under the circumstances of this case that the jury based its robbery finding on the taking of the key and not the car, this rationale alone cannot support the robbery special circumstance. (See *People v. Green* (1980) 27 Cal.3d 1, 70, 164 Cal.Rptr. 1, 609 P.2d 468.) Accordingly, I would strike the robbery special circumstance, and affirm the death verdict in this case based solely on the lying-in-wait special circumstance.

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Frances KINLAW et al., Plaintiffs and Appellants,

v.

STATE of California, Kenneth Kizer as Director of the Department of Health Services, etc., et al., Defendants and Respondents.

No. S014349.

Supreme Court of California, In Bank.

Aug. 30, 1991.

Medically indigent adults and taxpayers brought action against State and director of Department of Health Services of State, alleging that State had shifted its financial responsibility for funding of

health care for poor onto counties without providing necessary funding, in violation of constitutional article prohibiting State from avoiding its spending limits by shifting programs and their financial burdens to local governments. The Superior Court, Alameda County, No. 632120-4, Henry Ramsey, Jr., and Demetrios P. Agretelis, JJ., granted summary judgment to State. Plaintiffs appealed. The Court of Appeal reversed and remanded. The Supreme Court granted review, 269 Cal.Rptr. 492, 790 P.2d 1289, superseding opinion of Court of Appeal. The Supreme Court, Baxter, J., held that plaintiffs lacked standing.

Court of Appeal reversed.

Broussard, J., issued dissenting opinion in which Mosk, J., joined.

Opinion, 265 Cal.Rptr. 760, superseded.

1. States ⇐115, 168½

Medically indigent adults and taxpayers lacked standing to challenge State's alleged violation of constitutional article prohibiting State from avoiding its spending limits by shifting programs and their financial burdens to local governments; administrative procedures established by Legislature, which are available only to local agencies and school districts directly affected by state mandate, are exclusive means by which State's obligations under that constitutional article are to be determined and enforced. West's Ann.Cal. Const. Art. 13B, § 6.

2. Constitutional Law ⇐82(1)

Unless exercise of constitutional right is unduly restricted, court must limit enforcement to procedures established by Legislature.

3. States ⇐115

For purposes of medically indigent adults' challenge to shift of portion of costs of medically indigent care program by State to county, constitutional article prohibiting State from avoiding its spending limits by shifting programs and their financial burdens to local governments did not provide remedy of reinstatement to Medi-Cal pending further action by State; remedy for failure to fund program is declaration that mandate is unenforceable, and that relief is available only after determination that mandate exists and Legislature has failed to include costs in local government claims bill, and only on petition by county. West's Ann.Cal.Gov.Code § 17612; West's Ann.Cal. Const. Art. 13B, § 6.

Stephen D. Schear, Stephen E. Ronfeldt, Armando M. Menocal III, Lois Salisbury, Laura Schulkind and Kirk McInnis, San Francisco, for plaintiffs and appellants.

Catherine I. Hanson, Astrid G. Meghrigian, Alice P. Mead, Alan K. Marks, County Counsel, San Bernardino, Paul F. Mordy, Deputy County Counsel, De Witt W. Clinton, County Counsel, Los Angeles, Robert M. Fesler, Asst. County Counsel, Frank J. DaVanzo, Deputy County Counsel, Weissburg & Aronson, Mark S. Windisch, Carl Weissburg and Howard W. Cohen as amici curiae on behalf of plaintiffs and appellants.

John K. Van de Kamp and Daniel E. Lungren, Attys. Gen., N. Eugene Hill, Asst. Atty. Gen., Richard M. Frank, Asher Rubin and Carol Hunter, Deputy Attys. Gen., Sacramento, for defendants and respondents.

BAXTER, Justice.

Plaintiffs, medically indigent adults and taxpayers, seek to enforce section 6 of article XIIIB (hereafter, section 6) of the California Constitution through an action for declaratory and injunctive relief. They invoked the jurisdiction of the superior court as taxpayers pursuant to Code of Civil Procedure section 526a and as persons affected by the alleged failure of the state to comply with section 6. The superior court granted summary judgment for defendants State of California and Director of the Department of Health Services, after concluding that plaintiffs lacked standing to prosecute the action. On appeal, the Court of Appeal held that plaintiffs have standing and that the action is not barred by the availability of administrative remedies.

We reverse. The administrative procedures established by the Legislature, which are available only to local agencies and school districts directly affected by a state mandate, are the exclusive means by which the state's obligations under section 6 are to be determined and enforced. Plaintiffs therefore lack standing.

I

STATE MANDATES

Section 6, adopted on November 6, 1979, as part of an initiative measure imposing spending limits on state and local government, also imposes on the state an obligation to reimburse local agencies for the cost of most programs and services which they must provide pursuant to a state mandate if the local agencies were not under a preexisting duty to fund the activity. It provides:

"Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service, except that the Legislature may, but need not, provide such subvention of funds for the following mandates:

"(a) Legislative mandates requested by the local agency affected;

"(b) Legislation defining a new crime or changing an existing definition of a crime; or

"(c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

A complementary provision, section 3 of article XIIIB, provides for a shift from the state to the local agency of a portion of the spending or "appropriation" limit of the state when responsibility for funding an activity is shifted to a local agency:

"The appropriations limit for any fiscal year ... shall be adjusted as follows: [¶] (a) In the event that the financial responsibility of providing services is transferred, in whole or in part, ... from one entity of government to another, then for the year in which such transfer becomes effective the appropriations limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount."

II

PLAINTIFFS' ACTION

The underlying issue in this action is whether the state is obligated to reimburse the County of Alameda, and shift to Alameda County a concomitant portion of the state's spending limit, for the cost of providing health care services to medically indigent adults who prior to 1983 had been included in the state Medi-Cal program. Assembly Bill No. 799 (1981–1982 Reg. Sess.) (AB 799) (Stats.1982, ch. 328, p. 1568) removed medically indigent adults from Medi-Cal effective January 1, 1983. At the time section 6 was adopted, the state was funding Medi-Cal coverage for these persons without requiring any county financial contribution.

Plaintiffs initiated this action in the Alameda County Superior Court. They sought relief on their own behalf and on behalf of a class of similarly situated medically indigent adult residents of Alameda County. The only named defendants were the State of California, the Director of the Department of Health Services, and the County of Alameda.

In the complaint for declaratory and injunctive relief, plaintiffs sought an injunction compelling the state to restore Medi-Cal eligibility to medically indigent adults or to reimburse the County of Alameda for the cost of providing health care to those persons. They also prayed for a declaration that the transfer of responsibility from the state-financed Medi-Cal program to the counties without adequate reimbursement violated the California Constitution.[1]

1. The complaint also sought a declaration that the county was obliged to provide health care services to indigents that were equivalent to those available to nonindigents. This issue is

At the time plaintiffs initiated their action neither Alameda County, nor any other county or local agency, had filed a reimbursement claim with the Commission on State Mandates (Commission).[2]

Whether viewed as an action seeking restoration of Medi-Cal benefits, one to compel state reimbursement of county costs, or one for declaratory relief, therefore, the action required a determination that the enactment of AB 799 created a state mandate within the contemplation of section 6. Only upon resolution of that issue favorably to plaintiffs would the state have an obligation to reimburse the county for its increased expense and shift a portion of its appropriation limit, or to reinstate Medi-Cal benefits for plaintiffs and the class they seek to represent.

The gravamen of the action is, therefore, enforcement of section 6.[3]

III

ENFORCEMENT OF ARTICLE XIIIB, SECTION 6

[1] In 1984, almost five years after the adoption of article XIIIB, the Legislature enacted comprehensive administrative procedures for resolution of claims arising out of section 6. (§ 17500.) The Legislature did so because the absence of a uniform procedure had resulted in inconsistent rulings on the existence of state mandates, unnecessary litigation, reimbursement delays, and, apparently, resultant uncertainties in accommodating reimbursement requirements in the budgetary process. The necessity for the legislation was explained in section 17500:

"The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under Section 6 of Article XIIIB of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary and, therefore, in order to relieve unnecessary congestion of the judicial system, *it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs.*" (Italics added.)

In part 7 of division 4 of title 2 of the Government Code, "State-Mandated Local Costs," which commences with section 17500, the Legislature created the Commission (§ 17525), to adjudicate disputes over the existence of a state-mandated program (§§ 17551, 17557) and to adopt procedures for submission and adjudication of reimbursement claims (§ 17553). The five-member Commission includes the Controller, the Treasurer, the Director of Finance, the Director of the Office of Planning and

not before us. The County of Alameda aligned itself with plaintiffs in the superior court and did not oppose plaintiffs' effort to enforce section 6.

2. On November 23, 1987, the County of Los Angeles filed a test claim with the Commission. San Bernardino County joined as a test claimant. The Commission ruled against the counties, concluding that no state mandate had been created. The Los Angeles County Superior Court subsequently granted the counties' petition for writ of mandate (Code Civ.Proc., § 1094.5), reversing the Commission, on April 27, 1989. (No. C-731033.) An appeal from that judgment is presently pending in the Court of Appeal. (*County of Los Angeles v. State of California* No. B049625.)

3. Plaintiffs argue that they seek only a declaration that AB 799 created a state mandate and an injunction against the shift of costs until the state decides what action to take. This is inconsistent with the prayer of their complaint which sought an injunction requiring defendants to restore Medi-Cal eligibility to all medically indigent adults until the state paid the cost of full health services for them. It is also unavailing.

An injunction against enforcement of a state mandate is available only after the Legislature fails to include funding in a local government claims bill following a determination by the Commission that a state mandate exists. (Gov. Code, § 17612.) Whether plaintiffs seek declaratory relief and/or an injunction, therefore, they are seeking to enforce section 6.

All further statutory references are to the Government Code unless otherwise indicated.

Research, and a public member experienced in public finance. (§ 17525.)

The legislation establishes a test-claim procedure to expeditiously resolve disputes affecting multiple agencies (§ 17554),[4] establishes the method of payment of claims (§§ 17558, 17561), and creates reporting procedures which enable the Legislature to budget adequate funds to meet the expense of state mandates (§§ 17562, 17600, 17612, subd. (a).)

Pursuant to procedures which the Commission was authorized to establish (§ 17553), local agencies [5] and school districts [6] are to file claims for reimbursement of state-mandated costs with the Commission (§§ 17551, 17560), and reimbursement is to be provided only through this statutory procedure. (§§ 17550, 17552.)

The first reimbursement claim filed which alleges that a state mandate has been created under a statute or executive order is treated as a "test claim." (§ 17521.) A public hearing must be held promptly on any test claim. At the hearing on a test claim or on any other reimbursement claim, evidence may be presented not only by the claimant, but also by the Department of Finance and any other department or agency potentially affected by the claim. (§ 17553.) Any interested organization or individual may participate in the hearing. (§ 17555.)

A local agency filing a test claim need not first expend sums to comply with the alleged state mandate, but may base its claim on estimated costs. (§ 17555.) The Commission must determine both whether a state mandate exists and, if so, the amount to be reimbursed to local agencies and school districts, adopting "parameters and guidelines" for reimbursement of any claims relating to that statute or executive order. (§ 17557.) Procedures for determining whether local agencies have achieved statutorily authorized cost savings and for offsetting these savings against reimbursements are also provided. (§ 17620 et seq.) Finally, judicial review of the Commission decision is available through petition for writ of mandate filed pursuant to Code of Civil Procedure section 1094.5. (§ 17559.)

The legislative scheme is not limited to establishing the claims procedure, however. It also contemplates reporting to the Legislature and to departments and agencies of the state which have responsibilities related to funding state mandates, budget planning, and payment. The parameters and guidelines adopted by the Commission must be submitted to the Controller who is to pay subsequent claims arising out of the mandate. (§ 17558.) Executive orders mandating costs are to be accompanied by an appropriations bill to cover the costs if the costs are not included in the budget bill, and in subsequent years the costs must be included in the budget bill. (§ 17561, subds. (a) & (b).) Regular review of the costs is to be made by the Legislative Analyst who must report to the Legislature and recommend whether the mandate should be continued. (§ 17562.) The Commission is also required to make semiannual reports to the Legislature of the number of mandates found and the estimated reimbursement cost to the state. (§ 17600.) The Legislature must then adopt a "local government claims bill." If that bill does not include funding for a state mandate, an affected local agency or school district may seek a declaration from the superior court for the County of Sacramento that the mandate is unenforceable,

4. The test claim by the County of Los Angeles was filed prior to that proposed by Alameda County. The Alameda County claim was rejected for that reason. (See § 17521.) Los Angeles County permitted San Bernardino County to join in its claim which the Commission accepted as a test claim intended to resolve the issues the majority elects to address instead in this proceeding. Los Angeles County declined a request from Alameda County that it be included in the test claim because the two counties' systems of documentation were so similar that joining Alameda County would not be of any benefit. Alameda County and these plaintiffs were, of course, free to participate in the Commission hearing on the test claim. (§ 17555.)

5. "'Local agency' means any city, county, special district, authority, or other political subdivision of the state." (§ 17518.)

6. "'School district' means any school district, community college district, or county superintendant of schools." (§ 17519.)

and an injunction against enforcement. (§ 17612.)

Additional procedures, enacted in 1985, create a system of state-mandate apportionments to fund reimbursement. (§ 17615 et seq.)

It is apparent from the comprehensive nature of this legislative scheme, and from the Legislature's expressed intent, that the exclusive remedy for a claimed violation of section 6 lies in these procedures. The statutes create an administrative forum for resolution of state mandate claims, and establishes procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created. It also designates the Sacramento County Superior Court as the venue for judicial actions to declare unfunded mandates invalid (§ 17612).

The legislative intent is clearly stated in section 17500: "It is the intent of the Legislature in enacting this part to provide for the implementation of Section 6 of Article XIIIB of the California Constitution and to consolidate the procedures for reimbursement of statutes specified in the Revenue and Taxation Code with those identified in the Constitution...." And section 17550 states: "Reimbursement of local agencies and school districts for costs mandated by the state shall be provided pursuant to this chapter."

Finally, section 17552 provides: "This chapter shall provide *the sole and exclusive procedure* by which a local agency or school district may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution." (Italics added.)

In short, the Legislature has created what is clearly intended to be a comprehensive and exclusive procedure by which to implement and enforce section 6 of article XIIIB.

IV

EXCLUSIVITY

Plaintiffs argued, and the Court of Appeal agreed, that the existence of an administrative remedy by which affected local agencies could enforce their right under section 6 to reimbursement for the cost of state mandates did not bar this action because the administrative remedy is available only to local agencies and school districts.

The Court of Appeal recognized that the decision of the County of Alameda, which had not filed a claim for reimbursement at the time the complaint was filed, was a discretionary decision which plaintiffs could not challenge. (*Dunn v. Long Beach L. & W. Co.* (1896) 114 Cal. 605, 609, 610–611, 46 P. 607; *Silver v. Watson* (1972) 26 Cal.App.3d 905, 909, 103 Cal.Rptr. 576; *Whitson v. City of Long Beach* (1962) 200 Cal.App.2d 486, 506, 19 Cal.Rptr. 668; *Elliott v. Superior Court* (1960) 180 Cal. App.2d 894, 897, 5 Cal.Rptr. 116.) The court concluded, however, that public policy and practical necessity required that plaintiffs have a remedy for enforcement of section 6 independent of the statutory procedure.

The right involved, however, is a right given by the Constitution to local agencies, not individuals either as taxpayers or recipients of government benefits and services. Section 6 provides that the "state shall provide a subvention of funds *to reimburse ... local governments....*" (Italics added.) The administrative remedy created by the Legislature is adequate to fully implement section 6. That Alameda County did not file a reimbursement claim does not establish that the enforcement remedy is inadequate. Any of the 58 counties was free to file a claim, and other counties did so. The test claim is now before the Court of Appeal. The administrative procedure has operated as intended.

[2] The Legislature has the authority to establish procedures for the implementation of local agency rights under section 6 of article XIIIB. Unless the exercise of a constitutional right is unduly restricted, the court must limit enforcement to the procedures established by the Legislature. (*Peo-*

ple v. Western Air Lines, Inc. (1954) 42 Cal.2d 621, 637, 268 P.2d 723; *Chesney v. Byram* (1940) 15 Cal.2d 460, 463, 101 P.2d 1106; *County of Contra Costa v. State of California* (1986) 177 Cal.App.3d 62, 75, 222 Cal.Rptr. 750.)

Plaintiffs' argument that they must be permitted to enforce section 6 as individuals because their right to adequate health care services has been compromised by the failure of the state to reimburse the county for the cost of services to medically indigent adults is unpersuasive. Plaintiffs' interest, although pressing, is indirect and does not differ from the interest of the public at large in the financial plight of local government. Although the basis for the claim that the state must reimburse the county for its costs of providing the care that was formerly available to plaintiffs under Medi-Cal is that AB 799 created a state mandate, plaintiffs have no right to have any reimbursement expended for health care services of any kind. Nothing in article XIIIB or other provision of law controls the county's expenditure of the funds plaintiffs claim must be paid to the county. To the contrary, section 17563 gives the local agency complete discretion in the expenditure of funds received pursuant to section 6, providing: "Any funds received by a local agency or school district pursuant to the provisions of this chapter may be used for any public purpose."

The relief plaintiffs seek in their prayer for state reimbursement of county expenses is, in the end, a reallocation of general revenues between the state and the county. Neither public policy nor practical necessity compels creation of a judicial remedy by which individuals may enforce the right of the county to such revenues. The Legislature has established a procedure by which the county may claim any revenues to which it believes it is entitled under section 6. That test-claim statute expressly provides that not only the claimant, but also "any other interested organization or individual may participate" in the hearing before the Commission (§ 17555) at which the right to reimbursement of the costs of such mandate is to be determined. Procedures for receiving any claims must "provide for presentation of evidence by the claimant, the Department of Finance and any other affected department or agency, *and any other interested person.*" (§ 17553. Italics added.) Neither the county nor an interested individual is without an opportunity to be heard on these questions. These procedures are both adequate and exclusive.[7]

[3] The alternative relief plaintiffs seek—reinstatement to Medi-Cal pending further action by the state—is not a remedy available under the statute, and thus is not one which this court may award. The remedy for failure to fund a program is a declaration that the mandate is unenforceable. That relief is available only after the Commission has determined that a mandate exists and the Legislature has failed to include the cost in a local government claims bill, and only on petition by the county. (§ 17612.)[8]

Moreover, the judicial remedy approved by the Court of Appeal permits resolution of the issues raised in a state mandate claim without the participation of those officers and individuals the Legislature deems necessary to a full and fair exposition and resolution of the issues. Neither the Controller nor the Director of Finance

7. Plaintiffs' argument that the Legislature's failure to make provision for individual enforcement of section 6 before the Commission demonstrates an intent to permit legal actions is not persuasive. The legislative statement of intent to relegate all mandate disputes to the Commission is clear. A more likely explanation of the failure to provide for test cases to be initiated by individuals lies in recognition that (1) because section 6 creates rights only in governmental entities, individuals lack sufficient beneficial interest in either the receipt or expenditure of reimbursement funds to accord them standing; and (2) the number of local agencies having a direct interest in obtaining reimbursement is large enough to ensure that citizen interests will be adequately represented.

8. Plaintiffs are not without a remedy if the county fails to provide adequate health care, however. They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action. (See, e.g., *Mooney v. Pickett* (1971) 4 Cal.3d 669, 94 Cal.Rptr. 279, 483 P.2d 1231.)

was named a defendant in this action. The Treasurer and the Director of the Office of Planning and Research did not participate. All of these officers would have been involved in determining the question as members of the Commission, as would the public member of the Commission. The judicial procedures were not equivalent to the public hearing required on test claims before the Commission by section 17555. Therefore, other affected departments, organizations, and individuals had no opportunity to be heard.[9]

Finally, since a determination that a state mandate has been created in a judicial proceeding rather than one before the Commission does not trigger the procedures for creating parameters and guidelines for payment of claims, or for inclusion of estimated costs in the state budget, there is no source of funds available for compliance with the judicial decision other than the appropriations for the Department of Health Services. Payment from those funds can only be at the expense of another program which the department is obligated to fund. No public policy supports, let alone requires, this result.

The superior court acted properly in dismissing this action.

The judgment of the Court of Appeal is reversed.

LUCAS, C.J., and PANELLI, KENNARD and ARABIAN, JJ., concur.

BROUSSARD, Justice, dissenting.

I dissent. For nine years the Legislature has defied the mandate of article XIIIB of the California Constitution (hereafter article XIIIB). Having transferred responsibility for the care of medically indigent adults (MIA's) to county governments, the Legislature has failed to provide the counties with sufficient money to meet this responsibility, yet the Legislature computes its own appropriations limit as if it fully funded the program. The majority, however, declines to remedy this violation because, it says, the persons most directly harmed by the violation—the medically indigent who are denied adequate health care—have no standing to raise the matter. I disagree, and will demonstrate that (1) plaintiffs have standing as citizens to seek a declaratory judgment to determine whether the state is complying with its constitutional duty under article XIIIB; (2) the creation of an administrative remedy whereby counties and local districts can enforce article XIIIB does not deprive the citizenry of its own independent right to enforce that provision; and (3) even if plaintiffs lacked standing, our recent decision in *Dix v. Superior Court* (1991) 53 Cal.3d 442, 279 Cal.Rptr. 834, 807 P.2d 1063 permits us to reach and resolve any significant issue decided by the Court of Appeal and fully briefed and argued here. I conclude that we should reach the merits of the appeal.

On the merits, I conclude that the state has not complied with its constitutional obligation under article XIIIB. To prevent the state from avoiding the spending limits imposed by article XIIIB, section 6 of that article prohibits the state from transferring previously state-financed programs to local governments without providing sufficient funds to meet those burdens. In 1982, however, the state excluded the medically indigent from its Medi-Cal program, thus shifting the responsibility for such care to the counties. Subvention funds provided by the state were inadequate to reimburse the counties for this responsibility, and became less adequate every year. At the same time, the state continued to compute its spending limit as if it fully financed the entire program. The result is exactly what article XIIIB was intended to prevent: the state enjoys a falsely inflated spending limit; the county is compelled to assume a burden it cannot afford; and the medically indigent receive inadequate health care.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs—citizens, taxpayers, and persons in need of medical care—allege that

9. For this reason, it would be inappropriate to address the merits of plaintiff's claim in this proceeding. (Cf. *Dix v. Superior Court* (1991) 53 Cal.3d 442, 279 Cal.Rptr. 834, 807 P.2d 1063.) Unlike the dissent, we do not assume that in representing the state in this proceeding, the Attorney General necessarily represented the interests and views of these officials.

the state has shifted its financial responsibility for the funding of health care for MIA's to the counties without providing the necessary funding and without any agreement transferring appropriation limits, and that as a result the state is violating article XIIIB. Plaintiffs further allege they and the class they claim to represent cannot, consequently, obtain adequate health care from the County of Alameda, which lacks the state funding to provide it. The county, although nominally a defendant, aligned itself with plaintiffs. It admits the inadequacy of its program to provide medical care for MIA's but blames the absence of state subvention funds.[1]

At hearings below, plaintiffs presented uncontradicted evidence regarding the enormous impact of these statutory changes upon the finances and population of Alameda County. That county now spends about $40 million annually on health care for MIA's, of which the state reimburses about half. Thus, since article XIIIB became effective, Alameda County's obligation for the health care of MIA's has risen from zero to more than $20 million per year. The county has inadequate funds to discharge its new obligation for the health care of MIA's; as a result, according to the Court of Appeal, uncontested evidence from medical experts presented below shows that, "The delivery of health care to the indigent in Alameda County is in a state of shambles; the crisis cannot be overstated...." "Because of inadequate state funding, some Alameda County residents are dying, and many others are suffering serious diseases and disabilities, because they cannot obtain adequate access to the medical care they need...." "The system is clogged to the breaking point.... All community clinics ... are turning away patients." "The funding received by the county from the state for MIAs does not approach the actual cost of providing health care to the MIAs. As a consequence, inadequate resources available to county health services jeopardize the lives and health of thousands of people...."

The trial court acknowledged that plaintiffs had shown irreparable injury, but denied their request for a preliminary injunction on the ground that they could not prevail in the action. It then granted the state's motion for summary judgment. Plaintiffs appealed from both decisions of the trial court.

The Court of Appeal consolidated the two appeals and reversed the rulings below. It concluded that plaintiffs had standing to bring this action to enforce the constitutional spending limit of article XIIIB, and that the action is not barred by the existence of administrative remedies available to counties. It then held that the shift of a portion of the cost of medical indigent care by the state to Alameda County constituted a state-mandated new program under the provisions of article XIIIB, which triggered that article's provisions requiring a subvention of funds by the state to reimburse Alameda County for the costs of such program it was required to assume. The judgments denying a preliminary injunction and granting summary judgment for defendants were reversed. We granted review.

II. STANDING

A. *Plaintiffs have standing to bring an action for declaratory relief to determine whether the state is complying with article XIIIB.*

Plaintiffs first claim standing as taxpayers under Code of Civil Procedure section 526a, which provides that: "An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county ..., may be maintained

1. The majority states that "Plaintiffs are not without a remedy if the county fails to provide adequate health care.... They may enforce the obligation imposed on the county by Welfare and Institutions Code sections 17000 and 17001, and by judicial action." (Maj. opn., *ante*, p. 72, fn. 8 of 285 Cal.Rptr., p. 1314, fn. 8 of 814 P.2d.)

The majority fails to note that plaintiffs have already tried this remedy, and met with the response that, owing to the state's inadequate subvention funds, the county cannot afford to provide adequate health care.

against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein...." As in *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439, 261 Cal.Rptr. 574, 777 P.2d 610, however, it is "unnecessary to reach the question whether plaintiffs have standing to seek an injunction under Code of Civil Procedure section 526a, because there is an independent basis for permitting them to proceed." Plaintiffs here seek a declaratory judgment that the transfer of responsibility for MIA's from the state to the counties without adequate reimbursement violates article XIIIB. A declaratory judgment that the state has breached its duty is essentially equivalent to an action in mandate to compel the state to perform its duty. (See *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 9, 270 Cal.Rptr. 796, 793 P.2d 2, which said that a declaratory judgment establishing that the state has a duty to act provides relief equivalent to mandamus, and makes issuance of the writ unnecessary.) Plaintiffs further seek a mandatory injunction requiring that the state pay the health costs of MIA's under the Medi-Cal program until the state meets its obligations under article XIIIB. The majority similarly characterize plaintiffs' action as one comparable to mandamus brought to enforce section 6 of article XIIIB.

We should therefore look for guidance to cases that discuss the standing of a party seeking a writ of mandate to compel a public official to perform his or her duty.[2] Such an action may be brought by any person "beneficially interested" in the issuance of the writ. (Code Civ.Proc., § 1086.) In *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796, 166 Cal.Rptr. 844, 614 P.2d 276, we explained that the "requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." We quoted from Professor Davis, who said, "One who is in fact adversely affected by governmental action should have standing to challenge that action if it is judicially reviewable." (Pp. 796–797, 166 Cal.Rptr. 844, 614 P.2d 276, quoting Davis, 3 Administrative Law Treatise (1958) p. 291.) Cases applying this standard include *Stocks v. City of Irvine* (1981) 114 Cal.App.3d 520, 170 Cal.Rptr. 724, which held that low-income residents of Los Angeles had standing to challenge exclusionary zoning laws of suburban communities which prevented the plaintiffs from moving there; *Taschner v. City Council, supra*, 31 Cal.App.3d 48, 107 Cal. Rptr. 214, which held that a property owner has standing to challenge an ordinance which may limit development of the owner's property; and *Felt v. Waughop* (1924) 193 Cal. 498, 225 P. 862, which held that a city voter has standing to compel the city clerk to certify a correct list of candidates for municipal office. Other cases illustrate the limitation on standing: *Carsten v. Psychology Examining Com., supra*, 27 Cal.3d 793, 166 Cal.Rptr. 844, 614 P.2d 276 held that a member of the committee who was neither seeking a license nor in danger of losing one had no standing to challenge

2. It is of no importance that plaintiffs did not request issuance of a writ of mandate. In *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 56, 107 Cal.Rptr. 214 (overruled on other grounds in *Assoc. Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 596, 135 Cal.Rptr. 41, 557 P.2d 473), the court said that "[a]s against a general demurrer, a complaint for declaratory relief may be treated as a petition for mandate [citations], and where a complaint for declaratory relief alleges facts sufficient to entitle plaintiff to mandate, it is error to sustain a general demurrer without leave to amend."

In the present case, the trial court ruled on a motion for summary judgment, but based that ruling not on the evidentiary record (which supported plaintiffs' showing of irreparable injury) but on the issues as framed by the pleadings. This is essentially equivalent to a ruling on demurrer, and a judgment denying standing could not be sustained on the narrow ground that plaintiffs asked for the wrong form of relief without giving them an opportunity to correct the defect. (See *Residents of Beverly Glen, Inc. v. City of Los Angeles* (1973) 34 Cal.App.3d 117, 127–128, 109 Cal.Rptr. 724.)

a change in the method of computing the passing score on the licensing examination; *Parker v. Bowron* (1953) 40 Cal.2d 344, 254 P.2d 6 held that a union official who was neither a city employee nor a city resident had no standing to compel a city to follow a prevailing wage ordinance; and *Dunbar v. Governing Board of Grossmont Junior College Dist.* (1969) 275 Cal.App.2d 14, 79 Cal.Rptr. 662 held that a member of a student organization had standing to challenge a college district's rule barring a speaker from campus, but persons who merely planned to hear him speak did not.

No one questions that plaintiffs are affected by the lack of funds to provide care for MIA's. Plaintiffs, except for plaintiff Rabinowitz, are not merely citizens and taxpayers; they are medically indigent persons living in Alameda County who have been and will be deprived of proper medical care if funding of MIA programs is inadequate. Like the other plaintiffs here, plaintiff Kinlaw, a 60–year–old woman with diabetes and hypertension, has no health insurance. Plaintiff Spier has a chronic back condition; inadequate funding has prevented him from obtaining necessary diagnostic procedures and physiotherapy. Plaintiff Tsosie requires medication for allergies and arthritis, and claims that because of inadequate funding she cannot obtain proper treatment. Plaintiff King, an epileptic, says she was unable to obtain medication from county clinics, suffered seizures, and had to go to a hospital. Plaintiff "Doe" asserts that when he tried to obtain treatment for AIDS-related symptoms, he had to wait four to five hours for an appointment and each time was seen by a different doctor. All of these are people personally dependent upon the quality of care of Alameda County's MIA program; most have experienced inadequate care because the program was underfunded, and all can anticipate future deficiencies in care if the state continues its refusal to fund the program fully.

The majority, however, argues that the county has no duty to use additional subvention funds for the care of MIA's because under Government Code section 17563 "[a]ny funds received by a local agency ... pursuant to the provisions of this chapter may be used for any public purpose." Since the county may use the funds for other purposes, it concludes that MIA's have no special interest in the subvention.[3]

This argument would be sound if the county were already meeting its obligations to MIA's under Welfare and Institutions Code section 17000. If that were the case, the county could use the subvention funds as it chose, and plaintiffs would have no more interest in the matter than any other county resident or taxpayer. But such is not the case at bar. Plaintiffs here allege that the county is not complying with its duty, mandated by Welfare and Institutions Code section 17000, to provide health care for the medically indigent; the county admits its failure but pleads lack of funds. Once the county receives adequate funds, it must perform its statutory duty under section 17000 of the Welfare and Institutions Code. If it refused, an action in mandamus would lie to compel performance. (See *Mooney v. Pickett* (1971) 4 Cal.3d 669, 94 Cal.Rptr. 279, 483 P.2d 1231.) In fact, the county has made clear throughout this litigation that it would use the subvention funds to provide care for MIA's. The majority's conclusion that plaintiffs lack a special, beneficial interest in the state's compliance with article XIIIB ignores the practical realities of health care funding.

Moreover, we have recognized an exception to the rule that a plaintiff must be beneficially interested. "Where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question

3. The majority's argument assumes that the state will comply with a judgment for plaintiffs by providing increased subvention funds. If the state were instead to comply by restoring Medi-Cal coverage for MIA's, or some other method of taking responsibility for their health needs, plaintiffs would benefit directly.

enforced." (*Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100–101, 162 P.2d 627.) We explained in *Green v. Obledo* (1981) 29 Cal.3d 126, 144, 172 Cal.Rptr. 206, 624 P.2d 256, that this "exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.... It has often been invoked by California courts. [Citations.]"

Green v. Obledo presents a close analogy to the present case. Plaintiffs there filed suit to challenge whether a state welfare regulation limiting deductibility of work-related expenses in determining eligibility for aid to families with dependent children (AFDC) assistance complied with federal requirements. Defendants claimed that plaintiffs were personally affected only by a portion of the regulation, and had no standing to challenge the balance of the regulation. We replied that "[t]here can be no question that the proper calculation of AFDC benefits is a matter of public right [citation], and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty. [Citation.] It follows that plaintiffs have standing to seek a writ of mandate commanding defendants to cease enforcing [the regulation] in its entirety." (29 Cal.3d at p. 145, 172 Cal.Rptr. 206, 624 P.2d 256.)

We again invoked the exception to the requirement for a beneficial interest in *Common Cause v. Board of Supervisors, supra*, 49 Cal.3d 432, 261 Cal.Rptr. 574, 777 P.2d 610. Plaintiffs in that case sought to compel the county to deputize employees to register voters. We quoted *Green v. Obledo, supra*, 29 Cal.3d 126, 144, 172 Cal.Rptr. 206, 624 P.2d 256, and concluded that "[t]he question in this case involves a public right to voter outreach programs, and plaintiffs have standing as citizens to seek its vindication." (49 Cal.3d at p. 439, 261 Cal.Rptr. 574, 777 P.2d 610.) We should reach the same conclusion here.

B. *Government Code sections 17500–17630 do not create an exclusive remedy which bars citizen-plaintiffs from enforcing article XIIIB.*

Four years after the enactment of article XIIIB, the Legislature enacted Government Code sections 17500 through 17630 to implement article XIIIB, section 6. These statutes create a quasi-judicial body called the Commission on State Mandates, consisting of the state Controller, state Treasurer, state Director of Finance, State Director of the Office of Planning and Research, and one public member. The commission has authority to "hear and decide upon [any] claim" by a local government that it "is entitled to be reimbursed by the state" for costs under article XIIIB. (Gov.Code, § 17551, subd. (a).) Its decisions are subject to review by an action for administrative mandamus in the superior court. (See Gov.Code, § 17559.)

The majority maintains that a proceeding before the Commission on State Mandates is the exclusive means for enforcement of article XIIIB, and since that remedy is expressly limited to claims by local agencies or school districts (Gov.Code, § 17552), plaintiffs lack standing to enforce the constitutional provision.[4] I disagree, for two reasons.

4. The majority emphasizes the statement of purpose of Government Code section 17500: "The Legislature finds and declares that the existing system for reimbursing local agencies and school districts for the costs of state-mandated local programs has not provided for the effective determination of the state's responsibilities under section 6 of article XIII B of the California Constitution. The Legislature finds and declares that the failure of the existing process to adequately and consistently resolve the complex legal questions involved in the determination of state-mandated costs has led to an increasing reliance by local agencies and school districts on the judiciary, and, therefore, in order to relieve unnecessary congestion of the judicial system, it is necessary to create a mechanism which is capable of rendering sound quasi-judicial decisions and providing an effective means of resolving disputes over the existence of state-mandated local programs."

The "existing system" to which Government Code section 17500 referred was the Property Tax Relief Act of 1972 (Rev. & Tax.Code, §§ 2201–2327), which authorized local agencies and school boards to request reimbursement from the state Controller. Apparently dissatisfied with this remedy, the agencies and boards were bypassing the Controller and bringing actions directly in the courts. (See, e.g., *County of*

First, Government Code section 17552 expressly addressed the question of exclusivity of remedy, and provided that "[t]his chapter shall provide the sole and exclusive procedure by which *a local agency or school district* may claim reimbursement for costs mandated by the state as required by Section 6 of Article XIIIB of the California Constitution." (Italics added.) The Legislature was aware that local agencies and school districts were not the only parties concerned with state mandates, for in Government Code section 17555 it provided that "any other interested organization or individual may participate" in the commission hearing. Under these circumstances the Legislature's choice of words—"the sole and exclusive procedure by which a local agency or school district may claim reimbursement"—limits the procedural rights of those claimants only, and does not affect rights of other persons. *Expressio unius est exclusio alterius*—"the expression of certain things in a statute necessarily involves exclusion of other things not expressed." (*Henderson v. Mann Theatres Corp.* (1976) 65 Cal.App.3d 397, 403, 135 Cal.Rptr. 266.)

The case is similar in this respect to *Common Cause v. Board of Supervisors, supra,* 49 Cal.3d 432, 261 Cal.Rptr. 574, 777 P.2d 610. Here defendants contend that the counties' right of action under Government Code sections 17551–17552 impliedly excludes any citizen's remedy; in *Common Cause* defendants claimed the Attorney General's right of action under Elections Code section 304 impliedly excluded any citizen's remedy. We replied that "the plain language of section 304 contains no limitation on the right of private citizens to sue to enforce the section. To infer such a limitation would contradict our long-standing approval of citizen actions to require governmental officials to follow the law, expressed in our expansive interpretation of taxpayer standing [citations], and our recognition of a 'public interest' exception to the requirement that a petitioner for writ of mandate have a personal beneficial interest in the proceedings [citations]." (49 Cal.3d at p. 440, 261 Cal.Rptr. 574, 777 P.2d 610, fn. omitted.) Likewise in this case the plain language of Government Code sections 17551–17552 contain no limitation on the right of private citizens, and to infer such a right would contradict our long-standing approval of citizen actions to enforce public duties.

The United States Supreme Court reached a similar conclusion in *Rosado v. Wyman* (1970) 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442. In that case New York welfare recipients sought a ruling that New York had violated federal law by failing to make cost-of-living adjustments to welfare grants. The state replied that the statute giving the Department of Health, Education and Welfare authority to cut off federal funds to noncomplying states constituted an exclusive remedy. The court rejected the contention, saying that "[w]e are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." (P. 420, 90 S.Ct. p. 1222.) The principle is clear: the persons actually harmed by illegal state action, not only some administrator who has no personal stake in the matter, should have standing to challenge that action.

Second, article XIIIB was enacted to protect taxpayers, not governments. Sections 1 and 2 of article XIIIB establish strict limits on state and local expenditures, and require the refund of all taxes collected in excess of those limits. Section 6 of article XIIIB prevents the state from evading those limits and burdening county taxpayers by transferring financial responsibility for a program to a county, yet counting the cost of that program toward the limit on state expenditures.

These provisions demonstrate a profound distrust of government and a disdain for excessive government spending. An exclusive remedy under which only governments can enforce article XIIIB, and the taxpayer-citizen can appear only if a government

Contra Costa v. State of California (1986) 177 Cal.App.3d 62, 222 Cal.Rptr. 750.) The legislative declaration refers to this phenomena. It does not discuss suits by individuals.

has first instituted proceedings, is inconsistent with the ethos that led to article XIIIB. The drafters of article XIIIB and the voters who enacted it would not accept that the state Legislature—the principal body regulated by the article—could establish a procedure under which the only way the article can be enforced is for local governmental bodies to initiate proceedings before a commission composed largely of state financial officials.

One obvious reason is that in the never-ending attempts of state and local government to obtain a larger proportionate share of available tax revenues, the state has the power to coerce local governments into foregoing their rights to enforce article XIIIB. An example is the Brown–Presley Trial Court Funding Act (Gov.Code, § 77000 et seq.), which provides that the county's acceptance of funds for court financing may, in the discretion of the Governor, be deemed a waiver of the counties' rights to proceed before the commission on all claims for reimbursement for state-mandated local programs which existed and were not filed prior to passage of the trial funding legislation.[5] The ability of state government by financial threat or inducement to persuade counties to waive their right of action before the commission renders the counties' right of action inadequate to protect the public interest in the enforcement of article XIIIB.

The facts of the present litigation also demonstrate the inadequacy of the commission remedy. The state began transferring financial responsibility for MIA's to the counties in 1982. Six years later no county had brought a proceeding before the commission. After the present suit was filed, two counties filed claims for 70 percent reimbursement. Now, nine years after the 1982 legislation, the counties' claims are pending before the Court of Appeal. After that court acts, and we decide whether to review its decision, the matter may still have to go back to the commission for hearings to determine the amount of the mandate—which is itself an appealable order. When an issue involves the life and health of thousands, a procedure which permits this kind of delay is not an adequate remedy.

In sum, effective, efficient enforcement of article XIIIB requires that standing to enforce that measure be given to those harmed by its violation—in this case, the medically indigent—and not vested exclusively in local officials who have no personal interest at stake and are subject to financial and political pressure to overlook violations.

C. *Even if plaintiffs lack standing this court should nevertheless address and resolve the merits of the appeal.*

Although ordinarily a court will not decide the merits of a controversy if the plaintiffs lack standing (see *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 90, 181 Cal.Rptr. 549, 642 P.2d 460), we recog-

5. "(a) The initial decision by a county to opt into the system pursuant to Section 77300 *shall constitute a waiver of all claims for reimbursement for state-mandated local programs not theretofore approved by the State Board of Control, the Commission on State Mandates, or the courts to the extent the Governor, in his discretion, determines that waiver to be appropriate;* provided, that a decision by a county to opt into the system pursuant to Section 77300 beginning with the second half of the 1988–89 fiscal year shall not constitute a waiver of a claim for reimbursement based on a statute chaptered on or before the date the act which added this chapter is chaptered, which is filed in acceptable form on or before the date the act which added this chapter is chaptered. A county may petition the Governor to exempt any such claim from this waiver requirement; and the Governor, in his discretion, may grant the exemption in whole or in part. The waiver shall not apply to or otherwise affect any claims accruing after initial notification. Renewal, renegotiation, or subsequent notification to continue in the program shall not constitute a waiver. [¶] (b) The initial decision by a county to opt into the system pursuant to Section 77300 shall constitute a waiver of any claim, cause of action, or action whenever filed, with respect to the Trial Court Funding Act of 1985, Chapter 1607 of the Statutes of 1985, or Chapter 1211 of the Statutes of 1987." (Gov.Code, § 77203.5, italics added.)

"As used in this chapter, 'state-mandated local program' *means any and all reimbursements owed or owing by operation of either Section 6 of Article XIIIB of the California Constitution,* or Section 17561 of the Government Code, or both." (Gov.Code, § 77005, italics added.)

nized an exception to this rule in our recent decision in *Dix v. Superior Court, supra*, 53 Cal.3d 442, 279 Cal.Rptr. 834, 807 P.2d 1063 (hereafter *Dix*). In *Dix*, the victim of a crime sought to challenge the trial court's decision to recall a sentence under Penal Code section 1170. We held that only the prosecutor, not the victim of the crime, had standing to raise that issue. We nevertheless went on to consider and decide questions raised by the victim concerning the trial court's authority to recall a sentence under Penal Code section 1170, subdivision (d). We explained that the sentencing issues "are significant. The case is fully briefed and all parties apparently seek a decision on the merits. Under such circumstances, we deem it appropriate to address [the victim's] sentencing arguments for the guidance of the lower courts. Our discretion to do so under analogous circumstances is well settled. [Citing cases explaining when an appellate court can decide an issue despite mootness.]" (53 Cal.3d at p. 454, 279 Cal.Rptr. 834, 807 P.2d 1063.) In footnote we added that "Under article VI, section 12, subdivision (b) of the California Constitution ..., we have jurisdiction to 'review the *decision of the Court of Appeal* in any cause.' (Italics added.) Here the Court of Appeal's decision addressed two issues—standing and merits. Nothing in section 129(b) suggests that, having rejected the Court of Appeal's conclusion on the preliminary issue of standing, we are foreclosed from 'review[ing]' the second subject addressed and resolved in its decision." (P. 454, fn. 8, 279 Cal. Rptr. 834, 807 P.2d 1063.)

I see no grounds on which to distinguish *Dix*. The present case is also one in which the Court of Appeal decision addressed both standing and merits. It is fully briefed. Plaintiffs and the county seek a decision on the merits. While the state does not seek a decision on the merits in this proceeding, its appeal of the superior court decision in the mandamus proceeding brought by the County of Los Angeles (see maj. opn., *ante*, p. 68 of 285 Cal.Rptr., p. 1310 of 814 P.2d) shows that it is not opposed to an appellate decision on the merits.

The majority, however, notes that various state officials—the Controller, the Director of Finance, the Treasurer, and the Director of the Office of Planning and Research—did not participate in this litigation. Then in a footnote, the majority suggests that this is the reason they do not follow the *Dix* decision. (*Ante*, p. 73, fn. 9 of 285 Cal.Rptr., p. 1315, fn. 9 of 814 P.2d.) In my view, this explanation is insufficient. The present action is one for declaratory relief against the state. It is not necessary that plaintiffs also sue particular state officials. (The state has never claimed that such officials were necessary parties.) I do not believe we should refuse to reach the merits of this appeal because of the nonparticipation of persons who, if they sought to participate, would be here merely as amici curiae.[6]

The case before us raises no issues of departmental policy. It presents solely an issue of law which this court is competent to decide on the briefs and arguments presented. That issue is one of great significance, far more significant than any raised in *Dix*. Judges rarely recall sentencing under Penal Code section 1170, subdivision (d); when they do, it generally affects only the individual defendant. In contrast, the legal issue here involves immense sums of money and affect budgetary planning for both the state and counties. State and county governments need to know, as soon as possible, what their

6. It is true that these officials would participate in a proceeding before the Commission on State Mandates, but they would do so as members of an administrative tribunal. On appellate review of a commission decision, its members, like the members of the Public Utilities Commission or the Workers' Compensation Appeals Board, are not respondents and do not appear to present their individual views and positions. For example, in *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318, in which we reviewed a commission ruling relating to subvention payments for education of handicapped children, the named respondents were the State Superintendent of Public Instruction, the Department of Education, and the Commission on State Mandates. The individual members of the commission were not respondents and did not participate.

rights and obligations are; legislators considering proposals to deal with the current state and county budget crisis need to know how to frame legislation so it does not violate article XIIIB. The practical impact of a decision on the people of this state is also of great importance. The failure of the state to provide full subvention funds and the difficulty of the county in filling the gap translate into inadequate staffing and facilities for treatment of thousands of persons. Until the constitutional issues are resolved the legal uncertainties may inhibit both levels of government from taking the steps needed to address this problem. A delay of several years until the Los Angeles case is resolved could result in pain, hardship, or even death for many people. I conclude that, whether or not plaintiffs have standing, this court should address and resolve the merits of the appeal.

D. *Conclusion as to standing.*

As I have just explained, it is not necessary for plaintiffs to have standing for us to be able to decide the merits of the appeal. Nevertheless, I conclude that plaintiffs have standing both as persons "beneficially interested" under Code of Civil Procedure section 1086 and under the doctrine of *Green v. Obledo, supra*, 29 Cal.3d 126, 172 Cal.Rptr. 206, 624 P.2d 256, to bring an action to determine whether the state has violated its duties under article XIIIB. The remedy given local agencies and school districts by Government Code sections 17500–17630 is, as Government Code section 17552 states, the exclusive remedy by which those bodies can challenge the state's refusal to provide subvention funds, but the statute does not limit the remedies available to individual citizens.

III. MERITS OF THE APPEAL

A. *State funding of care for MIA's.*

Welfare and Institutions Code section 17000 requires every county to "relieve and support" all indigent or incapacitated residents, except to the extent that such persons are supported or relieved by other sources.[7] From 1971 until 1982, and thus at the time article XIIIB became effective, counties were not required to pay for the provision of health services to MIA's, whose health needs were met through the state-funded Medi-Cal program. Since the medical needs of MIA's were fully met through other sources, the counties had no duty under Welfare and Institutions Code section 17000 to meet those needs. While the counties did make general contributions to the Medi-Cal program (which covered persons other than MIA's) from 1971 until 1978, at the time article XIIIB became effective in 1980, the counties were not required to make any financial contributions to Medi-Cal. It is therefore undisputed that the counties were not required to provide financially for the health needs of MIA's when article XIIIB became effective. The state funded all such needs of MIA's.

In 1982, the Legislature passed Assembly Bill No. 799 (1981–1982 Reg.Sess.; Stats.1982, ch. 328, pp. 1568–1609) (hereafter AB No. 799), which removed MIA's from the state-funded Medi-Cal program as of January 1, 1983, and thereby transferred to the counties, through the County Medical Services Plan which AB No. 799 created, the financial responsibility to provide health services to approximately 270,000 MIA's. AB No. 799 required that the counties provide health care for MIA's, yet appropriated only 70 percent of what the state would have spent on MIA's had those persons remained a state responsibility under the Medi-Cal program.

Since 1983, the state has only partially defrayed the costs to the counties of providing health care to MIA's. Such state funding to counties was initially relatively constant, generally more than $400 million per year. By 1990, however, state funding

7. Welfare and Institutions Code section 17000 provides that "[e]very county ... shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."

had decreased to less than $250 million. The state, however, has always included the full amount of its former obligation to provide for MIA's under the Medi-Cal program in the year preceding July 1, 1980, as part of its article XIIIB "appropriations limit," i.e., as part of the base amount of appropriations on which subsequent annual adjustments for cost of living and population changes would be calculated. About $1 billion has been added to the state's adjusted spending limit for population growth and inflation *solely* because of the state's inclusion of all MIA expenditures in the appropriation limit established for its base year, 1979–1980. The state has not made proportional increases in the sums provided to counties to pay for the MIA services funded by the counties since January 1, 1983.

B. *The function of article XIIIB.*

Our recent decision in *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 486–487, 280 Cal.Rptr. 92, 808 P.2d 235 (hereafter *County of Fresno*), explained the function of article XIIIB and its relationship to article XIIIA, enacted one year earlier:

"At the June 6, 1978, Primary Election, article XIIIA was added to the Constitution through the adoption of Proposition 13, an initiative measure aimed at controlling ad valorem property taxes and the imposition of new 'special taxes.'" (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231–232, 149 Cal.Rptr. 239, 583 P.2d 1281.) The constitutional provision imposes a limit on the power of state and local governments to adopt and levy taxes. (*City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522 (*City of Sacramento*).)

"At the November 6, 1979, Special Statewide Election, article XIII B was added to the Constitution through the adoption of Proposition 4, another initiative measure. That measure places limitations on the ability of both state and local governments to appropriate funds for expenditures.

"'Articles XIII A and XIII B work in tandem, together restricting California governments' power both to levy and to spend [taxes] for public purposes.'" (*City of Sacramento, supra*, 50 Cal.3d at p. 59, fn. 1, 266 Cal.Rptr. 139, 785 P.2d 522.)

"Article XIII B of the Constitution was intended ... to provide 'permanent protection for taxpayers from excessive taxation' and 'a reasonable way to provide discipline in tax spending at state and local levels.' (See *County of Placer v. Corin* (1980) 113 Cal.App.3d 443, 446, 170 Cal.Rptr. 232, quoting and following Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Special Statewide Elec. (Nov. 6, 1979), argument in favor of Prop. 4, p. 18.) To this end, it establishes an 'appropriations limit' for both state and local governments (Cal. Const., art. XIII B, § 8, subd. (h)) and allows no 'appropriations subject to limitation' in excess thereof (*id.*, § 2).[8] (See *County of Placer v. Corin, supra*, 113 Cal.App.3d at p. 446, 170 Cal.Rptr. 232.) It defines the relevant 'appropriations subject to limitation' as 'any authorization to expend during a fiscal year the proceeds of taxes....' (Cal. Const., art. XIII B, § 8, subd. (b).)" (*County of Fresno, supra*, 53 Cal.3d at p. 486, 280 Cal.Rptr. 92, 808 P.2d 235.)

Under section 3 of article XIIIB the state may transfer financial responsibility for a program to a county if the state and county mutually agree that the appropriation limit of the state will be decreased and that of the county increased by the same amount.[9]

8. Article XIIIB, section 1 provides: "The total annual appropriations subject to limitation of the state and of each local government shall not exceed the appropriations limit of such entity of government for the prior year adjusted for changes in the cost of living and population except as otherwise provided in this Article."

9. Section 3 of article XIIIB reads in relevant part: "The appropriations limit for any fiscal year ... shall be adjusted as follows:

"(a) In the event that the financial responsibility of providing services is transferred, in whole or in part ... from one entity of government to another, then for the year in which such transfer becomes effective the appropria-

Absent such an agreement, however, section 6 of article XIIIB generally precludes the state from avoiding the spending limits it must observe by shifting to local governments programs and their attendant financial burdens which were a state responsibility prior to the effective date of article XIIIB. It does so by requiring that "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the cost of such program or increased level of service...." [10]

"Section 6 was included in article XIIIB in recognition that article XIIIA of the Constitution severely restricted the taxing powers of local governments. (See *County of Los Angeles* [*v. State of California* (1987)] 43 Cal.3d 46, 61 [233 Cal.Rptr. 38, 729 P.2d 202].) The provision was intended to preclude the state from shifting financial responsibility for carrying out governmental functions onto local entities that were ill equipped to handle the task. (*Ibid.*; see *Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d 830, 836, fn. 6 [244 Cal.Rptr. 677, 750 P.2d 318].) Specifically, it was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues." (*County of Fresno, supra*, 53 Cal.3d at p. 487, 280 Cal.Rptr. 92, 808 P.2d 235.)

C. *Applicability of article XIIIB to health care for MIA's.*

The state argues that care of the indigent, including medical care, has long been a county responsibility. It claims that although the state undertook to fund this responsibility from 1979 through 1982, it was merely temporarily (as it turned out) helping the counties meet their responsibilities, and that the subsequent reduction in state funding did not impose any "new program" or "higher level of service" on the counties within the meaning of section 6 of article XIIIB. Plaintiffs respond that the critical question is not the traditional roles of the county and state, but who had the fiscal responsibility on November 6, 1979, when article XIIIB took effect. The purpose of article XIIIB supports the plaintiffs' position.

As we have noted, article XIIIA of the Constitution (Proposition 13) and article XIIIB are complementary measures. The former radically reduced county revenues, which led the state to assume responsibility for programs previously financed by the counties. Article XIIIB, enacted one year later, froze both state and county appropriations at the level of the 1988-1989 budgets—a year when the budgets included state financing for the prior county programs, but not county financing for these programs. Article XIIIB further limited the state's authority to transfer obligations to the counties. Reading the two together, it seems clear that article XIIIB was intended to limit the power of the Legislature to retransfer to the counties those obligations which the state had assumed in the wake of Proposition 13.

Under article XIIIB, both state and county appropriations limits are set on the basis of a calculation that begins with the budgets in effect when article XIIIB was enacted. If the state could transfer to the county a program for which the state at that time had full financial responsibility, the county could be forced to assume additional financial obligations without the right to appropriate additional moneys. The state, at the same time, would get credit toward its appropriations limit for expenditures it did not pay. County tax-

tion limit of the transferee entity shall be increased by such reasonable amount as the said entities shall mutually agree and the appropriations limit of the transferor entity shall be decreased by the same amount...."

10. Section 6 of article XIIIB further provides that the "Legislature may, but need not, provide such subvention of funds for the following mandates: (a) Legislative mandates requested by the local agency affected; (b) Legislation defining a new crime or changing an existing definition of a crime; or (c) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975." None of these exceptions apply in the present case.

payers would be forced to accept new taxes or see the county forced to cut existing programs further; state taxpayers would discover that the state, by counting expenditures it did not pay, had acquired an actual revenue surplus while avoiding its obligation to refund revenues in excess of the appropriations limit. Such consequences are inconsistent with the purpose of article XIIIB.

Our decisions interpreting article XIIIB demonstrate that the state's subvention requirement under section 6 is not vitiated simply because the "program" existed before the effective date of article XIIIB. The alternate phrase of section 6 of article XIIIB, " 'higher level of service[,]' ... must be read in conjunction with the predecessor phrase 'new program' to give it meaning. Thus read, it is apparent that *the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing 'program.'*" (*County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, 233 Cal.Rptr. 38, 729 P.2d 202, italics added.)

Lucia Mar Unified School Dist. v. Honig, supra, 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318, presents a close analogy to the present case. The state Department of Education operated schools for severely handicapped students, but prior to 1979 *school districts were required by statute to contribute* to education of those students from the district at the state schools. In 1979, in response to the restrictions on school district revenues imposed by Proposition 13, the statutes requiring such district contributions were repealed and the state assumed full responsibility for funding. The state funding responsibility continued until June 28, 1981, when Education Code section 59300 (hereafter section 59300), requiring school districts to share in these costs, became effective.

The plaintiff districts filed a test claim before the commission, contending they were entitled to state reimbursement under section 6 of article XIIIB. The commission found the plaintiffs were not entitled to state reimbursement, on the rationale that the increase in costs to the districts compelled by section 59300 imposed no new program or higher level of services. The trial and intermediate appellate courts affirmed on the ground that section 59300 called for only an " 'adjustment of costs' " of educating the severely handicapped, and that "*a shift in the funding of an existing program is not a new program or a higher level of service*" within the meaning of article XIIIB. (*Lucia Mar Unified School Dist. v. Honig, supra*, 44 Cal.3d at p. 834, 244 Cal.Rptr. 677, 750 P.2d 318, italics added.)

We reversed, rejecting the state's theories that the funding shift to the county of the subject program's costs does not constitute a new program. "[There can be no] doubt that although the schools for the handicapped have been operated by the state for many years, the program was new insofar as plaintiffs are concerned, since *at the time section 59300 became effective* they were not required to contribute to the education of students from their districts at such schools. [¶] ... To hold, under the circumstances of this case, that a shift in funding of an existing program from the state to a local entity is not a new program as to the local agency would, we think, violate the intent underlying section 6 of article XIIIB. That article imposed spending limits on state and local governments, and it followed by one year the adoption by initiative of article XIIIA, which severely limited the taxing power of local governments.... [¶] The intent of the section would plainly be violated if the state could, while retaining administrative control[11] of programs it has supported with state tax money,

11. The state notes that, in contrast to the program at issue in *Lucia Mar*, it has not retained administrative control over aid to MIA's. But the quoted language from *Lucia Mar*, while appropriate to the facts of that case, was not intended to establish a rule limiting article XIIIB, section 6, to instances in which the state retains administrative control over the program that it requires the counties to fund. The constitutional language admits of no such limitation, and its recognition would permit the Legislature to evade the constitutional requirement.

simply shift the cost of the programs to local government on the theory that the shift does not violate section 6 of article XIIIB because the programs are not 'new.' Whether the shifting of costs is accomplished by compelling local governments to pay the cost of entirely new programs created by the state, *or by compelling them to accept financial responsibility in whole or in part for a program which was funded entirely by the state before the advent of article XIIIB, the result seems equally violative of the fundamental purpose underlying section 6 of that article.*" (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 835–836, 244 Cal. Rptr. 677, 750 P.2d 318, fn. omitted, italics added.)

The state seeks to distinguish *Lucia Mar* on the ground that the education of handicapped children in state schools had never been the responsibility of the local school district, but overlooks that the local district had previously been required to contribute to the cost. Indeed the similarities between *Lucia Mar* and the present case are striking. In *Lucia Mar,* prior to 1979 the state and county shared the cost of educating handicapped children in state schools; in the present case from 1971–1979 the state and county shared the cost of caring for MIA's under the Medi-Cal program. In 1979, following enactment of Proposition 13, the state took full responsibility for both programs. Then in 1981 (for handicapped children) and 1982 (for MIA's), the state sought to shift some of the burden back to the counties. To distinguish these cases on the ground that care for MIA's is a county program but education of handicapped children a state program is to rely on arbitrary labels in place of financial realities.

The state presents a similar argument when it points to the following emphasized language from *Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d 830, 244 Cal.Rptr. 677, 750 P.2d 318: "[B]ecause section 59300 shifts partial financial responsibility for the support of students in the state-operated schools from the state to school districts—*an obligation the school districts did not have at the time article XIIIB was adopted*—it calls for plaintiffs to support a 'new program' within the meaning of section 6." (P. 836, 244 Cal. Rptr. 677, 750 P.2d 318, fn. omitted, italics added.) It urges *Lucia Mar* reached its result *only* because the "program" requiring school district funding in that case *was not required by statute* at the effective date of article XIIIB. The state then argues that the case at bench is distinguishable because it contends Alameda County had a continuing obligation *required by statute* antedating that effective date, which had only been "temporarily" [12] suspended when article XIIIB became effective. I fail to see the distinction between a case—*Lucia Mar*—in which no existing statute as of 1979 imposed an obligation on the local government and one—this case—in which the statute existing in 1979 imposed no obligation on local government.

The state's argument misses the salient point. As I have explained, the application of section 6 of article XIIIB does not depend upon when the program was created, but upon who had the burden of funding it when article XIIIB went into effect. Our conclusion in *Lucia Mar* that the educational program there in issue was a "new" program as to the school districts was not based on the presence or absence of any antecedent statutory obligation therefor. *Lucia Mar* determined that whether the program was new *as to the districts* depended on *when* they were compelled to assume the obligation to partially fund an existing program which they had not funded at the time article XIIIB became effective.

The state further relies on two decisions, *Madera Community Hospital v. County of Madera* (1984) 155 Cal.App.3d 136, 201 Cal.Rptr. 768 and *Cooke v. Superior Court* (1989) 213 Cal.App.3d 401, 261 Cal.Rptr. 706, which hold that the county has a statutory obligation to provide medical care for indigents, but that it need not provide pre-

12. The state's repeated emphasis on the "temporary" nature of its funding is a form of post hoc reasoning. At the time article XIIIB was enacted, the voters did not know which programs would be temporary and which permanent.

cisely the same level of services as the state provided under Medi-Cal.[13] Both are correct, but irrelevant to this case.[14] The county's obligation to MIA's is defined by Welfare and Institutions Code section 17000, not by the former Medi-Cal program.[15] If the state, in transferring an obligation to the counties, permits them to provide less services than the state provided, the state need only pay for the lower level of services. But it cannot escape its responsibility entirely, leaving the counties with a state-mandated obligation and no money to pay for it.

The state's arguments are also undercut by the fact that it continues to use the approximately $1 billion in spending authority, generated by its previous total funding of the health care program in question, as a portion of its initial *base spending limit* calculated pursuant to sections 1 and 3 of article XIIIB. In short, the state may maintain here that care for MIA's is a county obligation, but when it computes its appropriation limit it treats the entire cost of such care as a state program.

IV. CONCLUSION

This is a time when both state and county governments face great financial difficulties. The counties, however, labor under a disability not imposed on the state, for article XIIIA of the Constitution severely restricts their ability to raise additional revenue. It is, therefore, particularly important to enforce the provisions of article XIIIB which prevent the state from imposing additional obligations upon the counties without providing the means to comply with these obligations.

The present majority opinion disserves the public interest. It denies standing to enforce article XIIIB both to those persons whom it was designed to protect—the citizens and taxpayers—and to those harmed by its violation—the medically indigent adults. And by its reliance on technical grounds to avoid coming to grips with the merits of plaintiffs' appeal, it permits the state to continue to violate article XIIIB and postpones the day when the medically indigent will receive adequate health care.

MOSK, J., concurs.

13. It must, however, provide a *comparable* level of services. (See *Board of Supervisors v. Superior Court* (1989) 207 Cal.App.3d 552, 564, 254 Cal.Rptr. 905.)

14. Certain language in *Madera Community Hospital v. County of Madera, supra,* 155 Cal.App.3d 136, 201 Cal.Rptr. 768, however, is questionable. That opinion states that the "Legislature intended that County bear an obligation to its poor and indigent residents, *to be satisfied from county funds,* notwithstanding federal or state programs which exist concurrently with County's obligation and alleviate, to a greater or lesser extent, County's burden." (P. 151, 201 CalRptr. 768.) Welfare and Institutions Code section 17000 by its terms, however, requires the county to provide support to residents only "when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions." Consequently, to the extent that the state or federal governments provide care for MIA's, the county's obligation to do so is reduced pro tanto.

15. The county's right to subvention funds under article XIIIB arises because its duty to care for MIA's is a state-mandated responsibility; if the county had no duty, it would have no right to funds. No claim is made here that the funding of medical services for the indigent shifted to Alameda County is not a program "'mandated'" by the state; i.e., that Alameda County has any option other than to pay these costs. (*Lucia Mar Unified School Dist. v. Honig, supra,* 44 Cal.3d at pp. 836–837, 244 Cal.Rptr. 677, 750 P.2d 318.)

54 Cal.3d 289
285 Cal.Rptr. 86

Dieter NICKELSBERG, Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD and Los Angeles Unified School District, Respondents.

No. S013121.

Supreme Court of California, In Bank.

Aug. 30, 1991.

Claimant appealed decision of Workers' Compensation Appeals Board that

Exhibit 11

***San Diego Housing Commission v. Public Emp.Relations Board* (2016)**
246 Cal.App.4th 1

246 Cal.App.4th 1
Court of Appeal,
Fourth District, Division 1, California.

SAN DIEGO HOUSING COMMISSION, Plaintiff and Appellant,
v.
PUBLIC EMPLOYMENT RELATIONS BOARD, Defendant and Appellant;
Service Employees International Union, Local 221, Real Party in Interest and Respondent

D066237
|
Filed March 30, 2016

Synopsis
Background: After Public Employment Relations Board granted union's request that dispute with city housing commission regarding layoffs of two union employees be submitted to a factfinding panel, commission filed action seeking a declaratory judgment and a writ of mandate prohibiting Board from ordering the use of factfinding procedures, determining the use of factfinding procedures is not permitted, and restraining the parties from using factfinding procedures on matters unrelated to the negotiation of memorandum of understanding (MOU). The Superior Court, San Diego County, No. 37–2012–00087278–CU–WM–CTL, Ronald L. Styn and Kevin A. Enright, JJ., granted commission's motion for summary judgment and issued judgment and writ of mandate. Union appealed.

[Holding:] The Court of Appeal, McConnell, P.J., held that Meyers–Milias–Brown Act's factfinding procedures apply to any bargaining impasse over negotiable terms and conditions of employment.

Reversed and remanded.

**631 APPEALS from a judgment of the Superior Court of San Diego County, Ronald L. Styn and Kevin A. Enright, Judges. Judgment reversed; cross-appeal dismissed as moot. (Super. Ct. No. 37–2012–00087278–CU–WM–CTL)

Attorneys and Law Firms

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McCONNELL, P.J.

INTRODUCTION

*6 This appeal requires us to decide whether the provisions in the Meyers–Milias–Brown Act (Act) (Gov.Code, § 3500 et seq.)[1] for impasse resolution through advisory factfinding (factfinding provisions) apply to impasses **632 arising during the negotiation of any bargainable matter or only to impasses arising during the negotiation of a comprehensive memorandum of understanding (MOU).[2] We conclude the factfinding provisions apply to impasses arising during the negotiation of any bargainable matter. As the trial court determined otherwise, we reverse the court's judgment and remand the matter for further proceedings consistent with our decision.

BACKGROUND

The San Diego Housing Commission (Commission) is a local public agency subject to the Act. (§ 3501, subd. (c).) Service Employees International Union, Local 221 (Union) is an employee organization and the exclusive representative of certain Commission employees. The Public Employment Relations Board (Board) is a quasi-judicial administrative agency modeled after the National Labor Relations Board and administers the Act. (*County of Los Angeles v. Los Angeles County Employee Relations Com.* (2013) 56 Cal.4th 905, 916, 157 Cal.Rptr.3d 481, 301 P.3d 1102 (*County of Los Angeles*); §§ 3501, subd. (f), 3509, subd. (a), 3541, subd. (g).)

[1] [2]After the Commission and the Union reached an impasse in their negotiations over the effects of the Commission's decision to lay off two employees represented by the Union, the Union made a written request to the Board for the parties' dispute to be submitted to a factfinding panel under section 3505.4, *7 subdivision (a).[3] When the Board granted the request over the Commission's objection, the Commission filed this action seeking a declaratory judgment and a writ of mandate prohibiting the Board from ordering the use of factfinding procedures in this case, determining the use of factfinding procedures is not permitted under the circumstances of this case, and restraining the parties from using factfinding procedures on matters unrelated to the negotiation of an MOU.[4]

**633 The Commission subsequently filed a motion for summary judgment, arguing the Commission was entitled to a declaratory judgment and writ of mandate as a matter of law because the Act's factfinding provisions applied only to an impasse arising during the negotiation of a comprehensive MOU, not to an impasse arising during the negotiation of a discrete, bargainable issue. The court agreed with the Commission's interpretation of the Act and granted the Commission's motion. The court then issued a judgment declaring the Act's factfinding provisions only apply to an impasse arising from the negotiation of a new or successor MOU and do not apply to an impasse arising from any other negotiations. The court also issued a writ of mandate *8 commanding the Board to dismiss the factfinding proceedings requested by the Union, to rescind any requirement for the Commission to participate in factfinding proceedings for impasses not involving the negotiation of a new or successor MOU, and to reject any requests for the Commission to participate in factfinding proceedings for impasses not involving the negotiation of a new or successor MOU. The court later denied the Commission's motion for attorney fees under Code of Civil Procedure section 1021.5.

DISCUSSION

I

The resolution of this appeal turns on the proper interpretation of the Act's factfinding provisions. The interpretation of a statute presents a question of law, which we review independently. (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 189, 195 Cal.Rptr.3d 220, 361 P.3d 319; *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1026, 169 Cal.Rptr.3d 228 (*Santa Clara*).)

" 'Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them their usual and ordinary meaning. [Citation.] The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' [Citations.] If the words in the statute do not, by themselves, provide a reliable indicator of legislative intent, '[s]tatutory ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes. [Citation.]' [Citation.] ' "Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute ...; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation]." [Citations.]' [Citation.] If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy." (*People v. Arias* (2008) 45 Cal.4th 169, 177, 85 Cal.Rptr.3d 1, 195 P.3d 103.)

II

A

[3] [4] [5]The Act imposes a duty on a public agency to "meet and confer in good faith" with a recognized union, "regarding wages, hours, and other terms and conditions of employment ... prior to arriving at a determination *9 of policy or course of **634 action." (§ 3505.) The duty to bargain applies to a decision "directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls." (*International Assn. of Fire Fighters, Local 188, AFL–CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272, 120 Cal.Rptr.3d 117, 245 P.3d 845 (*Fire Fighters 188*).) The duty to bargain also applies to a fundamental management or policy decision if the decision directly affects employment and " 'the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about' " the decision. (*Id.* at pp. 273, 274, 120 Cal.Rptr.3d 117, 245

P.3d 845; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 638, 47 Cal.Rptr.3d 69, 139 P.3d 532.) Thus, the duty to bargain extends to matters beyond what might typically be incorporated into a comprehensive MOU, including, as here, the implementation and effects of a decision to lay off employees. (*Fire Fighters 188, supra,* at p. 277.)

B

Before the passage of AB 646, if a public agency and a union reached an impasse in their negotiations, the Act permitted the parties to mutually agree to engage in mediation (§ 3505.2), but did not require the parties to engage in factfinding or any other impasse procedure. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25–26, 132 Cal.Rptr. 668, 553 P.2d 1140; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 614, fn. 4, 116 Cal.Rptr. 507, 526 P.2d 971.) If there was no impasse procedure applicable by local law or by the parties' agreement, the public agency could unilaterally impose its last, best and final offer. (*Santa Clara, supra,* 224 Cal.App.4th at p. 1034, 169 Cal.Rptr.3d 228.)

C

The absence of mandatory impasse procedures in the Act prompted the introduction of AB 646. (*Santa Clara, supra,* 224 Cal.App.4th at p. 1035, fn. 5, 169 Cal.Rptr.3d 228.) With AB 646's passage, if a public agency and a union reach an impasse in their negotiations, the union may now require the public agency to participate in one type of impasse procedure—submission of the parties' differences to a factfinding panel for advisory findings and recommendations—before the public agency may unilaterally impose its last, best, and final offer. (§§ 3505.4, subd. (a), 3505.5, subd. (a), 3505.7.)[5]

***10** Upon submission of the parties' differences to a factfinding panel, the panel ****635** must meet with the parties "and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate." (§ 3505.4, subd. (c).) In arriving at its findings and recommendations, the panel must consider, weigh, and be guided by several criteria, including "[t]he interests and welfare of the public and the financial ability of the agency"; a "[c]omparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies"; "[t]he consumer price index for goods and services, commonly known as the cost of living"; and "[t]he overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received." (§ 3505.4, subd. (d)(4)-(7).)[6]

[6]If the parties do not settle their dispute within a specified or agreed upon period, the factfinding panel must make advisory findings and recommendations, which the public agency must make publicly available within a specified time after their receipt. (§ 3505.5, subd. (a).) Provided the public ***11** agency is not subject to interest arbitration,[7] the public agency may proceed to implement its last, best, and final offer, but not an MOU, after the public agency exhausts any applicable mediation and factfinding procedures and conducts a public hearing regarding the impasse. (§ 3505.7.) The public agency's unilateral implementation of its last, best, and final offer "shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." (*Ibid.*)

III

A

[7]Around the time the court entered its judgment, the Board issued a decision ****636** addressing the statutory interpretation question at issue in this appeal. (*County of Contra Costa* (2014) PERB Dec. No. Ad–410–M [2014 Cal. PERB LEXIS 14].) The Board held the Legislature intended the Act's factfinding procedures to apply "to any bargaining impasse over negotiable terms and conditions of employment, and not only to impasses over new or successor [MOUs]." (*Id.* at pp. *2–3.) The Board reaffirmed this holding in a subsequent decision. (*City & County of San Francisco* (2014) PERB Dec. No. Ad–419–M [2014 Cal. PERB LEXIS 48].)

The Board based its holding on several factors. First, the Act does not contain any language expressly limiting its factfinding provisions to impasses occurring during the

negotiation of a comprehensive MOU. (*County of Contra Costa, supra,* 2014 Cal. PERB LEXIS 14 at pp. *51–52.) Second, the Board had consistently applied the analogous factfinding provisions in the Educational Employment Relations Act (EERA) (§§ 3548.1 through 3548.3) and Higher Education Employer–Employee Relations Act (HEERA) (§§ 3591 through 3593) to all types of bargaining disputes, not just disputes arising in the context of a negotiation for a comprehensive MOU. (*County of Contra Costa,* at pp. *15, 38–43, 68–69.) Third, interpreting the Act's factfinding provisions to apply to any bargaining disputes is consistent with the legislative history of AB 646. (*County of Contra Costa,* at pp. *55–59.) Finally, interpreting the Act's factfinding provisions to apply to any bargaining dispute is consistent with the parties' continuous duty to bargain on any bargainable issue and prepare an MOU after reaching an agreement. (*Id.* at pp. *64–67.)

***12** B

[8] [9]Although statutory interpretation is ultimately a judicial function, the Board is vested with the authority to interpret the Act. (*Santa Clara, supra,* 224 Cal.App.4th at p. 1026, 169 Cal.Rptr.3d 228; *Burke v. Ipsen* (2010) 189 Cal.App.4th 801, 809, 117 Cal.Rptr.3d 91.) " '[The Board] is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." ' " (*County of Los Angeles, supra,* 56 Cal.4th at p. 922, 157 Cal.Rptr.3d 481, 301 P.3d 1102.) Consequently, we must defer to the Board's interpretation of the Act unless the Board's interpretation is clearly erroneous. (*Ibid.*; *Santa Clara,* at p. 1026, 169 Cal.Rptr.3d 228.)

[10]Amici curiae League of California Cities and California State Association of Counties (Amici) contend the Board's decisions interpreting the Act are entitled to no deference because they were created for the purpose of assisting the Board in this litigation. However, the timing of the Board's decision does not affect the deference we must accord to the decision. (*S. Bay Union Sch. Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 502, 506–507, 279 Cal.Rptr. 135 ["[O]ur construction of legal principles can be influenced by other, even later, pronouncements of the administrative agency"].) Further, judicial comity and restraint preclude us from speculating about any ulterior motives the Board may have had in reaching its decision. (See *In re Shaputis* (2011) 53 Cal.4th 192, 217–218, 134 Cal.Rptr.3d 86, 265 P.3d 253.)

IV

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The Commission does not directly contest any of the Board's reasons for broadly interpreting the Act's factfinding provisions, ****637** including the most compelling reason—there is no language in the Act expressly limiting the factfinding provisions to particular types of impasses. Instead, the Commission asserts four reasons why, notwithstanding the lack of limiting language in the Act, we should interpret the factfinding provisions to apply only to impasses occurring in the context of negotiations for comprehensive MOUs. First, the Commission points to the list of criteria in section 3505.4, subdivision (d), that a factfinding panel "shall" consider and weigh before reaching its findings and recommendations. (See fn. 6, *ante.*) In the Commission's view, these criteria—particularly the criteria requiring the consideration of the comparable wages, hours, and working conditions of other public ***13** agencies; the consumer price index for goods and services; and the overall compensation employees currently receive (§ 3505.4, subd. (d)(5)-(7))—only make sense for impasses occurring in the context of negotiations for comprehensive MOUs. To conclude otherwise, the Commission contends, would render much of the language in this subdivision surplusage.

2

[11] [12]However, as the Board points out, the criteria listed in section 3505.4, subdivision (d), are virtually identical to the criteria contained in analogous provisions of the EERA. (See § 3548.2, subd. (b).) The only difference between the statutes is that the Act includes a requirement for the factfinding panel to consider local rules, regulations, or ordinances (§ 3505.4, subd. (d)(2)), a criterion not expected to be included in the EERA because the criterion is not generally relevant to public school employment relations. Since at least 2008, the Board has applied the factfinding provisions of the EERA to all types of impasses, not just impasses arising during

negotiations of comprehensive MOUs.[8] (See, e.g., *Chico Unified School Dist.* (2008) FF–623 < http://www.perb.ca.gov//ffpdfs/FR0623.pdf> [as of Sept. 26, 2008].) The Legislature presumably knew of the Board's practice when it passed AB 646 in 2011.[9] (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017–1018, 9 Cal.Rptr.2d 358, 831 P.2d 798.) Therefore, we cannot reasonably infer from the language of section 3505.4, subdivision (d), a legislative intent to limit the application of the factfinding provisions in the manner the Commission asserts.

Moreover, if we were to limit the application of the Act's factfinding provisions to only those impasses in which all eight of the listed criteria are relevant, which is the logical extension of the Commission's position, there would be few, if any, circumstances in which the factfinding provisions ****638** could ever be utilized. As the Board explained in its decision in *City & County of* ***14** *San Francisco, supra,* 2014 Cal. PERB LEXIS 48: "Even in a factfinding proceeding concerning a new or successor MOU, not every one of the eight criteria is necessarily applicable to the issues that divide the parties. When parties reach an impasse in negotiations over a comprehensive MOU, they have usually agreed to at least some terms prior to reaching impasse on more intractable proposals. Issues that impede final agreement can be economic, or non-economic.... Where the issues are non-economic, it is unlikely the factfinding panel would spend time comparing wages and hours of comparable public agencies or assessing the consumer price index in arriving at its recommendations. Thus, the listing of eight criteria that factfinders are to consider does not demonstrate that factfinding applies only to comprehensive MOUs.... [M]id-term bargaining disputes, or disputes over the effects of layoffs or some other proposed economic reduction, can involve issues that are just as complex as disputes over comprehensive MOUs. The eight listed criteria can be equally applicable or equally not applicable to any bargaining dispute, whether it be a mid-term re-opener, a single issue, effects bargaining, or a comprehensive MOU." (*Id.* at pp. *22–24.)

B

1

Next, the Commission points to the language in section 3505.7 allowing a public agency to implement its last, best, and final offer after exhausting any applicable mediation and factfinding procedures, but precluding the public agency from implementing an MOU. (See fn. 5, *ante.*) The Commission asserts the Legislature would not have used the "any applicable" language in the statute if it had intended the factfinding procedures to apply to any bargainable dispute. The Commission further asserts the language precluding the implementation of an MOU logically reflects the intent only to apply the factfinding procedures to resolve an impasse arising from the negotiation of an MOU.

2

One key difficulty with the Commission's position is that the language upon which it relies was part of the Act before the Legislature added the factfinding provisions. The language was derived from the original section 3505.4 with minimal revisions to accommodate the addition of the factfinding provisions.[10] (***15** *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237, 254, fn. 4, 167 Cal.Rptr.3d 123; see fn. 3, *ante,* for a history of section 3505.4.) Consequently, the language offers no particular insight into the intended scope of the factfinding provisions.

In addition, the "any applicable" language is more logically and reasonably construed as a recognition that neither mediation nor factfinding will necessarily ****639** occur after an impasse. Mediation will only occur if the parties mutually agree to it. (§ 3505.2.) Factfinding will only occur if the union requests it. (§ 3505.4, subd. (a).) If the parties choose not to mediate their dispute or the union chooses not to request a factfinding, then there would not be "any applicable" mediation or factfinding procedures to exhaust before the public agency could implement its last, best, and final offer.

Likewise, the language precluding the implementation of an MOU is more logically and reasonably construed as a recognition that, at the point a public agency implements its last, best, and final offer, there has not been an understanding or an agreement between the parties to implement. This construction is consistent with section 3505.1, which indicates a binding MOU is the result of a tentative agreement between the public agency's and the union's negotiators that has been adopted by the public agency's governing body.[11]

C

The Commission also relies on references in AB 646's legislative history the Commission believes indicate the Act's factfinding provisions ***16** were directed solely at addressing failed efforts to negotiate collective bargaining agreements. (See, e.g., Assem. Conc. Sen. Amends. to Assem. Bill No. 646 (2011–2012 Reg. Sess.) as amended June 22, 2011, p. 2 ["According to the author, 'Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures *where efforts to negotiate a collective bargaining agreement have failed,*' " (italics added)]; *id.* at p. 3 ["AB 646 undermines a local agency's authority to establish local rules for resolving impasse and the requirement that a local agency engage in factfinding *may delay rather than speed the conclusion of contract negotiations,*" (italics added)].)

[13]However, these references are to arguments made by the supporters and opponents of AB 646. While the Legislature knew of these arguments because they were noted in committee reports and analyses, we generally do not consider references showing the motive or understanding of the bill's author or other interested persons in determining legislative intent. (*Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 759, 162 Cal.Rptr.3d 158.) Such references are entitled to no weight "unless they reiterate legislative discussion and events leading up to the bill's passage." (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 348, 110 Cal.Rptr.3d 628, 232 P.3d 625.) Even if we could consider the Commission's proffered references, the references are not illuminating because they focus on the ****640** mandatory nature of the factfinding provisions, not the scope of their application.

D

Finally, the Commission contends the Board's reliance on decisions interpreting the EERA and the HEERA is misplaced because these statutory schemes differ fundamentally from the Act in their treatment of impasse and factfinding. Specifically, the Commission points out that under the Act, the parties must mutually agree to mediation, and under the other statutory schemes, either party may compel mediation. (§§ 3505.2, 3548, 3590.) In addition, under the Act, only a union may initiate factfinding, and under the other two statutory schemes, either party may initiate factfinding after a mediator declares factfinding to be appropriate. (§§ 3505.4, 3548.1, subd. (a), 3591.) Further, under the Act, the parties must pay the cost of mediation and factfinding, and under the other statutory schemes, the Board may be required to absorb some of the costs. (§§ 3505.5, subds. (b) & (c), 3548.3, subds. (b) & (c), 3593, subd. (b).)

While these procedural distinctions indeed exist, the Commission has not explained nor is it apparent how they are relevant to the intended application of the Act's factfinding provisions, much less how they compel a conclusion ***17** the factfinding provisions only apply to impasses during negotiations of comprehensive MOUs. This omission in the Commission's analysis notably weakens the Commission's position, particularly since there is no material distinction in the three statutory schemes' descriptions of what may be submitted to a factfinding panel. (§§ 3505.4, subd. (a) [parties' "differences" may be submitted to a factfinding panel]; 3548.1, subd. (a) [parties' "differences" may be submitted to a factfinding panel]; 3591 [parties' "differences" may be submitted to a factfinding panel].)[12]

Amici attempt to fill the analytical gap by arguing the word "differences" does not have the same contextual meaning in the Act as it does in the other two statutory schemes. Citing to section 3548 and section 3590, Amici contend the contextual meaning of "differences" in the other two statutory schemes is an impasse "over matters within the scope of representation."[13] Since the Act does not contain ****641** the "within the scope of representation" language, Amici Curiae posit the Legislature must have intended for the word "differences" in the Act to mean something other than an impasse over matters within the scope of representation. We are unpersuaded by this argument because it ignores the fact the Act is a public sector labor relations statute and, as such, "matters within the scope of representation" is the implicit context for all of its provisions. For the reasons stated in part IV.B, *ante,* we are also unpersuaded by Amici's reliance on the MOU language in section 3505.7 to divine the contextual meaning of "differences."

***18** E

In addition to being unconvincing, the Commission's position is inconsistent with the Act's general purpose. (*Mays v. City of Los Angeles* (2008) 43 Cal.4th 313, 321, 74 Cal.Rptr.3d 891, 180 P.3d 935 [when construing a statute, courts ultimately must choose the construction most closely fitting the Legislature's apparent intent, with a view to promoting, not defeating the statute's general purpose].) The Act is intended "to promote full communication between public employers and their

employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (§ 3500, subd. (a).) The Act is also intended "to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed." (*Ibid.*)

Applying the factfinding provisions only to impasses arising from MOU negotiations would hinder this purpose by depriving the parties of an orderly method for resolving disputes arising during the negotiation of supplemental matters. Such a result would also be anomalous since the Act makes no other procedural or substantive distinction between the negotiation of comprehensive MOUs and the negotiation of supplemental matters. Indeed, we cannot fathom why the need for an orderly method of resolving disputes would be less acute during the negotiation of supplemental matters than during the negotiation of comprehensive MOUs. The negotiation of supplemental matters is not necessarily less complex nor is the outcome necessarily less important than the negotiation of comprehensive MOUs. For this and the other reasons stated in this opinion, we conclude the Board correctly interpreted the Act's factfinding provisions to apply to all impasses and not just impasses arising during negotiations of comprehensive MOUs. As the trial court determined otherwise, we reverse the judgment and remand the matter for further proceedings consistent with this decision.

V

Given our resolution of the Board's appeal, we need not decide the Commission's cross-appeal of the court's orders on the Commission's motion for attorney fees and the Board's motion to tax costs. Therefore, we dismiss the Commission's cross-appeal as moot.

***19** DISPOSITION

The judgment is reversed. The Commission's cross-appeal is dismissed as moot. The matter is remanded to the trial court for further proceedings consistent with this decision. The Board is awarded its costs on appeal.

WE CONCUR:

****642** McINTYRE, J.

AARON, J.

All Citations

246 Cal.App.4th 1, 200 Cal.Rptr.3d 629, 16 Cal. Daily Op. Serv. 3491, 2016 Daily Journal D.A.R. 3129

Footnotes

1 Further statutory references are to the Government Code unless otherwise specified.

2 We ordered this appeal considered with the appeal in *County of Riverside v. Public Employment Relations Board* (Mar. 30, 2016, D069065) —— Cal.App.4th ——, 200 Cal.Rptr.3d 573, 2016 WL 1238737.

3 Section 3505.4 was originally enacted in 2000. (Stats.2000, ch. 316, § 1.) In 2011, the Legislature adopted Assembly Bill No. 646 (AB 646), which repealed the original version of section 3505.4 and replaced it with new sections 3505.4, 3505.5, and 3505.7. (Stats.2011, ch. 680, §§ 1–4.) Subdivision (a) of the new section 3505.4 authorized an employee organization to request the parties' differences be submitted to a factfinding panel for advisory findings and recommendations after the parties reached an impasse they were unable to resolve through mutually agreed upon mediation and before the public agency imposed its last, best, and final offer.

In 2012, after this action was filed, the Legislature amended subdivision (a) of section 3505.4 to authorize an employee organization to request the parties' differences be submitted to a factfinding panel for advisory findings and recommendations even if the parties had not first attempted to resolve the impasse through mutually agreed upon mediation. The Legislature also added subdivision (e) to section 3505.4, which precludes an employee organization from waiving its right to request a factfinding panel. (Stats.2012, ch. 314, § 1.) Because the 2012 amendments do not affect the resolution of this appeal, our references to section 3505.4 are to the amended, or

current, version of the code section.
Current section 3505.4, subdivision (a), provides in part: "[A]n employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The [Board] shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel."

4 The parties informed us at oral argument the two affected employees no longer work for the Commission. None of the parties contends this case is moot. "A case is moot when the reviewing court cannot provide the parties with practical, effectual relief. [Citation.] In such cases, the appeal generally should be dismissed. [Citation.] But even if a case is technically moot, the court has inherent power to decide it where the issues presented are important and of continuing interest." (*City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 417–418, 100 Cal.Rptr.3d 396.) Even if this action "is technically moot, given the important issues presented, 'it is appropriate for us to retain and decide the matter.' " (*Id.* at p. 418, 100 Cal.Rptr.3d 396.)

5 See fn. 3, *ante,* for the text of section 3505.4, subdivision (a).
Section 3505.5, subdivision (a), provides: "If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt."
Section 3505.7 provides: "After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law."

6 Section 3505.4, subdivision (d), provides in full: "In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria: [¶] (1) State and federal laws that are applicable to the employer. [¶] (2) Local rules, regulations, or ordinances. [¶] (3) Stipulations of the parties. [¶] (4) The interests and welfare of the public and the financial ability of the public agency. [¶] (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies. [¶] (6) The consumer price index for goods and services, commonly known as the cost of living. [¶] (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received. [¶] (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations."

7 "Interest arbitration involves an agreement between an employer and a union to submit disagreements about the proposed content of a new labor contract to an arbitrator or arbitration panel." (*City of Fresno v. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 96, 83 Cal.Rptr.2d 603.)

8 The Legislature has also applied the factfinding provisions of the HEERA to all types of impasses since at least 2007. (See, e.g., *California State University* (2007) FF–613 < http://www.perb.ca.gov//ffpdfs/FR0613.pdf> [as of May 2, 2007].)

9 Amici contend this presumption does not apply because there is no regulation or reported court or administrative decision squarely addressing the Board's practice. There is also no information in AB 646's legislative history demonstrating the Legislature's awareness of the practice. Essentially, Amici contend we cannot apply the presumption because there is no evidence the presumption applies. This contention misapprehends the nature of a presumption. A presumption is a deduction the law requires to be made from particular facts. (*Maganini v. Quinn* (1950) 99 Cal.App.2d 1, 6, 221 P.2d 241.) Unless deemed by the law to be conclusive, a presumption is rebutted by the existence of contrary evidence, not by the absence of supporting evidence. (*Ibid.*) Regardless, the long-standing nature of the Board's practice is sufficient evidence the presumption applies. (*El Dorado Oil Works v. McColgan* (1950) 34 Cal.2d 731, 739, 215 P.2d 4.)

10 The original section 3505.4 provided: "If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, *and impasse procedures, where applicable, have been exhausted,* a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, *but shall not implement a memorandum of understanding.* The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." (Former § 3505.4; added by Stats.2000, ch. 316, § 1, italics added.)

11 Section 3505.1 currently provides: "If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding." (Amended by Stats.2013, ch. 785, § 1.)

At the time the Legislature passed AB 646, section 3505.1 similarly provided: "If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination." (Added by Stats.1968, ch. 1390, § 7, p. 2728.)

12 See fn. 3, *ante,* for the language of section 3505.4, subdivision (a).

Section 3548.1, subdivision (a) provides in part: "If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel."

Section 3591 provides in part: "If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel."

13 Section 3548 provides in part: "Either a public school employer or the exclusive representative may declare that *an impasse* has been reached between the parties in negotiations *over matters within the scope of representation* and may request the board to appoint a mediator for the purpose of assisting them in reconciling their *differences* and resolving the controversy on terms which are mutually acceptable." (Italics added.)

Section 3590 similarly provides in part: "Either an employer or the exclusive representative may declare that *an impasse* has been reached between the parties in negotiations *over matters within the scope of representation* and may request the board to appoint a mediator for the purpose of assisting them in reconciling their *differences* and resolving the controversy on terms which are mutually acceptable." (Italics added.)

End of Document

Exhibit 12

***Santa Clara County Correctional Peace Officers' Association v. County of Santa Clara* (2014)**
224 Cal.App.4th 1016

224 Cal.App.4th 1016
Court of Appeal,
Sixth District, California.

SANTA CLARA COUNTY CORRECTIONAL PEACE OFFICERS' ASSOCIATION, INC., Plaintiff and Appellant,
v.
COUNTY OF SANTA CLARA, Defendant and Respondent.

H037418
|
Filed March 17, 2014
|
Review Denied July 9, 2014

Synopsis
Background: Correctional peace officers' union petitioned for writ of administrative mandate challenging county's compliance with Myers-Milias-Brown Act (MMBA) in reducing members' work hours. The Superior Court, Santa Clara County, No. 1–11–CV–205583, Carrie A. Zepeda–Madrid, J., denied petition after bench trial. Union appealed.

Holdings: The Court of Appeal, Grover, J., held that:

[1] reduction of members' work hours was not within "emergency" exception from MMBA; but

[2] memorandum of understanding (MOU) did not waive union's right to meet and confer on reduction of members' work hours; but

[3] MOU waived any right for union to declare impasse and compel mediation;

[4] scope of negotiations was limited to details of implementing the reduction in hours; and

[5] county satisfied its duty to bargain in good faith.

Affirmed.

****233** Santa Clara County Superior Court, No. 1–11–CV–205583, Carrie A. Zepeda–Madrid, Judge.

Attorneys and Law Firms

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Cheryl Stevens, Deputy County Counsel, County of Santa Clara, for Defendant/Respondent County of Santa Clara.

GROVER, J.

*1022 I. INTRODUCTION

At issue in this appeal is whether the County of Santa Clara (County) complied with its statutory and contractual obligations regarding meeting and conferring in good faith before reducing the work schedules for an unspecified number of correctional peace officers who are members of the Santa Clara County Correctional Peace Officers' Association, Inc. (Association). The officers work for the County's Department of Correction (DOC) in staffing the County's jails, though they remain sheriff's deputies.

The County and the Association entered into a written memorandum of understanding (sometimes MOU) effective on June 2, 2008, that created three different work schedules, working either five eight-hour days a week (the 5/8 Plan) or four 10-hour days a week (the 4/10 Plan) for a total of 80 hours biweekly, or working 12.25 hours a day four days one week and three days the next (the 12 Plan) for a total of 85.75 hours biweekly. In order to reduce the County's total budget for fiscal year 2012 (July 1, 2011, through June 30, 2012) while avoiding layoffs, the DOC proposed, among other things, a reduction of the 12 Plan to working mostly 12-hour shifts totaling 80 hours biweekly, not 85.75 hours. The County and the Association met twice in early June 2011 before the County's board of supervisors adopted a proposed budget on June 15, 2011, which included a modified 12 Plan. After the budget was adopted, the parties met again and the Association's members voted on the County's proposals.

***1023** On July 22, 2011, the Association filed a verified petition for writ of mandate, alleging that the County, in modifying the 12 Plan, had breached duties to meet and

confer and to bargain in good faith under the MOU, the Meyers-Milias-Brown Act (Govt.Code, §§ 3500–3511[1]; sometimes MMBA), and the County's code. After a court trial based on documents submitted by both sides, the court denied the Association's petition, finding that a vote by the Association's members established both that they preferred the County's modified plan and that the County had met and conferred in good faith.

**234 The parties renew their contentions on appeal. The County contends that the Association has failed to exhaust its contractual remedies. The Association disputes this and contends that the County set an arbitrary deadline and failed to complete its obligation to meet and confer in good faith, including participating in impasse resolution, before implementing the work schedule change. The County contends that because it reserved rights in the MOU to convert 12 Plan assignments to other plans, it fulfilled all of its statutory and contractual obligations. For the reasons stated below, we will affirm the judgment after concluding that the County complied with its obligations to meet and confer about this reduction in working hours.

A. *The Memorandum Of Understanding*

The County and the Association entered into a memorandum of understanding effective on June 2, 2008. The term of the MOU was through "May 29, 2011, and from year to year thereafter." (MOU, § 27.) The MOU specified the monthly pay scales for correctional officers in different classifications, their hours of work, and lengths of shifts, among other things.

Three alternative shifts are recognized as a normal workday: the eight-hour shift of the 5/8 Plan, the 10–hour shift of the 4/10 Plan, and the 12.25-hour shift of the 12 Plan described above. (MOU, § 7.1.) The MOU provided that a full workweek is 40 hours except as otherwise provided in the MOU or by law. (*Ibid.*) The 12 Plan, by calling for working 85.75 hours biweekly, was thus an exception to a 40-hour workweek. According to the Association's mandate petition, the 12 Plan has been in place for 30 years.

The MOU defined overtime in section 7.5 as any time worked on a single day in excess of the defined shift length, or any time worked in a biweekly pay period over 80 hours. Section 7.5 further provided that "[f]or the employees in the Twelve (12) Plan all hours worked from 80 to 85.75 hours per pay period shall be considered for PERS purposes as overtime paid at the straight time rate." (MOU, § 7.5 subd. (a).) In another section, the MOU *1024 provided that "[a]ll hours worked by such employees on the Twelve Plan (and their briefing time) shall be compensated at straight time, up to 12.25 hours per day and 85.75 hours per pay period, with all hours in excess thereof to be considered overtime." (MOU, § 7.1, subd. (a).)

Section 7.1, subdivision (a) also provided: "Employees assigned by the Chief of Correction to the Twelve Plan will continue to work on the Twelve (12) Plan during the term of this Memorandum."

Section 7.1, subdivision (b) (sometimes section 7.1(b)) provided: "The Appointing Authority reserves the right to convert assignments on the Twelve Plan to either a 5/8 or a 4/10 Plan, upon the giving of forty-five (45) calendar days' advance notice of such change to the Association, which shall be afforded the opportunity to meet and confer on such a proposed change prior to its implementation."

It is up to the "Appointing Authority," the County, to "set up a standard shift and days off assignment policy within each department," based first "on the administrative needs of the department, so as to have a certain minimum number of experienced and/or qualified or skilled personnel on a shift." (MOU, § 7.2.)

The MOU also included a grievance procedure that we discuss below.

B. *The Meetings and the Association Vote*

John Hirokawa was involved in meetings with the Association in 2011 as the undersheriff **235 and also acting chief of the DOC. He filed a declaration stating the following.[2] Facing a projected County budget deficit of $230 million, the DOC was asked to make budget cuts of $15 million while avoiding staff layoffs, if possible. Among the proposals was to alter the 12 Plan by eliminating the built-in 5.75 hours of biweekly overtime with a projected annual savings of $5,860,683. This modification entailed related changes of officers reporting directly to their posts instead of the briefing room, supervisors checking staff in and out, and officers sharing information during the shift change and by information technology.

On May 19, 2011, the acting chief notified the Association by certified letter of its "intent to change the 12-plan work schedule to a 5/8, 4/10 or modified 12-plan" (80-hour work schedule) to become effective on July 4, 2011. "These proposed changes in the above described assignments will not *1025 be implemented until such time as the parties shall have the opportunity to meet and

confer." The parties agree that July 4, 2011, was the start of a new pay period under a new County budget.

The acting chief later attended three meetings with representatives of the Association, counsel for both sides, and other interested parties, including the County's labor relations representative Ramsin Nasseri. At the first meeting on June 2, 2011, the acting chief provided the Association with several proposed work schedules, including versions of how the 12 Plan could be modified to result in working 80 hours biweekly. The Association responded by questioning the existence of a budget deficit and the chief's authority to modify the 12 Plan and complaining about the unfair impact on Association members. The Association rejected the explanation that the reduction in hours was a business necessity in order to meet the DOC's $15 million target.

At the second meeting on June 13, 2011, the Association questioned how the schedule changes would affect the members. Custody Administrative Captain David Sepulveda explained the operational details as best he could. Some questions could not be answered because the County was awaiting the Association's feedback. The Association complained about a 7 percent salary reduction and contended that the goal could be accomplished by retirements and layoffs. The acting chief said that retirements and layoffs would not yield enough savings. He encouraged the Association to attend the County's upcoming budget hearings. The Association did not offer an alternative plan to save $6.1 million.

A third meeting was scheduled for June 20, 2011. Meanwhile, on June 15, the County Board of Supervisors considered the DOC's recommendations and, after hearing from several Association representatives, unanimously voted to accept the County Executive's proposed budget, which included the modified 12 Plan.

According to the acting chief, at the meeting on June 20, 2011, the Association still disputed the existence of a budget deficit and failed to propose another method for saving $15 million. The chief advised the Association that every day of delay in implementing the plan was costing the County about $17,000. The County agreed to the Association's request to delay implementation until its members could vote on the County's proposals.

**236 A report on the members' vote on the County's proposals was originally promised on July 2, 2011, and was delivered by e-mail at the end of the workday on July 6, 2011. The vote was reported as a 200 to 15 rejection of the County's MOU proposal. As to the different 12 Plan schedules presented, *1026 236 members voted in favor of one eight-hour day per pay period with the rest 12-hour days, as opposed to 13 members voting for two 10-hour days per pay period and 10 voting for the 5/8 schedule. The e-mail disclaimed any consent to a reduction of the 85.75 biweekly schedule.

C. The Trial Court's Findings

After a court trial based on the documents submitted, the trial court made the following findings in denying the petition for writ of mandate. "1. Pursuant to the Memorandum of Understanding between the County of Santa Clara and the Correctional Peace Officers' Association ('MOU'), the Appointing Authority reserved the right to convert assignments on the Twelve Plan to either a 5/8 or a 4/10 Plan upon the giving of 45 calendar days advance notice.

"2. Although the County did not adopt the 5/8 or the 4/10 schedule the fact that the County adopted a modified 12 Plan that Petitioner's membership preferred established that the County met and conferred in good faith.

"3. Additionally, because Petitioner's members chose the modified 12 Plan over the other proposed schedules, the Court finds there was mutual agreement and, therefore the parties did not need to declare impasse and mediation was not required.

"The Court therefore concludes the County satisfied its obligations to meet and confer pursuant to section 7.1(b) of the MOU."

II. THE STANDARDS OF REVIEW

[1]This appeal presents several issues that require application of different standards of review. How to interpret a statute such as the MMBA presents questions of law that we review independently on appeal. (*DiQuisto v. County of Santa Clara* (2010) 181 Cal.App.4th 236, 256, 104 Cal.Rptr.3d 93; **237 *Mendocino County Employees Assn. v. County of Mendocino* (1992) 3 Cal.App.4th 1472, 1477, 5 Cal.Rptr.2d 353.) It is ultimately a judicial function to interpret a statute, but courts will defer to a statutory interpretation by an agency like the Public Employment Relations Board (PERB) that administers a statute, unless it is clearly erroneous. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 586–587, 262 Cal.Rptr. 46, 778 P.2d 174.) The PERB has exclusive jurisdiction over alleged violations of the MMBA in most cases (§ 3509), but

peace officers are among those public employees who are exempt from its exclusive jurisdiction. (§ 3511; see *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077, fn. 1, 29 Cal.Rptr.3d 234, 112 P.3d 623.)

[2] ***1027** County codes and ordinances are subject to the same independent construction on appeal as statutes. (*People v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 113, 3 Cal.Rptr.3d 429.)

[3]The interpretation of an MOU also presents questions of law that we review independently on appeal when, as here, there was no conflicting extrinsic evidence presented as to its meaning. (Compare *Service Employees Internat. Union v. City of Los Angeles* (1996) 42 Cal.App.4th 1546, 1552–1553, 50 Cal.Rptr.2d 216 [undisputed evidence] and *Mendocino County Employees Assn. v. County of Mendocino, supra,* 3 Cal.App.4th 1472, 1477, 5 Cal.Rptr.2d 353 [same] with *Beverly Hills Firemen's Assn., Inc. v. City of Beverly Hills* (1981) 119 Cal.App.3d 620, 629–630, 174 Cal.Rptr. 178 [conflicting evidence].)

[4]However, whether a party actually engaged in meetings in good faith is generally a factual question, and the fact-finder's express or implicit determination will be upheld on appeal if supported by substantial evidence. (*Lipow v. Regents of University of California* (1975) 54 Cal.App.3d 215, 227, 126 Cal.Rptr. 515; *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25, 129 Cal.Rptr. 126 (*Placentia*).)

[5]" '[T]he applicable standards of appellate review of a judgment based on affidavits or declarations are the same as for a judgment following oral testimony: We must accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of credibility of the witnesses and the weight of the evidence. [Citation.]' " (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653, 35 Cal.Rptr.2d 800.)

III. DISCUSSION

A. *The Association Did Not Fail to Exhaust a Contractual Remedy*

[6]In the trial court, the County asserted that this action is barred because the Association failed to exhaust its contractual remedies and that a "party to a labor agreement that provides for binding grievance arbitration *must* exhaust contractual remedies in the absence of facts excusing exhaustion." The County renews this argument on appeal.

Section 23 of the MOU did establish a grievance procedure for resolving both "employee grievances" and "organizational grievances" through binding arbitration. However, excluded from the grievance procedure, as the Association points out, are "[i]tems within the scope of representation and subject to the ***1028** meet and confer process." (§ 23, subd. (a) 2g.) The Association had no obligation under the MOU to file a grievance regarding a negotiable topic that was subject to the meet and confer process. (Cf. *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996, 1003, 203 Cal.Rptr. 494.) As we will explain, the topic of a proposed reduction of working hours was a negotiable one.

In light of this conclusion, we need not consider the Association's alternate contentions that the grievance procedure has expired along with the MOU and that invoking the procedure would have been futile in light of the County's adoption of the modified 12 Plan.

B. *The Meyers-Milias-Brown Act*

"With the enactment of the George Brown Act (Stats. 1961, ch. 1964) in 1961, California became one of the first states to recognize the right of government employees to organize collectively and to confer with management as to the terms and conditions of their employment. Proceeding beyond that act the Meyers-Milias-Brown Act (Stats. 1968, ch. 1390) authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency." (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 331, 124 Cal.Rptr. 513, 540 P.2d 609, fn. omitted.)

"The MMBA has two stated purposes: (1) to promote full communication between ****238** public employers and employees, and (2) to improve personnel management and employer-employee relations. (§ 3500.) To effect these goals the act gives local government employees the right to organize collectively and to be represented by employee organizations (§ 3502), and obligates employers to bargain with employee representatives about matters that fall within the 'scope of representation' (§§

3504.5, 3505). [¶] Specifically, section 3504.5 provides that public agencies must give employee organizations 'reasonable written notice' of any proposed 'ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation' [3]; section 3505 provides that representatives of public agencies and employee organizations 'shall have the mutual obligation personally to *meet and confer* ***1029** promptly upon request by either party ... and to endeavor to reach agreement on matters within the *scope of representation* prior to the adoption by the public agency of its final budget for the ensuing year.' (Italics added.)" (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 657, 224 Cal.Rptr. 688, 715 P.2d 648 (*Farrell*); cf. *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 630, 47 Cal.Rptr.3d 69, 139 P.3d 532 (*Claremont*).)

"The recurrent phrase, 'scope of representation,' is defined in section 3504 to include 'all matters relating to employment conditions and employer-employee relations, including, but not 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.' (Italics added.)" (*Farrell, supra,* 41 Cal.3d 651, 658, 224 Cal.Rptr. 688, 715 P.2d 648.)

"[T]he phrase 'wages, hours, and other terms and conditions of employment' was taken directly from the National Labor Relations Act (NLRA) (29 U.S.C. § 158(d))" and state courts have accordingly looked for guidance to federal decisions in interpreting this phrase (*Farrell, supra,* 41 Cal.3d 651, 658, 224 Cal.Rptr. 688, 715 P.2d 648), even though the NLRA (National Labor Relations Act; 29 U.S.C. § 151 et seq.) has left it to individual states to regulate labor relations between states and their political subdivisions and their employees (29 U.S.C. § 152, subd. (2); *Davenport v. Washington Educ. Assn.* (2007) 551 U.S. 177, 181, 127 S.Ct. 2372, 168 L.Ed.2d 71).

The phrase "*merits, necessity or organization of any service* or activity" has no counterpart in the NLRA. (*Farrell, supra,* 41 Cal.3d 651, 658, 224 Cal.Rptr. 688, 715 P.2d 648.) "This exclusionary language, which was added in 1968, was intended to 'forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions.' [Citation]; Stats. 1968, ch. 1390, § 4, p. 2727.) 'Federal and California decisions both recognize the right of employers to make unconstrained decisions when fundamental management or policy choices are involved.' ([*Farrell*], *supra,* at p. 663 [224 Cal.Rptr. 688, 715 P.2d 648]; [citations].)" (*Claremont, supra,* 39 Cal.4th 623, 631, 47 Cal.Rptr.3d 69, 139 P.3d 532.)

[7] [8] ****239** Deciding whether a topic is bargainable under the MMBA and subject to a meet and confer requirement involves "a three-part inquiry. First, we ask whether the management action has 'a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.' ([*Farrell*], *supra,* 41 Cal.3d at p. 660 [224 Cal.Rptr. 688, 715 P.2d 648].) If not, there is no duty to meet and confer. (See § 3504; [citation].) Second, we ask whether the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, then, as in [*Farrell*], the meet-and-confer requirement ***1030** applies. ([*Farrell*], *supra,* at p. 664 [224 Cal.Rptr. 688, 715 P.2d 648].) Third, if both factors are present—if an action taken to implement a fundamental managerial or policy decision has a significant and adverse effect on the wages, hours, or working conditions of the employees—we apply a balancing test. The action 'is within the scope of representation only if the employer's need for unencumbered decisionmaking in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.' ([*Farrell*], *supra,* at p. 660 [224 Cal.Rptr. 688, 715 P.2d 648].) In balancing the interests to determine whether parties must meet and confer over a certain matter (§ 3505), a court may also consider whether the 'transactional cost of the bargaining process outweighs its value.' [Citation.]" (*Claremont, supra,* 39 Cal.4th 623, 638, 47 Cal.Rptr.3d 69, 139 P.3d 532.) This balancing test derives from federal law. (*Farrell, supra,* at p. 663, 224 Cal.Rptr. 688, 715 P.2d 648; *International Assn. of Fire Fighters, Local 188, AFL–CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259, 272–273, 120 Cal.Rptr.3d 117, 245 P.3d 845 (*Local 188*).)

C. *A Reduction in Working Hours Is Generally a Bargainable Topic*

These general principles aid in determining to what extent the County was required to meet and confer about its proposal to modify the 12 Plan. On appeal there is no real dispute that the County was obliged to meet and confer prior to reducing the working hours for certain represented employees from 85.75 hours to 80 hours biweekly. Case law has determined that at least some aspects of a reduction of working hours or a change in the scheduling of the hours are topics subject to collective bargaining. The MOU also recognized this obligation.

In *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d

608, 116 Cal.Rptr. 507, 526 P.2d 971 (*Vallejo*), the Supreme Court provided a framework for identifying the kinds of topics subject to bargaining by public employees. In that case, the court was called upon to interpret provisions of the Vallejo City Charter that were virtually identical to provisions in the MMBA. (*Id.* at p. 614, 116 Cal.Rptr. 507, 526 P.2d 971.) The charter provided in part that " '[i]t shall be the right of City employees individually or collectively to negotiate on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law ....' " (*Id.* at p. 613, fn. 2, 116 Cal.Rptr. 507, 526 P.2d 971.)

That appeal considered several proposals by the union, including two particularly relevant to our case. The union had proposed two work schedules for firefighters, "a maximum of 40 hours per week for fire fighters on 8-hour shifts and 56 hours per week for fire fighters on 24-hour shifts." (*Vallejo, supra,* at p. 617, 116 Cal.Rptr. 507, 526 P.2d 971.) The Supreme Court quickly rejected the city's argument that the schedules of hours were exempt from ****240** bargaining as pertaining to the organization of the fire service. (*Id.* at pp. 617–618, 116 Cal.Rptr. 507, 526 P.2d 971.)

***1031** The union also proposed a certain method for reducing personnel. The court commented that "[a] reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service." (*Vallejo, supra,* 12 Cal.3d at p. 621, 116 Cal.Rptr. 507, 526 P.2d 971.) On the other hand, while an employer may unilaterally decide that layoffs are necessary, it must bargain about which employees and how many are affected and when layoffs will occur. (*Ibid.*) To the extent that the layoffs might affect the workload or safety of the remaining employees, it is also subject to bargaining. (*Id.* at p. 622, 116 Cal.Rptr. 507, 526 P.2d 971.)

In *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 129 Cal.Rptr. 893 (*Huntington Beach*), the city took the position that a change to a 40-hour workweek of five eight-hour days from four 10-hour days (the Ten-Plan) was nonnegotiable. It was excluded from negotiations by both a city resolution and the applicable memorandum of understanding. (*Id.* at pp. 495–496, 129 Cal.Rptr. 893.) The appellate court concluded in part that "[t]he city's EER Resolution purporting to render work schedule nonnegotiable [*sic*] is in conflict with the declared purpose of the MMB Act and the mandatory language of section 3505. It is therefore invalid." (*Id.* at p. 503, 129 Cal.Rptr. 893.)

The city in that appeal did not point to any part of the memorandum of understanding that made this change nonnegotiable. The appellate court nevertheless reviewed the agreement and concluded, "[a]lthough the agreement inferentially recognizes the ultimate authority of the chief to decide to what extent the Ten-Plan shall be operative in his department, it does not, either expressly or by implication, provide that changes in policy affecting the application of the plan shall not be subject to the meet and confer process." (*Huntington Beach, supra,* at p. 504, 129 Cal.Rptr. 893.) Implementing the change without meeting and conferring violated the MMBA. (*Ibid.*)

In *Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 195 Cal.Rptr. 206 (*Sacramento*), the county proposed to start the eight-hour shift for custodial workers at 1:00 p.m. instead of 5:00 p.m. (*Id.* at p. 486, 195 Cal.Rptr. 206.) The county conceded that the shift change affected the hours of employment, but contended that, in their memorandum of understanding, "it retained the right to unilaterally assign its employees to any shift without first meeting and conferring with" the union. (*Id.* at p. 487, 195 Cal.Rptr. 206.) The court stated: "Petitioner does not contest the County's *power* to assign employees, but contends the County must meet and confer before exercising this power. We agree. The power to 'assign' employees is not inconsistent with the meet and confer requirement. As long as the County meets and confers in good faith, it may assign its employees however it sees fit." (*Ibid.*)

***1032** The contractual authority on which the County relies to justify its modification of the 12 Plan, section 7.1(b) of the MOU, states: "The Appointing Authority reserves the right to convert assignments on the Twelve Plan to either a 5/8 or a 4/10 Plan, upon the giving of forty-five (45) calendar days' advance notice of such change to the Association, *which shall be afforded the opportunity to meet and confer on such a proposed change prior to its implementation.*" (Italics added.) By ****241** giving the Association the opportunity to meet and confer prior to implementation of a change of assignments, the County recognized its own obligation to meet and confer on this topic. We understand the County to maintain that it fulfilled its duty, not that it could implement the change without meeting and conferring.

D. *The Business Necessity Defense Has Not Been Established*

In the trial court, the County asserted in its opposition to

the mandate petition that "a compelling business necessity may also justify unilateral action." County repeats this assertion on appeal, although the trial court made no express finding about it.

[9]In the area of private employment, "[t]he NLRB has recognized the existence of a compelling business justification to excuse or justify the unilateral implementation of a change in wages or working conditions. (See *Winn–Dixie Stores* (1979) 243 NLRB No. 151, 101 L.R.R.M. (BNA) 1534.) However, economic considerations alone are not sufficient to justify a unilateral change. (*Airport Limousine Service, Inc.* (1977) 231 NLRB No. 149, 96 L.R.R.M. (BNA) 1177, 1179–1180.) Moreover, neither exigent circumstances nor a business necessity completely absolves an employer of its duty to notify and bargain with the union. Bargaining is required to the extent that the situation permits, although an impasse is not necessary. Whether the business necessity defense exists is an issue determined on a case-by-case basis. (*Joe Maggio, Inc. et al.* (1982) 8 ALRB No. 72.)" (*Cardinal Distributing Co. v. Agricultural Labor Relations Bd.* (1984) 159 Cal.App.3d 758, 772, 205 Cal.Rptr. 860.)

California appellate courts have not yet explicitly applied or adapted this business necessity defense to the context of public employment. The PERB has, however, applied this doctrine to public employment by the County. "At times, a compelling operational necessity can justify an employer acting unilaterally before completing its bargaining obligation. [Citation.] However, the employer must demonstrate 'an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action.' " (*County of Santa Clara* (2010) PERB Dec. No. 2114M p. 16 [2010 Cal. PERB Lexis 29]; see *County of Santa Clara* (2010) PERB Dec. No. 2120-M p. 16 [2010 Cal. PERB Lexis 35].)

[10] ***1033** As we have noted above (*ante,* fn. 3), public agencies are excused from providing reasonable notice of proposed changes "in cases of emergency" (§ 3504.5, subd. (a); see *id.*, subd. (b)), but are required to "provide notice and opportunity to meet at the earliest practicable time" after implementing the changes (*id.*, subd. (b)). *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 1 Cal.Rptr.2d 850 stated: "Just what shall constitute an emergency is left unexplained by the MMBA. This omission is of no moment, given that emergency has long been accepted in California as an unforeseen situation calling for immediate action." (*Id.* at p. 276, 1 Cal.Rptr.2d 850.) The appellate court in that case discussed several criteria for an emergency and recognized that an imminent and substantial threat to public health certainly qualified. (*Id.* at p. 277, 1 Cal.Rptr.2d 850.) In this case the County, by its own account, was able to meet three times prior to implementing the proposed change in work schedules. We agree with the Association that the evidence does not establish a financial emergency or business necessity that would temporarily suspend the obligation to meet and confer before implementing a change. We conclude the circumstances ****242** here were more in the nature of foreseeable budget cuts than a temporary emergency requiring an immediate response.

E. *Impasse Resolution*

1. The MMBA does not impose an impasse resolution procedure

The Association alternatively argues that "the County failed to meet and confer with" the Association and that the County "failed to complete the meet and confer process regarding the decision to adopt the Modified 12 Plan because it failed to allocate sufficient time to complete the process, did not reach an agreement with the [Association] to adopt the Modified 12 Plan and failed to exhaust required impasse procedures." Since the parties indisputably met, we will assume that the Association's real point is that the County did not complete the process.

The County responds in part that the MMBA did not require the parties to resolve all disagreements through impasse procedures. The County is correct.

Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (E.g., § 3548 [public school employees], § 3590 [higher education employees; statutory language virtually identical to § 3548]; Pub. Util.Code, § 99568 [public transit employees]; Bus. & Prof.Code, § 19455, subd. (d)(8)(B) [racetrack backstretch workers].)

In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure. This is what it says on the ***1034** topic. " 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of

representation prior to the adoption by the public agency of its final budget for the ensuing year. *The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.*" (§ 3505, italics added.) This statute contemplates resolution of impasse by procedures that are imposed by other laws or by mutual agreement, not by the MMBA. The MMBA, unlike other statutes, provides no definition of "impasse." (E.g., §§ 3540.1, subd. (f), 3562, subd. (j).)

[11]Consistent with this permissive approach, section 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator. (*Placentia, supra,* 57 Cal.App.3d 9, 21, 129 Cal.Rptr. 126 ["In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."]; *Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal.App.3d 518, 534, 106 Cal.Rptr. 441 ["there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."].)

[12]Former section 3505.4 (Stats. 2000, ch. 316, § 1, p. 2638) provided: "If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and *impasse procedures, where applicable, have been exhausted,* a public agency that is not required to proceed ****243** to interest arbitration[4] may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." (Italics added.) Though this statute was repealed ***1035** and replaced as of January 1, 2012, the Association concedes that the former statute is the one applicable in this case.[5]

We recognize that the California Supreme Court has stated more than once that public agencies are required "to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse." (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537, 28 Cal.Rptr.2d 617, 869 P.2d 1142; see *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083, 29 Cal.Rptr.3d 234, 112 P.3d 623; *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 670, 42 Cal.Rptr.3d 868, 133 P.3d 1028.) However, the statement was dictum in each case. Only the third case involved a factual impasse. The impasse situation in *San Francisco Fire Fighters Local 798 v. City and County of San Francisco, supra,* 38 Cal.4th 653, 42 Cal.Rptr.3d 868, 133 P.3d 1028 was governed by specific impasse procedures in the charter of the City and County of San Francisco. (*Id.* at p. 670, 42 Cal.Rptr.3d 868, 133 P.3d 1028.) Those procedures required the parties to bargain to impasse and then submit the matter to binding arbitration. (*Ibid.*) The California Supreme Court observed that "[t]he Charter thus provides a rule of impasse resolution that differs from that generally provided to local government employees through the Meyers-Milias-Brown Act. (Gov.Code, § 3500 et seq.)" (*Ibid.*)

[13] [14] [15]The applicable version of the MMBA did not require public agencies to reach agreement. "Even if the parties meet and confer, they are not required to reach an agreement because the employer has 'the ultimate power to refuse to agree on any particular issue. [Citation.]' ([*Farrell*], *supra,* 41 Cal.3d at p. 665 [224 Cal.Rptr. 688, 715 P.2d 648].) However, good faith under section 3505 'requires a ****244** genuine desire to reach agreement.' [Citation.]" (*Claremont, supra,* 39 Cal.4th 623, 630, 47 Cal.Rptr.3d 69, 139 P.3d 532.) "Agreement between the public agency and its employees is to be sought as the result of meetings and conferences held in good faith for the purpose of achieving agreement if possible; but agreement is not mandated. It follows that government is not required to cease operations because agreement has not been reached." (*Placentia, supra,* 57 Cal.App.3d 9, 21, 129 Cal.Rptr. 126.)

***1036 2. The Santa Clara County Code does provide for impasse resolution**

As the Association contends, the Santa Clara County Code provides for impasse resolution in the Employee Relations Ordinance. Division A25 of the code pertains to the personnel department. Chapter IV, article 6 of that division is entitled "Impasse Procedures."

Section A25-414 of that Article states: "(a) If the appropriate level of management and the recognized employee organization fail to reach agreement prior to June 1 of a fiscal year on a matter within the scope of representation affecting the budget and subject to approval by the Board of Supervisors and the parties together are unable to agree on a method of resolving the dispute, the dispute *shall* be submitted to mediation.

"(b) If the parties are unable to agree on the mediator, either party *may* request the service of the State Conciliation Service to provide a mediator. Costs of mediation shall be divided one-half to the County and one-half to the recognized employee organization or recognized employee organizations." (Italics added.)

The County asserts that this ordinance is permissive only.

[16]"Under 'well-settled principle[s] of statutory construction,' we 'ordinarily' construe the word 'may' as permissive and the word 'shall' as mandatory, 'particularly' when a single statute uses both terms. [Citation.] In other words, '[w]hen the Legislature has, as here, used both "shall" and "may" in close proximity in a particular context, we may fairly infer the Legislature intended mandatory and discretionary meanings, respectively.' " (*Tarrant Bell Property, LLC v. Superior Court* (2011) 51 Cal.4th 538, 542, 121 Cal.Rptr.3d 312, 247 P.3d 542.) However, consideration of the legislative history may establish that the Legislature intended "shall" to be permissive. (*Ibid.*) The County offers no legislative history to contradict the plain meanings of "shall" and "may" in the quoted ordinance.

The County also argues that this impasse procedure was never triggered, because it reserved the right in section 7.1(b) of the MOU "to unilaterally adjust the work assignments over the union's objection provided adequate notice and an opportunity to meet and confer are given." We will next address the significance of this subdivision.

F. *The County's Reserved Right*

In section 7.1(b) of the MOU, the County, as appointing authority, specifically reserved "the right to convert assignments on the Twelve Plan to either ***1037** a 5/8 or a 4/10 Plan, upon the giving of forty-five (45) calendar days' advance notice of such change to the Association, which shall be afforded the opportunity to meet and confer on such a proposed change prior to its implementation."

1. The Association did not waive its right to bargain regarding reduced working hours

The County urges that this subdivision of the MOU amounts to "a management ****245** reservation of rights clause that reserves for management the right to implement certain unilateral changes." This clause, the County argues, "is evidence that [the Association] waived its right to bargain the change in work schedules."

[17]*Farrell, supra,* 41 Cal.3d 651, 224 Cal.Rptr. 688, 715 P.2d 648 discussed the waiver defense at pages 667 and 668, 224 Cal.Rptr. 688, 715 P.2d 648. " ' "Courts examine the defense of waiver carefully in order to ensure the protection of a party's rights, especially when these rights are statutorily based." ' ([*Sacramento*], *supra,* 147 Cal.App.3d 482, 488 [195 Cal.Rptr. 206], quoting *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1011 [175 Cal.Rptr. 105].) Federal courts use two basic tests when considering claims that a union has waived its right to bargain with an employer: some follow the rule that a waiver must be made in 'clear and unmistakable' language [citations], and others look beyond the language of the contract and consider the 'totality of the circumstances' to determine whether there was a waiver of rights [citation]. In California, the 'clear and unmistakable' language test has been preferred in cases involving public employees. (See, e.g., [*Sacramento*], *supra,* 147 Cal.App.3d at p. 488 [195 Cal.Rptr. 206]; *Oakland Unified School Dist. v. Public Employment Relations Bd., supra,* 120 Cal.App.3d at p. 1011 [175 Cal.Rptr. 105].)"

The County relies on *Sacramento, supra,* 147 Cal.App.3d 482, 195 Cal.Rptr. 206, even though the appellate court found no waiver in that case. In that case, as we have already discussed, a county conceded that a change of shift start times was generally subject to bargaining, but contended that the union "specifically waived its right to meet and confer on this matter in the MOU. The County relies on article III of the MOU, entitled 'county rights.' Subdivision (b) of that provision states '[t]he rights of the County include, ... the exclusive right to ... train, direct and *assign* its employees; ...' (Italics added.) The County urges that by this provision it retained the right to unilaterally assign its employees to any shift without first meeting and conferring with [the union]." (*Id.* at p. 487, 195 Cal.Rptr. 206.)

The *Sacramento* decision applied both tests and found no waiver. Looking at the totality of the circumstances, a history of unilateral reassignments ***1038** without a request to meet and confer did not establish a waiver, considering that history also showed that the union had agreed to two of the three shift changes that involved multiple employees. (*Sacramento, supra,* 147 Cal.App.3d 482, 488–489, 195 Cal.Rptr. 206.) The county argued that it requested the "county rights" provision many years earlier "to protect itself from the statutory bargaining requirements." (*Id.* at p. 489, 195 Cal.Rptr. 206.) The court characterized this as an undisclosed intention at the time and also when the union "signed a subsequent

agreement years later." (*Ibid.*) "Nor does the record show that either the practices or mutual intentions of the parties indicated the County's right to 'assign' employees was to be considered a waiver of [the union's] right to meet and confer on the matter." (*Ibid.*)

Farrell, supra, 41 Cal.3d 651, 224 Cal.Rptr. 688, 715 P.2d 648 similarly found no waiver by provisions in an MOU under either test of waiver. (*Id.* at p. 668, 224 Cal.Rptr. 688, 715 P.2d 648.)

[18]As section 7.1(b) of the MOU specifically recognized the Association's right to meet and confer before implementation of a plan to convert 12 Plan assignments to 5/8 or 4/10 Plan assignments, we do not regard the subdivision as a waiver of the same right. (Cf. ****246** *N.L.R.B. v. U.S. Postal Service* (D.C.Cir.1993) 8 F.3d 832, 836–837 (*U.S. Postal Service*) ["questions of 'waiver' normally do not come into play with respect to subjects already covered by a collective bargaining agreement."].)

2. The MOU specified the applicable time period to meet and confer

The Association complains that the "County failed to provide adequate time to complete the process because it set an arbitrary deadline for completing the meet and confer process."

We reiterate that section 3505 provides in part: " 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer *promptly* upon request by either party and *continue for a reasonable period of time* in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. *The process should include adequate time for the resolution of impasses* where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent." (Italics added.)

[19] [20]The MMBA does not attempt to specify how long or how frequently parties must meet in order to establish prima facie good faith or when impasse may be declared. The parties to an MOU, however, are free to agree ***1039** in advance on a period of time that they consider reasonable to allow them to freely exchange information and proposals and endeavor to reach agreement. It appears that the parties did so as to this particular topic. Section 7.1(b) of the MOU states that the County could convert 12 Plan assignments to the 5/8 Plan or 4/10 Plan 45 days after giving written notice and providing the opportunity to meet and confer. The County scheduled implementation of its modification to coincide with its new fiscal year. We conclude that neither the specified 45-day period nor the date was an arbitrary deadline.

The specified time period of 45 days from notice to implementation also contains an unavoidable implication about the applicability of the impasse procedure contained in the County code. The County code provides for resolution of impasse by mediation if the parties are unable to agree on another method of resolving their dispute. Here, 45 days was sufficient time to conduct three meetings to discuss the County's proposal and to conduct a vote by Association members. But 45 days is an unrealistically short time to conduct several meetings at which the parties "exchange freely information, opinions, and proposals, and to endeavor to reach agreement" (§ 3505), and also to reach and declare an impasse, agree on a mediator, and participate in mediation. The MOU arguably did not allow an "adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance." (§ 3505.) It therefore appears that the parties did not intend the impasse resolution procedure to apply to this particular proposal by the County to convert 12 Plan assignments. Instead they specified the entire applicable process in the MOU, 45 days' notice of a County proposal to convert 12 Plan assignments, the opportunity to meet and confer within those 45 days, and implementation of the County's proposal 45 days after providing notice, regardless of whether the parties reach agreement or impasse on implementation in the interim. Though we have concluded that the Association ****247** did not waive the right to bargain about the implementation of converting the 12 Plan to other plans, we conclude that the Association did waive any right to postpone implementation beyond 45 days by declaring impasse and compelling mediation.

3. The reserved right to reassign all 12 Plan employees included the right to reduce the 12 Plan shifts

We recognize that the County sought to achieve budget savings through reduced work schedules rather than employee layoffs. Nonetheless, we find guidance regarding the County's obligation to meet and confer from cases involving layoffs.

The California Supreme Court has clarified its earlier ruling in *Vallejo* regarding the extent to which

contemplated layoffs of public employees are ***1040** negotiable. Looking at cases involving private employers, the court noted: "[F]ederal courts have held that bargaining is required when the layoffs result from an employer's decision to reassign bargaining unit work to independent contractors or to managers. [Citations.] On the other hand, federal courts do not require bargaining when layoffs result from profitability considerations that are independent of labor costs [citation], or from a management decision to shut down all or part of a business [citation]. When layoffs are motivated primarily by a desire to reduce labor cost, but are not the result of a decision to change the nature or scope of the enterprise, and do not involve reassigning bargaining unit work to non-bargaining-unit workers, federal courts require bargaining over the timing of the layoffs and the number and identity of the affected employees, but not necessarily over the layoff decision itself. [Citations.] The United States Supreme Court has said that a conflict resulting from an employer's desire to reduce labor costs is 'peculiarly suitable for resolution within the collective bargaining framework' under the NLRA. (*Fibreboard Paper Products Corp. v. National Labor Relations Board* (1964) 379 U.S. 203, 214 [85 S.Ct. 398, 13 L.Ed.2d 233].)" (*Local 188, supra,* 51 Cal.4th 259, 272, 120 Cal.Rptr.3d 117, 245 P.3d 845.)

[21]Adapting these private employment cases to public employment, the court explained that "the rule adopted in *Vallejo* is that under the MMBA a local public entity may unilaterally decide that financial necessity requires some employee layoffs, although the entity must bargain over the implementation of that decision and its effects on the remaining employees." (*Local 188, supra,* 51 Cal.4th 259, 276, 120 Cal.Rptr.3d 117, 245 P.3d 845; cf. *State Assn. of Real Property Agents v. State Personnel Bd.* (1978) 83 Cal.App.3d 206, 213, 147 Cal.Rptr. 786 ["federal cases have uniformly held that an employer faced with economic necessity has the right unilaterally to decide that some reduction in work forces must be made."].) "Under the MMBA, a local public entity that is faced with a decline in revenues or other financial adversity may unilaterally decide to lay off some of its employees to reduce its labor costs. In this situation, a public employer must, however, give its employees an opportunity to bargain over the implementation of the decision, including the number of employees to be laid off, and the timing of the layoffs, as well as the effects of the layoffs on the workload and safety of the remaining employees." (*Local 188, supra,* 51 Cal.4th at p. 277, 120 Cal.Rptr.3d 117, 245 P.3d 845.) The Supreme Court held that "when a city, faced with a budget deficit, decides that some firefighters must be laid off as a cost-saving measure, the city is not required to meet and confer with the firefighters' authorized employee representative before ****248** making that initial decision." (*Id.* at pp. 264–265, 120 Cal.Rptr.3d 117, 245 P.3d 845; cf. *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 656, 35 Cal.Rptr.2d 800 [the "decision to lay off employees because of lack of funds or lack of work" is "an exclusive management right."].)

[22]*Local 188* defines the scope of the exclusion in section 3504 from bargaining of the "merits, *necessity*, or organization of any service or ***1041** activity." (Italics added.) This "necessity" is not the kind of business necessity or financial emergency that merely postpones the obligation to meet and confer. Instead, it identifies the kind of decision that is exempt from collective bargaining altogether because it is inherently within managerial policy and prerogative.

In a different context, it has been established that the "integrated process of determining the budget of a county and adjusting the number of employees in each county office to conform to the overall spending plan is a legislative function which 'may not be controlled by the courts.' " (*County of Butte v. Superior Court* (1985) 176 Cal.App.3d 693, 698, 222 Cal.Rptr. 429.) "The power and obligation to enact a county's budget is vested by law in the board of supervisors. (Gov.Code, § 29088.) Furthermore, the board of supervisors is responsible for fixing the number of employees of each county office, their compensation, and other conditions of employment. (Cal. Const. art. XI, § 4, subd. (f), Gov. Code, § 25300.)" (*Ibid.*) This language, though not arising in the labor context, suggests what must be considered as management's prerogative.

[23]Applying the reasoning of *Local 188* to our case, how much the County can afford to spend on staffing its jails, in other words, the budget for the DOC, is inherently within fundamental managerial policy and prerogative, even without an explicit reservation of managerial rights. Deciding how to accomplish a budget target, namely, by layoffs, is also within management prerogative. If a county decides to preserve jobs and find ways other than layoffs to trim the budget of a department, that would also be within managerial prerogative.

We conclude that the County was not required by the MMBA or the MOU to meet and confer about the need to reduce the budget of the DOC or about the policy decision to avoid layoffs in making reductions. Retaining all existing employees while paying them less necessarily requires either reducing their hours or their compensation, both bargainable under the MMBA. Although under section 7.1(b) of the MOU the County was required to

meet and confer before exercising its right to convert 12 Plan employees to other plans, the scope of those negotiations was limited to details of *implementing* such a change.

The Association contends it never agreed to the County's decision to adopt the modified 12 Plan. This contention challenges the trial court's finding that "because [the Association's] members chose the modified 12 Plan over the other proposed schedules, ... there was mutual agreement and, therefore the parties did not need to declare impasse and mediation was not required." The Association argues that its e-mail report of the members' vote reflected a ***1042** preference for one type of implementation over another, but "does not show mutual agreement to the *decision*" to adopt the plan. The County counters that the e-mail was intentionally self-contradictory and that substantial evidence supports the trial court's interpretation. While we agree with the Association that the reported vote does not reflect its consent to the County's proposal to modify the 12 Plan, we disagree with the underlying ****249** premise that the Association's consent was required.

The County had reserved the right in the MOU to convert all 12 Plan employees to other listed plans upon 45 days' notice and the opportunity to meet and confer before implementation. In other words, the Association had already consented to a conversion on these terms. The Association had the right to meet and confer about how the conversion would be implemented, such as the timing of the conversion, but not about whether it would be implemented. The Association did not have the right to delay implementation beyond 45 days by declaring impasse and requesting mediation.

It is evident that the County contemplated in section 7.1(b) of the MOU that at some future time it might lose the financial ability to maintain a number of employees working 85.75 hours biweekly instead of 80 hours biweekly. The reservation of rights did not eliminate the County's obligation to meet and confer about reassigning all 12 Plan employees to shorter workweeks, but it was apparently adopted in contemplation of circumstances possibly requiring elimination of the 12 Plan.

[24]The trial court noted that the County did not actually exercise its right to convert all 12 Plan employees to other listed plans. The Association likewise emphasizes that "[s]ection 7.1(b) only permits a 5/8 or 4/10 Plan, not the Modified 12 Plan" and that "section 7.1(b) does not authorize 12-hour shifts." We agree that section 7.1(b) did not explicitly authorize the County to offer alternatives to converting 12 Plan employees to either the 4/10 or 5/8 Plans. However, it is a maxim of jurisprudence that "[t]he greater contains the less." (Civ.Code, § 3536.) As the County was able to assign all 12 Plan employees to 40-hour workweeks and 80 hours biweekly on one of two other plans, it is implicit that the County could offer 12 Plan employees other formulas for working 80 hours biweekly.

The appellate court in *Uforma/Shelby Business Forms, Inc. v. N.L.R.B.* (6th Cir.1997) 111 F.3d 1284, cited by neither side, applied similar reasoning. At issue in that case was whether a private employer "had the right to abolish the third shift, reschedule twelve employees to different shifts, and lay off five other employees without first providing notice and opportunity to bargain." (*Id.* at p. 1290.) The NLRB had found a violation of the employer's obligation to ***1043** meet and confer. The appellate court disagreed, looking at the rights reserved to management (petitioner) in the collective bargaining agreement.

"Although the language does not state that petitioner may 'eliminate a shift,' it reserves to petitioner the exclusive ability to schedule and assign work, determine the number of employees required for a job, and layoff or relieve employees from duties. These broad powers necessarily encompass the ability to reschedule and lay off the members of a given shift, regardless of whether petitioner is affecting one or one hundred employees. The reasoning of the ALJ exalts form over substance by suggesting that collective bargaining agreements must catalog every conceivable permutation of a decision to lay off, such as delineating with precision each position or work force percentage which an employer may reschedule or lay off." (*Uforma/Shelby Business Forms, Inc., supra,* 111 F.3d 1284, 1290.)

While the reserved management rights in our case were not as broad as those in *Uforma/Shelby Business Forms, Inc.,* they did contemplate the County converting 12 Plan employees to working 80 hours biweekly after allowing the Association to ****250** meet and confer about the implementation of this conversion. We conclude that the power to eliminate all 12 Plan assignments and the power to lay off employees for budgetary reasons must include the ability to modify 12 Plan assignments to conform to other work schedules recognized in the MOU. The County was acting within its reserved rights by preserving most of the 12 Plan schedule, rather than reassigning all or most 12 Plan employees to other plans. The County recognized an obligation to meet and confer before exercising this reserved right, and the record reflects that it complied with that obligation.

4. Bargaining in good faith

The County repeatedly asserts that the Association engaged in bad faith bargaining, apparently in response to its perception that the Association has accused the County of bad faith bargaining. The Association's briefs do not expressly accuse the County of bargaining in bad faith, but they complain that the County failed to complete its obligation to bargain in good faith and imposed an arbitrary deadline. We have already rejected those contentions, which we understand to be the Association's only implicit claims of bad faith by the County.

[25] [26]We do not agree with the trial court's finding that the Association's membership vote preferring one form of a modified 12 Plan over another established the County's good faith in bargaining. As we have explained, however, modifying the 12 Plan was within the County's reserved rights so ***1044** long as it met and conferred regarding the implementation. The record establishes that there were three meetings at which the Association was afforded an opportunity to discuss implementation.

[27] [28]"In general, good faith is a subjective attitude and requires a genuine desire to reach agreement [citations]. The parties must make a serious attempt to resolve differences and reach a common ground [citation]. The effort required is inconsistent with a 'predetermined resolve not to budge from an initial position.' [Citations.]" (*Placentia, supra,* 57 Cal.App.3d 9, 25–26, 129 Cal.Rptr. 126.) However, adamantly insisting on a position does not necessarily establish bad faith. (*Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 805–806, 213 Cal.Rptr. 491.)

To the extent the Association implies the County acted in bad faith, the implication is based on the premise that the County was required to engage in further meetings and then participate in mediation if an impasse was reached. As we have concluded that the County acted within the authority reserved in section 7.1(b) of the MOU, we reject the implication that the County's action was taken in bad faith.

IV. DISPOSITION

The judgment is affirmed.

WE CONCUR:

Rushing, P.J.

Elia, J.

All Citations

224 Cal.App.4th 1016, 169 Cal.Rptr.3d 228, 14 Cal. Daily Op. Serv. 2978, 2014 Daily Journal D.A.R. 3403

Footnotes

1 Unspecified section references are to the Government Code.

2 The Association has filed no counterdeclaration regarding what transpired at the meetings. Instead, on appeal it relies on parts of Hirokawa's declaration as well as its verified petition.

3 Section 3504.5 excuses public agencies from providing reasonable notice "in cases of emergency as provided in this section." (*Id.*, subd. (a).) Subdivision (b) provides: "In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation."

4 The MMBA does not itself define "interest arbitration." This court has stated: " 'Resolution of disputed contract issues through a binding process is commonly referred to as "interest arbitration" in labor law.' [Citation.] ' "Interest arbitration, unlike grievance arbitration, focuses on what the terms of a new agreement should be, rather than the meaning of the terms of the old agreement." ' " (*City of San Jose v. International Assn. of Firefighters, Local 230* (2009) 178 Cal.App.4th 408, 414, 100 Cal.Rptr.3d 396, quoting *Hess Collection Winery v. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 45 Cal.Rptr.3d 609.)

5 Former section 3505.4 was repealed and replaced amidst a number of amendments to the MMBA effective on January 1, 2012. Assembly Bill No. 646 (2011–2012 Reg. Sess.) repealed and replaced section 3505.4 and added sections 3505.5 and 3505.7. The nonexistence of mandatory impasse procedures in the MMBA is what prompted the author of Assembly Bill No. 646 to propose this new legislation. (Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011–2012 Reg. Sess.) as amended Mar. 23, 2011, at <http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0601-0650/ab_646_cfa_20110503_ 104246_asm_comm.html> [as of Mar. 17, 2014].)

End of Document

Exhibit 13

Santa Clara County Counsel Attys. Assn. v. Woodside (1994)
7 Cal. 4th 525

7 Cal.4th 525, 869 P.2d 1142, 28 Cal.Rptr.2d 617, 145 L.R.R.M. (BNA) 2981
Supreme Court of California

SANTA CLARA COUNTY COUNSEL ATTORNEYS ASSOCIATION, Plaintiff, Cross-defendant and Respondent,
v.
STEVEN WOODSIDE, as County Counsel, etc., Defendant, Cross-complainant and Appellant;
COUNTY OF SANTA CLARA, Defendant and Appellant.

No. S031593.
Mar 31, 1994.

SUMMARY

After failing to obtain a mutually agreeable wage package with a county, an association representing the attorneys in the office of the county counsel notified the county that it intended to file a petition for a writ of mandate to enforce its members' bargaining rights. The county counsel, however, informed the attorneys that litigation on the salary issues could not be maintained unless the lawyers ceased employment or the county consented. The association then filed an action for declaratory and injunctive relief against the county counsel and the county, seeking a declaration that the proposed writ proceeding did not violate its members' duty of loyalty or other ethical obligations. The trial court determined that the association members were entitled to proceed with their petition and enjoined the county counsel from terminating the members from their employment if a suit was filed. (Superior Court of Santa Clara County, No. 697174, Martin C. Suits, Judge.*) The Court of Appeal, Sixth Dist., No. H008865, reversed.

The Supreme Court reversed the judgment of the Court of Appeal, with directions to affirm the judgment of the trial court. The court held that the attorneys' association had a right to bring a mandamus action against the county for breach of its duty under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) to bargain in good faith (Gov. Code, § 3505), without violating the attorneys' obligations under State Bar Rules Prof. Conduct, rules 3-300 (avoiding acquisition of interests adverse to client) and 3-310 (avoiding representation of adverse interests), or their common law ethical obligations to their employer-client. Moreover, the authorization of such lawsuits under the act does not violate the constitutional separation of powers between the Legislature and the Judiciary. The court further held that despite the general rule that a client may discharge an attorney at will (Code Civ. Proc., § 284), an attorney may not be terminated solely or chiefly because he or she has engaged in protected activity under the act. Lastly, the court held that the trial court correctly decided that, although the attorneys could not be discharged or disciplined for participating in the filing of the mandamus action, the county was free to rearrange assignments within the county counsel's office to ensure that it received legal representation in which it had full confidence. (Opinion by Mosk, J., with Lucas, C. J., Kennard, Arabian, Baxter and George, JJ., concurring. Separate dissenting opinion by Panelli, J.* *)

HEADNOTES

Classified to California Digest of Official Reports

(1)
Labor § 37--Collective Bargaining--Public Agencies--Duty to Bargain.
The duty of public agencies under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations (Gov. Code, § 3505) is a duty to bargain with the objective of reaching binding agreements between agencies and employee organizations over the relevant terms and conditions of employment. The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse, and this duty continues in effect after the expiration of any employer-employee agreement.

(2)
Labor § 17--Labor Unions--Membership--Right to Join--Public Employees.
Unlike federal labor law, the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) (right to form local public employee organizations) includes supervisory,

management, and confidential employees within its scope. Contrary to federal practice, by virtue of the broad definition of "public employee" in Gov. Code, § 3501, subd. (d), which excludes only elected officials and those appointed by the Governor, the act extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy. Although Gov. Code, § 3507.5, permits a public agency to adopt rules for the designation of management and confidential employees, and for restricting such employees from representing any employee organization that represents other employees of the public agency, it does not prohibit such employees from forming, joining, or participating in an employee organization.

([3a], [3b], [3c])
Labor § 44--Collective Bargaining--Actions in State Courts--Right of Public Employee Association to Sue Public Agency for Violation of Duty to Bargain.
An association representing attorneys in a county counsel's office had a right to bring a mandamus action against the county under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) for breach of its duty to bargain in good faith (Gov. Code, § 3505), and there were no statutory or common law grounds for limiting that right. The Legislature intended the act to impose substantive duties, and confer substantive, enforceable rights, on public employers and employees, and it is irrelevant that the act contains no express right to sue. The Legislature, in order to create a right to sue under the act, need not have included language concerning the right to sue within the act itself. It was enough for the Legislature to endow the public employers and employees with substantive rights and duties that limited public employers' discretion, and then to allow employees to enforce their rights by means of traditional mandamus under Code Civ. Proc., § 1085.

([4a], [4b], [4c])
Mandamus and Prohibition § 21--Mandamus--To Public Agencies--Availability of Remedy as Affected by Public Policy.
Mandamus is available to compel a public agency to perform an act prescribed by law. (Code Civ. Proc., § 1085.) It is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as "ministerial" or "legislative." Once the Legislature has created a duty in a public agency, a court may not limit, on public policy grounds, the availability of a writ of mandate to enforce that duty.

([5])
Mandamus and Prohibition § 5--Mandamus--Conditions Affecting Issuance.
What is required to obtain relief by a writ of mandamus is a showing by the petitioner of a clear, present, and usually ministerial duty on the part of the respondent, and a clear, present, and beneficial right in the petitioner to the performance of that duty.

([6a], [6b])
Attorneys at Law § 5--Right to Practice and Admission to Bar-- Power to Regulate--As Between Courts and Legislature.
The power to regulate the practice of law is among the inherent powers of the courts established by Cal. Const., art. VI, and the courts have the exclusive power to control the admission, discipline, and disbarment of persons entitled to practice before them, although the Legislature, under the police power, may exercise a reasonable degree of regulation and control over the profession and practice of law. Nonetheless, the Supreme Court has the inherent power to provide a higher standard of attorney-client conduct than the minimum standards prescribed by the Legislature, and any statute that would permit an attorney to act in a way that would seriously violate the integrity of the attorney-client relationship, so as to materially impair the functioning of the courts, would be constitutionally suspect. However, a statute affecting attorney-client relations will not be held to be unconstitutional on separation of powers grounds unless there is a direct and fundamental conflict between the operation of the statute, as it applies to attorneys, and attorneys' settled ethical obligations.

[See 1 **Witkin,** Cal. Procedure (3d ed. 1985) Attorneys, §§ 257, 258.]

([7])
Constitutional Law § 37--Distribution of Governmental Powers--Between Branches of Government--Doctrine of Separation of Powers--Violations of Doctrine--Standard for Assessment of Violation.
The standard for assessing whether the Legislature has overstepped its authority and thereby violated the separation of powers principle is summarized as follows: The Legislature may put reasonable restrictions on constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.

([8a], [8b], [8c])
Attorneys at Law § 13--Attorney-client Relationship--Rules of Professional Conduct--Suit Against Client--Avoiding Acquisition of Interests Adverse to Those of Client.
An association representing attorneys in a county counsel's office could bring a mandamus action against the county for breach of its duty under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) to bargain in good faith (Gov. Code, § 3505), without violating State Bar Rules Prof. Conduct, rule 3-300 disallowing the acquisition of interests adverse to client). The rule was intended to regulate business transactions between attorneys and clients and the acquisition by attorneys of pecuniary interests adverse to those of the clients. The association's lawsuit was not a business transaction, nor could the meaning of the term "acquire ... a pecuniary interest," as used in the rule, be stretched to encompass the filing of a petition for a writ of mandate, since that term is intended to signify the pursuit of some business or financial interest as conventionally understood, rather than an attempt to redress some legal wrong through the courts. Moreover, the rule does not require an attorney, for loyalty's sake, to forgo his or her statutory rights against a client to redress a legal injury.

[See 1 **Witkin,** Cal. Procedure (3d ed. 1985) Attorneys, § 368Q et seq.]

([9a], [9b], [9c])
Attorneys at Law § 13--Attorney-client Relationship--Rules of Professional Conduct--Suit Against Client--Avoiding Representation of Adverse Interests.
An association representing attorneys in a county counsel's office could bring a mandamus action against the county for breach of its duty under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) to bargain in good faith (Gov. Code, § 3505), without violating State Bar Rules Prof. Conduct, rule 3-310 (avoiding representation of adverse interests). By being a part of the association's lawsuit, the attorneys did not have a professional interest adverse to the county within the meaning of State Bar Rules Prof. Conduct, rule 3-310(B)(4) (attorney may not represent client, without disclosure, when attorney has professional interest in subject matter of representation). The rule does not address the existence of general antagonism between lawyer and client, but rather tangible conflicts between their interests in the subject matter of the representation, and the record supported the conclusion that no such conflict of interest was present. Rule 3-310 does not require an attorney, for loyalty's sake, to forgo his or her statutory rights against a client to redress a legal injury.

([10a], [10b], [10c])
Attorneys at Law § 12--Attorney-client Relationship--Dealings With Clients--Attorney's Common Law Duty of Loyalty and Other Ethical Obligations to Client--As Affecting Statutory Right of Attorneys Employed in Public Sector to Sue Client:Labor § 44--Collective Bargaining--Actions in State Courts.
Attorneys employed in the public sector, who exercise their statutory right to sue to enforce rights given them by the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) (right to form local public employee organizations), do not in such capacity violate their common law duty of loyalty or other ethical obligations to their employer-client. However, attorneys in such circumstances are held to the highest ethical obligations to continue to represent the client in the matters they have undertaken, and a violation of their duty to represent the client competently or faithfully, or of any of the State Bar Rules Prof. Conduct, will subject those attorneys to appropriate discipline, both by the employer and by the State Bar. In any event, the Legislature, in extending the act's means of conflict resolution to public employee attorneys in arguably managerial roles, did not put such a strain on the attorney-client relationship as to compel the conclusion that the authorization of such lawsuits violates the constitutional separation of powers between the Legislature and the Judiciary.

([11])
Attorneys at Law § 12--Attorney-client Relationship--Dealings With Clients--Attorney's Common Law Duty of Loyalty to Client--Applicability to Attorney in Public Sector.
It is an attorney's duty of loyalty to protect his or her client in every way, and it is a violation of that duty for the attorney to assume a position adverse or antagonistic to his or her client without the client's free and intelligent consent. By virtue of this rule, an attorney is precluded from assuming any relationship that would prevent him or her from devoting his or her entire energies to the client's interests. Moreover, the duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney's counterpart in private practice.

([12])
Attorneys at Law § 12--Attorney-client Relationship--Dealings With Clients--Attorney's Common Law Duty of Loyalty to Client--As Affecting

Collective Bargaining Rights of Attorneys Employed in Public Sector:Labor § 37--Collective Bargaining.
Government attorneys who organize themselves into associations pursuant to statute and who proceed to bargain collectively with their employer-clients are not per se in violation of any duty of loyalty or any other ethical obligation. An attorney in pursuit of an employee association's goals oversteps ethical boundaries when he or she violates actual disciplinary rules pertaining to the attorney's duty to represent the client faithfully, competently, and confidentially, which duty is found principally in State Bar Rules Prof. Conduct, rule 3-110. Thus, in determining whether an action taken by an attorney or employee association violates the attorney's ethical obligations, the question is not whether the action creates antagonism between the attorney-employee and the client-employer, since such antagonism in the labor relations context is commonplace, but whether the attorney has permitted that antagonism to overstep the boundaries of the employer-employee bargaining relationship and has actually compromised client representation.

([13a], [13b])
Attorneys at Law § 16--Attorney-client Relationship--Termination--Power of Client to Discharge Attorney at Will--Exception for Exercise of Collective Bargaining Rights by Attorneys Employed in Public Sector:Labor § 37--Collective Bargaining.
The Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) (right to form local public employee organizations) in creates an exception to the general rule found in Code Civ. Proc., § 284, and in case law, that a client may discharge an attorney at will. That exception is a prohibition against terminating an attorney solely or chiefly because he or she has engaged in protected activity under the act. Moreover, attorneys who believe they have been discriminated against for protected activity may bring an antidiscrimination action in the manner available to other employees.

([14])
Attorneys at Law § 16--Attorney-client Relationship--Termination-- Power of Client to Discharge Attorney at Will.
Code Civ. Proc., § 284, confers on clients, beyond the context of litigation, the absolute power to discharge an attorney, with or without cause. The statute embodies the recognition that the interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and the client has the right to employ such attorney as will in his or her opinion best subserve his or her interest.

([15])
Labor § 17--Labor Unions--Membership--Right to Join--Public Employees--Discharge or Discrimination for Exercise of Right.
The Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) ensures a public employee the right to engage in a wide range of union-related activities without fear of sanction (Gov. Code, § 3506). Public employers may not discriminate against their employees on the basis of membership or participation in union activities, and this freedom from sanction includes the right not to be discharged for lawful union activity.

([16])
Attorneys at Law § 16--Attorney-client Relationship--Termination-- Power of Client to Discharge Attorney at Will--Exception for Exercise of Collective Bargaining Rights by Attorneys Employed in Public Sector--Right of Employer to Reorganize Its Office:Labor § 37--Collective Bargaining.
In an action for declaratory and injunctive relief, to determine the right of an association representing attorneys in a county counsel's office to bring a mandamus action against the county under the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.) for breach of its duty to bargain in good faith (Gov. Code, § 3505), the trial court correctly decided that, although an attorney could not be discharged or disciplined for participating in the filing of the petition for a writ of mandate, the attorneys involved had no right to be reinstated to their full employment responsibilities, from which they had been excluded once they announced their intention to sue. Although the county could not punish the attorneys for filing suit, there was no reason why the county should not have been accorded great flexibility in reorganizing the county counsel's office to respond to the lawsuit. By allowing the county this flexibility, the trial court properly balanced the county's need for obtaining representation in which it had full confidence with the attorneys' statutory employment rights.

COUNSEL
Remcho, Johansen & Purcell, Robin B. Johansen, Joseph Remcho, Karen A. Getman and Philip C. Monrad for Defendant, Cross-complainant and Appellant and Defendant and Appellant.
Daniel S. Hapke, Jr., Frederick J. Krebs, O'Melveny & Myers and George A. Riley as Amici Curiae on behalf of Defendant, Cross-complainant and Appellant and for Defendant and Appellant.
Pillsbury, Madison & Sutro, Kevin M. Fong, Edward P. Davis and J. Donald Best for Plaintiff, Cross-defendant and Respondent.
Daniel F. Moss, Ann Brick, Edward M. Chen, Matthew

A. Coles, Margaret C. Crosby and Alan L. Schlosser as Amici Curiae on behalf of Plaintiff, Cross-defendant and Respondent.

MOSK, J.

We are asked to decide whether the right of local government employees to sue a public agency for violations of the Meyers-Milias-Brown Act (MMBA, Gov. Code, § 3500 et seq.) extends to attorneys who are employed in the office of the Santa Clara County Counsel (County Counsel), or whether the duty of loyalty imposed upon these attorneys towards their client, the County of Santa Clara (County), precludes such a suit. We conclude that the MMBA authorizes the suit, and that the suit is not prohibited for any constitutional reason. Further, we conclude that the County is statutorily forbidden from discharging attorneys for exercising their right to sue under the MMBA, although the County is still free to rearrange assignments within the County Counsel's office in order to ensure that it receives legal representation in which it has full confidence. Because ***533** we find in favor of the Santa Clara County Attorneys Association on statutory grounds, we do not consider the argument that their right to sue is constitutionally protected.

I. *Factual Background*

Petitioner Santa Clara County Counsel Attorneys Association (Association) consists of approximately 20 out of 40 attorneys (Attorneys) in the County Counsel's office. The County Counsel's office, by statute (Gov. Code, § 26526) and by practice, acts as the primary legal adviser to the County Board of Supervisors. In addition to serving as counsel to the board, deputies in the County Counsel's office advise and represent various administrative departments of the county in matters ranging from land use law to social service benefits. The County Counsel's office is also charged with representing special districts within the county (*id.*, § 27645), representing the state at guardianship proceedings (*id.*, § 27646), and representing superior and municipal court judges (*id.*, § 27647).

In order to understand the relevant circumstances of this case, it is helpful to recount briefly the history of the Association.

In 1973, the Santa Clara County Criminal Attorneys Association, which included deputy district attorneys and deputy public defenders, filed a petition to form an attorney bargaining unit, pursuant to provisions of the MMBA. The County Board of Supervisors (the Board) placed the deputy County Counsel attorneys in the same bargaining unit as these attorneys. At the same time, the County removed the attorneys' status as classified employees who, under the MMBA, have certain restrictions placed on their associational rights. (See Gov. Code, § 3507.5.) However, the following year, the deputy County Counsel attorneys petitioned to be placed in a separate bargaining unit. The stated reason for the petition was that the attorneys, unlike the deputy district attorneys and public defenders, were in a "confidential attorney-client relationship with the Board of Supervisors and county management," and therefore "should not be included with attorneys and others not in such a relationship." The petition was granted, and the Association became a recognized employee association under the MMBA.

There is evidence in the record that in the late 1970's the Association attempted to change the status of its members, in effect proposing to disband them as a bargaining unit in exchange for a salary increase 5 percent greater than those of the deputy district attorneys and deputy public defenders. These latter attorneys objected and the proposal was never adopted.

In 1984, the Association joined the deputy public defenders and deputy district attorneys' unit in a lawsuit against the County. At issue was whether ***534** the County was setting the attorneys' salaries in accordance with the comparable wage provisions of County Charter section 709, and whether the County was violating the MMBA, specifically Government Code section 3505's requirement that a public employer "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment ...." The suit was subsequently settled.

This brings us to the events leading to the present lawsuit. In 1989, the most recent memorandum of understanding between the County and the Association expired. The Association refused to accept a wage package already approved by the deputy public defenders. Instead, the Association sought to meet and confer independently with the County and the Board to present its own comparative survey data, to support its position that its members deserved higher salaries than those offered by the County. On August 17, 1989, the Association requested that the Board schedule a hearing to set salaries pursuant to County Charter section 709. The Board did not comply with that request. On September 1, 1989, the Association proposed that the rate of pay for its members be set by binding arbitration. The County again did not respond. In November 1989, the County notified the Association that it intended to give the Attorneys the first phase of the

increase negotiated with other attorneys. The County offered to meet and confer with them on the implementation of this increase. On December 8, 1989, the Association proposed nonbinding fact-finding by a neutral third party or any other reasonable procedure that would assist the parties in resolving the comparable wage issue. Once again the County did not respond.

In December 1989, the Board enacted its 4 percent wage increase for the Attorneys. The Association at that point notified the County of its intent to file a petition for writ of mandate to enforce its rights under the MMBA and the County Charter. On December 21, 1989, Steven Woodside, the County Counsel, distributed a memorandum to all deputies in the office, setting forth his position with regard to the impending writ action. After a review of various California Rules of Professional Conduct as well as the American Bar Association model rules, Woodside concluded that "litigation against the County on these issues may not be maintained by lawyers employed by the County unless the lawyers cease employment in the County Counsel's Office or the County consents." Moreover, Woodside took certain steps to segregate Association members from confidential meetings and contacts with the Board.

On December 29, 1989, the Association requested that the County waive the conflict of interest or submit the controversy to a court without the filing ***535** of a formal action, pursuant to Code of Civil Procedure section 1138. After the County's rejection of this proposal, the Association filed this formal action for declaratory and injunctive relief. The Association alleged that the County had failed to meet and confer on wages, as it is obliged to do under the MMBA, and failed to adjust salaries in accordance with County Charter section 709. Subsequently, the County filed a cross-complaint seeking to enjoin the Association from filing a petition for writ of mandate or, in the alternative, seeking a declaration that prior to filing the petition, the Association be required to make a showing (1) that there is a likelihood of prevailing on the merits, and (2) that harm to the County would be minimal.

The Association asked the court to grant the following relief: (1) to declare that the members of the Association do not have to resign prior to filing a petition for writ of mandate against the County over the wage issue; (2) to declare that such a writ of mandate action does not create a conflict of interest or violate any ethical code which would subject the Attorneys to discipline; (3) for an injunction prohibiting the County from preventing the Attorneys from performing their customary duties, from disciplining or terminating the Attorneys, or from referring the Attorneys to the State Bar for discipline; and (4) to reinstate the Attorneys to their full employment responsibilities, including confidential meetings with the Board and other County policymaking officials. It is worthy of emphasis that the underlying merits of the petition for writ of mandate sought by the Association were not before the trial court, and are not before this court. The only issues argued in the court below were whether the Association's contemplated petition was lawful, and whether it could proceed without discipline from either the County or the State Bar. Those are the only questions we decide here.

The trial court found for the Association on most points. It enjoined the County from terminating the Attorneys for filing a writ of mandate action to resolve the salary dispute. It further declared that the members of the Association did not have to resign in order to file the suit, and that the filing of a petition for writ of mandate did not create any conflict of interest in violation of the Attorneys' ethical code. It declined to enjoin the County, however, from reassigning attorneys so as to exclude them from confidential meetings.

The County appealed. The trial court stayed its judgment pending appeal, but left in effect a preliminary injunction preventing the County from terminating any of the Attorneys for filing the suit. The Court of Appeal reversed, finding in essence that the Association's suit did indeed present a grave breach of the Attorneys' duty of loyalty to their clients. The Court of ***536** Appeal found, moreover, that the MMBA did not authorize the Attorneys to file the petition. We granted the Association's petition for review to resolve this important question of first impression.

II. *Discussion*

In support of the Court of Appeal's holding, the County advances two lines of argument against the Association's right to sue. The first of these is a statutory/common law argument based on a construction of the MMBA. The second is a constitutional argument based on the separation of powers between the legislative and judicial branches of government. The constitutional argument claims in substance that the MMBA as applied to these attorneys permits them to violate their settled ethical obligations, and that therefore the statute is in that respect unconstitutional. Each of these arguments will be considered in turn.

A. *Statutory Arguments*

The Association contends that the Court of Appeal erred when it held that the Attorneys had no right to sue under the MMBA. The County, on the other hand, argues that the MMBA contains no explicit right to sue. It contends that the remedies available to grievants under the MMBA are essentially common law actions created by the courts. The County further maintains that there are compelling public policy reasons for not extending the common law right to sue to attorneys who, as here, are involved in an attorney-client relationship with their employers. The primary public policy reason against allowing such suits is that they would cause an attorney to violate his or her duty of loyalty to the client.

We disagree with the fundamental premise of the County's argument. We construe the MMBA to provide a right to petition for writ of mandate to those employees who fall within its protections, including the Attorneys in the present case. Therefore this court has no discretion to deny that remedy on public policy grounds, however strong those grounds may be.

1. *Scope of Coverage Under the MMBA*

The MMBA was adopted in 1968, after several more modest attempts to regulate labor relations for local government employees. Its stated purpose is to provide "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment ...." (Gov. Code, § 3500.) ([1]) Its principal means for doing so is by imposing on public agencies the obligation to "meet and confer in good faith regarding wages, ***537** hours, and other terms and conditions of employment with representatives of recognized employee organizations...." (*Id.*, § 3505.) The duty to meet and confer in good faith has been construed as a duty to bargain with the objective of reaching binding agreements between agencies and employee organizations over the relevant terms and conditions of employment. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 336 [124 Cal.Rptr. 513, 540 P.2d 609].) The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse; this duty continues in effect after the expiration of any employer-employee agreement. (*San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818-819 [207 Cal.Rptr. 876].)

The MMBA explicitly includes attorneys within the scope of its protections. Government Code section 3507.3 states that "Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization .... [¶] 'Professional employees' for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, *attorneys*, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists." (Italics added.)

([2]) Moreover the MMBA, unlike federal labor law, includes supervisory, management and confidential employees within its scope. "Contrary to federal practice, by virtue of the broad definition of 'public employee' in section 3501, subdivision (d), which excludes only elected officials and those appointed by the Governor, MMBA extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy." (*Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331, 338 [122 Cal.Rptr. 210].) Government Code section 3507.5 permits a public agency to adopt rules for the designation of management and confidential employees, and for "restricting such employees from representing any employee organization, which represents other employees of the public agency," but does not prohibit such employees from forming, joining or participating in an employee organization.

Thus, under federal labor law, the Attorneys in this case may well have been excluded from union representation because they would be classified as ***538** management employees who " ' "formulate and effectuate management policies by expressing and making operative the decisions of their employer. " ' " (*NLRB v. Yeshiva University* (1980) 444 U.S. 672, 682 [63 L.Ed.2d 115, 125, 100 S.Ct. 856].) The purpose for the managerial exclusion, as the Supreme Court explained, was to prevent a situation whereby employees would be tempted to "divide their loyalty between employer and union." (*Id.* at p. 688 [63 L.Ed.2d at p. 129].) The attorneys, or some of them, might have also been excluded under federal law as confidential employees who " 'assist and act in a confidential capacity to persons who exercise "managerial" functions in the field of labor relations.' " (*NLRB v. Hendricks Cty. Rural Electric Corp.* (1981) 454 U.S. 170, 180-181 [70 L.Ed.2d 323, 332, 102 S.Ct. 216].)

But under the MMBA neither exclusion is applicable. By choosing to explicitly include supervisorial, managerial, and confidential employees within the realm of the MMBA's protections, the Legislature implicitly decided that the benefits for public sector labor relations achieved by including managerial employees outweighed the

potential divided loyalty dilemmas raised.[1] We therefore note at the outset that any argument which contends that MMBA protections should not apply to certain managerial employees because of problems with divided loyalty must be viewed with skepticism, for that argument follows precisely the legislative road the MMBA declined to take.

2. *The Right to Sue Under the MMBA*

([3a]) The County's statutory argument is premised on what it considers the lack of an express right to sue under the MMBA. Its argument begins with our statement in *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 197 [193 Cal.Rptr. 518, 666 P.2d 960] (hereafter *City of Gridley*), that the MMBA "furnishes only a 'sketchy and frequently vague framework of employer-employee relations for California's local government agencies.' [Citation.] A product of political compromise, the provisions of the act are confusing, and, at times, contradictory." From there, the County points to the lack of any stated right to sue under the MMBA, and concludes that "the Legislature deliberately left important provisions of the Act to court interpretation, including any provisions for enforcement." ***539**

Such an argument fundamentally misconstrues the statutory protections afforded by the MMBA. As we stated in *City of Gridley*, *supra*, 34 Cal.3d at page 198: "Notwithstanding its otherwise 'sketchy' provisions, the act contains strong protection for the rights of public employees to join and participate in the activities of employee organizations, and for the rights of those organizations to represent employees' interests with public agencies." Thus, in spite of the fact that the language of the MMBA, read literally, can be construed to provide no more than "a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation" (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 761), we have consistently held that the Legislature intended in the MMBA to impose substantive duties, and confer substantive, enforceable rights, on public employers and employees. (See *City of Gridley*, *supra*, 34 Cal.3d at p. 202 [local government agencies may not adopt labor relations regulations in conflict with provision of the MMBA]; *Glendale City Employees Assn., Inc. v. City of Glendale, supra*, 15 Cal.3d 328, 337-338 [memorandum of understanding between public employer and employees negotiated under the MMBA is enforceable and binds the discretion of city council].)

That being the case, the County's assertion that the MMBA contains no *express* right to sue is irrelevant. The Legislature, in order to create a right to sue under the MMBA, need not have included language concerning the right to sue within the act itself. It was enough for the Legislature to endow the public employers and employees with substantive rights and duties which limited public employers' discretion, and then to allow employees to enforce their rights by means of traditional mandamus, under Code of Civil Procedure section 1085.

Code of Civil Procedure section 1085 declares that a writ may be issued "by any court ... to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station ...." ([4a]) The availability of writ relief to compel a public agency to perform an act prescribed by law has long been recognized. (See, e.g., *Berkeley Sch. Dist. v. City of Berkeley* (1956) 141 Cal.App.2d 841, 849 [297 P.2d 710] [mandamus appropriate against city auditor to compel release of fund to schools pursuant to city charter provision].)

([5]) What is required to obtain writ relief is a showing by a petitioner of "(1) A clear, present and usually ministerial duty on the part of the respondent ...; and (2) a clear, present and beneficial right in the petitioner to ***540** the performance of that duty ...." (*Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 813-814 [25 Cal.Rptr. 798], citations omitted.) ([4b]) Mandamus is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as "ministerial" or "legislative" Thus, we held that an ordinance passed by a city council imposing a certain salary adjustment, usually a legislative act, was an abuse of the city council's discretion because it violated a previously enacted agreement with an employee association, and was therefore subject to challenge via writ of mandate. (*Glendale City Employees' Assn., Inc. v. City of Glendale*, *supra*, 15 Cal.3d 328, 343-345.)

([3b]) The MMBA, at Government Code section 3505, created a clear and present duty on the part of the County to meet and confer with the Association in good faith on the fixing of the Association members' salary and other conditions of employment, and created in Association members the corresponding beneficial right to meet and confer. (See, e.g., *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 540 [280 Cal.Rptr. 206]; *Social Services Union v. Board of Supervisors* (1990) 222 Cal.App.3d 279, 285 [271 Cal.Rptr. 494]; *American Federation of*

State etc. Employees v. City of Santa Clara (1984) 160 Cal.App.3d 1006, 1009-1010 [207 Cal.Rptr. 57].) If, as the Association alleges, there has been a violation of that duty, then a writ of mandate will be available to remedy the violation.

([4c]) The County cites no authority for the proposition that, once the Legislature has created a duty in a public agency, a court may limit, on public policy grounds, the availability of a writ of mandate to enforce that duty. It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through the normal judicial means. What public policy reasons there are against enforcement of a statutory duty are reasons against the creation of the duty *ab initio*, and should be addressed to the Legislature.

On the contrary, when the Legislature creates a public duty but wishes to limit the use of a writ of mandate to enforce it, it has done so affirmatively. Thus, in other public employment legislation, where the Legislature has created the Public Employment Relations Board as the principal means of enforcing the statutory duties and rights of employers and employees, it has under certain limited instances circumscribed writ relief. In these various labor relations statutes, the availability of a writ of mandate to review a Public Employment Relations Board determination of a bargaining unit's composition is limited to two circumstances: (1) instances in which the ***541** board, upon petition, agrees that the case is one of special importance, or (2) cases in which a party raises the issue of the bargaining unit's composition as a defense to an unfair labor practice charge. (See Gov. Code, §§ 3520, subd. (a), 3542, subd. (a), 3564, subd. (a).) Thus, the Legislature knew how to circumscribe the availability of writ review, and did so for labor relations statutes that rely primarily on administrative, nonjudicial enforcement. No such administrative enforcement exists in the MMBA, and no such limitation of writ review can be found in the statute.

([3c]) The case law in this state is indeed unanimous that a writ of mandate lies for an employee association to challenge a public employer's breach of its duty under the MMBA. (See *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 810 [165 Cal.Rptr. 908]; see also *San Francisco Fire Fighters Local 798 v. Board of Supervisors* (1992) 3 Cal.App.4th 1482 [5 Cal.Rptr.2d 176]; *Social Services Union v. Board of Supervisors*, *supra*, 222 Cal.App.3d 279; *American Federation of State etc. Employees v. City of Santa Clara*, *supra*, 160 Cal.App.3d 1006; *Public Employees of Riverside County, Inc. v. County of Riverside* (1977) 75 Cal.App.3d 882 [142 Cal.Rptr. 521].) The County cites no contrary authority.[2]

Nor do we find persuasive the County's attempt to analogize limitations on the right to sue with limitations on the right of public employees to strike. In support of the proposition that "the extent of a public employee's enforcement rights under the MMBA depends very much on the type of work he or she performs," the County cites *City of Santa Ana v. Santa Ana Police Benevolent Assn.* (1989) 207 Cal.App.3d 1568 [255 Cal.Rptr. 688], in which it was held that police were prohibited from engaging in a strike or slowdown. Therefore, the County reasons, just as there are circumstances in which one traditional method of enforcing employee rights-the right to strike-may be limited, so the right to sue may be limited in some circumstances when the suit would gravely interfere with the functioning of county government.

Under closer scrutiny, however, the analogy falls apart. In *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 ***542** [214 Cal.Rptr. 424, 699 P.2d 835], we abrogated the common law doctrine that prohibited public employee strikes. In doing so, we acknowledged that the MMBA was silent on the question of public employee strikes, leaving the matter "shrouded in ambiguity." (*Id.* at p. 573.) We found the traditional common law rule without basis in modern labor law, particularly in light of the MMBA and other public employment relations statutes, and in effect created a new common law rule: "[S]trikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public." (*Id.* at p. 586.) In the case of *City of Santa Ana v. Santa Ana Police Benevolent Assn.*, *supra*, 207 Cal.App.3d at pages 1572-1573, the court merely applied this new common law rule and found that a police strike or sickout did pose a danger to public health and safety.

The availability of the writ of mandate remedy in this case, on the other hand, is statutory, and is unambiguous. Unlike the right of public employees to strike, their right of access to courts has not been seriously questioned. As a statutory right, it is for the Legislature to delineate. There is therefore no room for a common law limitation on the right to writ relief.

We conclude that the MMBA inherently provides the Association with a right to bring a mandamus action against the County for breach of its duty to bargain in good faith, and that there are no statutory or common law grounds for limiting that right.

B. *Constitutional Separation of Powers Arguments*

The conclusion that the MMBA gives the Association the statutory right to sue does not end our inquiry. The County argues, and the Court of Appeal implicitly held, that even if the MMBA does grant the Association the right to sue, that right is nonetheless superseded by the attorney's duty of loyalty, as delineated in several Rules of Professional Conduct, and in general common law principles. The County asserts that to the extent a statute authorizes a violation of the Rules of Professional Conduct, or other professional obligation, it violates the constitutional separation of powers inherent in article VI of the California Constitution, which implicitly vests the power to govern the legal profession in the judiciary. The Association, on the other hand, claims that the Court of Appeal erred in holding the suit barred by the Attorney's duty of loyalty.

In order to assess the merit of the parties' constitutional arguments, a brief review of the separation of powers doctrine under article VI of the California Constitution is needed. ([6a]) In California, "the power to regulate the ***543** practice of law ... has long been recognized to be among the inherent powers of the article VI courts." (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 [178 Cal.Rptr. 801, 636 P.2d 1139].) Such power of regulation has meant that the courts are vested with the exclusive power to control the "admission, discipline and disbarment of persons entitled to practice before them ...." (*Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300 [19 Cal.Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310].) Thus, in *Hustedt*, we held that former Labor Code section 4407, which invested in (non-article VI) workers' compensation judges the right to suspend attorneys from practicing before them, was unconstitutional because it trespassed on the powers of the judiciary inherent in article VI to regulate attorney discipline.

Other cases in which we used California Constitution, article VI separation of powers doctrine to declare a statute or a portion of it unconstitutional are few and far between. In *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724 [147 Cal.Rptr. 631, 581 P.2d 636], we held that former Code of Civil Procedure section 90, giving non-attorney representatives of corporations the right to appear in municipal court, unconstitutionally infringed on the judiciary's exclusive right to grant admission to the practice of law. In *In re Lavine* (1935) 2 Cal.2d 324, 329 [41 P.2d 161], this court held unconstitutional a statute that automatically reinstated to the bar attorneys who were convicted felons, once they received a full gubernatorial pardon. The statute encroached upon "the inherent power of this court to admit attorneys to the practice of the law and [was] tantamount to the vacating of a judicial order by legislative mandate." (*Ibid.*) These cases, as with *Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d 329, entail statutes that impinge on the court's traditional power to control admission, discipline and disbarment of attorneys.

On the other hand, "this court has respected the exercise by the Legislature under the police power, of 'a reasonable degree of regulation and control over the profession and practice of law ...' in this state." (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d at p. 337.) ([7]) "The standard for assessing whether the Legislature has overstepped its authority and thereby violated the separation of powers principle has been summarized as follows. ' The legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.' " (*Id.* at p. 338, citing *Brydonjack v. State Bar* (1929) 208 Cal. 439, 444 [281 P. 1018, 66 A.L.R. 1507].)

([6b]) In the field of attorney-client conduct, we recognize that the judiciary and the Legislature are in some sense partners in regulation. Side by ***544** side with the Rules of Professional Conduct approved by this court are numerous statutes which regulate the profession and protect consumers of legal services. The State Bar Act (Bus. & Prof. Code, § 6000 et seq.) regulates various aspects of the attorney-client relationship, including contingency fee contracts (*id.*, § 6146), unlawful solicitation (*id.*, § 6150 et seq.), willful delay of client's suit with a view to the attorney's own gain (*id.*, § 6128), and purchase of a legal claim (*id.*, § 6129).

We also note that the Legislature, in enacting the MMBA, was acting well within its police powers to regulate employer-employee relations. (See generally, *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 186 et seq. [172 Cal.Rptr. 487, 624 P.2d 1215].) The Legislature has established statutory regimes for vast numbers of employees not covered by federal labor legislation, including agricultural workers, public education employees, and state workers, as well as local government employees.

We have never held a statute of general application, which does not affect the traditional areas of attorney admission, disbarment and discipline, unconstitutional. Nonetheless, we recognize that in the field of attorney-client conduct, as in these other areas, this court has the inherent power to provide a higher standard of attorney-client conduct than the minimum standards

prescribed by the Legislature. (See *Emslie v. State Bar* (1974) 11 Cal.3d 210, 225 [113 Cal.Rptr. 175, 520 P.2d 991]; *In re Lavine*, *supra*, 2 Cal.2d at p. 328.) We also recognize that any statute which would permit an attorney to act in such a way as to seriously violate the integrity of the attorney-client relationship, so as to "materially impair" the functioning of the courts (*Hustedt v. Workers' Comp. Appeals Bd.*, *supra*, 30 Cal.3d at p. 339), would be constitutionally suspect.

But a ruling that a statute affecting attorney-client relations is unconstitutional on separation of powers grounds will not be lightly made. Those raising such a claim must at least show that a direct and fundamental conflict exists between the operation of the statute in question, as it applies to attorneys, and attorneys' settled ethical obligations, as embodied in this state's Rules of Professional Conduct or some well-established common law rule. As will appear below, the County fails to make that showing in the present case.

1. *Violation of the Rules of Professional Conduct*

([8a]),([9a]) In determining whether a statute regulating attorney conduct violates the separation of powers, we begin with whether the statute in question would permit or require an attorney to contravene one of the Rules ***545** of Professional Conduct. The County claims that a petition for a writ of mandate brought by the Association would cause the Attorneys to run afoul of rules 3-300 and 3-310 of the Rules of Professional Conduct (hereafter, all references to rules are to the Rules of Professional Conduct of the State Bar). We do not agree. As the Court of Appeal in this case conceded, neither rule is directly applicable.

([8b]) Rule 3-300 does not allow an attorney to "knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client," without undergoing an extensive protocol for gaining the client's consent. The County contends that a lawsuit against the client would be tantamount to "acquiring" a "pecuniary interest" adverse to the client. The language of the rule and the intent behind it do not support that interpretation.

Rule 3-300 was intended to regulate two types of activity: business transactions between attorneys and clients and the acquisition by attorneys of pecuniary interests adverse to clients. (See State Bar, Request that the Supreme Court of Cal. Approve Amendments to the Rules of Professional Conduct of the State Bar of Cal., & Memorandum Supporting Documents in Explanation (1987) at p. 33.) Clearly, the present lawsuit is not a business transaction. Nor can we stretch the meaning of the term "acquire ... a pecuniary interest" to encompass the filing of a petition for writ of mandate.

Although some petitions filed to enforce the MMBA could be labeled, in a certain sense, "pecuniary," in that their object is monetary gain, others have as their aim the attainment of injunctive or declaratory relief related to conditions of employment without any immediate economic payoff. (See, e.g., *Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482, 487 [195 Cal.Rptr. 206].) Indeed, the very use of the word "acquire," which cannot sensibly be applied to the filing of a lawsuit or a petition for writ of mandate, demonstrates that such actions are not intended to be included within the scope of rule 3-300. As the few cases concerned with applying rule 3-300's "pecuniary interest" (as opposed to "business transaction") provision illustrate, the term "acquire a ... pecuniary interest" is intended to signify the pursuit of some business or financial interest as conventionally understood, rather than an attempt to redress some legal wrong through the courts. (See, e.g., *Brockway v. State Bar* (1991) 53 Cal.3d 51, 63-65 [278 Cal.Rptr. 836, 806 P.2d 308] [attorney violated predecessor rule by taking ownership interest in client's property in excess of attorney fees].) Thus, the filing of the present petition is not addressed by rule 3-300. ***546**

([9b]) Nor is rule 3-310 directly implicated. Rule 3-310 proscribes attorney conflicts of interest in various contexts. The rule is concerned not merely with conflict in representation of current or former clients, but also, in rule 3-310(B), with conflicts between an attorney's own financial and personal interests and those of his or her client. The County contends that rule 3-310(B)(4), in particular, is applicable to the present case. That rule precludes attorneys from representing a client, without disclosure,[3] when "the member has or had a legal, business, financial, or professional interest in the subject matter of the representation." The County argues that the attorneys have a professional interest adverse to the County by being a part of the Association's lawsuit. We do not agree that this lawsuit falls within the scope of rule 3-310(B)(4).

The language of rule 3-310(B)(4), adopted by this court in the 1991 amendments to the Rules of Professional Conduct, applies only to conflicts that arise over "the subject matter of the representation" that the attorney undertakes for the client, and not to conflicts the attorney and client may have outside this subject matter. The primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise his or her representation of the client in order to advance the

attorney's own financial or personal interests.

In this case, the lawsuit by the Association does not, in general, present a conflict with the client on matters in which the Attorneys represent the County. Stated concretely, when deputy County Counsel attorneys represent the County in a nuisance abatement action, or advise the County in a landuse matter, they will face no temptation to compromise their representation of the County in order to further their own interests. The outcome of most of the matters for which the Attorneys have undertaken representation will not affect, nor be affected by, the outcome of the Association's lawsuit. The lawsuit will not disable the Attorneys from objectively considering, recommending, or carrying out an appropriate course of action in their representation of the County. An attorney/employee may experience ill will towards the client/employer, and vice versa, as is sometimes the case when employer/ ***547** employee relations deteriorate. Rule 3-310(B)(4), however, addresses not the existence of general antagonism between lawyer and client, but tangible conflicts between the lawyer's and client's interests in the subject matter of the representation.[4] The record below supports the trial court's implicit conclusion that no such conflict of interest is present within the meaning of rule 3-310(B)(4).[5]

([8c]),([9c]) Implied in the position of the County that rules 3-300 and 3-310 are violated by the Attorneys is an *a fortiori* argument. The County appears to contend that, if the duty of loyalty that an attorney owes a client requires the attorney to refrain from engaging in a business transaction with a client without informed consent, or in representing clients with conflicting interests without disclosure, then it must surely prohibit an attorney from suing a current client. This argument ignores the distinct policy considerations inherent in the different types of conflict. It is one thing to require an attorney, for the sake of client loyalty, to forgo a business opportunity or a potential client. It is another thing to require an attorney, for loyalty's sake, to forgo his or her statutory rights against a client to redress a legal injury. While such a sacrifice may indeed be required in some circumstances, that requirement is not to be found in the specific proscriptions set forth in rules 3-300 or 3-310.[6] Rather, it is to be located in a general, common law duty of ***548** loyalty beyond the scope of these two rules. It is this general duty that we next consider.

2. *The Common Law Duty of Loyalty and the Prohibition on the Right to Sue*

([10a]) Although the question of an attorney's suit against a present client is not explicitly covered in the Rules of Professional Conduct, or by any statute, arguably it may be prohibited by the general duty of loyalty recognized at common law. It is clear that the duties to which an attorney in this state are subject are not exhaustively delineated by the Rules of Professional Conduct, and that these rules are not intended to supersede common law obligations. (See rule 1-100, and accompanying discussion.)

([11]) This court's statement of the attorney's duty of loyalty to the client over 60 years ago is still generally valid: "It is ... an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent .... By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests." (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].) We have also decided that the duty of loyalty for an attorney in the public sector does not differ appreciably from that of the attorney's counterpart in private practice. (See *People* ex rel. *Deukmejian v. Brown* (1981) 29 Cal.3d 150, 157 [172 Cal.Rptr. 478, 624 P.2d 1206] [Attorney General's role as " 'guardian of the public interest' " does not exempt him from conflict of interest rules applicable to other attorneys].)

([10b]) No reported appellate cases in this state have considered the extent to which an attorney's duty of loyalty to a client prohibits the attorney ***549** from suing the client. It may well be that the lack of case law is due to the obviousness of the prohibition. As one court has stated: "The almost complete absence of authority governing the situation where, as in the present case, the lawyer is still representing the client whom he sues clearly indicates to us that the common understanding and the common conscience of the bar is in accord with our holding that such a suit constitutes a reprehensible breach of loyalty and a violation of the preamble to the Canons of Professional Ethics." (*Grievance Com. of Bar of Hartford County v. Rottner* (1964) 152 Conn. 59 [203 A.2d 82, 85].)

The attorney's duty of loyalty to the client has led the Los Angeles County Bar Association to conclude that an attorney in a fee dispute with a client must withdraw from representing a client prior to filing suit against a client. (Los Angeles County Bar Ethics Opns., opn. No. 212 (1953).) Indeed, courts in some jurisdictions have concluded that attorneys may not sue their ex-clients in some circumstances, such as for retaliatory discharge, where the lawsuit would disrupt the confidentiality of the attorney-client relationship. (See *Balla v. Gambro, Inc.*

(1991) 145 Ill.2d 492 [164 Ill.Dec. 892, 584 N.E.2d 104, 16 A.L.R.5th 1000] [former in-house counsel may not sue for retaliatory discharge]; but see *Parker v. M & T Chemicals, Inc.* (1989) 236 N.J.Super. 451 [566 A.2d 215] [retaliatory discharge suit permitted].)

But we do not decide here generally the extent to which the duty of loyalty precludes an attorney's lawsuit against a current client. Rather, we seek to determine whether an attorney's lawsuit to enforce rights granted pursuant to a statutory scheme of public employer-employee bargaining is fundamentally incompatible with the essentials of the duty of loyalty. In order to answer this question, we must decide another, more fundamental, issue: to what extent is the collective bargaining relationship between an attorney/employee and a client/employer itself compatible with the attorney's duty of loyalty?

3. *Duty of Loyalty and Collective Bargaining*

([12]) At the heart of the conflict between attorney rights and responsibilities posed by this case is the conflict between the attorney-client relationship on the one hand, and the collective bargaining relationship between employer and (organized) employees on the other. Until relatively recently, the legal profession looked askance at attorneys joining unions or other employee associations. In 1966, the American Bar Association Committee on Ethics and Professional Responsibility (hereinafter the ABA Committee) opined that a United States government attorney could not, consistent with ***550** ethical responsibilities, join a union. (2 ABA Informal Ethics Opns., opn. No. 917 (Jan. 25, 1966) p. 65.) As the committee explained, the attorney owes "undivided loyalty" to the government agency for which he or she works, and by becoming a member of a labor union the attorney assumes obligations "which may at times be incompatible with his obligation to his client." (*Id.* at p. 66.)[7]

One year later, however, the ABA Committee essentially reversed its position. In informal opinion No. 986, the ABA Committee acknowledged that "Generally speaking, the idea of lawyers belonging to or joining together in labor unions is basically contrary to the spirit of the Canons of Ethics" because of the conflict with the duty owed the client. (2 ABA Informal Ethics Opns., opn. No. 986 (July 3, 1967) p. 144.) However, the ABA Committee recognized that the general principle was no longer universally applicable.

"[I]t is realized that the number of lawyers who represent single employer clients, for example governmental agencies and corporations, has increased substantially in recent years and will undoubtedly continue to increase in the future. The relationship of a lawyer who is employed by a corporation or by a governmental agency to his client in terms of compensation is different from that of the lawyer who represents in his daily practice ... a number of different clients.... Such lawyers have one client only, do not charge fees for their individual work and their compensation generally is not related to particular individual assignments they perform, but is rather related to the overall services which they perform. This differentiates them from those lawyers employed in a general practice of law where they perform services for a number of different clients.

"It is our opinion, therefore, that lawyers who are paid a salary and who are employed by a single client employer may join an organization limited *solely* to other lawyer employees of the same employer for the purpose of negotiating wages, hours, and working conditions with the employer client so long as the lawyer continues to perform for his employer client professional services as directed by his employer in accordance with the provisions of the Canons of Ethics. Such a lawyer would not have the right to strike, to withhold services for any reasons, to divulge confidences or engage in any other activities as a member of such a union which would violate any Canon" (2 ABA Informal Ethics Opns., opn. No. 986, *supra*, p. 45; accord, ***551** Cal. Compendium on Prof. Responsibility, L.A. County Bar Assn. Formal Opn. No. 337 (June 14, 1973) p. 35.)

In 1975, the ABA Committee again revisited the ethical questions related to an attorney's union activities. In informal opinion No. 1325, the ABA Committee considered the propriety of strikes by attorneys who are employed by a single employer in public or private practice. The ABA Committee began by recalling its neutral position on the question of attorney membership in employee associations consisting only of attorneys. That position had since been codified in the American Bar Association's Model Code of Professional Responsibility, EC 5-13, which now states in part that "Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences."

As informal opinion No. 1325 explains, while joining an employee organization violates no specific American Bar Association disciplinary rule, there is the potential of violating several rules, such as "DR 6-101 (A)(3), proscribing neglect of a legal matter entrusted to a lawyer, DR 7-101 (A)(2), forbidding a lawyer to intentionally fail

to carry out a contract for employment with a client, and DR 7-101 (A)(3), prohibiting a lawyer to intentionally prejudice or damage his client during the course of the professional relationship." (ABA Recent Ethics Opns., informal opn. No. 1325 (Mar. 31, 1975) p. 2.) The ABA Committee thereupon adopted what may be called a pragmatic approach to the question of strikes and other collective bargaining matters. If the attorney's strike leads to the neglect or intentional sabotage of the employer/client's affairs, then the attorney would have violated his or her professional obligations as embodied in the disciplinary rules cited above, and would be subject to discipline. However, "in some situations participation in a strike might be no more disruptive of the performance of legal work than taking a two week's vacation might be." (*Ibid.*)

Although we do not necessarily endorse the ABA Committee's position on the permissibility of strikes for government attorneys, we find its approach to the question of employee organization among these attorneys to be essentially correct. First, we do not find that government attorneys who organize themselves into associations pursuant to statute and who proceed to bargain collectively with their employer/clients are *per se* in violation of any duty of loyalty or any other ethical obligation. The growing phenomenon of the lawyer/employee requires a realistic accommodation between an attorney's professional obligations and the rights he or she may have as an employee. ***552**

Moreover, we follow the ABA Committee's approach to determining when an attorney, in pursuit of an employee association's goals, oversteps ethical boundaries. That occurs when the attorney violates actual disciplinary rules, most particularly rules pertaining to the attorney's duty to represent the client faithfully, competently, and confidentially. In California, those duties are found principally in Rule 3-110, which prohibits a member from "intentionally, recklessly or repeatedly fail[ing] to perform legal services with competence." An attorney, in pursuing rights of self-representation, may not use delaying tactics in handling existing litigation or other matters of representation for the purpose of gaining advantage in a dispute over salary and fringe benefits. (See Cal. Compendium on Prof. Responsibility, pt. II, State Bar Formal Opn. No. 1979-51.) Indeed, an attorney who "[w]illfully delays [a] client's suit with a view to his [or her] own gain" is guilty of a misdemeanor. (Bus. & Prof. Code, § 6128, subd. (b); see *Silver v. State Bar* (1974) 13 Cal.3d 134, 141 [117 Cal.Rptr. 821, 528 P.2d 1157].)

In other words, in determining whether an action taken by an attorney or employee association violates the attorney's ethical obligations, we look not to whether the action creates antagonism between the attorney/employee and the client/employer, since such antagonism in the labor relations context is unfortunately commonplace; rather, we seek to ascertain whether an attorney has permitted that antagonism to overstep the boundaries of the employer/employee bargaining relationship and has actually compromised client representation.

([10c]) The County concedes that the Association and its members do have rights under the MMBA, but claims that these do not include authority to sue when their rights are violated. To fend off the argument that these collective bargaining guaranties would be meaningless without a judicial remedy, the County argues the Association has alternative effective means for enforcing the rights of its members, most notably by virtue of the fact that the attorneys have "unparalleled access" to county officials, "which they can use to [exert] pressure on the County to reach an agreement regarding wages."

Whether or not sound, that argument is beside the point. The ability of the Attorneys to influence the Board by informal means is one that predates, and exists independently of, the formal rights granted them under the MMBA. If the Attorneys are deprived of any formal means to enforce their rights, then these "rights" are no more meaningful than they were prior to the passage of the MMBA. Indeed, if the County's logic were followed, the Attorneys could be discharged for simply joining an employee association under the ***553** MMBA, and would have no ability to sue, despite the County's clear violation of statute, and no recourse other than the informal lobbying of the Board.

Therefore, the denial of the Attorneys' right to sue for MMBA violations would represent not a compromise between collective bargaining rights and professional obligations, as the County contends, but a de facto judicial nullification of those rights. The only realistic accommodation between the enforcement of statutory guaranties under the MMBA and the enforcement of the Attorneys' professional obligations in this situation is to permit a petition for writ of mandate, as would be permitted to other public employees, while at the same time holding the Attorneys to a professional standard that ensures that their *actual* representation of their client/employer is not compromised.

We therefore hold that attorneys employed in the public sector, who exercise their statutory right to sue to enforce rights given them by the MMBA, do not in such capacity violate their ethical obligations to their employer/client.[8]

In so holding, we emphasize that attorneys in such circumstances are held to the highest ethical obligations to continue to represent the client in the matters they have undertaken, and that a violation of their duty to represent the client competently or faithfully, or of any other rule of conduct, will subject those attorneys to the appropriate discipline, both by the employer and by the State Bar.[9]

In announcing this rule, we are not unmindful of the fact that attorneys suing their clients, in any circumstance, put a strain on the attorney/client ***554** relationship, and may tend to diminish the client's confidence in their attorneys' loyalty. But we must also acknowledge, as is obvious in the record of the present case, that the hostility between an attorney/employee and the client/employer predated and to some extent gave rise to the lawsuit. The MMBA is intended not to exacerbate conflict between employers and employees, but to provide the peaceful and ordered means for resolving those conflicts by promoting "full communication between public employers and their employees." (Gov. Code, § 3500.) The Legislature may have decided that the benefits to public employee/employer relations of including attorneys within the MMBA's protections outweighed potential burdens on the attorney/client relationship. In any event, we cannot say that the Legislature, in extending these means of conflict resolution to public employee attorneys in arguably managerial roles, put such a strain on the attorney/client relationship as to compel the conclusion that the authorization of such lawsuits violates the constitutional separation of powers between the Legislature and the Judiciary.[10]

C. *The Right of the Client to Discharge the Attorney*

([13a]) Finally, we must address a point not raised explicitly by the County, but one nonetheless before us because of the nature of the relief ***555** requested:[11] whether the client has the right to discharge an attorney in whom it purportedly has lost faith. This question is analytically distinct from the question of attorney loyalty to the client; it considers whether, despite an attorney's actual loyalty, job performance, or observance of the Rules of Professional Conduct, a public employer should nonetheless have the right to discharge the attorney because it no longer has complete confidence in the attorney's capacity to serve loyally.

([14]) Code of Civil Procedure section 284 provides in part that an "attorney in an action or special proceeding may be changed at any time before or after judgment or final determination as follows: ... (2) Upon the order of the court, upon the application of either client or attorney, after notice from one to the other." We have construed this code section to confer upon clients, beyond the context of litigation, the "[absolute] power to discharge an attorney, with or without cause ...." (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790 [100 Cal.Rptr. 385, 494 P.2d 9].) That statute embodies the recognition that " 'the interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest.' " (*Ibid.*, quoting *Gage v. Atwater* (1902) 136 Cal. 170, 172 [68 P. 581].)

([15]) There is no question that the MMBA prohibits employers from discharging employees who exercise lawful employee rights of representation. Government Code section 3506 states that "[p]ublic agencies ... shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502 [the public employees' right to 'form, join, and participate in the activities of employee organizations of their own choosing']." The MMBA ensures a public employee the right to "engage in a wide range of union-related activities without fear of sanction ...." (*Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 388 [113 Cal.Rptr. 461, 521 P.2d 453].) Public employers may not discriminate against their employees on the basis of membership or participation in union activities. ***556** (See *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 [182 Cal.Rptr. 461]; *Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 806. 807 [213 Cal.Rptr. 491].)

This freedom from sanction obviously includes the right not to be discharged for lawful union activity. The right to participate in employee self-organization and collective bargaining would be meaningless if an employee could be discharged simply for engaging in such lawful activity. (See *Portland Williamette Co. v. N.L.R.B.* (9th Cir. 1976) 534 F.2d 1331, 1334 [discharge of employee engaged in union activity "inherently destructive" of union activity and therefore presumed to be discriminatory].) And as we have already concluded, in part II.A.2. of this opinion, *ante*, a suit by an employee association to enforce its rights under the MMBA is a form of lawful, protected activity. Under normal circumstances, therefore, the filing of such a suit may not lead to the discriminatory discharge or discipline of an employee. ([13b]) The question before us, then, is how that right to be free from discriminatory discharge for lawfully participating in activities sanctioned by the MMBA may be reconciled with the rule of Code of Civil Procedure section 284 that an attorney may be discharged by a client for any reason and for no reason.

In determining the manner in which partially conflicting statutes are to be construed, we look first to the intent of the Legislature. (*Woods v. Young* (1991) 53 Cal.3d 315, 323 [279 Cal.Rptr. 613, 807 P.2d 455].) As a rule, a later, more specific, statute will prevail over an earlier, more general one. (*Id.* at p. 324.) In this case, the general rule permitting a client to discharge her attorney has been modified by the subsequent explicit inclusion of certain attorneys within the scope of a statutory labor relations scheme which inherently limits the right of public employers to terminate their employees at will. We do not believe the Legislature intended to explicitly confer these rights to organize and bargain collectively on attorneys employed by cities and counties, without also intending that these attorneys be protected from discharge for pursuit of these rights.

Moreover, even if the rule of a client's right to discharge an attorney is one that predates, and has validity independent of, its enactment into statute, the legislative modification of the rule does not raise constitutional separation of powers issues.[12] The Legislature could legitimately decide that this rule-based on the principle that the client's interest in receiving satisfactory ***557** representation is superior to the attorney's interest in continued employment-should be altered in those limited class of cases in which the attorney is the client's employee and is discharged primarily not for providing inadequate representation as an attorney, but for the assertion of his statutory rights as an employee. The obligation of attorneys to follow the Rules of Professional Conduct and State Bar Act, as well as the client's ability to discharge an attorney for reasons other than participation in activity sanctioned by the MMBA, provides sufficient safeguards to protect the integrity of the attorney-client relationship.

We therefore hold that the MMBA creates an exception to the general rule found in Code of Civil Procedure section 284 and case law, that a client may discharge an attorney at will. That exception is a prohibition on terminating an attorney solely or chiefly because he or she has engaged in protected activity under the MMBA. As discussed in part II.A.2. of this opinion, *ante*, a suit by an employee organization to enforce such collective bargaining rights is an example of such protected activity, and may not be punished by the attorney's discipline or discharge. Attorneys who believe they have been discriminated against for protected activity may bring an antidiscrimination action in the manner available to other employees. (See *Public Employees Assn. v. Board of Supervisors*, *supra*, 167 Cal.App.3d 797, 807; *Fun Striders, Inc. v. N.L.R.B.* (9th Cir. 1981) 686 F.2d 659, 661-662.)

([16]) In so holding, we note here that the trial court, though deciding that an attorney cannot be discharged or disciplined for participating in the filing of this petition, declined to grant the Association's request to reinstate the Attorneys to their full employment responsibilities, e.g., to entitle them to attend confidential meetings from which they were excluded by the County Counsel once they announced their intention to sue. The trial court decided this matter correctly. Although the County may not punish the Attorneys for suit over an MMBA matter, there is no reason why the County should not be accorded great flexibility in reorganizing the County Counsel's office to respond to the lawsuit. This may include, as the trial court below suggested, the reassignment of Association members to matters of representation outside the field of labor relations. Nothing in the MMBA prohibits the Board and its members from asserting their rights, as clients, to refuse representation from the Association attorneys on any given matter, and to make use of non-Association attorneys or outside counsel in sensitive matters, so long as such reassignment is done nonpunitively. By allowing the County this flexibility, the trial court properly balanced the County's need for obtaining representation in which it has full confidence with the Attorneys' statutory employment rights. ***558**

III. *Disposition*

The judgment of the Court of Appeal is reversed, with directions to affirm the judgment of the trial court.

Lucas, C. J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.

PANELLI, J., *

Dissenting.-The majority concludes that, at least in this case, an attorney's interest in suing a present client takes precedence over the client's right to discharge an attorney who no longer enjoys the client's full trust and confidence. I do not agree.

My primary objection is not to the majority's interpretation of statutes and disciplinary rules but, rather, to its failure to see the problem from the client's perspective. This failure is evident in the majority's belief

that there can be "general antagonism between lawyer and client" due to litigation between them without "actually compromis[ing] client representation." (Maj. opn., *ante*, at pp. 547, 552.) Experienced attorneys may have no difficulty meeting as friends after facing each other as adversaries in court. But the same is not to be expected of clients, who justifiably feel that they are entitled to their advocates' unquestioned loyalty. "When a client engages the services of a lawyer in a given piece of business he is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate and his champion. If, as in this case, he is sued ... by his own attorney, who is representing him in another matter, all feeling of loyalty is necessarily destroyed, and the profession is exposed to the charge that it is interested only in money." (*Grievance Com. of Bar of Hartford County v. Rottner* (1964) 152 Conn. 59 [203 A.2d 82, 84].)

Because clients do expect loyalty, I find no reason to doubt the sincerity of the members of the board of supervisors who testified that being sued by their own attorneys has "greatly affected" their "level of trust and confidence" in the latter. The majority, I submit, tacitly concedes that the supervisors' fears are reasonable by holding that the supervisors, "to respond to the lawsuit," may reorganize the county counsel's office and reassign members of the Association to matters outside the field of labor relations. (Maj. opn., *ante*, p. 557.) What is the point of such a reorganization unless the supervisors have actually lost confidence in their attorneys' ability to represent the county effectively, at least in the area of labor relations, on ***559** account of their attorneys' decision to accuse the county in open court of violating the labor relations laws?

The majority, in concluding that these attorneys may sue their clients, places far too much weight on the absence of a specific disciplinary rule to the contrary. If anything can be inferred from the absence of such a rule it is not that this court, or the bar, implicitly endorses such conduct. Instead, the more reasonable inference is that in most cases no rule is necessary. From my experience, any lawyer in private practice so bold as to sue his client can expect to be fired on the spot. As one court put it, "[t]he almost complete absence of authority governing the situation ... indicates to us that the common understanding and the common conscience of the bar is in accord with [the view] that such a suit constitutes a reprehensible breach of loyalty ...." (*Grievance Com. of Bar of Hartford County v. Rottner, supra*, 152 Conn. 59 [203 A.2d at p. 85].)

In the rare cases in which an attorney has become the client's adversary in litigation, the resulting appearance of impropriety has been found too serious to countenance. Thus, we have enjoined the Attorney General from suing the Governor, his client, on the ground that he was bound by the same ethical principles that prevent other attorneys from representing adverse interests. (*People* ex rel. *Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155-160 [172 Cal.Rptr. 478, 624 P.2d 1206].) Similarly, other courts have held that a criminal defendant who was sued by his attorney for fees while in jail awaiting sentencing was entitled to have his conviction reversed on account of ineffective assistance without proving that the lawsuit actually affected his counsel's performance (*Clark v. State* (1992) 108 Nev. 324 [831 P.2d 1374, 1377]), and that an in-house attorney who represented a corporation on employment matters was properly terminated for filing a discrimination suit against the corporation (*Jones v. Flagship Intern.* (5th Cir. 1986) 793 F.2d 714, 726, cert. den. (1987) 479 U.S. 1065 [93 L.Ed.2d 1001, 107 S.Ct. 952]).

The county's brief nicely illustrates how the appearance of impropriety arises in such cases and why it is so serious: "the County will be greatly disadvantaged in defending itself against the Association's proposed lawsuit. The Association members have been privy to the most confidential internal communications within the County government for years. As plaintiffs, they will have an awareness of their defendants' strategies, resources and legal opinions that would be protected from any other plaintiff by the attorney-client privilege. This insider's familiarity will give the Association an invaluable advantage in making legal argument, but particularly in pursuing settlement. The County will be put in the untenable position of having to rely on outside counsel that knows less about the Supervisors and the inner workings of the County client than does the party suing it." ***560**

In this way, when governmental and other in-house lawyers sue their clients, the former relationship of trust and confidence becomes an unfair tactical and informational advantage that the client may well view as a serious betrayal. This, in my view, is something that this court should prevent and has the power to prevent. We have always accepted the ultimate responsibility of regulating the practice of law and claimed the prerogative of doing so as one of "the inherent powers of the article VI courts." (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336 & fn. 5 [178 Cal.Rptr. 801, 636 P.2d 1139]; see also *The People v. Turner* (1850) 1 Cal. 143, 150.) Indeed, we have held to be unconstitutional statutes that purported to usurp that

prerogative. (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d at p. 336; *Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 728-729 [147 Cal.Rptr. 631, 581 P.2d 636]; *In re Lavine* (1935) 2 Cal.2d 324, 329 [41 P.2d 161].)

It is unfortunate that today the majority takes a step backwards by concluding that the general statute authorizing courts to issue the writ of mandamus (Code Civ. Proc., § 1085) somehow supersedes our inherent power to regulate the bar, unlike the other statutes that have come into conflict with that power. The majority asserts that the petition for mandate, "[a]s a statutory right, ... is for the Legislature to delineate" and that "[t]here is therefore no room for a common law limitation on the right to writ relief." (Maj. opn., *ante*, at p. 542.) But the majority's reasoning is faulty. This court's power to regulate the practice of law is grounded in article VI of the state Constitution rather than the common law. (*Hustedt v. Workers' Comp. Appeals Bd., supra*, 30 Cal.3d at p. 336 & fn. 5.) When the Constitution conflicts with a statute, the former must control.

Finally, I doubt whether the majority's holding will be good for governmental and other in-house attorneys. In recent years the status of in-house attorneys has improved as governments and businesses have increasingly relied upon them in their drive to save legal costs. This is good for society, because attorneys with intimate knowledge of and constant access to their clients are in an excellent position to advise responsible behavior and compliance with the law. However, in-house attorneys enjoy this trust and confidence in large measure because they have been held to the same high ethical standards as all other attorneys. If, through decisions such as this, the perception arises that in-house attorneys are not being held to the same ethical standards, their professional standing and usefulness to their clients and society will diminish to the detriment of attorney and client alike.

I would affirm the judgment of the Court of Appeal.

Respondent's petition for a rehearing was denied May 19, 1994. ***561**

Footnotes

* Judge of the Justice Court for the Avenal Judicial District sitting under assignment by the Chairperson of the Judicial Council.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

1 We note that the inclusion of managerial employees within the MMBA has been maintained in spite of opposition from public employers and in spite of legislative committee recommendations. (See Sen. Select Com. on Local Public Safety Employment Practices Rep., To Meet and Confer: A Study of Public Employee Labor Relations (1972) p. 31.)

2 A petition under Code of Civil Procedure section 1085 may not be the sole judicial means available to redress MMBA violations. When an employee association seeks to challenge a city charter amendment which unilaterally alters wages or working conditions in violation of the MMBA, it has been held the exclusive remedy to challenge the Charter Amendment would be to file an action in quo warranto. (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687 [220 Cal.Rptr. 256].) Without deciding whether the result of that case is correct, we note that no case suggests that violation of a right based in the MMBA is without *some* judicial remedy.

3 The County is quite correct that the disclosure required by rule 3-310(B) implies the right of the client to dismiss the attorney if it finds the disclosed conflict sufficiently problematic. Thus, the Association's suggestion that its members have not violated rule 3-310(B)(4) because they have openly sued the County, and have therefore "disclosed" their conflict, is beside the point. If, in fact, the Attorneys' suit fell within the scope of the actions proscribed by rule 3-310(B)(4), they would have the duty not only to disclose, but also to resign if requested by the client, which the Attorneys failed to do in this case. Therefore, the fact that the Attorneys' suit was known to the client does not of itself absolve the Attorneys from violation of rule 3-310(B)(4).

4 Although there is no rule 3-310 conflict present here, if the attorney did, out of malice, or to extract concessions from the County, deliberately mishandle a matter of representation, the attorney would be subject to discipline under rule 3-110, as well as possible misdemeanor charges under Business and Professions Code section 6128. See part II.B.3 of this opinion, *post*.

5 The County quotes the discussion of rule 3-310(B)(4), which cites, as one example of a proscribed professional interest in the subject matter of representation, "a member's membership in a professional organization which is

entering into lease negotiations with the member's client." (State Bar, Request That the Supreme Court of Cal. Approve Amendments to the Rules of Professional Conduct of the State Bar of Cal., & Memorandum and Supporting Documents in Explanation (1991) at p. 15.) We understand this example to mean that the attorney would be obliged to disclose membership in a professional organization negotiating a lease with the client, if the lease negotiations in some manner related to the subject matter of his representation of the client. If the attorney represented the client in an antitrust matter, and belonged to the San Francisco Bar Association which was negotiating a lease with the client, he would be under no obligation to disclose this membership because it would not constitute a "professional interest in the *subject matter of representation*." (Rule 3-310(B)(4), italics added.) If, however, the attorney was connected with the lease negotiations, membership in the professional organization would be sufficient to require disclosure, even though the attorney may not stand to gain financially from the outcome of the negotiations.

6 The Court of Appeal below relied for its holding in large part on rule 3-310(C). Case law has interpreted this rule, and its predecessors, to prohibit attorneys, without consent, from representing not only clients with conflicting interests in particular matters of representation, but also to prohibit attorneys from accepting employment adverse to a client even though the employment is unrelated to the representation of the current client. (See *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1056-1057 [8 Cal.Rptr.2d 228] [firm representing party A in wrongful termination action may not represent party B in unrelated suit against party A]; *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6 [136 Cal.Rptr. 373] [firm violated predecessor rule to rule 3-310(C) by representing a client in a personal injury action, and the client's wife in a divorce action].) The rationale for these rulings was the maintenance of the attorney's "duty of undivided loyalty," without which " 'public confidence in the legal profession and the judicial process' is undermined." (*Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, *supra*, 6 Cal.App.4th at p. 1057.)
Yet even this interpretation of rule 3-310(C) does not make the rule apply to the present situation. A rule that an attorney must refrain from redressing a legal wrong done to him or her by a client requires a different, and greater, kind of self-abnegation than that compelled by rule 3-310(C)'s stricture that an attorney must refrain from representing a potential client for the sake of current client loyalty. Again, although the former sacrifice may be required by the general duty of loyalty to the client, it is not necessitated by rule 3-310(C).

7 As stated in the Rules of Professional Conduct, ethics opinions of other jurisdictions may be consulted to determine appropriate professional conduct. (Rule 1-100(A); see also Cal. Compendium on Prof. Responsibility, pt. II, State Bar Formal Opn. No. 1983-71.)

8 We do not, by this holding, approve the general proposition that an attorney suit against a present client is ethically permissible. When the attorney is an independent contractor, and when no statute protects an attorney's employment rights, it may well be the case that the attorney's general duty of loyalty dictates that the attorney not sue the present client and that such a suit may subject the attorney to discipline-a question not before us here.

9 In arguing that the Attorneys were ethically obligated to refrain from suing the County, the County cites a number of cases from other jurisdictions involving retaliatory terminations of in-house counsel. In some of these cases, the attorneys were not permitted to sue their former clients. (See *Balla v. Gambro, Inc.*, *supra*, 584 N.E.2d 104; *Willy v. Coastal Corp.* (S.D.Tex. 1986) 647 F.Supp. 116, revd. in part on other grounds (5th Cir. 1988) 855 F.2d 1160, affd. on other grounds _____ U.S. _____ [117 L.Ed.2d 280, 112 S.Ct. 1076]; *Jones v. Flagship Intern.* (5th Cir. 1986) 793 F.2d 714, cert. den. (1987) 479 U.S. 1065 [93 L.Ed.2d 1001, 107 S.Ct. 952].) Each of these cases is readily distinguishable from the present case. *Balla v. Gambro* was decided, in large part, on the basis that prosecution of the lawsuit would likely make use of information obtained in confidence, and would therefore have a chilling effect on the confidential nature of the attorney-client relationship. (*Balla v. Gambro, Inc.*, *supra*, 584 N.E.2d at pp. 109-110). In *Jones*, a direct conflict existed between the attorney's claim and the subject matter of her representation. (*Jones v. Flagship Intern.*, *supra*, 793 F.2d at p. 728 [attorney representing corporation on Equal Employment Opportunity Commission (EEOC) matters herself brings EEOC claim].) *Willy* involved a common law retaliatory discharge claim which the court, for public policy reasons, declined to extend to in-house counsel. (*Willy v. Coastal Corp.*, *supra*, 647 F.Supp. at p. 118.)
In this case the record reveals that the contemplated writ of mandate action, concerned with the duty to meet and confer, will not lead to the revelation or use of confidential information. Nor is a *Jones* situation implicated in this case. The Attorneys represent the County in numerous areas outside the labor relations field, and the County has the flexibility to reassign counsel in the few matters where a more direct conflict exists between the attorney's subject matter of representation and the present lawsuit. (See pt. II.C. of this opinion, *post*.) Finally, the suit is brought under a statutory, not a common law theory, and this court may not limit a statutory remedy on public policy grounds (see pt. II.A.2. of this opinion, *ante*).

10 The petition for writ of mandate that the Association contemplates filing is based on the claims that the County failed to meet and confer under the MMBA, and that it violated the prevailing wage provisions of the County Charter, section 709. These claims are interrelated. Indeed, part of its MMBA failure of good faith claim is that the County attempted to

impose a wage adjustment by ignoring its own charter provision. We need not decide, therefore, whether the County's charter provision alone, without the MMBA claim, would provide the basis of a suit by the Attorneys against the County. It remains for the court below to resolve, in adjudicating the petition for writ of mandate, the extent of the County's obligation to further negotiate with the Association or its obligations to pay a certain wage under the County's charter provisions. (See, e.g., *Glendale City Employees' Assn., Inc. v. City of Glendale*, *supra*, 15 Cal.3d 328, 345 [lower court may mandate the granting of specific wage increases if public agency has already committed itself to a particular wage formula].)

11 As explained on page 535 of this opinion, *ante*, the Association asked the court to enjoin the County from discharging any of its members after the filing of the petition for writ of mandate. The request was made in response to County Counsel Woodside's opinion that the Association members were required to resign before filing a petition for writ of mandate against the County. The trial court granted this injunctive relief, both preliminarily and permanently. Therefore, the question whether the County could terminate the Attorneys for participation in the lawsuit is one which was before the trial court, and is before this court. That the County did not explicitly raise that issue in its brief to this court may be due to the fact, as expressed by the County's attorney at oral argument, that it does not in fact intend to discharge the Attorneys if the Association prosecutes a suit against it. Nonetheless, the question is ripe for consideration, and is integral to the disposition of the case.

12 Indeed, in the office of county counsel itself, the Legislature has chosen for various public policy reasons to modify the usual attorney-client at will relationship, and has provided that the county counsel will serve a four-year term removable only for "good cause." (Gov. Code, § 27641.)

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

End of Document

Exhibit 14

***City and County of San Francisco* (2006)**
PERB Dec. No. 1890-M, p. 8

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, Charging Party, v. CITY & COUNTY OF SAN FRANCISCO, Respondent.	Case No. SF-CE-355-M PERB Decision No. 1890-M March 12, 2007

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Stationary Engineers Local 39; Gina M. Roccanova, Deputy City Attorney, for City & County of San Francisco.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

SHEK, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Stationary Engineers Local 39 (Local 39) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the City & County of San Francisco (City) violated the Meyers-Milias-Brown Act (MMBA)[1] by engaging in bad faith bargaining. Local 39 alleged that this conduct constituted an unfair practice under the MMBA in violation of PERB Regulation 32603(a), (b), (c), (f) and (g).[2] Local 39 also alleged that this conduct violated Section 16.216 of the City's Employee Relations Ordinance (ERO). Additionally, Local 39 alleged that Section A8.409-4 of the City's Charter (Charter) was unreasonable on its face and as applied to the extent that it permitted the City to begin impasse procedures before an impasse had been reached.

[1]MMBA is codified at Government Code Section 3500, et seq. Unless otherwise noted, all statutory references are to the Government Code.

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

The Board has reviewed the entire record in this case, including but not limited to Local 39's unfair practice charge, the City's position statement, the amended unfair practice charge, the warning and dismissal letters, Local 39's appeal, and the City's response thereto. Based upon this review, we affirm the dismissal, subject to the discussion below.

BACKGROUND

Local 39's April 11, 2006, unfair practice charge alleged that Section A8.409-4 of the Charter was unreasonable to the extent that it allowed the City to declare impasse before there was a real impasse, and that the City engaged in surface bargaining and had no intention of bilaterally reaching an agreement with Local 39.

When Local 39 filed this unfair practice charge, there was a collective bargaining agreement (CBA) in effect between the parties that extended through June 30, 2006. Local 39 alleged that the City did not bargain in good faith during negotiations for a successor CBA because it intended to rely upon the mediation/arbitration procedures in the Charter[3] to resolve the basic economic issues to be negotiated.

Under the Charter, after engaging in good faith bargaining, either the authorized representative of the City or Local 39 may declare an impasse with regard to unresolved disputes over wages, hours, benefits or other terms and conditions of employment. Upon the declaration of an impasse, the unresolved disputes shall be submitted to a three-member mediation/arbitration board (board) for resolution. (Charter sec. A8.409-4(a).) The board has discretion to resolve disputes by mediation and/or arbitration, and may hold hearings and receive evidence from the parties. (Charter sec. A8.409-4(c).) The Charter provides that if no

[3]Besides the Charter provisions, Local 39 alleges a violation of Section 16.216 of the City's ERO, which provides for mediation procedures that differ from those in the Charter. However, the charge does not further explain how this section was violated. Additionally, the appeal does not raise this issue. Matters not raised on appeal are waived. (PERB Reg. 32300(c).)

agreement is reached prior to the conclusion of the arbitration hearings, the board shall direct each of the parties to submit, within such time limit as the board may establish, a last offer of settlement on each of the remaining issues in dispute. It provides that the board shall decide each issue by majority vote by selecting whichever last offer of settlement on that issue it finds most conforms to traditionally enumerated factors in determining wages, hours, benefits or other terms and conditions of employment. (Charter sec. A8.409-4(d).) The Charter states that the board shall reach a final decision no later than 60 days before the date the Mayor is required to submit a budget to the board of supervisors, except by mutual agreement of the parties. (Charter sec. A8.409-4(e).)

Charter section A8.409-4(b) requires that the parties involved in bargaining select and appoint one person to the board not later than January 20 of any year in which bargaining on a CBA takes place. It provides that the third member of the board shall be selected by agreement between the City and the recognized employee organization, and shall serve as the neutral chairperson of the board.

In January 2006, before negotiations began, the City demanded that Local 39 select its representative to the board pursuant to Charter section A8.409-4(b). On February 6, 2006, however, Local 39 advised the City that it did not believe that Charter section A8.409-4 was mandatory and declined to select a representative to the board. Throughout the contract negotiations that followed, Local 39's attorney continued to dispute the obligation to select a representative to the board. Local 39 alleged that it was not required to select a representative to the board because the parties were not at impasse.

On April 5, 2006, the City filed a petition to compel arbitration and a petition for writ of mandate in the San Francisco Superior Court, while negotiations were underway. On May 8, 2006, the superior court denied the City's petitions to compel arbitration and for writ of

mandate, holding that PERB had jurisdiction over the City's attempt to compel Local 39 to participate in arbitration under the collective bargaining provisions of the Charter.[4]

The parties engaged in twelve (12) negotiation sessions for a successor agreement between February 2 and April 7, 2006. During the first bargaining session on February 2, 2006, the City allegedly maintained its right to withdraw from negotiations because Local 39 was not participating in the mandatory impasse arbitration procedures. That same day, Local 39 offered an initial basic wage proposal that called for specified salary increases. In response, the City stated that it needed time to make calculations before it could meet again.

During the next several negotiating sessions, the parties discussed various terms and conditions of employment, but not basic wage proposals. On February 15, 2006, the City presented a cost analysis relating to Local 39's economic proposals. On February 16, 2006, the parties discussed the rates paid to Stationary Engineers in the private sector, and discussed the City's cost analysis. Local 39 alleged that the City's lead negotiator cut short the February 16 bargaining session by announcing in the morning that she would not be available after lunch.

Local 39 also alleged that the City arrived late or called caucuses immediately or almost immediately at the start of six bargaining sessions; that the City sometimes attended

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[4]On July 7, 2006, the City appealed the Superior Court's May 8, 2006 decision to the Court of Appeal, in Case No. A1 14815, which is currently pending.

Additionally, on May 10, 2006, the City filed an unfair practice charge, Case No. SF-CO-129-M, against Local 39 alleging a violation of PERB Regulation 32604(d) (employee organization unfair practices under MMBA) based on Local 39's refusal to name a neutral and refusal to participate in the mediation/arbitration process contained in the local rules. PERB issued a complaint in that case on May 12, 2006. PERB Administrative Law Judge Donn Ginoza held hearings in that case on January 11 and 12, 2007, and the matter is currently pending.

bargaining sessions without being prepared with written proposals; and that the City negotiator did not have authority to bargain.

According to Local 39, on or about March 23, 2006, the City made its first (and only) basic wage proposal. Subsequently, the parties exchanged package proposals.

After at least three additional bargaining sessions, on April 7, 2006, the City's representative stated that the parties appeared to be at impasse due to a "substantial gap on the economic issues." Local 39's negotiators protested that it "had every intention on bargaining to obtain a contract rather than have a contract imposed by third parties," and had "room to move," but that the City appeared to be not bargaining in good faith. However, at this point, the City stated that it would not resume bargaining until Local 39 agreed to use the impasse procedure.

Prior to the City's declaration of impasse, the parties had arrived at substantive tentative agreements for at least eight different subjects.[5]

On April 11, 2006, Local 39 filed its unfair practice charge. On May 9, 2006, the City Director of Employee Relations, Mikki Callahan, called Local 39 and proposed the "crafts deal," which was offered to other crafts unions, as a means of settling the contract dispute with Local 39. Local 39 did not accept this offer.

The Board agent issued a warning letter on May 26, 2006, and a dismissal letter on August 24, 2006, finding that Local 39 had failed to allege a prima facie case of surface bargaining.

[5]Local 39 alleged that the parties reached substantive tentative agreements in the following eight areas: dive pay (payment for performing underwater dives); apprentice training fund; vacation scheduling; grievance procedure; holidays; timely payment of compensation; jury duty; and in lieu holiday pay. In contrast, the City alleged that the parties reached tentative agreements in 17 different areas.

Local 39 appealed the dismissal on September 8, 2006. The appeal focuses upon the legal issue of whether the Charter unlawfully conflicts with the MMBA. It alleges that the process established in the Charter is a "contract of adhesion."[6] It alleges that "Charter section A8.409-4 is drafted in a way as to insulate the [City] from any Union proposal which it unilaterally deems to be objectionable."[7] It states, "To the extent that the [Charter] authorizes one party to declare an impasse regardless of whether or not the parties are truly at an impasse or whether the party which declares impasse has bargained in bad faith, the Charter is inconsistent with [the MMBA]." The appeal also alleges that the Board agent erred in finding that there was no prima facie case of surface bargaining. On September 28, 2006, the City filed a response to the appeal denying the allegations.

DISCUSSION

This case presents two primary issues: (1) whether Local 39 has demonstrated that Section A8.409-4 of the Charter is unreasonable; and (2) whether Local 39 has alleged a prima facie case of surface bargaining by the City. To determine whether a charge alleges a prima facie case, the Board must assume that the essential facts alleged in the charge are true. (San Juan Unified School District (1977) EERB[8] Decision No. 12.)

Whether Charter Section A8.409-4 Violates the MMBA

The MMBA authorizes local agencies to adopt "reasonable rules and regulations," governing collective bargaining matters, including "[a]dditional procedures for the resolution of

[6]We do not address the issue of whether the Charter was a contract of adhesion, because that allegation is outside of PERB's jurisdiction.

[7]We do not further address this allegation because the charge and appeal contain no supporting facts.

[8]Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

disputes involving wages, hours and other terms and conditions of employment." (MMBA sec. 3507(a)(5).)[9] The Board has the authority to review whether local agency rules are reasonable. (Gridley; City of San Rafael (2004) PERB Decision No. 1698-M.)

"Where a legislative action by a local governmental agency is attacked as unreasonable, the burden of proof is on the attacking party. Such regulations are presumed to be reasonable in the absence of proof to the contrary." (San Bernardino County Sheriff's Etc. Assn. v. Board of Supervisors (1992) 7 Cal.App.4th 602, 613 [8 Cal.Rptr.2d 658], citing Organization of Deputy Sheriffs v. County of San Mateo (1975) 48 Cal.App.3d 331, 338 [122 Cal.Rptr. 210].) However, a local governmental agency may not adopt rules and regulations that "would frustrate the declared policies and purposes of the [MMBA sec. 3500, et seq.]." (Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492, 502 [129 Cal.Rptr. 893].)

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[9]In enacting the MMBA, the Legislature intended "to set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations." The Legislature

> did not intend thereby to preempt the field of public employer-employee relations except where public agencies do not provide reasonable 'methods of administering employer-employee relations through . .. uniform and orderly methods of communication between employees and the public agencies by which they are employed.'
> (Los Angeles County Firefighters Local 1014 v. City of Monrovia (1972) 24 Cal.App.3d 289, 295 [101 Cal.Rptr. 78], emphasis added.)

This is consistent with the preamble of the MMBA, which contains the following language:

> Nothing contained herein shall be deemed to supersede the ... rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations ....
> (MMBA sec. 3500, cited in International Brotherhood of Electrical Workers v. City of Gridley (1983) 34 Cal. 3d 191, 197-198, fn. 4 [193 Cal.Rtpr. 518] (Gridley).)

The MMBA specifically authorizes local agencies to adopt their own impasse procedures, although adoption of such procedures is not mandatory. Section 3505 of the MMBA states that the meet and confer "process should include adequate time for the resolution of impasses" only "where local rules include impasse procedures." Additionally, Section 3505.4 of the MMBA references "impasse procedures, where applicable." Thus, local agencies have discretion to craft their own impasse resolution procedures.

The MMBA does not delineate what local agency impasse rules must contain. The MMBA states simply that negotiations must continue for a "reasonable period of time." Section 3505 of the MMBA states, in part, that the public agency and a recognized employee organization:

> shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

Additionally, Section 3505.2 of the MMBA provides that if the parties fail to reach agreement "after a reasonable period of time," the parties may "agree upon the appointment of a mediator mutually agreeable to the parties."

The relevant provision of the Charter, section A8.409-4(a), states that disputes pertaining to wages, hours, benefits or other terms and conditions of employment "which remain unresolved after good faith bargaining" shall be submitted to the mediation/arbitration board "upon the declaration of an impasse either by the authorized representative of the city and county of San Francisco or by the authorized representative of the recognized employee organization involved in the dispute." The board has the discretion to resolve disputes by

mediation and/or arbitration, and may hold hearings and receive evidence from the parties. If no agreement is reached prior to the conclusion of the arbitration hearings, the board shall direct each of the parties to submit a last offer of settlement on each of the remaining issues in dispute. The board must then vote to adopt a last offer of settlement for each issue, based upon the traditionally enumerated factors in determining wages, hours, benefits or other terms and conditions of employment.

Under the principles discussed above, we find that Charter section A8.409-4(a) is reasonable on its face. The MMBA specifically allows local agencies the discretion to adopt their own impasse rules. The rules in this case restrict the use of the impasse procedure to situations where disputed issues remain unresolved after good faith bargaining. Moreover, the Charter provisions at issue appear to effectuate the MMBA's purpose of promoting "full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment." (Sec. 3500(a).) Additionally, the language of the Charter requiring good faith bargaining appears to be consistent with the MMBA requirement that negotiations "continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement." Therefore, the Board finds that Local 39 has failed to allege a prima face case that the City's Charter section A8.409-4 is unreasonable on its face under the MMBA.

Local 39 also alleges that Charter section A8.409-4 was unreasonable as applied in this situation, i.e., that the City declared "impasse" prematurely. As discussed in the following section, however, we find that based on the facts alleged, the City engaged in good faith bargaining. Local 39 alleged that the parties met over twelve separate bargaining sessions, exchanged information and proposals, and reached tentative agreements on at least eight

different subjects. Additionally, the parties exchanged basic wage proposals and held substantive discussions about those proposals. The City finally declared impasse when it allegedly believed there to be a substantial gap on the economic issues. Under these circumstances, we find that Local 39 has failed to allege a prima facie case that Charter section A8.409-4 was unreasonable as applied.

Whether Local 39 Has Established a Prima Facie Case of Surface Bargaining by the City

The unfair practice charge in this case alleged that the employer violated MMBA section 3505 and PERB Regulation 32603(c) by engaging in bad faith or "surface" bargaining. Bargaining in good faith is a "subjective attitude and requires a genuine desire to reach agreement." (Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25 [92 LRRM 3373] (Placentia Fire Fighters).) PERB has held that the essence of surface bargaining is that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275; Placentia Fire Fighters.)

The Board has affirmed dismissals of surface bargaining charges when the facts indicate that the parties have not been impeded from negotiating due to alleged multiple indicia of bad faith behavior. For example, in City of Fresno (2006) PERB Decision No. 1841-M, the Board upheld dismissal of a surface bargaining charge where the city adamantly refused to consider increasing salaries for the Local 39 contract (because other city contracts include most

favored nation clauses, and because workers compensation costs and health care costs were high). The Board agent found that "[t]he facts seem to suggest that the city had a rational basis for their position." (Citing NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].) In that case, the city cancelled two successive days of negotiation without explanation. At one bargaining session, city negotiators were without authority beyond the economic offers already made, and the city's lead negotiator was absent at a bargaining session. (The city explained that the outside negotiator's contract had expired and needed to be renewed.) The Board agent found that there was insufficient evidence of surface bargaining because both parties have offered several unique proposals. In that case, until the declaration of impasse, the parties were not delayed from negotiating because of the cited behavior by the city.

Similarly, in Ventura County Community College District (1998) PERB Decision No. 1264, the Board upheld a dismissal of a surface bargaining charge despite allegations of bad faith, where the charge failed to provide specific facts to establish that the district's behavior was indicative of an intent to frustrate the bargaining process.

The Board has likewise affirmed the dismissal of a surface bargaining charge where the factual allegations did not state that the employer was attempting to "torpedo" a proposed agreement or otherwise undermine the negotiations process (State of California (Department of Education) (1996) PERB Decision No. 1160-S); and where periodic unproductive negotiation sessions did not rise to the level of bad faith (County of Riverside (2004) PERB Decision No. 1715-M, at p. 8).

Under these authorities, the dismissal of Local 39's unfair practice charge was proper. Despite Local 39's allegations of the City's tardiness and dilatory tactics, the parties appeared to make progress in their negotiations. The City's behavior did not have the effect of frustrating

the negotiations. Local 39 has not alleged sufficient facts that the City negotiator lacked authority to bargain, or that the City's response to request for information was so inadequate that it frustrated the bargaining process. Local 39 has not demonstrated that the alleged delays in the bargaining process were sufficient to "torpedo" the negotiations process.

Instead, the record indicates that the parties conducted substantive discussions, exchanged proposals and information, asked and responded to questions, and that the City was willing to schedule negotiating sessions. The parties reached tentative agreements on at least eight different issues. Additionally, the City attempted to follow the impasse resolution procedures in the Charter, which are reasonable based on the above discussion. Furthermore, based on the alleged facts and circumstances, the City's lawsuit to compel arbitration did not frustrate the bargaining process, and thus does not constitute bad faith.

For these reasons, the Board finds that the unfair practice charge fails to state a prima facie case that under the MMBA, the City's Charter section A8.409-4 is unreasonable on its face or as applied, and that the City engaged in surface bargaining. Thus, the Board affirms the Board agent's dismissal of the charge.

ORDER

The unfair practice charge in Case No. SF-CE-355-M is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan and Member Neuwald joined in this Decision.

Exhibit 15

City of Clovis (2009)
PERB Dec. No. 2074-M, p.5, fn.5

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL 3, Charging Party, v. CITY OF CLOVIS, Respondent.	Case No. SA-CE-513-M PERB Decision No. 2074-M October 30, 2009

Appearance: Lozano Smith by David M. Moreno, Attorney, for City of Clovis.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Clovis (City) to the proposed decision of an administrative law judge (ALJ). The ALJ found that the City violated the Meyers-Milias-Brown Act (MMBA)[1] when it failed to resume negotiations with Operating Engineers Local 3 (also referred to as Clovis Public Works Employees' Affiliation or CPWEA) after impasse was broken, and failed to implement the City's last, best, and final offer after it was accepted by CPWEA. The proposed decision ordered the City to implement a three percent salary increase effective July 1, 2007.

The Board has thoroughly reviewed the proposed decision and the record in light of the City's exceptions and the relevant law.[2] Based on this review, the Board finds that CPWEA

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2] The City's request for oral argument is denied. The Board has historically denied requests for oral argument where an adequate record has been prepared, the parties had ample opportunity to present briefs, and the issues before the Board are sufficiently clear to make oral

failed to establish that the City violated MMBA sections 3503, 3505, 3506 and 3509(b), and PERB Regulation 32603(a), (b) and (c).[3] Therefore, for the reasons stated herein, we reverse the proposed decision and dismiss the complaint.

FINDINGS OF FACT

CPWEA is the exclusive representative of a unit of City employees who work in the Public Works Department. CPWEA and the City are parties to a memorandum of understanding (MOU) effective July 1, 2005 through June 30, 2008. The MOU includes a provision that on or about March 2007, the parties would re-open negotiations regarding wages for July 2007 through June 2008, the third year of the MOU.

The parties began negotiations on the wage re-opener in May 2007. After multiple bargaining sessions the parties were unsuccessful in reaching agreement. On July 13, 2007, the City proffered its last, best, and final offer of a three percent salary increase, effective July 1, 2007. On July 17, 2007, CPWEA rejected the offer and declared impasse.

Following unsuccessful mediation sessions, the parties met to resume negotiations on September 21, 2007. The City proposed a three percent salary increase effective July 1, 2007, or in the alternative, a three percent salary increase effective October 1, 2007 plus a one-time payment of $400. CPWEA countered with a proposal for a four percent wage increase. The City rejected this proposal and informed CPWEA that the three percent salary increase effective July 1, 2007 constituted its last, best, and final offer.

On September 28, 2007, CPWEA chief negotiator Doug Gorman (Gorman) sent a letter to the City's chief negotiator, Jeff Cardell (Cardell), stating that the City's proposal had been

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argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

voted down by the union membership and the union again declared impasse. The letter also informed the City that CPWEA intended to file an unfair practice charge alleging that the City had engaged in surface bargaining.

On October 9, 2007, the City Manager sent a memorandum to employees represented by CPWEA regarding the status of negotiations, stating in part:

> Given the current fiscal conditions of the City, the declining economy in general, and considering the competitiveness of the existing wage scales for this unit in the marketplace, I believe that the City's offer of a 3.0% wage increase retroactive to July 1, 2007, for all employees in this unit, was a very good offer.
>
> CPWEA's labor representative informed the City's labor negotiators that the unit members who voted on the City's most recent wage proposal voted not to accept it. In view of the fact that CPWEA representatives/membership has rejected various versions of the City's wage offer several times, and considering that CPWEA representatives have declared on two (2) occasions that the negotiation process is at impasse, the City has decided to conclude its efforts to reach agreement on this issue.

On October 24, 2007, CPWEA filed an unfair practice charge alleging that the City had engaged in bad faith bargaining with respect to the wage re-opener.

After receiving the City Manager's October 9, 2007 memorandum, Gorman assumed the City would implement its last, best, and final offer of a three percent salary increase. Gorman was aware that the City had imposed final offers on other bargaining units. However, by late January 2008, Gorman realized the City had not implemented the three percent wage increase.

On February 1, 2008, after discussions with union membership, Gorman left a voicemail message advising Cardell that CPWEA would dismiss the pending unfair practice charge if the City would implement the three percent salary increase contained in its last, best, and final offer.

In response, on February 7, 2008, Cardell sent a letter to Gorman that stated, in part:

> Thank you for your telephone call of February 1, 2008, regarding resolution of the Unfair Labor Practice Charge (ULPC) filed by [CPWEA]. As I understand your proposed resolution, in recognition of improved labor relations made in the Public Utilities Department, CPWEA is willing to dismiss the ULPC in exchange for implementing the City's "last best and final offer" of three (3) percent effective July 1, 2007, which was offered by the City during the last meet and confer process.
>
> The City appreciates CPWEA's interest in resolving the ULPC. The City also desires to resolve this issue; however, we must decline the offer as stated above in view of the fact that CPWEA previously rejected the City's wage offer and declared the negotiations process to be at impasse. The City considers the negotiations concerning wages for the third year of the 2005-2008 MOU to be concluded. Additionally, the City considers the assertions made by CPWEA in the ULPC to be without merit, and therefore, not subject to the type of "trade off" you have proposed.

Cardell concluded the letter by stating that the City looked forward to opening negotiations on a successor MOU in the near future.

CPWEA did not respond to the City's February 7, 2008, letter.

On March 11, 2008, CPWEA amended its charge to allege that the City's February 7, 2008 letter was an unlawful rescission of the last, best, and final offer, and a further indicator of surface bargaining.

On March 27, 2008, the PERB General Counsel issued a complaint that alleged that by failing to implement its last, best, and final offer of a three percent wage increase for the third year of the MOU, the City had committed an unfair practice.[4]

[4] CPWEA withdrew all other allegations, leaving only the allegation regarding the refusal to implement the last, best, and final offer.

DISCUSSION

MMBA section 3505 provides that local government agencies and recognized employee organizations "shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment."

The parties in this matter engaged in negotiation efforts on the wage re-opener from May 2007, through September 28, 2007, when CPWEA rejected the City's last, best, and final offer of a three percent salary increase, and declared impasse. The proposed decision held that Gorman's subsequent voicemail message effectuated a valid acceptance of the City's offer, which automatically created a binding, enforceable agreement between the parties. In its appeal, the City contends that the evidence does not support finding that CPWEA accepted the City's offer.

The Board agrees with the City and concludes the record does not establish that CPWEA made a valid acceptance of the City's last, best, and final offer.[5]

At the hearing on this matter, the entirety of Gorman's testimony on this issue is as follows:

> Q . . . when you made the phone conversation to Jeff Cardell, was it your intent to accept the last, best and final offer?
>
> A Yes, it was.

The record is void of any direct testimony by Gorman (or any other CPWEA witness) as to the actual content of the voicemail message. The remainder of the CPWEA "testimony" on this issue is made by CPWEA's attorney, primarily during opening arguments, and thus cannot be considered evidence in support of CPWEA's charge.

[5] Pursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency "may implement its last, best, and final offer." This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer.

The bulk of the direct witness testimony as to the content of the voicemail message comes from Cardell, who testified as follows:

> Q Can you explain the nature of that contact?
>
> A Mr. Gorman gave me a telephone call and made a proposal that in exchange for dismissal of the unfair labor practice charge that we should go ahead and implement the 3 percent offer retroactive to July 1st. And it was with the spirit of, or the recognition that the reason for the call was that things were going well at the Public Utilities Department and let's try to put this behind us and let's, so let's try to make this go away by we'll dismiss this if a, [sic] if the 3 percent is provided back to July 1st.

Cardell further testified that he understood Gorman's proposal to be nothing more than a settlement offer of the unfair practice charge. The only other evidence of the content of Gorman's voicemail message is reflected in Cardell's February 7, 2008 letter. In the letter, Cardell summarized his understanding of the purpose of the call and CPWEA's proposal to settle the charge. The City declined CPWEA's settlement offer via the February 7, 2008 letter, explaining why it did not believe the offer to be an appropriate resolution to the unfair practice charge.

Gorman's testimony, simply responding "yes" to the CPWEA attorney's characterization of Gorman's subjective intent in making the telephone call to Cardell, is wholly insufficient to demonstrate the actual content of the voice message. Therefore, in the absence of evidence on the record to demonstrate that Gorman's telephone message was anything more than an attempt to open settlement negotiations with respect to the unfair practice charge, as reported by Cardell, we simply cannot make the leap to find that the

telephone message was a specific, and unconditional, acceptance of the City's last, best, and final offer, that created an agreement between the parties.[6]

Moreover, MMBA section 3505.1, provides that:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.

Consequently, even if Gorman's voicemail message represented a valid acceptance of the City's last, best, and final offer, the proposed decision's finding that it created a binding and enforceable agreement is in error. As the City correctly asserted in its appeal, Section 3505.1 requires that the agreement be reduced to writing and ratified by the City before it will become binding on the parties. Numerous cases have discussed and approved this interpretation. In *Long Beach City Employees Association, Inc. v. City of Long Beach* (1977) 73 Cal.App.3d 273, the court denied a petition to compel the city to adopt a memorandum of understanding, and soundly rejected the union's argument that it was bad faith for the city council to refuse to ratify the agreement. The Court explained that the MMBA,

> . . . expressly provides that the memorandum 'shall not be binding' but shall be presented to the *governing body* of the agency or its statutory representative for *determination*, thus reflecting the *legislative decision that the ultimate determinations are to be made by the governing body itself.*

(*Long Beach,* p. 278, citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22.)[7]

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[6] The absence of evidence that CPWEA made any attempt to respond to the City's February 7, 2008 letter to clarify its intent to accept the last, best, and final offer, as opposed to making a settlement offer on the unfair practice charge, further supports our finding herein.

[7] Also citing *Glendale City Employees' Assn., Inc.* v. *City of Glendale* (1975) 15 Cal.3d 328, and *Crowley v. City and County of San Francisco* (1977) 64 Cal.App.3d 450.

In the case at hand, the record is void of any evidence that an agreement was reduced to writing and ratified by the City. Therefore, a finding that a binding agreement was created which mandates implementation of the three percent salary increase is contrary to law.[8]

Unalleged Violation

The City also excepts to the ALJ's conclusion that Gorman's voicemail message amounted to changed circumstances that broke the impasse between the parties, such that the City's failure to resume bargaining was a violation of the duty to bargain in good faith.[9]

We conclude that no findings can be made as to the allegation that the City violated its duty to bargain in good faith when it failed to resume negotiations as a result of a significant concession by CPWEA because it was not alleged in the complaint. The Board may only review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*Fresno County Superior Court* (2008) PERB

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[8] The proposed decision cites *Local 512, Warehouse & Office Workers' Union v. NLRB* (9th Cir. 1986) 795 F.2d 705, in support of the finding that acceptance of the City's last, best and final offer by CPWEA creates a binding, enforceable agreement. However, this case is distinguished, because the private sector parties in *Local 512* were not covered by a statutory scheme that mandated ratification of the parties' agreement. Furthermore, although the parties in *Local 512* were subject to a stipulation that any agreement reached would be binding only if ratified by the employees and approved by the employer, the court made a specific finding that these conditions had been satisfied.

[9] In *Modesto City Schools* (1983) PERB Decision No. 291, the Board held that "impasse suspends the bargaining obligation only until 'changed circumstances' indicate an agreement may be possible." Changed circumstances include concessions "which have a significant impact on the bargaining equation." (*Ibid.*) The duty to bargain in good faith is thus revived. Where concessions are made by one party, they must be given consideration by the other, and a good faith effort must be made to determine the potential for agreement. (*Ibid.*)

Decision No. 1942-C.) The unalleged violation also must have occurred within the applicable statute of limitations period. (*Ibid.*)

These criteria have not been met in this case. As stated previously, the complaint alleged only that the City violated its duty to bargain in good faith by failing to implement its last, best, and final offer. The claim that Gorman's voicemail message constituted a "changed circumstance" that revived the City's duty to bargain was not alleged in CPWEA's charge, was not alleged in the complaint, was not introduced at hearing, and was not raised by CPWEA until its post hearing brief. The City was not provided notice, or adequate opportunity to fully litigate the issue, and did not have the opportunity to examine and cross-examine witnesses on this issue. Therefore, we cannot consider whether the City's February 7, 2008, letter constituted an unlawful failure to resume bargaining in response to changed circumstances, in violation of the MMBA.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-513-M are hereby DISMISSED.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.

Exhibit 16

County of Contra Costa (2014)
PERB Order No. Ad-410-M, p.33

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF CONTRA COSTA, Employer, and AFSCME LOCAL 2700, Exclusive Representative.	Case No. SF-IM-126-M Administrative Appeal PERB Order No. Ad-410-M April 16, 2014

Appearances: Meyers, Nave, Riback, Silver & Wilson by Edward L. Kreisberg and Jesse J. Lad, Attorneys, for County of Contra Costa; Beeson, Tayer & Bodine by Adrian J. Barnes, Attorney, for AFSCME Local 2700.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the County of Contra Costa (County) from an administrative determination (attached) by the Office of the General Counsel pursuant to PERB Regulation 32802.[1] In that determination, the Office of the General Counsel approved AFSCME Local 2700's (AFSCME) request that the parties' bargaining differences be submitted to a factfinding panel. The parties' bargaining dispute involved a single unresolved issue that remained after they had reached agreement on all other issues related to the creation of a new classification, legal clerk. The remaining dispute concerned the level of salary to be paid to the new classification.

[1] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Office of the General Counsel determined that the factfinding procedures prescribed in the Meyers-Milias-Brown Act (MMBA) section 3505.4[2] and its implementing regulation, PERB Regulation 32802(a)(2),[3] were applicable to this dispute and directed the parties to select their respective panel member. From this determination the County appeals, pursuant to PERB Regulation 32360.

For reasons discussed herein, we affirm the Office of the General Counsel's determination and hold that the factfinding procedures added to the MMBA by Assembly Bill No. 646 (Statutes 2011, ch. 680) (AB 646), passed in 2011, and codified at MMBA

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[2] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code unless otherwise noted. MMBA section 3505.4 establishes a non-binding factfinding procedure for resolving post-impasse bargaining disputes that may be invoked by the representative employee organization after mediation efforts, if available, have failed to produce a settlement.

[3] PERB Regulation 32802 provides, in pertinent part:

> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator . . .
>
> (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.
>
> (b) A request for factfinding must be filed with the appropriate regional office; . . .
>
> (c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirement of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

sections 3505.4 through 3505.7, apply to any bargaining impasse over negotiable terms and conditions of employment, and not only to impasses over new or successor memoranda of understanding (MOU).

PROCEDURAL HISTORY

After having negotiated over the creation of a legal clerk classification and reached agreement on all issues except for the rate of pay for employees in the classification, the parties declared impasse in early September 2013. On September 25, 2013, AFSCME filed a request for factfinding with the Office of the General Counsel pursuant to MMBA section 3505.4.

The County opposed AFSCME's request and urged the Office of the General Counsel to deny it, asserting that the request was insufficient to meet the statutory requirements for factfinding. The County provided extensive written argument that factfinding was applicable only to bargaining disputes arising after negotiation for an MOU, and not to single issue bargaining disputes. AFSCME filed a timely response, disputing the County's arguments and asserting that if the Legislature intended to limit factfinding under the MMBA, it would have clearly said so, rather than using more comprehensive words, such as "dispute" and "differences" in referring to what is subject to factfinding.

On October 2, 2013, the Office of the General Counsel informed the parties by e-mail that AFSCME's request was approved. This determination was memorialized on October 4, 2013, in the form of an administrative determination.

After being granted extensions of time, the County filed a timely appeal of the administrative determination on October 28, 2013, and AFSCME filed a timely response on November 21, 2013.

ADMINISTRATIVE DETERMINATION

In explaining its reasons for approving AFSCME's request, the Office of the General Counsel first noted that the bargaining obligation under the MMBA extends to all matters relating to wages, hours, and other terms and conditions of employment, and that this duty requires the employer to refrain from making unilateral changes until the parties have bargained to an agreement or impasse and complied with any applicable post-impasse resolution procedures. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083-1084.) AB 646 imposed new obligations on employers, but also provided a "more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose" their last, best and final offer (LBFO). (Admin. Determination, p. 6.)

The administrative determination noted that although the MMBA does not define the term "impasse," PERB has held that the definition of impasse under the Educational Employment Relations Act (EERA)[4] is the appropriate standard under the MMBA as well. The definition of "impasse" does not limit the types of "disputes" or "differences" to just those arising during negotiations for a new or successor collective bargaining agreement (CBA) or MOU.

Additionally, the administrative determination noted that decisions of the courts, PERB and National Labor Relations Board have made clear that collective bargaining is a continuing process that is not restricted to one comprehensive agreement or one single period of bargaining. (*Conley v. Gibson* (1957) 355 U.S. 41, 46). The parties' bargaining obligation encompasses meeting and conferring with respect to wages, hours, and other terms and

[4] EERA is codified at Government Code section 3540 et seq.

conditions of employment, as well as proposed changes in negotiable terms and conditions of employment that may arise during the term of an MOU.

Turning next to the language in the MMBA, the Office of the General Counsel concluded that when construed as a whole, the MMBA does not limit the applicability of its factfinding provisions solely to disputes arising during negotiations for an MOU. MMBA section 3505.4 uses the term "differences" and "dispute," without limitation to disputes arising during negotiations over the MOU. Likewise, in MMBA section 3505.5, which authorizes the factfinding panel to make findings of fact and recommend terms of settlement, there is no language limiting the parties' "dispute" to one arising during negotiations for an MOU or to any other type of negotiations. The Office of the General Counsel noted that if the Legislature intended to limit the types of disputes that could be submitted to factfinding, it could have explicitly done so.

The Office of the General Counsel concluded that from a policy perspective, the County's position would undermine the intent of AB 646, which was to "prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency's goals and agenda." (Admin. Determination, p. 9.) If factfinding applies only to disputes arising during negotiations over an MOU, employers could essentially avoid factfinding by splintering negotiations over terms and conditions of employment into single, mid-term bargaining sessions.

Finally, the Office of the General Counsel noted that PERB has applied the statutory impasse procedures under EERA and the Higher Education Employer-Employee Relations Act (HEERA)[5] to single-subject and effects bargaining disputes, citing *Moreno Valley Unified School District* (1982) PERB Decision No. 206, *Redwoods Community College District* (1996)

[5] HEERA is codified at Government Code section 3560 et seq.

PERB Decision No. 1141 (*Redwoods CCD*), and *California State University* (1990) PERB Decision No. 799-H. As PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to disputes arising during negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper.

The Office of the General Counsel summarily rejected the County's assertion that AB 646 violates the California Constitution. Factfinding, unlike binding arbitration for resolution of impasses, is an advisory procedure and therefore does not interfere with the County's constitutional authority to set wages. Nor does AB 646 delegate to a private party any of the County's powers. It therefore does not violate the state constitution.

COUNTY'S APPEAL

The County interposes both procedural and substantive objections to the administrative determination. As an initial matter, it claims that PERB lacks jurisdiction to consider the issue in this case–whether AB 646 applies to a single issue bargaining dispute–because the matter should be determined only through an unfair practice proceeding, rather than by appeal of an "advisory" opinion of the Office of the General Counsel. According to the County, MMBA section 3509, which grants PERB jurisdiction over enforcement of the MMBA, "explicitly provides that alleged violations of the MMBA shall be processed as unfair labor practice charges." (County's Appeal, p. 6.) Therefore, reasons the County, PERB may not bypass the unfair practice process and issue an advisory opinion "regarding whether or not a local public agency has failed to comply with what a union might choose to allege is a required impasse resolution procedure." (*Ibid.*) Depriving the County of an unfair practice hearing deprives it of due process, the argument continues.

The County asserts, "the only factfinding action that PERB is empowered to take pursuant to Section 3505.4(a) is to appoint a panel chair for a factfinding panel." PERB does not have the authority to make a legal determination on the merits of an employer's failure to comply with the factfinding requirements of AB 646 outside of the unfair practice process. (County's Appeal, p. 8.) In response to a factfinding request, PERB is limited to determining whether the request was timely, or whether the request included a statement that the parties were unable to reach a settlement, according to the County. The Board would be free to adjudicate the larger issue–whether factfinding applies to all bargaining disputes–were AFSCME to file an unfair practice charge, which would be subject to a full administrative hearing and ultimate appeal to the Board itself. (County's Appeal, p. 14.)

Next, the County asserts that PERB is bound by a recent decision in *County of Riverside v. Public Employment Relations Board,* (2013) Case No. RIC 1305661 (*County of Riverside*), issued by the superior court in Riverside County. In that case, the court agreed with the employer and found that in passing AB 646, the Legislature intended factfinding under the MMBA to be available only to address bargaining disputes over a new or successor MOU. The superior court enjoined PERB from appointing a factfinding panel in any bargaining dispute arising under the MMBA other than in MOU negotiations, and further required PERB to dismiss any pending factfinding requests involving disputes over single issue bargaining or the negotiations over the effects of a management decision.

In the County's view, the administrative determination, issued a few weeks after the superior court's decision in the *County of Riverside* case, violated the court's order, and PERB should now vacate the determination. The County also asserts that the doctrines of collateral estoppel and res judicata bar PERB from re-litigating the issues that were determined by the

superior court. Thus, PERB is precluded from "holding that the County must go to factfinding on the instant dispute." (County's Appeal, p. 12.)

In its third procedural argument, the County contends that PERB's neutrality has been compromised because the Office of the General Counsel issued the administrative determination while concurrently representing PERB as a defendant in the *County of Riverside* superior court litigation involving the same issue that is the subject of this appeal. According to the County, "basic notions of due process and appearances of neutrality preclude the same person or office from both advocating a position with a neutral decision-making Board and at the same time turning around and serving as the Board's legal advisor on the identical issue." (County's Appeal, p. 13.)

Regarding the merits of this controversy, the County asserts that the legislative history and statutory interpretation of AB 646 "lead to the conclusion that AB 646 factfinding procedures apply only to negotiations for a new MOU." (County's Appeal, p. 14.) Because the factfinding provisions of MMBA sections 3505.4 through 3505.7 immediately follow the MMBA sections that relate to MOU negotiations, factfinding therefore can only apply to MOU negotiations, according to the County.

In the County's view, MMBA section 3505.7 provides further proof that factfinding applies only to MOU negotiations. That section allows the public agency to implement its LBFO after completing impasse resolution procedures, but it may not implement an MOU. MMBA section 3505.7 also provides that after the imposition of the LBFO, the employee organization retains its right to meet and confer on all matters within the scope of representation annually before adoption of the agency's budget. According to the County, this annual right to negotiate applies only in the context of successor MOUs.

Further argued by the County, a factfinding panel must take into consideration the eight factors enumerated in MMBA section 3505.4(d), which refer to components of an MOU and only make sense "in the context of collective bargaining." (County's Appeal, p. 18.) For example, the factfinding panel is directed to consider and weigh the financial ability of the public agency; comparability of wage, hour and other conditions of employment between the relevant bargaining unit employees and other similarly situated employees of comparable public agencies; cost-of-living information; and overall employee compensation. According to the County, these factors "are only relevant when evaluating the interplay of economic and other proposals made in negotiations for a comprehensive successor collective bargaining agreement." (County's Appeal, p. 18.)

Next, the County argues that AB 646's exemption from factfinding for those jurisdictions that already use binding arbitration to resolve bargaining impasses (MMBA, § 3505.5(e)), provides further support for its position. According to the County, this exemption exists because binding arbitration provides a procedure for resolving MOU disputes. AB 646's goal of providing a "mandatory and uniform impasse procedure" would not be served if factfinding procedures were to apply to issues other than MOU negotiations, according to the County.

The County also objects to the administrative determination's reliance on PERB decisions under EERA, noting that there are significant differences between EERA and the MMBA. In particular, the County seeks to distinguish *Redwoods CCD, supra,* PERB Decision No. 1141, a case arising under EERA, because, according to the County, the legislative intent of AB 646 was to enhance the effectiveness of the collective bargaining process, whereas the purpose of EERA's factfinding provisions was to avoid strikes.

Finally, the County reiterates its claim that AB 646 unconstitutionally interferes with the County's right to manage its finances and determine compensation for its employees.

DISCUSSION

We first address the County's claim that the Board itself is without jurisdiction to consider the merits of this case, and then address other procedural objections raised by the County. We then turn to the merits of the case, first considering the purpose of factfinding in other statutes administered by PERB that include factfinding, and then explaining the differences between those statutes and the MMBA. Ultimately, this case requires us to discern the Legislature's intent in passing AB 646, thereby introducing factfinding into the MMBA as a procedure for resolving bargaining impasses. Did the Legislature intend to simply import and replicate the factfinding process and procedures from EERA and HEERA into the MMBA, or did it intend, as the County urges, to provide a much more limited procedure that applies only when the parties are at impasse in their negotiations over a new or successor comprehensive agreement? As we explain further, we conclude that in passing AB 646, the Legislature intended to import to the MMBA the factfinding processes of EERA and HEERA. Factfinding is a final step in the bargaining process. It is intended to facilitate agreement between the parties on any and all negotiable terms and conditions of employment, and is therefore not to be artificially restricted only to disputes arising during negotiations over a comprehensive MOU for a set duration.

I. PROCEDURAL ISSUES

A. Jurisdiction

After having urged the Office of the General Counsel to consider its arguments on the merits, i.e., that the factfinding procedures of the MMBA do not apply to single-issue bargaining disputes or any other disputes outside negotiations for a new or successor MOU, the

County now claims that the Board itself does not have authority to consider these arguments. We disagree. Both statutory and regulatory authority describe PERB's role in administering the provisions of AB 646.

Factfinding under the MMBA is triggered when a recognized employee organization files a request that the parties' "differences" be submitted to a factfinding panel. (MMBA, § 3505.4(a).) The request must be filed with the appropriate regional office of PERB, accompanied by proof of service and a statement that the parties have been unable to effect a settlement, and the request must be filed within certain time frames described in PERB Regulation 32802.[6]

Within five working days from when the request is filed, a PERB Board agent must notify the parties whether the request satisfies the requirements described above. If the request is not timely, no further action shall be taken by PERB. However, "if the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days." (PERB Reg. 32802(c).) Implicitly contained within the authority to determine whether the request is sufficient is the jurisdiction to assess whether the request is properly before the Board, i.e., whether the conditions precedent to a valid request for factfinding exist. Just as courts have jurisdiction to determine the scope of their jurisdiction, PERB necessarily has jurisdiction to determine whether the provisions of MMBA section 3505.4 apply to a particular factfinding request. (*SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 192; *United States v. Superior Court* (1941) 19 Cal.2d 189, 195.)

[6] PERB is authorized to adopt regulations and to issue decisions implementing and interpreting the MMBA. (MMBA, § 3509(a); EERA, § 3541.3.)

After consideration of the County's and AFSCME's arguments on the merits, the Office of the General Counsel concluded that the factfinding procedures set forth in MMBA section 3505.4 et seq., are applicable to this dispute, and that the other requirements of PERB Regulation 32802 have been met.

An appeal may be taken (and therefore considered by the Board itself) from an administrative decision made by a Board agent (PERB Regs. 32350 and 32360.) The administrative determination issued by the Office of the General Counsel in this case is an administrative decision within the meaning of PERB Regulation 32350(b), which requires that it contain a statement of the issues, fact, law and rationale used in reaching the determination. This administrative determination is not a refusal to issue a complaint, a dismissal of an unfair practice charge, or a proposed decision following a formal hearing, all of which are excluded from the definition of "administrative decision" under PERB Regulation 32350(a). The County's appeal of the administrative determination is therefore properly before the Board itself pursuant to PERB Regulation 32360.[7]

The County is incorrect in its claim that PERB may only consider the issue in this case in the context of an unfair practice determination. It states: "The question of whether the County has violated any MMBA factfinding requirements should be determined through the unfair practice process, and PERB's Board only has jurisdiction to consider this issue via an appeal of an Administrative Law Judge's (ALJ) decision on an unfair labor practice concerning this issue." (County's Appeal, p. 5.) The flaw in this argument is that the County has not been accused of violating any MMBA factfinding requirements. The Office of the General Counsel

[7] PERB Regulation 32380 lists administrative decisions that are not appealable. Prior to October 1, 2013, the list included determinations regarding factfinding requests made pursuant to PERB Regulation 32802.

did not determine that the County had violated any part of the MMBA. It simply ordered the parties to select its panel member, and from that order, the County appeals.[8]

The County also argues that the administrative determination is an "advisory legal decision" because it "bypasses" the unfair practice process. As explained above, the administrative determination is not an "advisory" opinion. It resolved a controversy that was squarely placed before the Office of the General Counsel when the County claimed that factfinding did not apply to the bargaining dispute over which AFSCME requested factfinding.

B. Effect of Superior Court Decision in the *County of Riverside* Case

PERB appealed the court's decision in *County of Riverside*, which has the effect of staying the effectiveness of the superior court's decision until the case is finally determined by the appellate courts.[9] (Code Civil Proc., § 916; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190; *Private Investors v. Homestake Mining Co.* (1936) 11 Cal.App.2d 488 [writ of mandate stayed on appeal].) Thus, PERB is presently not bound by the superior court's order.

The County also asserts that the doctrines of res judicata and collateral estoppel bar PERB "through its General Counsel's Office now or in subsequent litigation from re-litigating issues that were already determined in prior court actions." (County Appeal, pp. 11-12.) How this applies to the Board's administrative determination of the County's appeal (as opposed to a re-litigation of a previously determined claim) we need not unravel, for it is well-settled in

[8] It is entirely possible that the same legal question we are presented with in this case could come before the Board as an unfair practice case if an employer were to unilaterally implements its LBFO without having participated in factfinding when it was allegedly obligated to do so. However, unfair practice litigation is not the only manner in which PERB is authorized to administer the MMBA. (MMBA, § 3509; EERA, § 3541.3.)

[9] The County's petition to the court of appeal for the fourth district for a writ of supersede as seeking to lift the automatic stay of the superior court's order was summarily denied on January 14, 2014.

California that neither res judicata nor collateral estoppel apply until and unless the judgment is final. (*Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 606; 7 Witkin Calif. Procedure, 5th ed. (2008) Judgment, § 364.) Because an appeal of the superior court's decision is pending, there is no final decision in the *County of Riverside* litigation yet.

C. Conflict of Interest Between the Board Itself and the Office of the General Counsel

The County claims that the Board itself cannot be neutral in this controversy because the Office of the General Counsel took a position in the *County of Riverside* litigation that is adverse to the County's position in this case and issued the administrative determination at issue here, which coincides with the Office of the General Counsel's defense in the *County of Riverside* litigation. This argument ignores the statutory role of the Office of the General Counsel and misapprehends how the Office of the General Counsel and the Board itself function.

MMBA section 3509(a), which moved enforcement of the MMBA from the courts to PERB, provides that "[t]he powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter." Included in the powers and duties enumerated in EERA section 3541.3 is the power to adopt rules and regulations to carry out the provisions and effectuate the purposes and policies of the MMBA and other statutes PERB administers, and to take "any other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of" the statutes it administers. (EERA, § 3541.3(g) and (n).) Like most public agencies, PERB operates through its employees who are delegated the authority to carry out the statutory functions of the agency.[10] (EERA, § 3543.1(k).)

[10] PERB regulations make the distinction between "the Board itself," meaning the appointed members and "the Board," which means either the appointed Board or any Board agent. (PERB Regs. 32020 and 32030.)

The General Counsel, appointed pursuant to EERA section 3541(f), has broad responsibility to "assist the board in the performance of its functions." In addition, the General Counsel is specifically authorized to represent PERB in "any litigation or other matter pending in a court of law to which the board is a party or in which it is otherwise interested." (EERA, § 3541(g).) When PERB is sued over an administrative decision made in the course of administering MMBA section 3505.4, it is completely within PERB's authority and duty to defend itself in that litigation, through its General Counsel.

The Office of the General Counsel has other duties in addition to representing the agency in litigation. The General Counsel supervises PERB's regional attorneys who investigate and process unfair practice charges to determine whether they should be dismissed or whether PERB should issue a complaint based on the charge. Regional attorneys also investigate and process petitions for representation, decertification, and unit modifications, and a variety of other issues concerning the identity of the exclusive representative. PERB Regulation 32793 authorizes PERB to determine if parties who request the appointment of a mediator pursuant to EERA or HEERA are truly at impasse. These determinations are made by the Board's agents, the regional attorneys in the Office of the General Counsel. And PERB Regulation 32802, which sets forth the procedure for initiating the factfinding process under the MMBA, requires the factfinding request to be filed with the appropriate regional office, where a member of the Office of the General Counsel staff will determine if the request satisfies the requirements of the regulation.

The Board itself serves mainly as an appellate body, deciding appeals taken from proposed decisions after a formal hearing before an administrative law judge (ALJ), dismissals of unfair practice charges, administrative determinations, as in this case, and rulings on motions and interlocutory orders. The County is incorrect in its assertion that the General

Counsel advises PERB in this endeavor. It is the legal advisor, appointed by the Governor for each Member of the Board, that provides legal guidance to Board Members regarding cases under the Board's consideration, not the General Counsel. (EERA, § 3541(h).) Thus, the web of conflict between the Office of the General Counsel and the Board itself presumed by the County simply does not exist.[11]

Because the Office of the General Counsel has no role in advising the Board itself in its appellate function regarding cases pending before the Board, there is nothing improper about the Office of the General Counsel representing PERB in the Riverside County litigation seeking to halt PERB's administration of MMBA section 3505.4. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731.) See also, *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 10 (*San Diego*), where the state Supreme Court rejected a similar argument, i.e., that PERB could not direct its general counsel to seek injunctive relief against an unfair practice without compromising the Board's neutrality in the subsequent consideration of the merits of the unfair practice case. The Court noted in

[11] The fallacy of the County's argument is further underscored by the role of the Office of the General Counsel in unfair practice charge processing. Pursuant to PERB Regulation 32620, a regional attorney in the Office of the General Counsel investigates unfair practice charges and either issues a complaint or dismisses the charge if it fails to state a prima facie case. Dismissals are appealable to the Board itself. (PERB Reg. 32635.) If the County's claim regarding a conflict of interest were correct, the Board would not be able to exercise its appellate function to review dismissals of unfair practice charges. Yet, EERA section 3541.5 explicitly vests in the Board the duty to devise and promulgate procedures for deciding unfair practice cases. Since the inception of the agency, PERB has delegated to the Office of the General Counsel the authority to investigate unfair practice charges initially, subject to the Board's appellate review.

We also note that the County's conflict of interest argument is belied by its invitation and assertion that this matter only be adjudicated as an unfair practice case. The Board itself would be in the exact position it is now in deciding the unfair practice appeal, which originates when the Office of the General Counsel dismisses a charge, or when, after a complaint issues, an ALJ hears the case and issues a proposed decision.

San Diego, that EERA section 3541.3(i) gives PERB prosecutorial power, e.g., to investigate unfair practice charges and alleged violations of EERA and to take any action as the Board deems necessary to effectuate the policies of EERA. The fact that EERA section 3541(f) provides for a General Counsel who is to "assist the board in the performance of its functions under this chapter" indicated to the Court that the Board could delegate its prosecutorial functions to its General Counsel. While we are not here concerned with an unfair practice, the principle remains the same. There is nothing improper about the General Counsel defending PERB in litigation, even if the same issues are subsequently presented to the Board itself by appeals of administrative determinations. Indeed, the statute prescribes this. EERA section 3543.1(g) specifically authorizes PERB's General Counsel to represent the Board in "any litigation or other matter pending in a court of law to which the board is a party . . . ."

II. AB 646: MMBA AND THE ROLE OF FACTFINDING IN CALIFORNIA LABOR RELATIONS

A. Background

The MMBA, passed in 1968, was the first true collective bargaining law passed in California for public employees.[12] Its purpose, articulated in MMBA section 3500, is to "promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment." An additional purpose is to improve employer-employee relations within various public agencies by "providing a uniform basis for recognizing the right of employees to join organizations of their own choice and be represented by those organizations

[12] Earlier statutes such as the George M. Brown Act (Stats. 1961, ch. 1964, § 1) and the Winton Act (Stats. 1965, ch. 2041, § 2) did not provide for collective bargaining as commonly conceived because they did not require the employer to recognize a single exclusive representative of employees, and did not place on either the employer or employees a duty to negotiate in good faith. (See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 176.) Nor did either of these statues provide for written, binding agreements after the conclusion of meeting and conferring.

in their employment relationships with public agencies." Prior to the passage of AB 646 in 2011, the MMBA had no provision for factfinding, and mediation was either voluntary or dictated by local rule or regulation.

Although the statutes enacted after the MMBA (notably EERA and HEERA) prescribed more elaborate procedures for resolving bargaining impasses, including factfinding, the MMBA recognized the utility of impasse resolution procedures even before the passage of AB 646. MMBA section 3505, defining "meet and confer in good faith" states, in relevant part:

> The process [of meeting and conferring in good faith] should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

1. Factfinding Under EERA and HEERA

In 1975, the Legislature passed Senate Bill No. 160, (Stats. 1975, ch. 961) (SB 160), creating the Educational Employment Relations Board (later re-named the Public Employment Relations Board) and enacting EERA. The purposes of EERA are very similar to those of the MMBA: "to promote the improvement of personnel management and employer-employee relations within the public school systems . . . by providing a uniform basis for recognizing the right of . . . employees to join organizations of their own choice, to be represented by the organizations in their . . . employment relationships with public school employers." (EERA, § 3540.)[13]

[13] HEERA, the other statute under PERB's jurisdiction that contains a factfinding process, states its purpose slightly differently, exhibiting deference to academic freedom, the constitutional status of the Regents of the University of California, etc. HEERA section 3560(a) declares the state's fundamental interest in the development of harmonious and cooperative labor relations between higher education employers and their employees. Subsection (e) of 3560 further states that it is the intent of HEERA to accomplish its purpose by providing a uniform basis for recognizing the

From its initial draft and throughout amendments made to the bill, SB 160 contained the impasse procedures provisions that now appear in EERA section 3548.[14] Under those provisions, either a public school employer or the exclusive bargaining representative may declare that "an impasse has been reached . . . in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable." The Board appoints a mediator if it determines that an impasse exists. (EERA, § 3548.)

If the mediator is unable to effect a settlement of the dispute, and declares that factfinding is "appropriate to the resolution of the impasse," either party may request that their differences be submitted to a factfinding panel. (EERA, § 3548.1.) Each party designates its appointee to the panel and PERB selects a chairperson.

The factfinding panel then conducts an investigation and may hold a hearing, or "take any other steps as it may deem appropriate." EERA section 3548.2(b) directs the factfinders to "consider, weigh, and be guided by all the following criteria:"

> (1) State and federal laws that are applicable to the employer.
>
> (2) Stipulations of the parties.
>
> (3) The interests and welfare of the public and the financial ability of the public school employer.
>
> (4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding

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right of employees to designate representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select an exclusive representative for the purpose of meeting and conferring.

[14] In fact, earlier unsuccessful bills to enact collective bargaining for all public sector employees contained similar provisions for factfinding after mediation. See SB 400 (Moscone), which was vetoed in 1974.

proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.

(5) The consumer price index for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

(7) Any other facts, not confined to those specified in paragraphs (1) through (6), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

The purpose of these impasse resolution procedures was to provide an orderly method for assisting the parties in reaching agreement over bargaining disputes. Factfinding was seen as an alternative to binding arbitration for impasse resolution, which is not provided for in EERA. In addition, "The impasse procedures almost certainly were included in EERA for the purpose of heading off strikes. [Citation omitted.] Since they assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith and thus an unfair practice under section 3543.6, subdivision (d)." (*San Diego, supra,* 24 Cal.3d 1, 8-9.)[15] In short, impasse resolution procedures under EERA were conceived as an instrument for bringing labor peace by assisting parties in reaching agreement in negotiations.

[15] PERB cases decided after *San Diego, supra,* 24 Cal.3d 1 established that a strike occurring before the completion of impasse procedures, including factfinding, creates a rebuttable presumption that the striking employee organization violates its duty to bargain in good faith or to participate in the impasse resolution procedures in good faith. (*Fresno Unified School District* (1982) PERB Decision No. 208; *Sacramento City Unified School District* (1987) PERB Order No. IR-49.)

HEERA contains impasse procedures very similar to those in EERA. (HEERA, § 3590 et seq.) Either party may declare "that an impasse has been reached between the parties in negotiations over matters within the scope of representation." (HEERA, § 3590.) If the Board determines that an impasse exists, it appoints a mediator who shall attempt "to persuade the parties to resolve their differences and effect a mutually acceptable memorandum of understanding." (HEERA, § 3590.) If the mediator is unable to effect settlement "of the controversy" and declares that factfinding is appropriate, either party may request that their differences be submitted to a three-person factfinding panel, consisting of one member appointed by each party and the chairperson appointed by the Board.

The factfinding panel meets with the parties and considers their respective positions and makes additional inquiries and investigations as it deems appropriate. If the dispute is not settled within 30 days, the factfinding panel makes findings of fact and recommends "terms of settlement," which are advisory. Unlike under EERA and the MMBA, the HEERA factfinding panel is not instructed to consider any particular factors in making its recommendations for settlement.

2. The Scope of Impasse Resolution Procedures Under EERA and HEERA

EERA section 3548 provides that either party may invoke impasse resolution procedures by declaring that "an impasse has been reached . . . in negotiations over the matters within the scope of representation." HEERA contains the same language at HEERA section 3590. Under both statutes, after PERB determines that an impasse exists, a mediator is appointed to assist the parties in "resolving the controversy," and to attempt to "effect a

mutually acceptable agreement."[16] If the mediator is unsuccessful in settling "the controversy," the parties' "differences" are submitted to a factfinding panel. (EERA, § 3548.1; HEERA, § 3591.) If the "dispute" is not settled through the factfinding investigation, the panel shall recommend "terms of settlement." (EERA, § 3548.3; HEERA, § 3593(a).)

Thus, the plain language of EERA and HEERA extends factfinding to negotiations over all matters within the scope of representation. By using such terms as "differences," "controversy" and "dispute," the Legislature avoided limiting EERA's and HEERA's impasse resolution procedures only to negotiations over new or successor collective bargaining agreements. On the contrary, the language used in other parts of EERA and HEERA points in the opposite direction. "Impasse" "means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating" where future meetings would be futile. (EERA, § 3540.1(f), emphasis added.)[17] "Impasse" is not confined to intractable disputes over only a particular type of agreement, such as a single CBA or successor MOU.

EERA also defines "Meeting and negotiating" expansively. It means "meeting, conferring, negotiating and discussing . . . in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached . . . ." (EERA, § 3540.1(h).)[18] Agreement on

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[16] HEERA is phrased slightly differently. The mediator is to "persuade the parties to resolve their differences and effect a mutually acceptable memorandum of understanding." (HEERA, § 3590.)

[17] HEERA defines "Impasse" as "a point in meeting and conferring at which [the parties'] differences in position are such that further meetings would be futile." (HEERA, § 3562(j).)

[18] HEERA's definition of "Meet and confer" more closely replicates that of the MMBA. Under HEERA the parties have a mutual obligation "to meet at reasonable times and to confer in good faith with respect to matters within the scope of

matters within the scope of representation include not only complete CBAs, but settlements of disputes over a myriad of terms and conditions of employment, because the duty to bargain is not limited only to negotiations that result in written CBAs.

It is beyond dispute that the duty to bargain is an ongoing obligation on the part of both parties that does not necessarily end once a CBA is finalized. (*National Labor Relations Bd. v. Jacobs Mfg. Co.* (2d. Cir. 1952) 196 F. 2d 680 [duty to bargain continues during the term of a CBA, unless the duty is discharged or waived].) PERB has followed this rule. (*Placentia Unified School District* (1986) PERB Decision No. 595; *State of California (Department of Forestry and Fire Protection)* (1993) PERB Decision No. 999-S.)

The duty to bargain in good faith applies to any matter within the scope of representation and is not confined to negotiations that result in a comprehensive MOU for a certain duration. Thus, an employer must refrain from making unilateral changes in negotiable terms and conditions of employment unless and until it has bargained in good faith with the exclusive representative. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *San Mateo County Community College District* (1979) PERB Decision No. 94.) This prohibition against unilateral changes extends through the completion of any impasse procedures. (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 32-33 (*Modesto*); *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900; *Moreno Valley Unified School District* (1982) PERB Decision No. 206 (*Moreno Valley*).)

The duty to bargain also includes the duty to negotiate over the implementation and foreseeable effects of managerial decisions not otherwise subject to the process of collective bargaining, such as layoffs, staffing levels, employee background checks, additional

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representation and to endeavor to reach agreement on matters within the scope of representation. This process shall include adequate time for the resolution of impasses. If agreement is reached . . . [the parties] shall jointly prepare a written memorandum of understanding . . . ." (HEERA, § 3562(m).)

educational programs, etc. (*International Assn. of Fire Fighters, Local 188 v. Public Employment Relations Bd. (City of Richmond)* (2011) 51 Cal.4th 259, 277 (*International Assn. of Fire Fighters*); *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223; *County of Santa Clara* (2013) PERB Decision No. 2321-M; *Sutter County In-Home Supportive Services Public Authority* (2007) PERB Decision No. 1900-M; *Trustees of the California State University* (2012) PERB Decision No. 2287-H; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*).) Likewise, parties have an obligation to bargain over particular subjects contained in a written agreement when they have mutually agreed to re-open negotiations on those subjects during the term of that agreement, commonly concerning wages and benefits, and over any mandatory subject not covered in the CBA or not waived by a zipper clause or management rights clause.

Under EERA, the end product of such negotiations is a "written document incorporating any agreements reached," if either party requests a written document. (EERA, § 3540.1(h).) HEERA requires the parties to "jointly prepare a written memorandum of understanding" after reaching agreement on matters within the scope of representation. (HEERA, § 3562(m).) Under the MMBA, an MOU is the end product of meeting and conferring on matters within the scope of representation if a tentative agreement is adopted by the governing body of the public agency. (MMBA, § 3505.1.) In other words, an "MOU" signifies a written agreement on any matter within the scope of representation. It can address a single subject, the effects of a decision within the managerial prerogative, mid-term negotiations, or side letters of agreement, etc. MOUs are the manifestation of the parties' agreement on any negotiable subject. Contrary to the County's implication, the term "MOU" is not limited to a document that results from negotiations for a comprehensive agreement of a set duration. All negotiations are negotiations "for an MOU."

As shown, the duty to bargain in good faith extends well beyond the duty to bargain for a comprehensive MOU for a set duration, and that duty includes good faith participation in the impasse resolution procedures. Given that there is no language in EERA or HEERA that limits impasse resolution procedures only to negotiations for a comprehensive contract, it follows that factfinding, at least under EERA and HEERA, applies to all bargaining disputes concerning matters within the scope of representation.

PERB has held as much throughout its administration of EERA section 3548 et seq., and under HEERA section 3590. In *Moreno Valley, supra,* PERB Decision No. 206, pp. 4-5, the Board explained:

> The assumption of unilateral control over the employment relationship prior to exhaustion of the impasse procedures frustrates the EERA's purpose of achieving mutual agreement in exactly the same ways that such conduct frustrates that purpose when it occurs at an earlier point. [Citation omitted.] The impasse procedures of EERA contemplate a continuation of the bilateral negotiations process . . . . For the reasons set forth in San Mateo Community College District [(1979) PERB Decision No. 94], we find that following a declaration of impasse, a unilateral change regarding a subject within the scope of negotiations prior to exhaustion of the impasse procedure is, absent a valid affirmative defense, per se an unfair practice.

The Board's decision in *Moreno Valley, supra,* PERB Decision No. 206 was affirmed by the court of appeal in *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191 (*Moreno v. PERB*). The court explained: "Since 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process, . . . we think the Board reasonably determined that the considerations warranting per se treatment of unilateral changes at the negotiation stage also warranted per se treatment of such changes prior to the exhaustion of the statutory impasse procedure." (*Moreno v. PERB*, p. 200.) The court also affirmed PERB's holding that the District was

obligated to exhaust impasse resolution procedures prior to eliminating certain positions, a decision over which the employer had to negotiate only the effects thereof. Thus, factfinding under EERA applies to a wide variety of bargaining disputes, including issues presented by effects bargaining.

Redwoods CCD, supra, PERB Decision No. 1141, also evidences PERB's consistent interpretation that EERA's factfinding procedures apply without limitation to bargaining disputes, whether arising in the context of negotiations over a comprehensive agreement or otherwise. In that case, the parties' CBA regarding work hours permitted the employer to seek voluntary adjustments of work schedules. If there was no voluntary agreement on such adjustments, the CBA provided for negotiations between the employer and employee organization. If negotiations proved futile, the CBA provided for private mediation, and if that was not successful, "the dispute shall not be submitted to a fact-finding panel under the provisions of the Educational Employment Relations Act." (*Redwoods CCD,* ALJ Proposed Dec., p. 6). The parties negotiated over the employer's proposal to rotate security officers' shifts but did not reach agreement. Private mediation was also unsuccessful, and the employer implemented its proposed change. The employee organization filed an unfair practice charge alleging that the employer had failed to participate in the impasse procedure in good faith in violation of EERA section 3543.5(e). The issue before PERB was whether the parties could legally waive the impasse resolution procedure established by EERA. The Board held that factfinding may not be waived because it was intended as a public benefit. Implicit in this holding is that factfinding was found to apply to a single-subject dispute—shift rotation.

The County objects to the Office of the General Counsel's reliance on *Redwoods CCD, supra,* PERB Decision No. 1141, to support its administrative determination, but we find the case relevant to demonstrate how PERB interprets the factfinding process under EERA.

A review of factfinding reports issued by panels appointed to resolve EERA and HEERA bargaining disputes reveals that PERB has consistently appointed mediators and factfinding panels pursuant to EERA section 3548 and HEERA section 3590 to assist the parties in resolving a variety of disputes, not merely those involving the negotiations of new or successor collective bargaining agreements. These include the effects of layoffs (*Natomas Unified School District* (2012) FF-663; *Stockton Unified School District* (2012) FF-661), and single issue disputes such as health and welfare benefits (*Santa Monica Community College District* (2011) FF-653; *Wasco Union High School District* (2011) FF-644), work-year calendar (*San Miguel Joint Union School District* (2011) FF-650), application of a salary formula (*California State University* (2010) FF-634-H), binding arbitration (*Chico Unified School District* (2008) FF-623), and fee waiver (*California State University* (2007) FF-613). Factfinding panels have also been appointed to resolve bargaining disputes arising in re-opener negotiations (*Palmdale School District* (2013) FF-691; *Ramona Unified School District* (2013) FF-688; *Alameda Unified School District* (2012) FF-665; *Red Bluff Union Elementary School District* (2011) FF-658; *California State University* (2011) FF-654; *Lodi Unified School District* (2010) FF-645; *San Carlos School District* (2010) FF-638; *Hayward Unified School District* (2007) FF-612; *University of California* (2008) FF-624).[19]

[19] The reports of factfinding panels appointed pursuant to EERA and HEERA are available at PERB's website, www.perb.ca.gov. The reports are part of PERB's official files, of which we take administrative notice. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 23; *Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 4.) The vast majority of factfinding reports concern impasses reached by parties who were negotiating for successor agreements.

B. MMBA Factfinding

1. The Plain Language of AB 646

We turn now to the language of MMBA section 3505.4 et seq., to consider the differences between that statute and EERA and HEERA to determine whether those differences mandate a different interpretation of the scope of MMBA factfinding, bearing in mind that our ultimate task is to discern the Legislature's intent in passing AB 646.

AB 646 added to the MMBA sections 3505.4 through 3505.7, which permit an employee organization to request that the parties' "differences" over bargaining be submitted to a factfinding panel after mediation, if utilized, was unsuccessful. The factfinding panel is empowered to hold hearings and investigations and ultimately make findings and recommendations to resolve the bargaining dispute. The panel's recommendations are not binding on either party, and the public agency is free to implement its LBFO after holding a public hearing on the impasse.

There are salient differences between the impasse resolution procedures prescribed by EERA and HEERA on the one hand, and those contained in the MMBA. Under the latter statute, mediation is either subject to local rule or regulation, or completely voluntary with the parties. (MMBA, § 3505.2.) PERB has no role in appointing a mediator under the MMBA and no role in determining at this stage whether an impasse exists. Likewise, a mediator, if utilized by the parties under the MMBA, has no role in determining that factfinding is appropriate to resolving the dispute. Instead, factfinding may be invoked under the MMBA only by the employee organization within certain timeframes after the completion of mediation, if it was utilized, or after a written declaration of impasse by either party. (MMBA, § 3505.4.) As under the EERA and HEERA, the Board selects the chairperson of the MMBA

factfinding panel, or the parties may mutually agree upon a chair in lieu of the person selected by the Board. (MMBA, § 3505.4.)

The MMBA borrows from EERA section 3548.2(b) in directing the factfinding panel to "consider, weigh and be guided by all the following criteria." (MMBA, § 3505.4(d).) These criteria, set forth *infra* at pages 42-43, are identical, except that an MMBA factfinding panel must consider local rules, regulations, and ordinances in addition to state and federal laws that are applicable to the employer.

The factfinding panel recommendation for terms of settlement under all three statutes is advisory only, and is to be submitted to the parties privately before the public employer is required to make it public. (MMBA, § 3505.5(a); EERA, § 3548.3(a); HEERA, § 3593(a).)

The cost of the panel chairperson is equally divided between the parties under the MMBA. (MMBA, § 3505.5(b) and (c).) EERA and HEERA require the Board to pay for the chairperson selected by the Board. (EERA, § 3548.3(b); HEERA, § 3593(b).)

The MMBA recognizes that some charter cities, charter counties, or a charter city and county may provide in their charter a provision for binding arbitration if an impasse has been reached between the parties. The provisions of MMBA section 3505.4 do not apply to such charter entities "with regard to its negotiations with a bargaining unit to which the impasse procedure applies." (MMBA, § 3505.5(e).) There is no similar provision for binding arbitration in either EERA or HEERA to resolve bargaining impasses.

MMBA section 3505.7 permits the public agency subject to the factfinding procedures to implement its LBFO no earlier than ten days after the factfinding panel's written findings of fact and recommended terms of settlement have been submitted to the parties and after the public agency has held a public hearing regarding the impasse. This codifies PERB decisions under EERA and HEERA holding that an employer may not implement its LBFO until after

impasse resolution procedures have been exhausted. (*Rowland Unified School District* (1994) PERB Decision No. 1053; *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S.)

MMBA section 3505.7 additionally clarifies the status of an imposed LBFO. The public agency may implement its LBFO after the exhaustion of impasse resolution procedures, but it may not implement an MOU. Further, "[t]he unilateral implementation of a public agency's last, best and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." This language is not replicated in EERA or HEERA.

The County points to three differences between EERA and the MMBA that it claims justify a narrow interpretation of AB 646. First, EERA applies to schools and colleges, and the MMBA applies to municipalities and local governmental subdivisions of the state. Second, the MMBA permits local employers to adopt their own local rules governing employment relations, including resolution of impasses. And third, EERA has a "complicated" scope of bargaining, which specifically enumerates certain terms and conditions of employment and identifies circumstances in which the Education Code applies if the parties fail to reach agreement. The scope of bargaining under the MMBA, in contrast, requires bargaining on wages, hours and terms and conditions of employment. (County Appeal, p. 20-21.) While the County identifies these differences between the statutory schemes, it fails to explain why they require a radically different interpretation of the factfinding provisions contained in the MMBA. Nor do we believe the differences we identified above require, or even suggest, that MMBA factfinding applies only to comprehensive MOU negotiations.

At the time AB 646 was passed, the law regarding impasse resolution was well-established. The Legislature is presumed to have known that PERB applied existing impasse resolution procedures to single-issue bargaining disputes, mid-term contract negotiations disputes, and effects bargaining disputes. (*Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1018; *Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal.App.3d 166, 170.) Likewise, the Legislature is presumed to have knowledge of judicial decisions describing the scope of the duty to meet and confer in good faith, namely that the duty covers more than simply the duty to meet and confer over the terms of an MOU. (See *Claremont, supra,* 39 Cal.4th 623 [the duty to bargain attaches to proposed changes in wages, hours and other terms and conditions of employment]; *International Assn. of Fire Fighters, supra,* 51 Cal.4th 259 [duty to meet and confer on the effect of management decisions which are themselves within the prerogative of management to make].) (*Peters v. Superior Court* (2000) 79 Cal.App.4th 845, 850 (*Peters*).)

It is onto this statutory and regulatory landscape that the Legislature added the requirements of AB 646. The question before us then is whether, in passing AB 646, the Legislature intended to eschew PERB's earlier construction and application of impasse resolution procedures under EERA and HEERA and to create a much-constrained factfinding procedure applicable only to MOU negotiations.

In interpreting statutes, we are guided by the rules of statutory construction which seek to ascertain the intent of the Legislature so as to effectuate the purpose of the law by giving a reasonable and common sense interpretation consistent with the apparent purpose of the statute. Significance should be given, if possible, to every word, phrase and sentence of the statute, and effort must be made to harmonize the various parts of the enactment in the context of the statutory framework as a whole. We must take into account the harms to be remedied

and the history of legislation on the same subject, public policy and consistent administrative construction. (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) As noted in *Medical Board v. Superior Court* (2001) 88 Cal.App.4th 1001, 1016: "One 'elementary rule' of statutory construction is that statutes in pari materia—that is, statutes relating to the same subject matter—should be construed together." With these principles in mind, we turn to the task of ascertaining the Legislature's intent in passing AB 646.

Under all three statutes discussed here, the purpose of impasse resolution, whether mandatory or voluntary, is to bring resolution to bargaining disputes with the assistance of a neutral third party to mediate, persuade, or suggest terms of settlement. Impasse resolution procedures represent a legislative policy choice that favors negotiations above unilateral action by either party and seeks to provide a structured "cooling off" period. During this period, all avenues to a peaceful settlement of bargaining disputes can be explored as each party presents the factfinding panel with information, and the panel in turn makes findings of fact and suggests terms to settle the dispute.

The MMBA replicates EERA and HEERA in its description of the matters to which factfinding applies as "differences" and "disputes." (MMBA, §§ 3505.4(a) and 3505.6(a).)[20] No statute by its plain terms limits impasse resolution procedures to negotiations for collective bargaining agreements or comprehensive MOUs for a set duration. Yet the Legislature could have easily inserted such a limitation if that is what it intended. We find that the plain meaning of AB 646 is unambiguous. Therefore there is no need to resort to the legislative

[20] The MMBA defines "Mediation," the precursor to factfinding, as an effort by a third party "to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment." (MMBA, § 3501(e).)

history of AB 646 to discern the Legislature's intent. (*Peters, supra,* 79 Cal.App.4th 845; *Diamond Mutlimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047.)

2. Legislative History of AB 646

Even if we were to consider the legislative history of AB 646, it supports our construction of the statutory scheme. The County correctly notes that prior to the passage AB 646, local agencies had discretion to determine whether to adopt any impasse procedures or none at all. It is undeniable that one of the purposes of AB 646 was to provide for a uniform procedure for impasse resolution. A review of legislative committee reports that accompanied AB 646 through both houses of the Legislature shows that lawmakers believed that creating impasse procedures was likely to increase the effectiveness of the collective bargaining process by assuring that all avenues to agreement are fully explored before bargaining is declared unsuccessful.

Throughout AB 646's journey through the Assembly, committee reports replicate a quotation from its author, Assemblywoman Toni Atkins (Assemblywoman Atkins), on which the County relies heavily: "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed." (Assem. Com. on Public Employees, Retirement and Social Security, Rep. on AB 646 [2010-2011 Reg. Sess.] March 23, 2011 [proposed amendment].) Far from being conclusive, this statement indicates that impasse resolution would assist the parties in reaching agreement on MOUs. That does not imply an intent to limit impasse resolution procedures only to negotiations for a comprehensive MOU. That Assemblywoman Atkins did not provide a complete listing of all possible bargaining disputes in this sentence does not evince a legislative intent that factfinding would apply only to bargaining disputes over comprehensive MOUs. As we explained earlier, the term "MOU"

refers to any written agreement on negotiable terms and conditions of employment adopted by the parties. It is not only a contract covering a *comprehensive* set of employment terms and conditions for a set term.

Moreover, Assemblywoman Atkins' statement cannot be relied on for legislative history because it does not necessarily represent the intent of other members of the Legislature who voted to support the bill. (*In Re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589-590; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701; *Ross v. Ragingwire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 931.)

The summary prepared by the Assembly Committee on Public Employees, Retirement and Social Security for the May 4, 2011 hearing on AB 646 echoes Assemblywoman Atkins' comment: "SUMMARY: Establishes additional processes, including mediation and facfinding, that local public employers and employee organizations may engage in if they are unable to reach a collective bargaining agreement." (Assem. Com. on Public Employees, Retirement and Social Security, Rep. on AB 646 [2010-2011 Reg. Sess.] May 4, 2011 [Note: Date is the date of committee hearing.].) Significantly, the Assembly Public Employment, Retirement and Social Security Committee's summary changed by the third reading in the Assembly on the May 27, 2011 amended bill. Summarizing the amended bill, the committee report reads: "SUMMARY: Allows local public employee organizations to request fact-finding if a mediator is unable to reach a settlement within 30 days of appointment." (AB 646, 3d reading, as amended May 27, 2011.) (Emphasis added.) While the committee report also includes Assemblywoman Atkins' quote regarding the lack of a requirement for impasse resolution procedures where efforts to negotiate a collective bargaining agreement fail, it also includes the following observation from Assemblywoman Atkins: "The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process,

by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful." (*Ibid.*, emphasis added.) As discussed earlier, the "collective bargaining process" encompasses all labor negotiations, not simply negotiations for a comprehensive MOU.

By the time AB 646 reached the Senate, committee reports describing its purpose and effect described it as a bill that would allow local public employee organizations to request factfinding "if a mediator is unable to effect a settlement of a labor dispute." (Emphasis added.) (Sen. Com. on Public Employment & Retirement, Rep. on AB 646 [2010-2011 Reg. Sess.] as amended June 22, 2011.) The analysis by the Senate Rules Committee prepared for the third reading summarizes the bill using the same term, "labor dispute." (Sen. Rules Com. Off. of Sen. Floor Analyses, 3d reading analysis of AB 646 [2010-2011 Reg. Sess.] as amended June 22, 2011.)

A review of the several versions of the bill itself is instructive. The Legislative Counsel's Digest of the first version of AB 646, introduced on February 16, 2011 reads, in pertinent part:

> The Meyers-Milias-Brown Act contains various provisions that govern collective bargaining of local represented employees . . . . The act requires the governing body of a public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized organizations. . . . if the representatives of the public agency and the employee organization fail to reach an agreement, they may mutually agree on the appointment of a mediator . . . . If the parties reach an impasse . . . the public agency may unilaterally implement its last, best and final offer.
>
> This bill would . . . . provide that if the parties fail to reach an agreement either party may request that the board appoint a mediator, and would require the board, if it determines that an impasse exists, to appoint a mediator . . . .

> This bill would authorize either party to request that the matter be submitted to a factfinding panel if the mediator is unable to effect settlement of the controversy . . . . [¶] . . . if the dispute is not settled within 30 days, the factfinding panel [is required] to make findings of fact and recommend terms of settlement."

(Emphasis added.)[21]

Nothing in this summary confines impasse procedures to a single type of MOU. It begins with a description of existing law, referring to the duty to meet and confer in good faith generally on wages, hours and terms and conditions of employment. If the parties fail to reach "an agreement," they may request mediation. Since "an agreement" (as opposed to the term, "memorandum of understanding") refers to the conclusion of negotiations on any matter to which the duty to meet and confer attaches, this phrase in the Legislative Counsel's Digest signifies that mediation applies not only to comprehensive MOU negotiations, but to negotiations in general.

The use of the terms "matter," "controversy" and "dispute," as opposed to the more limited "MOU" or "collective bargaining agreement" (a term used in EERA and HEERA), lends further weight to the notion that the Legislature did not intend for the factfinding procedures of AB 646 to be limited to only negotiations for a comprehensive MOU.[22] Instead, AB 646 intended to import the EERA/HEERA model, slightly modified to accommodate some

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[21] Digests of bills prepared by the Legislative Counsel, like statements in legislative committee reports, may be relied on to determine legislative intent when those statements are in accord with a reasonable interpretation of the statute. (*Maben v. Superior Court* (1967) 255 Cal.App.2d 708, 713.)

[22] See *Retail Clerks International Association, Locals Unions Nos. 128 and 633 v. Lion Dry Goods* (1962) 369 U.S. 17, 25, relying on the assumption that Congress was well-aware of the meaning of the term "collective bargaining agreements" as opposed to "contracts" when it passed section 301(a) of the Labor Management Relations Act (29 USC, § 185) giving federal courts jurisdiction over suits for violations of contracts between an employer and labor organization.

of the unique aspects of the MMBA (such as binding arbitration to resolve impasses in some jurisdictions). Use of these terms, i.e., "matter," "controversy," and "dispute," did not change when AB 646 was amended on May 5, 2011, to authorize only an employee organization to request factfinding. The Legislative Counsel continued to use the all-inclusive terms "controversy," "matter," and "dispute," rather than "MOU," in referring to what may be submitted to a factfinding panel. (AB 646, as amended in Assembly, May 5, 2011, County Ex. Q.) These terms remain unchanged by the time the bill was signed into law on October 9, 2011.

The legislative history of AB 646, when considered as a whole, supports our construction of the statute.

3. Harmonizing the Statutory Scheme

As additional support for its appeal, the County asserts that because AB 646 was inserted into the section of the MMBA specifically dealing with MOU negotiations, and immediately follows those sections concerning MOU negotiations, the scope of AB 646 must therefore be limited to negotiations for new or successor comprehensive MOUs. The County reads too much into the statute's architecture.

MMBA section 3505 establishes in its first paragraph the duty of a public agency to meet and confer in good faith with employee representatives regarding wages, hours and other terms and conditions of employment. It must also "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (MMBA, § 3505.) Nothing in this paragraph limits the meet and confer duty to new or successor comprehensive MOUs. The duty applies prior to the public agency determining policy or course of action, and is limited only by the

appropriate subject matter of negotiations, i.e., wages, hours, and terms and conditions of employment.

The second paragraph of section 3505 defines "meet and confer." We do not read this definition to limit the duty only to negotiations that produce a comprehensive MOU. It reads, in pertinent part:

> "Meet and confer" means that a public agency . . . and representatives of recognized employee organizations, shall . . . meet and confer promptly upon request . . . and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.

As discussed previously, the duty to meet and confer in good faith applies not only to negotiations for a new or successor comprehensive MOUs, but to mid-term negotiations, proposed changes the public agency seeks to make in negotiable subjects, and bargaining over the effects of decisions within managerial prerogative.

The term "memorandum of understanding" is not used in MMBA section 3505. It does appear in the text of MMBA section 3505.1, which requires a public agency to submit a tentative agreement to its governing body for approval. If the tentative agreement is adopted, "the parties shall jointly prepare a written memorandum of understanding." In light of well-settled case law regarding the continuous nature of the duty to meet and confer on all negotiable terms and conditions of employment, we do not read this section to limit the type of MOU to comprehensive agreements. Instead, MMBA section 3505.1 establishes the procedure for approving an MOU after the parties reach a tentative agreement on whatever subject they bargained about. The proximity of MMBA sections 3505 through 3505.1 does not imply any limitation on section 3505's definition of "meet and confer."

MMBA section 3505.2 authorizes voluntary mediation if the parties fail to reach agreement. This section does not mention an MOU or otherwise limit mediation to efforts only to disputes in certain types of negotiations. Nor does this section refer to a "tentative agreement" unlike MMBA section 3505.1. The more inclusive term "reach agreement," as used in MMBA section 3505.2 implies that mediation applies in a variety of bargaining contexts, not merely negotiations for new or successor comprehensive MOUs.[23]

MMBA section 3505.3 provides employer-paid released time for a reasonable number of employee organization representatives when they are "formally meeting and conferring with" the employer on matters within the scope of representation.

The factfinding provisions of AB 646 appear in MMBA sections 3505.4 through 3505.7, immediately following the provision for released time, and after the provision for voluntary mediation. The County is simply not correct when it claims the factfinding provisions "immediately follow the MMBA sections that relate to MOU negotiations." (County's Appeal, p. 17.)[24] The factfinding provisions are in the same general section of the MMBA that prescribe the duty to meet and confer in good faith on all matters within the scope of bargaining. Indeed, there are only two sections in this portion of the MMBA sections 3505 through 3505.7, that specifically mention MOUs, and those are sections 3505.1 and 3505.7. It is logical for the Legislature to have codified AB 646 within this part of the MMBA because

[23] The definition of "Mediation" in MMBA section 3501(e) supports this conclusion, as it refers to "dispute regarding wages, hours and other terms and conditions of employment." "Mediation" is not confined to negotiations for a comprehensive MOU.

[24] The County also mistakenly quotes MMBA section 3505.4(a) thusly: "If the mediator is unable to effect settlement of the controversy . . . ." This language appeared in an earlier version of section 3505.4. That section was amended by Statutes 2012, ch. 314. The version applicable to this case arising in 2013 begins: "The employee organization may request that the parties' differences be submitted to a factfinding panel . . . following the appointment . . . of a mediator . . . ."

the leading provision, MMBA section 3505, establishes the duty to meet and confer in good faith, and subsequent provisions prescribe certain procedures concerning bargaining. We do not find that the codification of AB 646 within that part of the MMBA that describes bargaining generally indicates the Legislature's intent to confine factfinding only to comprehensive MOU negotiations, especially where other subsections of MMBA section 3505 do not limit negotiations only to such comprehensive agreements.

The County contends that because factfinding follows from failed attempts at mediation, and mediation applies only to comprehensive MOU negotiations, factfinding also must apply only to MOU negotiations. We reject this argument because, as discussed above, nothing in MMBA section 3505.2 limits mediation only to comprehensive MOU negotiations.

Next, the County claims that the language of MMBA section 3505.7, prohibiting a public agency from implementing an MOU after exhausting impasse resolution procedures, shows that factfinding can only apply to MOUs. As noted above, the term "MOU" refers to any written agreement on negotiable terms and conditions of employment adopted by the parties, not solely to a contract covering a comprehensive set of terms and conditions for a set duration. Even if the County were correct that the term "MOU" implied a comprehensive MOU, the County's argument ignores the history of this section, which in fact preceded AB 646. These provisions were added to the MMBA in 2000, eleven years before the passage of AB 646. (Statutes 2000, ch. 316, AB 852 (AB 1852).) In its original form, the main provisions of what is now section 3505.7 appeared in MMBA section 3505.4 and were deemed necessary to overturn the court of appeals decision in *Cathedral City Public Safety Management Assn. v. City of Cathedral City* (*Cathedral City*) (1999, Docket No. E022719. Review den. and opn. ordered non-published 9/15/99 S080447.) That decision held that a public employer could impose an MOU after impasse (as opposed to terms and conditions of

employment), thereby depriving the representative employee organization of the right to bargain during the term imposed by the MOU. The Legislature passed AB 1852 in 2000 to correct this decision which had permitted a public employer to effectively deny employees' statutory right to bargain by imposing long-term agreements upon impasse.[25] See *City of Santa Rosa* (2013) PERB Decision No. 2308-M for a discussion of the legislative history of AB 1852.

When AB 646 was added to the MMBA, the language discussed above was moved from former MMBA section 3505.4 into the newly created section 3505.7. The concept embodied in current MMBA section 3505.7, i.e., that an employer may not impose an MOU, and that imposition does not deprive the employee organization of the right to meet and confer each year on matters within the scope of representation prior to the adoption of a budget or as otherwise required by law, was not new with the passage of AB 646, contrary to the County's contention. We therefore reject the County's argument that the language of MMBA section 3505.7 suggests that factfinding applies only to comprehensive MOU negotiations under the MMBA.

The change AB 646 made in MMBA section 3505.7 merely prohibits imposition of the employer's LBFO until "any applicable mediation and factfinding procedures have been exhausted" and until the public agency has held a public hearing regarding the impasse. Previously, the employer was permitted to impose its LBFO after exhaustion of any mediation, if mediation was agreed to or required by local rules. With the addition of factfinding, the

[25] Several years before *Cathedral City,* PERB recognized that an employer may not impose a collective bargaining agreement at the conclusion of impasse resolution procedures, but may impose only terms and conditions of employment, since unilaterally imposing a duration clause would illegally limit the right to bargain. (*Rowland Unified School District* (1994) PERB Decision No. 1053; see also, *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S.)

change in MMBA section 3505.7 simply clarifies that the employer must now wait until this new impasse resolution procedure is exhausted before it may implement its LBFO. The fact that MMBA section 3505.7 forbids the employer from imposing an MOU when and if it implements its LBFO does not mean that factfinding is limited to negotiations for a comprehensive MOU. Facfinding surely applies to this type of negotiation, but MMBA section 3505.7 does not mean that factfinding applies only to comprehensive MOU negotiations.

By the same token, the fact that MMBA section 3505.7 reserves to the employee organization the right to meet and confer on matters within the scope of representation each year prior to the adoption of a budget, even if the employer has imposed its LBFO, does not mean that factfinding is limited to comprehensive MOU negotiations, contrary to the County's claim. This provision was part of the 2000 legislation and was necessary to correct the *Cathedral City* decision. Thus, the language of a prior bill that had nothing to do with factfinding cannot be relied on to inform the interpretation of AB 646 or limit its application.

The County also points to the eight criteria the factfinding panel is to consider in arriving at its findings and recommendations, urging that these factors only make sense in the context of negotiations for a complete MOU. MMBA section 3505.4(d) provides:

> In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
>
> (1) State and federal laws that are applicable to the employer.
>
> (2) Local rules, regulations, or ordinances.
>
> (3) Stipulations of the parties.
>
> (4) The interests and welfare of the public and the financial ability of the public agency.

> (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
>
> (6) The consumer price index for goods and services, commonly known as the cost of living.
>
> (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.
>
> (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

These are virtually the same criteria that EERA directs factfinders to "consider, weigh and be guided by."[26] Despite EERA's inclusion of these criteria, it is well-established that EERA factfinding applies to single-issue disputes, mid-term negotiations, and effects bargaining. That these criteria also appear in the MMBA supports our conclusion that the Legislature did not intend AB 646 to be applied differently than factfinding applies under EERA. These criteria have been instructive to resolving bargaining disputes involving single issues, since common sense and the way that factfinding panels actually work does not require that each of the criteria be considered in every bargaining dispute.

There are some disputes, such as whether binding arbitration should be the last step in a grievance process, that are not sensibly resolved by considering the consumer price index, or comparable compensation of other employees. On the other hand, arriving at recommendations regarding binding arbitration might require evidence described in MMBA

[26] Both EERA and the MMBA direct factfinding panels to be guided by all of these criteria.

section 3505.4(d)(5), the comparable "conditions of employment," or the all-inclusive criteria in subsection (7), which factfinding panels have read to include basic notions of fairness. The same could be said about negotiations over the effects of layoffs, which may raise both economic and non-economic issues. Bargaining disputes over health and welfare benefits would likely require the factfinding panel to assess the "financial ability" of the public agency and wage/benefit comparisons with similarly situated employees. Less obvious in such a dispute is the relevance of state and federal laws.

As discussed above, at page 27, such topics as binding arbitration and the effects of layoff are stand-alone, single subject bargaining disputes to which the factfinding process has been applied under EERA and HEERA. The fact that factfinding panels are directed to consider several different criteria does not imply that all criteria are relevant in all disputes, thereby negating the County's argument that the listing of criteria evidences a legislative intent to limit factfinding to comprehensive MOU negotiations.

As previously stated, AB 646 recognized that some charter cities and counties provide for binding arbitration as a means for resolving bargaining impasses, and in those instances, the factfinding process will not apply. (MMBA, § 3505.5(e).)[27] The County asserts that this accommodation to local rules further shows the legislative intent to limit factfinding only to negotiations for a comprehensive MOU. The County's argument assumes that the scope of binding arbitration under local rules is coterminous with the scope of factfinding under

[27] MMBA section 3505.5(e) provides, in pertinent part:

> A charter city, [or a] charter county . . . with a charter that has a procedure that applies if impasse has been reached . . . and the procedure includes . . . a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

AB 646. It is noted that the text of subsection (e) does not limit the types of disputes subject to binding arbitration. It refers only to "impasse," which, as seen in the definition in EERA section 3540.1(f), uses the terms "dispute" and "differences," placing no limitation on the type of negotiation that may reach impasse.[28] It is true that this exemption contained in MMBA section 3505.5(e) exists because where an impasse is subject to a binding arbitration process, it need not also be subject to a factfinding process. Binding arbitration, after all, resolves a bargaining dispute with finality, negating the need for any additional advisory factfinding and recommendation process. It does not follow, however, that factfinding is therefore limited only to impasses over negotiations for a comprehensive MOU. The applicability of factfinding and the scope of factfinding are two, wholly distinct issues.

The County takes issue with what it characterizes as the Office of the General Counsel's reliance on an EERA decision, *Redwoods CCD, supra,* PERB Decision No. 1141 in support of the determination that MMBA factfinding applies to single issue bargaining disputes. This decision should not be relied on, according to the County, because it arose under EERA and it was premised on the notion that EERA impasse procedures were intended to head off strikes, whereas AB 646 was intended to improve the effectiveness of the collective bargaining process. According to the County, the "MMBA factfinding process thus was clearly for the benefit of the exclusive representatives . . . to provide them with an additional procedural step for impasses in MOU negotiations—not for the public." (County's Appeal, p. 22.) We explained earlier that *Redwoods CCD* is appropriate precedent for the Board to rely on in interpreting AB 646, even though it arose under EERA. We address here the County's contention that factfinding in EERA serves a different purpose than that intended by AB 646.

[28] PERB has applied EERA's definition of "impasse" to cases arising under the MMBA. (*City & County of San Francisco* (2009) PERB Decision No. 2041-M.)

Factfinding is considered to be an effective tool to improve labor relations because it can facilitate mutual agreement by assisting reasoned decision-making after relevant facts are presented. Under EERA, the process may avert strikes by convincing the parties to reach agreement. It may postpone both strikes and unilateral impositions under EERA because neither party may legally use its weapon of last resort until the factfinding procedure is complete.[29] The overall purpose served by EERA's impasse resolution procedure is to assure labor peace by institutionalizing the assistance of a neutral and credible process when the parties have reached an impasse in whatever negotiations they are engaged in. As the Board stated in *Modesto, supra,* PERB Decision No. 291, p. 36:

> The impasse procedure of EERA contemplates a continuation of the bargaining process with the aid of neutral third parties. [Citation omitted.] Mediation is an instrument designed to advance the parties' efforts to reach agreement; factfinding is a second such tool required by the law when mediation fails to bring about agreement. . . . [T]he factfinder's recommendations are a crucial element in the legislative process structured to bring about peacefully negotiated agreements.

The same purpose—assuring labor peace—is served by AB 646, whether it averts or postpones strikes, or postpones imposition of LBFOs, or promotes "full communication between public employers and their employees by providing a reasonable method of resolving disputes." (MMBA, § 3500(a).) The purpose of factfinding under all three statutes that provide for the procedure is the same, and that purpose is not served by reading AB 646 so narrowly as the County urges us to do.

The County cites certain differences between the EERA and MMBA factfinding provisions, such as the fact that MMBA permits local employers to adopt their own rules and regulations governing employment relations, while EERA does not. The scope of bargaining

[29] We agree with the County that the purpose of AB 646 was probably not to head off strikes, because unlike under EERA, only the employee organization may invoke factfinding.

under EERA is more "complicated" than that under the MMBA, the County argues, because it enumerates subjects of bargaining and identifies circumstances in which the Education Code applies if the parties do not reach agreement. Under the MMBA the parties are to split the costs of factfinding, but under EERA, PERB pays for the neutral panel member, according to the County. We note these differences, but the County fails to explain, and we are unable to discern, why or how these differences support the view that MMBA factfinding is a radically constricted procedure, compared to that prescribed by EERA.[30]

C. The Constitutionality of AB 646

The County claims that AB 646 violates Article XI, sections 1 and 11 of the California Constitution because factfinding is an "almost identical" process to the binding arbitration process that was rejected in *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 (*Riverside v. Superior Ct.*). PERB is constitutionally prohibited from declaring any of the statutes it administers unconstitutional. (*Regents of Univ. of California v. Public Employment Relations Bd.* (1983) 139 Cal.App.3d 1037, 1042; Calif. Constitution, Art. III, § 3.5.) We have nevertheless recently explained our view on the scope and limitation of the Supreme Court's

[30] The County also cites to public testimony of former PERB Division Chief Chisholm (Chisholm) at a public meeting of PERB on June 13, 2013, explaining the rationale for proposed changes in MMBA regulations pertaining to the appealability of a board agent's determination regarding factfinding requests. The County quotes Chisholm as stating that "'the distinction' between MMBA and EERA, 'warrants treating these requests differently than the Board treats other impasse determinations.'" (County's Appeal, p, 21, fn. 9.) To the extent the County relies on this quote for its view that factfinding is limited to MOU negotiations, it misconstrues the context of Chisholm's comments. He was explaining why the Board should adopt a regulation that would permit the parties to appeal a Board agent's determination regarding the appropriateness, timeliness, and procedural sufficiency of a factfinding request. Under EERA and HEERA, Board agent decisions as to whether the parties are actually at impasse are not reviewable by the Board itself. Because the MMBA factfinding procedures were new, Chisholm recommended a rule change to allow the Board itself "to apply its expertise and develop case law and precedence [sic] that can then guide future determinations by Board agents and serves to inform the parties as what to expect." (County's Appeal, Ex. J., p. 9.) Nothing in Chisholm's comments suggest an interpretation of AB 646 that would limit it to MOU negotiations.

ruling in *Riverside v. Superior Ct.* in our own *County of Riverside* (2014) PERB Decision No. 2360, pp. 25-28. Nothing in AB 646 interferes with the ultimate decision-making authority of public agencies to determine wages or manage its finances. As the County well knows, it is not compelled to adopt the recommendations of the factfinding panel. Like negotiations, the factfinding process requires the parties to engage in a procedure with no particular outcome mandated. This is quite unlike the binding interest arbitration that was rejected by the Supreme Court in *Riverside v. Superior Ct.*.

CONCLUSION

The Legislature enacted AB 646 to bring to the MMBA a further procedure for resolving bargaining impasses, factfinding after mediation. This procedure has been part of the public sector bargaining landscape under EERA and HEERA since the mid-1970s and has been applied by PERB to a variety of bargaining disputes, not simply impasses over successor or new comprehensive agreements. It is completely within the purpose of the MMBA to import the range of bargaining disputes recognized under EERA and HEERA as appropriate to factfinding, given that one of the purposes of the MMBA is to provide a "reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment." (MMBA, § 3500.) These disputes may take many forms—single-issue disputes over the wages to be paid a new classification, re-opener negotiations, effects of layoff or effects of other management decisions, in addition to disputes over the terms of a comprehensive MOU. Based on application of the rules of statutory construction, we conclude that the Legislature did not intend that MMBA factfinding be cabined to a narrow classification of bargaining disputes, especially given that single-issue disputes, e.g., proposed reductions in health or pension benefits, may engender as much labor-management conflict as negotiations for new or

successor comprehensive MOUs. For these reasons, we affirm the administrative determination.

ORDER

The administrative determination of the Office of the General Counsel that the factfinding procedures set forth in the Meyers-Milias-Brown Act (MMBA) section 3505.4 et seq., are applicable to the dispute in this case is hereby AFFIRMED. AFSCME Local 2700's request for factfinding satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802(a)(2) and the matter is REMANDED to the Office of the General Counsel for further processing pursuant to PERB Regulation 32804.

Chair Martinez and Members Huguenin and Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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October 4, 2013

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Re: *County of Contra Costa and AFSCME Local 2700*
Case No. SF-IM-126-M
Administrative Determination

Dear Interested Parties:

On September 25, 2013, AFSCME Local 2700 (AFSCME or Union) filed a request for factfinding (Request) with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] AFSCME asserts that the County of Contra Costa (County) and Union have been unable to effect a settlement in their current negotiations. AFSCME's Request describes the "type of dispute" as follows:

> The parties have spent considerable time negotiating over the creation of a Legal Clerk Classification. They have reached agreement on all issues except for the issue of whether employees in the Legal Clerk Classification should receive additional compensation.

The County sent the Union a written notice of impasse with respect to these negotiations on September 3, 2013.

[1] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code unless otherwise noted. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Procedural Background

After AFSCME filed its Request, the County was given an opportunity to state its position. On October 1, 2013, the County verbally informed the undersigned Board agent that it would be opposing the Request, and would be filing a written statement to that effect. By letter dated October 2, 2013, the County opposed AFSCME's Request and asserted that the Request was insufficient to meet the statutory requirements for factfinding. The County requested that PERB deny the Request. Subsequently, AFSCME filed a letter disputing the County's position statement.

Later on October 2, 2013, PERB approved AFSCME's Request and informed the parties in an e-mail message that the determination would be memorialized in writing.

Discussion

A. The County's Position

The County explains that the parties have resolved all issues related to the creation of this new classification, with the exception of wages. The Memorandum of Understanding (MOU) between the parties expired on June 30, 2013 and the parties are currently in negotiations for a successor MOU. The County implicitly acknowledges that the negotiations regarding the Legal Clerk Classification were separate and distinct from successor MOU negotiations.

The County asserts that a "single" issue—such as the one asserted by AFSCME—is not subject to the MMBA factfinding provisions, since it is not negotiations for a new or successor collective bargaining agreement (CBA) or MOU. In support of its position, the County relies on several comments made by the author of Assembly Bill (AB) 646[2] and recites the following:

> The author of AB 646, Assembly Member Toni Atkins (D-San Diego) indicated the following purpose for AB 646:
>
> > Although the MMBA requires employers and employees to bargain in good faith, some municipalities and **agencies** choose not to adhere to this principle and instead attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. (Emphasis added.)
>
> Similarly, the State Assembly Floor analysis dated September 1, 2011 at Page 3 states:

[2] AB 646 (Statutes 2011, Chapter 680), is codified at Government Code sections 3505.4, 3505.5 and 3505.7.

> According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in **impasse procedures where efforts to negotiate a collective bargaining agreement have failed.** [...] the creation of mandatory impasse procedures is likely to increase the effectiveness of **the collective bargaining process,** by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. [...] (Emphases added.)

Further, the County also relies upon the last sentence set forth in MMBA section 3505.7[3] and asserts as follows:

> It is apparent from the language of the statute and the legislative history that AB 646 is intended to slow the process of the implementation of last, best, and final offers by public employers. In fact, the statute institutes what is basically advisory interest arbitration to bring the parties to a negotiated resolution as opposed to an implemented one. The pause in bargaining created by AB 646 is intended to allow the parties additional time when negotiation for a collective bargaining agreement fails. The purpose is not served by applying AB 646 to each and every dispute that arises between the parties.
>
> The level of disruption in the ordinary course of labor relations that would follow a decision by PERB to apply AB 646 to all issues for which a meet and confer obligation attaches, is staggering. Neither PERB, the parties, nor the fact-finding community have the resources to apply AB 646 to all disputes. The purpose for this legislation is clearly stated, it was not intended to create a logjam of fact-finding activity to distract from ongoing negotiation for successor MOUs. PERB has the opportunity and responsibility to administratively prevent this paralysis of ongoing labor relations activity.

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[3] Section 3505.7 states in part:

> After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. (Emphasis added.)

B. AFSCME's Position

AFSCME disputes the County's position that the factfinding provisions under the MMBA are intended solely to be used when impasse is reached for a new or successor CBA/MOU. AFSCME asserts that the Legislature clearly intended for the MMBA factfinding provisions to apply to "single" issues, as well as to negotiations for an entire agreement. AFSCME argues that the definition of the terms "dispute" and "differences" as referenced in sections 3505.4 and 3505.5,[4] demonstrate that the Legislature had each and every impasse dispute in mind when drafting this legislation.

AFSCME asserts, in its response to the County's opposition, as follows:

> The County argues that because section 3505.7 provides that an employer may not, after exhausting fact-finding procedures, implement an MOU, this means that the fact-finding procedures of the MMBA must be limited to negotiations for an MOU. This simply doesn't follow. Some disputes that proceed to fact-finding under the MMBA will, of course, involve negotiations over an MOU, and section 3505.7 merely makes clear that after fact-finding in such cases the employer may not implement an MOU. Had the legislature intended to limit factfinding to cases involving negotiations over an MOU surely it would have said so in sections 3505.4 or 3505.5, or elsewhere in

[4] Section 3505.4 provides:

> If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.... (Emphasis added.)

Section 3505.5, subdivision (a) provides in part:

> If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt. (Emphasis added.)

the statute, rather than, as the County claims, by leaving a cryptic mark of its intent in section 3505.7. Because the statutory provisions clearly do not limit the utilization of the MMBA's factfinding procedures to instances in which parties have reached impasse in their negotiations for an MOU, PERB need not consider the legislative history of AB 646 or the County's public policy arguments.

C. MMBA Factfinding Is the Final Step in an Orderly Process Designed to Resolve Any Impasse That Arises From Negotiations Over Matters Within the Scope of Representation

Essentially, the County contends that the factfinding requirements under the MMBA apply only to impasses stemming from negotiations for a new or successor CBA/MOU, and do not apply to impasses resulting from isolated or single issue bargaining or from any other types of negotiations. In support of its position, the County quotes portions of the legislative history of AB 646 that reference the fact that under AB 646, the parties may engage in factfinding if they are unable to reach a "collective bargaining agreement."

1. The MMBA's Meet and Confer Obligations in General

The duty to meet and confer in good faith "means that the parties must genuinely seek to reach agreement, but the MMBA does not require that an agreement result in every instance, and it recognizes that a public employer has the ultimate power to reject employee proposals on any particular issue." (*International Assoc. of Fire Fighters, Local 188, AFL-CIO v. City of Richmond* (2011) 51 Cal.4th 259, 271 [*City of Richmond*].) The duty to meet and confer in good faith extends to all matters within the scope of representation, which is defined as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment," but does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) "'The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse ....'" (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1083-1084, quoting *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.)

2. The MMBA Factfinding Provisions Adopted by the Legislature Under AB 646

In 2011, the Legislature for the first time established a structured impasse procedure, applicable statewide, for the MMBA, by enacting factfinding provisions pursuant to AB 646.[5]

[5] The legislative history does not evidence the Legislature's intent to provide that negotiations for a new or successor CBA/MOU are the *only* types of disputes that can be submitted to factfinding. If the Legislature had wanted to exclude factfinding for all disputes other than for a CBA/MOU, it could have expressly included a provision to that effect, but failed to do so. Moreover, generally, the statements of the author of legislation are not determinative of legislative intent as there is no guarantee that others in the Legislature shared

The statute provided that only unions could invoke the MMBA's factfinding provisions. While AB 646 imposed new obligations on MMBA employers, it also provided them with a more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose their "last, best, and final offer" on the subject of the parties' negotiations. (§ 3505.7.) Also in 2011, PERB promulgated regulations for administering the MMBA factfinding process. (Cal. Code Regs., tit. 8, §§ 32802, 32804.)

In 2012, the Legislature amended Government Code section 3504.5, pursuant to Assembly Bill 1606 (Statutes 2012, Chapter 314, effective January 1, 2013), in part to expressly codify the procedures PERB had adopted by regulation to implement AB 646. The Legislature deemed the 2012 amendments as technical and clarifying of existing law. (*Ibid.*)

Previously PERB Regulation 32802, subdivision (e), prohibited an appeal of a determination of the sufficiency of a factfinding request. Effective October 1, 2013, PERB's regulations have been modified to delete subdivision (e), and now permit an appeal by either party to the Board itself of a factfinding determination.

It is also noted that although the use of PERB's form, titled "MMBA Factfinding Request" is not required, the form, under Type of Dispute, lists as examples all of the following: "initial contract, successor contract, reopeners, effects of layoff, other."

3. PERB's Interpretation of the Term "Impasse"

Where the parties are not required to and have not engaged the services of a mediator, the MMBA factfinding provisions may be invoked by an exclusive representative only after one party provides the other with a written declaration of *impasse*. (§ 3505.4 ["an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse"].)

Although the MMBA uses the term "impasse," it does not define that term, unlike other statutes within PERB's jurisdiction. For instance, the Educational Employment Relations Act (§ 3540 et seq. [EERA]) defines "impasse" to mean "the parties to a *dispute* over matters within the scope of representation have reached a point in meeting and negotiating at which their *differences* in positions are so substantial or prolonged that future meetings would be futile." (§ 3540.1, subd. (f), emphasis added.)[6] Thus, PERB has held that an impasse in bargaining exists where the "parties have considered each other's proposals and

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the same view. (*San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 863.)

[6] Similarly, under the Higher Education Employer-Employee Relations Act (§ 3560 et seq. [HEERA]), impasse is defined to mean that "the parties have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile." (§ 3562, subd. (j).)

counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124.)

Given the longstanding acceptance of the concept of impasse as a term of art central to labor relations, the Board has held that the definition of impasse under EERA, as interpreted by PERB, is the appropriate standard under the MMBA as well. (*Fire Fighters Union* v. *City of Vallejo* (1974) 12 Cal.3d 608 [*Fire Fighters Union*]; *City & County of San Francisco* (2009) PERB Decision No. 2041-M.) The definition of impasse does not limit the types of "disputes" or "differences" that the parties may have to just those for a new or successor CBA/MOU. In fact, nowhere in the statutory or decisional law definitions of impasse do the terms "agreement" or "collective bargaining" appear.

4. The Courts, PERB and NLRB's Interpretation of the Terms "Collective Bargaining" and "Collective Bargaining Agreement"

As noted previously, the County asserts that the Legislature's use of the term "collective bargaining" means that the public agency and the exclusive representative are negotiating a complete new or successor CBA/MOU that governs all of the employees' terms and conditions of employment. In other words, the County appears to assert that collective bargaining only occurs during a certain period of time, culminating in some type of comprehensive master agreement that ideally addresses all wages, hours, and other terms and conditions of employment, with the term of such agreement set for one or more years. As the County would have it, only if the parties cannot reach agreement on this "master" CBA/MOU, may the Union invoke the MMBA's factfinding procedures for assistance.

PERB and NLRB decisions have made clear, however, that collective bargaining is a *continuing process* that is not restricted to one comprehensive agreement or one single period of bargaining. California's public sector collective bargaining statutes are largely modeled after the federal National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.). (*Long Beach Community College District* (2003) PERB Decision No. 1564; *City of San Jose* (2010) PERB Decision No. 2141-M.) Accordingly, when interpreting the MMBA, courts and PERB have appropriately taken guidance from the express language of the NLRA, as well as from cases interpreting the NLRA. (*Fire Fighters Union*, *supra*, 12 Cal.3d at pp. 615-617.) For instance, the Supreme Court has noted that the phrase in the MMBA's meet and confer requirement regarding "wages, hours, and other terms and conditions of employment" was taken directly from section 8(d) of the NLRA concerning the "the obligation to bargain collectively," which states in relevant part:

> For the purposes of this section, to ***bargain collectively*** is the performance of the mutual obligation of the employer and the representative of the employees to ***meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder***, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not

> compel either party to agree to a proposal or require the making of a concession. . .

(29 U.S.C. § 158(d), emphasis added, *Fire Fighters Union*, *supra*, at p. 617.)

As the express language of the NLRA makes clear, the obligation to bargain collectively is not just limited to the "negotiation of an agreement." Rather, such an obligation also encompasses meeting with respect to any wages, hours, and other terms and conditions of employment, as well as concerning questions or disputes that may arise within the agreement. In the words of the United States Supreme Court:

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

(*Conley v. Gibson* (1957) 355 U.S. 41, 46, overruled in part on other grounds; see also, *National Labor Relations Board v. Acme Indus. Co.* (1967) 385 U.S. 432, 435-436.)

More importantly, courts have described a "collective bargaining agreement" as "the framework within which the process of collective bargaining may be carried on." (*J.I. Case Co. v. National Labor Relations Board* (7th Cir. 1958) 253 F.2d 149, 153.) In *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, the California Supreme Court observed that a collective bargaining agreement '"is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate .... It calls into being a new common law - the common law of the particular industry.'" (*Id.* at p. 177, quoting *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578 [*Warrior & Gulf Co.*].)

5. The MMBA Does Not Expressly Limit Factfinding Solely to Impasses Over Negotiations for a CBA/MOU

The MMBA, when construed as a whole, simply does not limit the applicability of its factfinding provisions solely to disputes arising from negotiations for a CBA/MOU. Section 3505.4, provides that an "employee organization may request that the parties' differences be submitted to a factfinding panel" following mediation, or if the "dispute" is not submitted to mediation, then the employee organization may request that the parties "differences be submitted to a factfinding panel...." (§ 3505.4, subd. (a).) There is no language in the statute that limits the types of "differences" or "disputes" that may be submitted to a factfinding panel.

As added by AB 646, moreover, section 3505.5 provides that if the "dispute" is not settled within a set time, the factfinding panel "shall make findings of fact and recommended terms of settlement, which shall be advisory only." (§ 3505.5, subd. (a).) Again, there is no language in that statute limiting the parties' "dispute," which can be submitted to a factfinding panel, to negotiations for an MOU, or any other "type" of negotiations. Section 3505.7 further provides that after any applicable impasse procedures have been exhausted, and written findings of fact

and recommended terms of settlement have been submitted to the parties and made public, a public agency may implement its last, best, and final offer, but is not permitted to implement a MOU. (§ 3505.7.)

Thus, once an employee organization requests the parties' "differences" be submitted to factfinding, and the procedural aspects of the factfinding sections are met, then participation in factfinding is mandatory. The plain language of the factfinding sections does not distinguish or limit the types of disputes that arise in collective bargaining negotiations that may be submitted to factfinding. If the Legislature intended to limit the types of disputes or differences that could be submitted to a factfinding panel only to those arising during negotiations for a CBA or MOU, it could have done so explicitly. It did not. Accordingly, when the MMBA's statutory scheme is viewed as a whole, the County's interpretation of the factfinding provisions as applying only to negotiations for an CBA/MOU is simply not a correct interpretation of the statute.

Finally, it is well settled that public employers who are subject to the MMBA and other collective bargaining statutes administered by PERB may not make a unilateral change in a negotiable subject until all applicable impasse procedures have been exhausted, as impasse procedures are part of the collective bargaining process. (*Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, 199-200 [*Moreno Valley*]; *Temple City Unified School District* (1990) PERB Decision No. 841, p. 11; see also § 3506.5, subd. (e).) According to the County's interpretation that MMBA factfinding applies only to impasse over negotiations for a complete CBA or MOU, this would necessarily mean that single employment issues would be excluded from the statutory impasse procedures, and would thus allow the public agency to impose its will on employees if the parties cannot reach agreement. Unlike "main table" negotiations for a new or successor CBA/MOU, employers often have control over the timing of "single" subjects, such as layoffs or the creation of a new position. If PERB were to accept the County's position that only new or successor CBAs/MOUs are subject to factfinding, an employer could splinter subjects within the scope of representation into multiple "single" issues, in order to intentionally avoid factfinding.

This interpretation is contrary to the intent of AB 646, which was enacted to prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency's goals and agenda before exhausting available impasse procedures. Moreover, the County's claim that the MMBA does not authorize factfinding other than for negotiations for a CBA/MOU cannot be squared with the MMBA's stated purposes "to promote full communication between public employers and employees," and "to improve personnel management and employer-employee relations." (§ 3500.) Allowing the County to take unilateral action concerning the parties' employment relationship without exhausting the MMBA's impasse procedures simply because the parties' dispute does not arise during negotiations for a CBA/MOU, does not further, but would rather frustrate, the MMBA's purpose of promoting full communications between the parties and improving employer-employee relations.

6. PERB Has Interpreted Statutory Impasse Procedures Under EERA and HEERA to Apply to a Wide Variety of Collective Bargaining Negotiations, and Not Just Those for a CBA/MOU

The County's assertion that MMBA factfinding provisions are limited only to those negotiations for a CBA/MOU that reach impasse is contrary to the language and judicial interpretation of factfinding provisions found in the other collective bargaining statutes that PERB administers. As discussed above, it is well settled that statutes should be construed in harmony with other statutes on the same general subject. (*Farrell*, 41 Cal.3d at p. 665) Moreover, when interpreting the MMBA, PERB appropriately takes guidance from cases interpreting not only the NLRA, but also other collective bargaining statutes that PERB administers with provisions similar to those of the MMBA. (*Fire Fighters Union*, *supra*, 12 Cal.3d 608.)

EERA and HEERA contain provisions governing impasse resolution that are similar, though not identical, to the those in the MMBA. (Compare §§ 3548-3548.8 [EERA], with §§ 3590-3594 [HEERA], and §§ 3505.4-3505.7 [MMBA].) Under long-standing case law, PERB and the courts have interpreted the impasse provisions under EERA and HEERA as applying to negotiations other than just those for an MOU or CBA. Under this body of related law, to which our Supreme Court has directed the courts to look for reliable guidance when they are called upon to interpret the latter statute (*City of San Jose*, *supra*, 49 Cal.4th at pp. 605-607 & fn. 3), it is clear that public employers are prohibited from making a unilateral change on a matter subject to *impacts* and *effects* bargaining until all applicable impasse procedures have been exhausted.

For example, in *Moreno Valley Unified School District* (1982) PERB Decision No. 206, the Board upheld a hearing officer's determination that, among other things, the District violated section 3543.5, subdivision (e), by failing to participate in impasse procedures in good faith, and by making unilateral changes prior to the exhaustion of the statutory impasse procedures under EERA, as to proposals to eliminate teaching and staff positions. (*Id.* at pp. 1-2, 11-12.) The District subsequently filed a writ of mandate challenging the Board's decision. In *Moreno Valley*, *supra*, 142 Cal.App.3d 191, the Court of Appeal upheld PERB's determination that the school district committed an unfair labor practice under EERA by unilaterally implementing changes in employment conditions before exhausting statutory impasse procedures, including failing to participate in good faith in impasse procedures regarding the "effects" of the school district's decision to eliminate certain teaching and staff positions. (*Id.* at pp. 200, 202-205.) The court stated that "[s]ince 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process . . . the Board reasonably interpreted the statute in finding a per se violation of the statutory duty of employers to participate in good faith in the impasse procedures." (*Id.* at p. 200.)

In *Redwoods Community College District* (1996) PERB Decision No. 1141 (*Redwoods*), the Board determined that EERA's statutory impasse procedures applied to the parties' negotiations over hours of security officers, which were conducted *separate and apart* from the parties' negotiations for a successor MOU. In that regard, the parties negotiated a contract provision covering workweeks and work schedules, which provided for negotiations between the employer and the employee representative regarding any change in hours. (*Ibid.*) That

provision further stated that if negotiations were unsuccessful, the parties would submit the dispute to mediation. (*Ibid.*) The provision also stated that the dispute "shall not be submitted to a fact-finding panel under the provisions of the [EERA]." (*Ibid.*) The Board held that the parties could not waive EERA's statutory impasse procedures, ***noting that until the impasse procedures are completed, the employer may not make a unilateral change in a negotiable subject.*** (*Ibid.*; see also, *California State University* (1990) PERB Decision No. 799-H [a HEERA case, where the parties participated in mediation and factfinding concerning negotiations over increased parking fees].)

Thus, as PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper, and should be applied to factfinding requests made under sections 3505.4, 3505.5 and 3505.7.

7. The MMBA Factfinding Provisions Do Not Raise a Constitutional Issue

To the extent the County may be suggesting that the MMBA factfinding is an unconstitutional imposition on local agencies, there is no legal authority to support such a claim. MMBA factfinding, as an *advisory* method of post-impasse dispute resolution, does not delegate or deprive the County of its constitutional authority to set terms and conditions of employment and, as such, MMBA factfinding clearly passes constitutional muster. Because MMBA factfinding does not impair or delegate to a private party any of the County's powers, it does not suffer any constitutional infirmity. (*County of Sonoma v. Sonoma County Law Enforcement Assn.* (2009) 173 Cal.App.4th 322 [*Sonoma*]; *County of Riverside v. Riverside Sheriffs' Assn.* (2003) 30 Cal.4th 278 [*Riverside*].) While the decisions in *Riverside* and *Sonoma* eradicated the ability of unions to compel an MMBA employer to participate in ***binding*** interest arbitration after negotiations have reached impasse, the decisions make clear that an impasse resolution method that leaves intact a County's constitutional right to set terms and conditions of employment is a lawful method of impasse resolution. (*Ibid.*)

Determination

Applying the precedent discussed above, PERB concludes that the factfinding procedures set forth in MMBA section 3505.4 et seq. are applicable under the particular facts of this case.

Given the specific facts of this case, PERB determines that AFSCME's Request satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802, subdivision (a)(2). Therefore, AFSCME's Request will be processed by PERB.

Next Steps

Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than October 11, 2013.[7] Service and proof of service are required.

[7] This deadline, and any other referenced, may be extended by mutual agreement of the parties.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.[8] The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, *prior* to informing PERB of the selection.

Unless the parties notify PERB, on or before October 11, 2013, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

Pursuant to PERB Regulations, the County may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If the County appeals this determination, the Union may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

[8] The seven neutrals whose résumés are being provided are Robert M. Hirsch, Carol Vendrillo, Barry Winograd, Paul Roose, David Weinberg, Katherine Thomson, and Christopher Burdick.

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely,

Wendi L. Ross
Deputy General Counsel

Exhibit 17

***County of Fresno* (2014)**
PERB Order No. Ad-414-M p. 15

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF FRESNO, Employer, and SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 521, Exclusive Representative.	Case No. SA-IM-136-M Administrative Appeal PERB Order No. Ad-414-M June 17, 2014

Appearances: Catherine E. Basham and Amanda Ruiz, Attorneys, County Counsel, for County of Fresno; Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for Service Employees International Union, Local 521.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the County of Fresno (County) from an administrative determination (attached) made by the Office of the General Counsel that concluded factfinding procedures defined in the Meyers-Milias-Brown Act (MMBA) section 3505.4[1] and PERB Regulation 32802[2] applied to the bargaining impasse between the County and Service Employees International Union, Local 521 (SEIU).[3] The bargaining dispute concerned two

[1] The MMBA is codified at Government Code section 3500 et seq.

[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[3] Statutory references are to the Government Code unless otherwise noted. MMBA section 3505.4 establishes a non-binding factfinding procedure for resolving post-impasse bargaining disputes that may be invoked by the representative employee organization after mediation efforts, if available, have failed to produce a settlement.

County proposals regarding the number of employees working 12-hour shifts at the county jail and the addition of specialized assignments at the jail.

Based on our recent decision *County of Contra Costa* (2014) PERB Decision No. Ad-410-M (*Contra Costa*), in which we held that the factfinding procedures set forth in MMBA sections 3505.4 through 3505.7 apply to bargaining disputes over all matters within the scope of representation, we affirm the administrative determination.[4]

PROCEDURAL HISTORY

SEIU filed its request for factfinding on October 30, 2013, pursuant to MMBA section 3505.4 claiming that the parties declared impasse on October 28, 2013. The parties had met and conferred on three occasions prior to this date, and the County began to implement its proposals regarding jail staffing.

The County objected to SEIU's request for factfinding on three separate grounds. First, it asserted that the request was premature because no written notice of impasse had been issued by either party.

Second, the County argued that PERB was bound by a ruling by the superior court in *County of Riverside v. Public Employment Relations Board* (2013) Case No. RIC 1305661 (*Riverside*), which enjoined PERB from approving any request for factfinding in any bargaining dispute other than for a new or successor comprehensive memorandum of understanding (MOU). Thus, argued the County, PERB is prohibited from processing SEIU's request for factfinding in this case.

[4] PERB Regulation 32315 does not provide for oral argument on review of an administrative determination. Oral argument may only be requested upon exceptions being filed to a proposed decision. Therefore, SEIU's request for oral argument is denied.

Lastly, the County asserted that the legislative history of Assembly Bill (AB) 646 definitively shows the Legislature intended to limit factfinding procedures only to "collective bargaining agreements or MOUs." (County's November 1, 2013 Letter to PERB, p. 2.)

In response, SEIU asserted that *Riverside* does not bar PERB from processing its factfinding request in this case because the superior court ruling is not final and therefore the doctrine of res judicata does not apply in this case.[5] Addressing the merits, SEIU argued that AB 646 was intended to apply to bargaining disputes such as the one presented by this case.

ADMINISTRATIVE DETERMINATION

The Office of the General Counsel rejected the County's objections to factfinding, concluding that AB 646 applies to all bargaining disputes concerning matters within the scope of representation, and that such a reading comports with PERB's decisions interpreting similar language under the Educational Employment Relations Act (EERA).[6]

The Office of the General Counsel further concluded that the County's implementation of its proposals "is deemed to be or to include a 'written notice of declaration of impasse' within the meaning of section 3505.4." (Admin. Determination, p. 12.)[7]

[5] The doctrines of res judicata, or "claim preclusion" hold that a final judgment on the merits is a complete bar to further litigation on the same cause of action or defense by the same parties or those in privity with them. (7 Witkin California Procedure, Judgment, §§ 334 to 482 (5th ed. 2008).) The related doctrine of collateral estoppel or "issue preclusion," bars the parties from relitigating issues actually determined against them in an action in a subsequent cause of action. (7 Witkin, *id.* §§ 413-451.)

[6] EERA is codified at Government Code section 3540 et seq.

[7] The County did not object to this conclusion in its appeal. The issue is therefore not before us and we do not consider it.

Finally, the Office of the General Counsel rejected the County's assertion that res judicata or collateral estoppel precluded the Board from acting on SEIU's request for appointment of a factfinding panel because no final decision had issued in *Riverside.*

Having concluded that the factfinding procedures set forth in MMBA section 3505.4 were applicable to this dispute, the Office of General Counsel ordered each party to select its factfinding panel member and notify the Office of the General Counsel of the selection by November 19, 2013.

The County filed a timely appeal from this administrative determination.

THE COUNTY'S APPEAL

The County asserts three reasons for overturning the administrative determination. It claims that PERB does not have jurisdiction to review the Office of the General Counsel's determination that factfinding should occur because in this case, SEIU filed an unfair practice charge alleging that the County "improperly failed to engage in fact finding prior to creating a specialized assignment and increasing the number of 12-hour shifts for correctional officers." (County's Appeal, p. 5.) Therefore, the appropriateness of factfinding should be determined only after the full evidentiary process of an unfair practice proceeding, according to the County. It claims that the administrative determination is an advisory opinion, and by implication, a decision affirming the administrative determination would also be advisory in nature.

Second, the County renews its argument that PERB is enjoined and estopped from ordering factfinding by the superior court's decision in *Riverside.*

Finally, the County argues that AB 646 was not intended to apply to all impasses in bargaining disputes, but only to those reached in the course of negotiating new or successor comprehensive MOUs.

SEIU'S RESPONSE

SEIU contends in response to the County's appeal that the County conflates statutory impasse procedures with unfair practice proceedings, and that nothing precludes it from simultaneously pursuing its claim made in its unfair practice charge—that the County violated the MMBA by unilaterally implementing a unilateral change in negotiable terms and conditions of employment before exhausting impasse procedures—and requesting factfinding under MMBA section 3505.4.

SEIU also argues that the order by the superior court in *Riverside* does not enjoin or estop PERB from processing factfinding requests on "single issue" bargaining disputes because the superior court order is on appeal and therefore not final.

As to the intent of AB 646, SEIU asserts that it was intended to apply to all bargaining disputes, and not just those arising from the negotiation of new or successor MOUs.

DISCUSSION

1. The Board's Jurisdiction to Administer Factfinding Under the MMBA

The County makes two claims in its objection to PERB's jurisdiction. It first asserts that MMBA section 3509(b) provides that alleged violations of the MMBA shall be processed as unfair practices charges, implying that PERB may not "enforce" the MMBA by any means other than an unfair practice charge.

We addressed this claim in our recent decision in *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 12-13, fn. 8, where we noted the difference between an administrative

determination that orders the parties to participate in factfinding and a complaint that alleges a violation of the MMBA. We further explained in *City of Redondo Beach* (2014) PERB Order No. Ad-409-M, p. 5 that MMBA section 3509 is not the source of PERB's authority to appoint a factfinding panel. That authority derives from MMBA section 3505.4, and is not predicated on an alleged violation of the MMBA. As in *Contra Costa, supra,* PERB Order No. Ad-410-M, the County's appeal of the administrative determination will not result in any determination that the County violated the MMBA.

Secondly, the County argues that a determination in this administrative appeal could result in a determination of the County's liability in the unfair practice charge filed by SEIU alleging that the County unilaterally changed negotiable terms and conditions of employment before exhausting required impasse procedures.[8] The County urges the Board to declare the administrative determination void as an invalid advisory opinion. According to the County, the only situation in which this Board may determine whether factfinding applies to the parties' bargaining dispute is in the context of unfair practice proceedings. The County asserts that the administrative determination directing the parties to participate in factfinding "bypasses" the unfair practice adjudication process and would constitute an advisory opinion. We disagree.

[8] We take administrative notice of the agency's file in Unfair Practice Case No. SA-CE-846-M. PERB issued a complaint based on this charge on November 26, 2013 and a formal hearing is scheduled for July 2014. The complaint alleges that the County increased the number of 12-hours shifts available to corrections officers and created two new specialty assignments that are exempt from seniority-based bidding procedures without providing SEIU an opportunity to meet and confer over the decision and/or the effects of these changes in policy. The complaint further alleges that between October 30, 2013 (when SEIU requested factfinding) and November 14, 2013 (when the administrative determination issued), the County engaged in the unilateral conduct described above, which constitutes a failure and refusal to participate in factfinding procedures in good faith.

As we explained in *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 11-12, PERB has jurisdiction to determine whether the provisions of MMBA section 3505.4 apply to a particular factfinding request and PERB Regulation 32802(c) empowers the Board to notify the parties whether a request for factfinding has met the requirements of subsection (a)(1) or (2) of PERB Regulation 32802. Such a determination is necessarily made on a case-by-case basis after a review of the request itself and an assessment of the timelines, and, as in this case, after determining whether factfinding applies to the dispute between the parties. The administrative determination in this case was based on a review of the facts and an analysis of the law and it resulted in a direction to the parties to implement the next steps in the factfinding process. In sum, there was nothing "advisory" about the administrative determination.

Nor is a ruling by the Board itself on the County's appeal of the administrative determination an advisory opinion.[9] The County has appealed the administrative determination, presumably seeking an order from the Board itself overturning the administrative determination and absolving it of the duty to participate in factfinding. Such an order would not be theoretical or advisory, since it would resolve an actual, concrete dispute between the parties. Depending on the outcome of the appeal, an order would require either an affirmative act on the part of the County to participate in factfinding, or would direct the Office of the General Counsel to rescind its order to the parties to take the next steps in the factfinding process. We conclude, therefore that our decision resolving the County's appeal is not an advisory opinion.

[9] PERB does not render advisory opinions, but instead exercises its adjudicatory function through decisions resolving actual controversies between the parties concerning findings of facts and/or conclusions of law. (*Santa Clarita Community College District (College of the Canyons)* (2003) PERB Decision No. 1506, pp. 27-28, and cases cited therein.)

Our resolution of the issue presented by the County's appeal—whether the MMBA factfinding procedure applies to the two County proposals in dispute between the parties—conceivably overlaps with an issue in the unfair practice case, but does not prejudice nor determine the ultimate outcome in the unfair practice case. Our determination that factfinding applies to the bargaining dispute that is also the subject of the unfair practice complaint does not assess or decide any potential defenses the County may interpose to the unfair practice complaint. That task lies initially with the administrative law judge.

The issue before us in the instant case is simply whether the Office of the General Counsel correctly determined that the factfinding process applied to this bargaining dispute. The outcome of this case will be an order directing the parties to select their respective members of the factfinding panel and proceed to factfinding, a process that assists the parties in reaching agreement pursuant to the factfinding panel's recommended terms of settlement. The recommended terms of settlement are not binding on the parties. Unlike a remedy in an unfair practice proceeding, which could result in an order to rescind unilateral changes if the employer is determined to have violated the MMBA, an order resolving the issues raised by this appeal does not dictate a particular outcome to the underlying bargaining dispute.

In sum, both unfair practice litigation and this appeal may deal with the issue of whether the County was obligated to participate in factfinding. But our determination in this case that it was obligated to do so does not necessarily determine the outcome of the unfair practice proceeding. PERB's determination of the issues presented in this case is therefore not an advisory opinion that the County implies would interfere with the unfair practice case.

2. Effect of Superior Court's Decision in *Riverside*

The County's claims on this point have been addressed by *Contra Costa, supra,* PERB Order No. Ad-410-M, pp. 13-14. It is well-settled that doctrines of res judicata and collateral estoppel do not apply until and unless a court decision is final. (7 Witkin Calif. Procedure, 5th ed. (2008) Judgment, § 364.) PERB has appealed the superior court's ruling in *Riverside,* so these doctrines, even if they were applicable to this case, do not preclude this Board from ordering the parties to participate in factfinding.

Likewise, the County's assertion that PERB is bound by the superior court's injunction and issuance of a writ of mandate is rejected, because an appeal of the issuance of a writ of mandate and of an injunction automatically stays those orders. (Code of Civil Proc., § 916; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190; *Private Investors v. Homestake Mining Co.* (1936) 11 Cal.App.2d 488.)[10]

3. Factfinding Procedures Apply to All Bargaining Disputes Over Negotiable Matters

As did the employer in *Contra Costa, supra,* PERB Order No. Ad-410-M , the County here argues that the legislative history of AB 646 indicates that it was intended to apply only to impasses in negotiations for new or successor MOUs, and not to impasses in bargaining over mid-term reopeners, or the effects of non-mandatory subjects of bargaining, such layoffs, or other single-issue disputes. The County also points to the placement of factfinding requirements in the sections of the MMBA dealing with negotiations of MOUs as evidence of the Legislature's intent to limit the scope of factfinding under the MMBA. It further argues

[10] In *Riverside,* the county filed a petition in the Court of Appeal for a writ of supersedeas seeking to lift the automatic stay of the superior court's order. The writ was summarily denied by the Court of Appeal on January 14, 2014.

that the eight criteria set forth in MMBA sec. 3505.4 that the factfinding panel is directed to consider in arriving at their findings and recommendations primarily concern factors relating to wages. Since none of the criteria would allegedly be relevant to the negotiations regarding the issues that divide the parties in this case, factfinding cannot apply to this dispute, according to the County.

All of these contentions were addressed and resolved in *Contra Costa, supra,* PERB Order No. Ad-410-M. In that case we determined that the plain meaning of AB 646 did not limit factfinding procedures only to impasses in negotiations for comprehensive MOUs. (*Contra Costa*, p. 32.) Nevertheless, we reviewed the legislative history of AB 646, and rejected the employer's claim, repeated in this case, that comments by the author of AB 646 were dispositive that the bill was intended only for disputes over comprehensive MOUs. It is well-settled that a single legislator's comments, even the author's, cannot be relied on for legislative history because they do not necessarily represent the intent of the Legislature as a whole. (*Contra Costa*, p. 34.) We also reviewed various summaries of AB 646 as it moved through the Legislature, noting changes in those summaries from describing factfinding as a procedure parties may engage in "if they are unable to reach a collective bargaining agreement," to permitting factfinding "if a mediator is unable to reach a settlement" or a "settlement of a labor dispute." (*Contra Costa*, pp. 34-35, emphasis in original.)

We also considered in *Contra Costa, supra,* PERB Order No. Ad-410-M, the contention that the placement of the language of AB 646 following the portion of the MMBA section 3505 concerning the duty to meet and confer in good faith meant that AB 646 applies only to comprehensive MOUs. (*Contra Costa,* pp. 37-42.) We rejected that argument, concluding:

> It is logical for the Legislature to have codified AB 646 within this part of the MMBA because the leading provision, MMBA section 3505, establishes the duty to meet and confer in good faith, and subsequent provisions prescribe certain procedures concerning bargaining. We do not find that the codification of AB 646 within that part of the MMBA that describes bargaining generally indicates the Legislature's intent to confine factfinding only to comprehensive MOU negotiations, especially where other subsections of MMBA section 3505 do not limit negotiations only to such comprehensive agreements.

Contra Costa, supra, PERB Order No. Ad-410-M also addressed the County's argument that the enumeration in MMBA section 3505.4(c) of eight criteria that the factfinding panel must consider supports its view that factfinding applies only to comprehensive MOUs. (*Contra Costa,* pp. 42-44.) We noted that these are virtually the same criteria enumerated in EERA, and it is well-established that under EERA, factfinding has been applied to single-issue disputes, mid-term negotiations and effects bargaining. Common sense does not require that each of these criteria be applied in every bargaining dispute. Depending on the dispute, some criteria may be more relevant than others.

Finally, the County contends that PERB's reliance on EERA for any conclusion that factfinding applies to all bargaining disputes is misplaced because there are three main differences between EERA and the MMBA factfinding procedures that require the narrow construction of AB 646 that the County urges. The County points out that under the MMBA, only the employee organization may invoke factfinding, whereas under EERA, either party may invoke it and the procedure commences only after PERB determines that the parties are at an impasse.[11] According to the County, the fact that only employee organizations may invoke

[11] EERA section 3548 provides that either party may declare impasse and request the appointment of a mediator. If the board determines that an impasse exists, it appoints a mediator. EERA section 3548.1 provides: "If a mediator is unable to effect settlement of the

factfinding, combined with the lack of PERB oversight in the determination of whether there is actually an impasse "greatly increases the likelihood that the process will be abused by employee representatives who seek only to delay." (County's Appeal, p. 14.)

It is not for PERB to speculate about the policy choices made by the Legislature. We do note however, that the Legislature is presumed to have known when AB 646 was passed that PERB applied the impasse resolution procedures under EERA to single-issue bargaining disputes, mid-term contract negotiations and effects bargaining disputes. (*Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1018; *Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal.App.3d 166, 170.) Had the Legislature intended that AB 646 apply to a narrower range of bargaining disputes than PERB had previously sanctioned, it could have easily drafted language saying so. As for the County's speculation that the legislative choice made by the Legislature will cause employee organizations to abuse the process and cause delay, this is a policy argument best addressed to the Legislature.

The second distinction between EERA and the MMBA factfinding procedure cited by the County is the fact that under EERA, the factfinding panel chair is appointed by PERB at no cost to the parties, whereas the costs of factfinding are split between the public agency and employee organization under the MMBA. According to the County, "It is inconceivable that the Legislature intended public agencies to expend their limited resources—taxpayer funding—engaging in factfinding over the effects of a management right or single issue negotiations at the whim of an employee organization." (County's Appeal, p. 14.) Again, this is an argument best addressed to the Legislature, rather than PERB. We note that because the costs are split between the parties under the MMBA, the employee organizations may be

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controversy . . . and declares that facfinding is appropriate to the resolution of the impasse, either party may . . . request that their differences be submitted to a factfinding panel."

constrained by similar economic forces as employers. Unions undoubtedly will be forced to pick and choose the disputes they take to factfinding, as they do not have limitless funds to spend on factfinding panels without regard to the importance of the dispute to their members.

Finally, the County argues that the differences between EERA and the MMBA on public disclosure of bargaining proposals requires that we find that MMBA factfinding is limited only to bargaining disputes over comprehensive MOUs. Under EERA, bargaining proposals of both parties must be presented at a public meeting of the public employer before negotiations may commence. (EERA, § 3547.) The requirement in EERA section 3548.3 that the factfinding report is to be made public by the employer before it makes any decision regarding the report is therefore "consistent with the rest of the EERA impasse procedures," according to the County. In contrast, there is no requirement under the MMBA for public employers to "sunshine" either their proposals or agreements, according to the County. "Public employers . . . are only required under the Brown Act . . . to place on the agenda and take a public vote on contracts, including memoranda of understanding or collective bargaining agreements. There is no requirement for a public meeting on proposals or negotiations over single issues that do not result in contracts or negotiations on the impact of decisions outside the scope of bargaining." (County Appeal, p. 14.) If factfinding is applicable to disputes other than initial or successor MOUs, then public employers would be required by MMBA section 3505.7 to hold public hearings on a factfinding report before they implement their last, best and final offer (LBFO) over, for example, the effects of layoff, before it can "move forward with action that it has an unmistakable right to take." (County Appeal, p. 15.)

We reject this argument for several reasons. As an initial matter, we determined in *Contra Costa, supra,* PERB Order No. Ad-410-M that the term "MOU" does not refer only to

a comprehensive collective bargaining agreement that typically addresses all subjects the parties bargained over and is in effect for a set duration of time. As we explained in *Contra Costa,* pp. 23-24:

> The duty to bargain in good faith applies to any matter within the scope of representation and is not confined to negotiations that result in a comprehensive MOU for a certain duration . . . .
>
> [¶]
>
> . . . . Under the MMBA, an MOU is the end product of meeting and conferring on matters within the scope of representation if a tentative agreement is adopted by the governing body of the public agency. (MMBA, § 3505.1.) In other words, an 'MOU' signifies a written agreement on any matter within the scope of representation. It can address a single subject, the effect of a decision within the managerial prerogative, mid-term negotiations, or side letters of agreement, etc.

Thus, whenever a tentative agreement on any negotiable subject is reached by the parties, MMBA section 3505.1 obligates the public agency to vote to accept or reject such agreement at a duly noticed public meeting. The purpose of any public meeting is to inform the public of official actions taken by the governing board of the public entity and presumably to receive input from the public before official action is taken (Brown Act at Gov. Code, § 54954.3; *Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461 [Brown Act is intended to facilitate public participation in all phases of local government decision-making]). Therefore, when the County places a tentative agreement with an employee representative organization on its agenda for a "duly noticed public meeting," it presumably makes the tentative agreement available to the public so that the public may meaningfully comment on the tentative agreement.

The obligation under MMBA section 3505.7 is no more onerous or time-consuming than what is already required when the parties reach a tentative agreement

without resort to impasse resolution procedures. The County need only wait 10 days after the factfinding panel's recommendations have been submitted to the parties before holding a public meeting regarding the impasse before it may implement its LBFO. Given the Legislature's choice favoring public disclosure of tentative agreements and matters regarding the impasse, delaying implementation of an LBFO for ten days in order to keep the public informed is not an onerous requirement.

Factfinding imposes a new process on the parties in MMBA jurisdictions, a process that is intended to assist the parties in reaching agreement, a goal which is firmly established as one of the purposes of the MMBA—to provide a "reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment." (MMBA, § 3500.) That this process may delay a public agency from imposing its LBFO the day after it determines the parties are at impasse is something the Legislature no doubt considered in passing AB 646. Any claim that this legislative policy choice will waste public funds or impede the functioning of local governments is thus best addressed to the Legislature.

For all of these reasons, we affirm the administrative determination.

ORDER

The administrative determination of the Office of the General Counsel that the factfinding procedures set forth in the Meyers-Milias-Brown Act (MMBA) section 3505.4 et seq., are applicable to the dispute in this case is hereby AFFIRMED. Service Employees International Union, Local 521's request for factfinding satisfies the

requirements of MMBA section 3505.4 and PERB Regulation 32805(a)(2) and the matter is REMANDED to the Office of the General Counsel for further processing pursuant to PERB Regulation 32804.

Chair Martinez and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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November 14, 2013

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Re: *County of Fresno and Service Employees International Union Local 521*
Case No. SA-IM-136-M
Administrative Determination

Dear Interested Parties:

On October 30, 2013, Service Employees International Union Local 521 (SEIU or Union) filed a request for factfinding (Request) with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] In that request, SEIU asserted that the County of Fresno (County) and the Union have been unable to effect a settlement in their current negotiations.[2] SEIU's Request provides that impasse was declared on "October 28, 2013."[3]

[1] The MMBA is codified at Government Code section 3500 et seq. and all future references are to the Government Code unless otherwise noted. PERB Regulations are codified at California Code of Regulations, title 8, section 31000 et seq. and will be referred to as PERB Regulations hereafter. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

[2] In its initial Request, SEIU merely described the "type of dispute" with the County as "meet and confer." Subsequent correspondence from the parties clarified that the "dispute" in question, involves the parties' negotiations over the County's two proposals to alter certain terms set forth in an addendum to the parties' expired Memorandum of Understanding (MOU) for Bargaining Unit 2, which includes all Correctional Officers employed by the County in the Jail, Probation Department, and Juvenile detention facilities (Unit 2). Specifically, the County's two proposals were to: (1) increase the number of employees working 12-hour shifts at the County Jail; and (2) add two specialized assignments in the County Jail that are exempt from the seniority-based bidding procedure.

[3] As will be discussed in greater detail below, the parties do not dispute that the County has not provided SEIU with a written notice of a declaration of impasse. SEIU contends

After SEIU filed its Request, the County was given an opportunity to state its position. On November 1, 2013, the County notified the undersigned Board agent that it would be opposing the Request, and would be filing a written statement to that effect. By letter dated November 1, 2013, the County opposed SEIU's Request and asserted that the Request was insufficient to meet the statutory requirements for factfinding. The County requested that PERB deny the Request. On November 5, 2013, SEIU filed a responsive letter in support of its Request and a Request for Judicial Notice disputing the County's position statement.

On November 6, 2013, PERB approved SEIU's Request and informed the parties in an e-mail message that the determination would be subsequently memorialized in writing.

Brief Factual Background

The parties' MOU expired on October 30, 2011 and on December 6, 2011, the County imposed its last, best and final offer (LBFO).

During the parties' negotiations in 2012, the parties did ultimately submit their dispute to a factfinding panel. On or about June 4, 2013, the County imposed its LBFO from those negotiations.

The current round of negotiations commenced on or about September 6, 2013, when the County proposed to create two new specialized assignments for Correctional Officers in the County Jail that would be exempt from the seniority-based bidding procedure described in an addendum to the parties' expired MOU. In or around September 2013, the County also proposed to increase the number of twelve-hour (12-hour) shifts in the County Jail.[4]

The parties met and conferred on three occasions: October 16, 25, and 28, 2013.[5] The Union submitted documentary evidence attached to the sworn declaration of Tom Abshere that indicates that the County has begun—or is in the process of—implementing both proposals. The Union has submitted information that on or about October 28, 2013, the County posted a new announcement on its Job Line for a "Booking/Records Unit" assignment – one of the newly created specialized assignments that was the subject of the parties' 2013 negotiations. Also, on October 28, 2013, the County sent an e-mail message to all employees in the County

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however, that the County's unilateral implementation of both proposals on or about October 28, 2013, equates to an "impasse" in the parties' negotiations ["It must be inferred from the County's unilateral conduct that the County is declaring 'impasse' in the meet and confer process"].

[4] The Union also asserts that the County unilaterally increased the number of twelve-hour shifts prior to September 2013 from 210 to 244.

[5] There is no dispute that during these negotiations, the County only agreed to negotiate the impacts of the creation of the two specialized assignments, but not the decision itself.

Jail regarding the Correctional Officers' December 9, 2013 bid for assignments. The attachment to the e-mail message contains a number of twelve-hour shifts (270), that far exceeds the number set forth in the parties' addendum to the expired contract (210).[6]

The Parties' Respective Positions

A. The County's Position

The County objects to the Petition based on several different grounds. It asserts that the Request is premature since no written notice of impasse has been issued by either party. The County notes in pertinent part as follows, "The Request states that impasse was declared on October 28, 2013, but no copy of a written notice of impasse is provided. The County has neither issued a notice of a declaration of impasse nor received such a notice from SEIU. As this prerequisite has not been met, SEIU's Request must be denied as premature."

The County also argues that approval of SEIU's request is "barred" based on a tentative ruling from the pending litigation in Riverside County Superior Court entitled *County of Riverside v. PERB; SEIU, Local 721*, Case No. RIC 1305661. The County states in pertinent part, that "[t]he Court ruled on September 13, 2013, that the clear intent of the legislature in adopting AB 646 was to address the negotiations for new or successor MOUs. The Court further found that PERB's interpretation of AB 646 to apply to negotiations over matters other than new or successor MOUs to be 'clearly erroneous.' . . . Thus SEIU is precluded from requesting fact-finding in this matter and PERB is precluded from granting such a request."

Finally, the County asserts that the legislative history of Assembly Bill 646 (AB 646)[7] conclusively demonstrates that SEIU's Request is "outside the purview of the fact-finding process." In particular, the County relies upon comments made by Assembly Member Toni Akins, the author of AB 646. The County references an undated comment by Assembly Member Akins:

> Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. (Emphasis added.)

[6] The Union has filed two unfair practice charges (UPC Nos. SA-CE-841-M, SA-CE-846-M) with respect to the County's alleged unlawful unilateral action regarding the specialized assignments and shift schedules. Although this determination does not make any findings with respect to those charges, it does appear from the undisputed information provided by SEIU, that the County has begun the process of implementing both proposals and that, therefore, the parties are at impasse in their negotiations.

[7] AB 646 (Statutes 2011, Chapter 680), is codified at Government Code sections 3505.4, 3505.5, and 3505.7.

(County's November 1, 2013 Letter, p. 2.) Similarly, the County relies on an Assembly Floor analysis dated September 1, 2011, at Page 3, which states:

> According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. [...] The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. [...] (Emphasis added.)

(*Ibid.*) The County notes in part, "it is inconceivable that the Legislature intended the public employer to use taxpayer dollars participating [*sic*] in this fact-finding process for anything other than negotiations over collective bargaining agreements or MOUs."

B. SEIU's Position

SEIU asserts that the parties met on three occasions, but the County "failed and refused to present a written notice of a declaration of impasse to SEIU Local 521. . . . Instead, shortly after the conclusion of the parties' October 28, 2013 meet and confer session, the County proceeded to unilaterally implement its two proposed changes to Correctional Officers' working conditions. . . . It must be inferred from the County's unilateral conduct that the County is declaring "impasse" in the meet and confer process."

The Union also provides five reasons why the *County of Riverside* case is not relevant to its factfinding demand: (1) the trial court in the *County of Riverside* case has made only an oral ruling on the record and has not issued a final written order with "res judicata" effect; (2) PERB's timeline to request reconsideration or file an appeal in the *County of Riverside* case has not expired yet; (3) an order from a County of Riverside Superior Court judge "does not dictate law or policy for the rest of the state"; (4) SEIU Local 721, the Real Party in Interest in the *County of Riverside* case, is not the same entity as SEIU Local 521; and (5) the trial court judge's ruling is clearly erroneous and will likely be vacated on appeal.

Finally, the Union asserts that AB 646 was meant to encompass the types of issues that the parties were negotiating over in this case: the County's proposal to add two specialized assignments that are exempt from the seniority-based bidding process and multiple new twelve-hour shift proposals.[8]

[8] The Union's Request for Judicial Notice is granted solely for purposes of this Administrative Determination. (*Compton Community College District* (1988) PERB Decision No. 704; *Antelope Valley Community College District* (1979) PERB Decision No. 97.)

Discussion

A. AB 646 Factfinding is the Final Step in an Orderly Process Designed to Resolve Any Impasse That Arises From Negotiations Over Matters Within the Scope of Representation Under the MMBA.

1. The Duty to Bargain to Impasse Over Matters Within the Scope of Representation Under the MMBA

Essentially, the County contends that the factfinding requirements under the MMBA apply only to impasses stemming from negotiations for a new or successor MOU, and do not apply to impasses resulting from isolated or separate issues arising from any other types of negotiations. However, when read together, MMBA sections 3505.7, 3505.4, and 3505.5,[9] demonstrate that the Legislature had each and every impasse dispute in mind when drafting this legislation.

a. The Courts, PERB and NLRB's Interpretation of the Terms "Collective Bargaining" and "Collective Bargaining Agreement"

PERB and NLRB decisions have made clear that collective bargaining is a *continuing process* that is not restricted to one comprehensive agreement or one single period of bargaining.

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[9] Section 3505.7 states, in relevant part:

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. (Emphasis added.)

Section 3505.4 provides:

If the *dispute* was not submitted to mediation, an employee organization may request that the parties' *differences* be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.... (Emphasis added.)

Section 3505.5, subdivision (a) provides, in relevant part:

If the *dispute* is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt. (Emphasis added.)

California's public sector collective bargaining statutes are largely modeled after the federal National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.). (*Long Beach Community College District* (2003) PERB Decision No. 1564; *City of San Jose* (2010) PERB Decision No. 2141-M.) Accordingly, when interpreting the MMBA, courts and PERB have appropriately taken guidance from the express language of the NLRA, as well as from cases interpreting the NLRA. (*Fire Fighters Union* v. *City of Vallejo* (1974) 12 Cal.3d 608, 615-617 [*Fire Fighters Union*].) For instance, the Supreme Court has noted that the phrase in the MMBA's meet and confer requirement regarding "wages, hours, and other terms and conditions of employment" was taken directly from section 8(d) of the NLRA concerning the "the obligation to bargain collectively," which states in relevant part:

> For the purposes of this section, to ***bargain collectively*** is the performance of the mutual obligation of the employer and the representative of the employees to ***meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder***, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . .

(29 U.S.C. § 158(d), emphasis added, *Fire Fighters Union*, *supra*, at p. 617.)

As the express language of the NLRA makes clear, the obligation to bargain collectively is not just limited to the "negotiation of an agreement." Rather, such an obligation also encompasses meeting with respect to any wages, hours, and other terms and conditions of employment, as well as concerning questions or disputes that may arise within the agreement. In the words of the United States Supreme Court:

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

(*Conley v. Gibson* (1957) 355 U.S. 41, 46, overruled in part on other grounds; see also, *National Labor Relations Board v. Acme Indus. Co.* (1967) 385 U.S. 432, 435-436.)

More importantly, courts have described a "collective bargaining agreement" as "the framework within which the process of collective bargaining may be carried on." (*J.I. Case Co. v. National Labor Relations Board* (7th Cir. 1958) 253 F.2d 149, 153.) In *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, the California Supreme Court observed that a collective bargaining agreement "'is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate .... It calls into being a new common law - the common law of the particular industry.'" (*Id.* at p. 177, quoting *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578 [*Warrior & Gulf Co.*].)

These cases are clear, collective bargaining means more than negotiations for a new or successor MOU—as the County asserts—it means negotiations for all disputes within the scope of representation.

b. The MMBA's Meet-and Confer Obligations

Under the MMBA, the duty to meet and confer in good faith "means that the parties must genuinely seek to reach agreement, but the MMBA does not require that an agreement result in every instance, and it recognizes that a public employer has the ultimate power to reject employee proposals on any particular issue." (*International Assoc. of Fire Fighters, Local 188, AFL-CIO v. City of Richmond* (2011) 51 Cal.4th 259, 271 [*City of Richmond*].) The duty to meet and confer in good faith extends to all matters within the scope of representation, which is defined as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment," but does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) "'The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse ....'" (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1083-1084, quoting *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.)

Although the MMBA uses the term "impasse," it does not define that term, unlike other statutes within PERB's jurisdiction. For instance, the Educational Employment Relations Act (§ 3540 et seq. [EERA]) defines "impasse" to mean "the parties to a *dispute* over matters within the scope of representation have reached a point in meeting and negotiating at which their *differences* in positions are so substantial or prolonged that future meetings would be futile." (§ 3540.1, subd. (f), emphasis added.)[10] Thus, PERB has held that an impasse in bargaining exists where the "parties have considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124.)

Given the longstanding acceptance of the concept of impasse as a term of art central to labor relations, the Board has held that the definition of impasse under EERA, as interpreted by PERB, is the appropriate standard under the MMBA as well. (*Fire Fighters Union, supra*, 12 Cal.3d 608; *City & County of San Francisco* (2009) PERB Decision No. 2041-M.) The definition of impasse does not limit the types of "disputes" or "differences" that the parties

[10] Similarly, under the Higher Education Employer-Employee Relations Act (§ 3560 et seq. [HEERA]), impasse is defined to mean that "the parties have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile." (§ 3562, subd. (j).)

may have to just those for a new or successor MOU. In fact, nowhere in the statutory or decisional law definitions of impasse do the terms "agreement" or "collective bargaining" appear.

c. The MMBA Does Not Expressly Limit Factfinding Solely to Impasses Over Negotiations for an MOU

The MMBA, when construed as a whole, simply does not limit the applicability of its factfinding provisions solely to disputes arising from negotiations for an MOU. Section 3505.4, provides that an "employee organization may request that the parties' differences be submitted to a factfinding panel" following mediation, or if the "dispute" is not submitted to mediation, then the employee organization may request that the parties "differences be submitted to a factfinding panel...." (§ 3505.4, subd. (a).) There is no language in the statute that limits the types of "differences" or "disputes" that may be submitted to a factfinding panel.

As added by AB 646, moreover, section 3505.5 provides that if the "dispute" is not settled within a set time, the factfinding panel "shall make findings of fact and recommended terms of settlement, which shall be advisory only." (§ 3505.5, subd. (a).) Again, there is no language in that statute limiting the parties' "dispute," which can be submitted to a factfinding panel, to negotiations for an MOU, or any other "type" of negotiations. Section 3505.7 further provides that after any applicable impasse procedures have been exhausted, and written findings of fact and recommended terms of settlement have been submitted to the parties and made public, a public agency may implement its last, best, and final offer, but is not permitted to implement an MOU. (§ 3505.7.)

Thus, once an employee organization requests the parties' "differences" be submitted to factfinding, and the procedural aspects of the factfinding sections are met, then participation in factfinding is mandatory. The plain language of the factfinding sections do not distinguish or limit the types of disputes that arise in collective bargaining negotiations that may be submitted to factfinding. If the Legislature intended to limit the types of disputes or differences that could be submitted to a factfinding panel only to those arising during negotiations for an MOU, it could have done so explicitly. It did not. Accordingly, when the MMBA's statutory scheme is viewed as a whole, the County's interpretation of the factfinding provisions as applying only to negotiations for an MOU is simply not a correct interpretation of the statute.

Finally, as noted above, it is well-settled that public employers who are subject to the MMBA and other collective bargaining statutes administered by PERB may not make a unilateral change in a negotiable subject until all applicable impasse procedures have been exhausted, as impasse procedures are part of the collective bargaining process. (*Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, 199-200 [*Moreno Valley*]; *Temple City Unified School District* (1990) PERB Decision No. 841, p. 11; see also § 3506.5, subd. (e).) According to the County's interpretation that MMBA factfinding applies only to impasse over negotiations for a complete MOU, this would necessarily mean that single employment issues would be excluded from the statutory impasse procedures, and would thus allow the public agency to impose its will on employees if the parties cannot reach agreement. Unlike "main

table" negotiations for a new or successor MOU, employers often have control over the timing of "single" subjects, such as layoffs or the creation of a new position. If PERB were to accept the County's position that only new or successor MOUs are subject to factfinding, an employer could splinter subjects within the scope of representation into multiple "single" issues, in order to intentionally avoid factfinding.

This interpretation is contrary to the intent of AB 646, which was enacted to prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency's goals and agenda before exhausting available impasse procedures. Moreover, the County's claim that the MMBA does not authorize factfinding other than for negotiations for an MOU cannot be squared with the MMBA's stated purposes "to promote full communication between public employers and employees," and "to improve personnel management and employer-employee relations." (§ 3500.) Allowing the County to take unilateral action concerning the parties' employment relationship without exhausting the MMBA's impasse procedures simply because the parties' dispute does not arise during negotiations for an MOU, does not further, but would rather frustrate, the MMBA's purpose of promoting full communications between the parties and improving employer-employee relations.

d. PERB Has Interpreted Statutory Impasse Procedures Under EERA and HEERA to Apply to a Wide Variety of Collective Bargaining Negotiations, and Not Just Those for an MOU

The County's assertion that MMBA factfinding provisions are limited only to those negotiations for an MOU that reach impasse is contrary to the language and judicial interpretation of factfinding provisions found in the other collective bargaining statutes that PERB administers. It is well-settled that statutes should be construed in harmony with other statutes on the same general subject. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 665.) Moreover, when interpreting the MMBA, PERB appropriately takes guidance from cases interpreting not only the NLRA, but also other collective bargaining statutes that PERB administers with provisions similar to those of the MMBA. (*Fire Fighters Union, supra,* 12 Cal.3d 608.)

EERA and HEERA contain provisions governing impasse resolution that are similar, though not identical, to those in the MMBA. (Compare §§ 3548-3548.8 [EERA], with §§ 3590-3594 [HEERA], and §§ 3505.4-3505.7 [MMBA].) Under long-standing case law, PERB and the courts have interpreted the impasse provisions under EERA and HEERA as applying to negotiations other than just those for an MOU. Under this body of related law, to which our Supreme Court has directed the courts to look for reliable guidance when they are called upon to interpret the latter statute (*City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597, 605-607 & fn. 3), it is clear that public employers are prohibited from making a unilateral change on a matter subject to *impacts* and *effects* bargaining until all applicable impasse procedures have been exhausted.

For example, in *Moreno Valley Unified School Dist.* (1982) PERB Decision No. 206, the Board upheld a hearing officer's determination that, among other things, the District violated section 3543.5, subdivision (e), by failing to participate in impasse procedures in good faith, and by making unilateral changes prior to the exhaustion of the statutory impasse procedures under EERA, as to proposals to eliminate teaching and staff positions. (*Id.* at pp. 1-2, 11-12.) The District subsequently filed a writ of mandate challenging the Board's decision. In *Moreno Valley*, *supra*, 142 Cal.App.3d 191, the Court of Appeal upheld PERB's determination that the school district committed an unfair labor practice under EERA by unilaterally implementing changes in employment conditions before exhausting statutory impasse procedures, including failing to participate in good faith in impasse procedures regarding the "effects" of the school district's decision to eliminate certain teaching and staff positions. (*Id.* at pp. 200, 202-205.) The court stated that "[s]ince 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process . . . the Board reasonably interpreted the statute in finding a per se violation of the statutory duty of employers to participate in good faith in the impasse procedures." (*Id.* at p. 200.)

In *Redwoods Community College District* (1996) PERB Decision No. 1141 (*Redwoods*), the Board determined that EERA's statutory impasse procedures applied to the parties' negotiations over hours of security officers, which were conducted *separate and apart* from the parties' negotiations for a successor MOU. In that regard, the parties negotiated a contract provision covering workweeks and work schedules, which provided for negotiations between the employer and the employee representative regarding any change in hours. (*Ibid.*) That provision further stated that if negotiations were unsuccessful, the parties would submit the dispute to mediation. (*Ibid.*) The provision also stated that the dispute "shall not be submitted to a fact-finding panel under the provisions of the [EERA]." (*Ibid.*) The Board held that the parties could not waive EERA's statutory impasse procedures, *noting that until the impasse procedures are completed, the employer may not make a unilateral change in a negotiable subject.* (*Ibid.*; see also, *California State University* (1990) PERB Decision No. 799-H [a HEERA case, where the parties participated in mediation and factfinding concerning negotiations over increased parking fees].)

Thus, as PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper, and should be applied to factfinding requests made under sections 3505.4, 3505.5 and 3505.7.

2. MMBA Factfinding Process and Procedure

    a. The MMBA Factfinding Provisions Adopted by the Legislature Under AB 646, and Implemented by Duly Adopted PERB Regulations

As noted above, in 2011, the Legislature for the first time established a structured impasse procedure, applicable statewide, for the MMBA, by enacting factfinding provisions pursuant to

AB 646.[11] The statute provided that only unions could invoke the MMBA's factfinding provisions. While AB 646 imposed new obligations on MMBA employers, it also provided them with a more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose their "LBFO" on the subject of the parties' negotiations. (§ 3505.7.) Also in 2011, PERB promulgated emergency regulations for administering the MMBA factfinding process. (Cal. Code Regs., tit. 8, §§ 32802, 32804.)

In 2012, the Legislature amended MMBA section 3504.5, pursuant to Assembly Bill 1606 (Statutes 2012, Chapter 314, effective January 1, 2013 [AB 1606]), in part to expressly codify the procedures PERB had adopted by emergency and, later, final regulations implementing AB 646. The Legislature deemed the 2012 amendments as technical and clarifying of existing law. (*Ibid.*)

Previously PERB Regulation 32802, subdivision (e), prohibited an appeal of a determination of the sufficiency of a factfinding request. Effective October 1, 2013, PERB's regulations have been modified to delete subdivision (e), and now permit an appeal by either party to the Board itself by any party aggrieved by a factfinding determination.

It is also noted that although the use of PERB's form, titled "MMBA Factfinding Request" is not required, the form, under Type of Dispute, lists as examples all of the following: "initial contract, successor contract, reopeners, effects of layoff, other."

b. A Written Declaration of Impasse

Both MMBA section 3505.4, subdivision (a), as amended by AB 646, and PERB Regulation 32802, subdivision (a)(2), as adopted by PERB to administer the new factfinding procedure required by AB 646, provide that if the dispute was not submitted to mediation,[12] an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.

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[11] The legislative history does not evidence the Legislature's intent to provide that negotiations for a new or successor MOU are the *only* types of disputes that can be submitted to factfinding. If the Legislature had wanted to exclude factfinding for all disputes other than for an MOU, it could have expressly included a provision to that effect, but failed to do so. Moreover, generally, the statements of the author of legislation are not determinative of legislative intent as there is no guarantee that others in the Legislature shared the same view. (*San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 863.)

[12] There is no evidence in this case indicating that the parties utilized, or intend to utilize, mediation to resolve the current dispute.

As noted previously, it appears from undisputed testimony and documentary evidence in the record of this case that the County has gone forward with the implementation of its two proposals. For present purposes, this evidence is deemed to be or to include a "written notice of declaration of impasse" within the meaning of section 3505.4. It is, in any event, clear from undisputed testimony and documentary evidence in the record that the parties are, in fact, at impasse in their current negotiations.

B. Res Judicata/Collateral Estoppel Do Not Apply in This Matter

The County cites the decision of *Boekin v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, in support of its assertion that SEIU is "barred" from filing the instant Request under the doctrine of "res judicata." In that case, the Supreme Court noted,

> As generally understood, '[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy.' . . . The doctrine 'has a double aspect.' . . . 'In its primary aspect,' commonly known as claim preclusion, it 'operates as a bar to the maintenance of a second suit *between the same parties* on the same cause of action.' . . . 'In its secondary aspect,' commonly known as collateral estoppel, '[t]he prior judgment ... "operates"' in 'a second suit ... based on a different cause of action ... "as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action." . . . 'The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.'"

(*Id.* at pp. 797-798, emphasis in the original.) None of the required elements for "res judicata" or "collateral estoppel" appear to have been met in this case because: as of today's date, no "final judgment" has been issued in *County of Riverside v. PERB; SEIU, Local 721* (Case No. RIC 1305661); SEIU, Local 521 is a separate and distinct entity from SEIU, Local 721, and therefore the parties are not the same; and since the County has imposed the terms of its LBFO two years in a row, it is unclear from the record whether SEIU and the County were negotiating terms of a successor agreement or side/single issues.[13]

[13] PERB makes no determination as to whether the parties were in fact engaged in "successor" negotiations. Rather, PERB does not make such determinations with respect to the subject matter of a factfinding.

Determination

Applying the precedent discussed above, PERB concludes that the factfinding procedures set forth in MMBA section 3505.4 et seq. are applicable under the particular facts of this case.

Given the specific facts of this case, PERB determines that SEIU's Request satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802, subdivision (a)(2). Therefore, SEIU's Request will be processed by PERB.

Next Steps

Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than November 19, 2013.[14] Service and proof of service are required.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.[15] The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, *prior* to informing PERB of the selection.

Unless the parties notify PERB, on or before November 19, 2013, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

Pursuant to PERB Regulations, the County may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

[14] This deadline, and any other referenced, may be extended by mutual agreement of the parties.

[15] The seven neutrals whose résumés are being provided are: Ron Hoh, Jerilou Cossack, John LaRocco, Catherine Harris, John Moseley, William Gould, and Katherine Thomson.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If the County appeals this determination, the Union may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely.

Wendi L. Ross
Deputy General Counsel

Exhibit 18

***County of Sonoma* (2010)**
PERB Dec. No. 2100-M, p. 13

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SONOMA COUNTY LAW ENFORCEMENT ASSOCIATION, Charging Party, v. COUNTY OF SONOMA, Respondent.	Case No. SF-CE-523-M PERB Decision No. 2100-M February 25, 2010

Appearances: Mastagni, Holstedt, Amick, Miller, Johnsen & Uhrhammer by Kathleen N. Mastagni, Attorney, for Sonoma County Law Enforcement Association; Renne Sloan Holtzman Sakai by Timothy G. Yeung and Genevieve Ng, Attorneys, for County of Sonoma.

Before McKeag, Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Sonoma County Law Enforcement Association (SCLEA) and the County of Sonoma (County) to the proposed decision of an administrative law judge (ALJ). The complaint alleged that the County violated the Meyers-Milias-Brown Act (MMBA)[1] by: (1) unilaterally implementing its last, best and final offer prior to the completion of impasse procedures; (2) unilaterally implementing terms and conditions of employment not reasonably contemplated within the parties' pre-impasse negotiations; and (3) unilaterally imposing a waiver of SCLEA's right to negotiate health benefit changes for the upcoming year.

[1] The MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

The ALJ found that the County violated MMBA section 3505.4[2] by refusing to participate in statutorily-mandated interest arbitration and unilaterally implementing terms and conditions as to those law enforcement employees who are entitled to interest arbitration, and thereby also denied SCLEA its right to represent bargaining unit employees, in violation of MMBA section 3505.[3] The ALJ dismissed the remaining allegations that the County violated MMBA by: (1) unilaterally implementing terms and conditions not reasonably contemplated within its last, best and final offer; and (2) depriving SCLEA of the right to negotiate on a yearly basis.

The County appeals only from that portion of the ALJ's proposed decision that found that it was required to submit to interest arbitration with respect to certain law enforcement employees, arguing that the governing statute is unconstitutional. SCLEA appeals from the findings that: (1) the County was not required to submit to interest arbitration as to all

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[2] MMBA section 3505.4 states:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

[3] The ALJ found that the County was not required to submit to interest arbitration with respect to employees not covered by MMBA section 3505.4.

employees; and (2) the County unilaterally implemented terms and conditions reasonably contemplated within its last, best and final offer.[4]

The Board has reviewed the proposed decision and the record in light of the parties' exceptions and responses thereto, and the relevant law. Based on this review, the Board reverses the proposed decision in part and affirms it in part for the reasons discussed below.

BACKGROUND[5]

The County is a public agency within the meaning of MMBA section 3501(c). SCLEA is an employee organization within the meaning of Section 3501(a).

SCLEA exclusively represents four bargaining units composed of sworn and non-sworn law enforcement employees. The units include classifications such as correctional officers, probation officers, district attorney investigators, welfare fraud investigators, park rangers, fire inspectors, communications dispatchers, and residential care counselors.

SCLEA and the County were parties to a memorandum of understanding (MOU) covering all four units, effective March 4, 2003 through June 18, 2007. The parties began negotiations for a single successor agreement in February 2007. The parties agreed to a number of ground rules: tentative agreements were to be signed by the teams' principals, but the principals lacked authority to enter into such agreements without first consulting with the team. It was understood that if neither side made a proposal as to an article in the MOU, the status quo would remain. The parties also agreed that all proposals and counterproposals would be presumed to be rejected unless specifically accepted by the other party.

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[4] SCLEA did not except to the dismissal of the allegation that the County denied SCLEA its statutory right to bargain on a yearly basis. Accordingly, the ALJ's determination on this issue is final. (PERB Reg. 32300(c); PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 3100 et seq.)

[5] The Board adopts the ALJ's findings of fact to the extent set forth herein.

During the Spring of 2007, the parties engaged in approximately 13 bargaining sessions. The parties agreed, at least in principle, to carry over many of the provisions of the existing MOU without change. The negotiations revolved primarily around the County's proposals offering a cost-of-living adjustment (COLA) for the entire unit, equity adjustments for particular positions, and changes in health and welfare benefits.

At the May 16, 2007 bargaining session, the County's lead negotiator, Kenneth Couch (Couch), provided SCLEA with a proposal on revisions to Article 18 of the MOU covering health and welfare benefits. In the past, the County had maintained a practice of contributing the same percentage of the monthly premium costs, regardless of the cost of the premium(s) associated with the selected health plan, for the employee (alone, with one dependent, or two or more dependents). The County proposed restricting that percentage to only the lowest-cost plan, beginning with the 2008-2009 plan year. In what the parties termed the "85-Y plan," the County's contribution dollar amount would be set at 85 percent of the lowest cost plan. For any higher cost plan, a "Y-rating" would freeze the County's contribution dollar amount at the 2007-2008 contribution dollar amount for those electing the more expensive plans, until the contribution dollar amount for the lowest-cost plan rose to the dollar amount of the higher-cost plan. Thereafter, any difference above the lowest-cost plan would be picked up by the employee. Having already adopted these provisions for its unrepresented employees, the County was interested in having these provisions apply to SCLEA's active bargaining unit employees as well as its future retirees, who received this benefit through the MOU. The County also offered an across-the-board COLA of 3.25 percent and, as a quid pro quo for acceptance of the 85-Y plan, equity adjustments to bring specified classifications to 100 percent of market wages, to be implemented in two steps.

The discussions during the May 16, 2007 bargaining session focused primarily on the COLA, equity adjustments, and the 85-Y health plan issues set forth in Article 18, sections 18.1, 18.2, and 18.3 of the MOU. The parties also discussed changes to future retiree health premiums, unpaid medical and pregnancy leaves, and long-term disability. During its review of the proposal, the SCLEA representatives noticed that three pages of the Article 18 text appeared to be missing and notified the County of the omission. Sections 18.1, 18.2 and 18.3 were not among the missing sections, and the parties continued to negotiate over those sections.

Although SCLEA requested that the County provide all new proposals in "legislative format," showing changes in strikeout and underlined text, the County determined it would be unfeasible to do so for Article 18, because the changes were numerous and were not of the type that lent itself to that type of formatting. Numerous sections were renumbered, previous whole sections split, and language was moved.

At the end of the May 16, 2007 session, SCLEA asserted that the parties were at impasse. The parties used a previously scheduled negotiation session on May 31, 2007 to identify issues for mediation, and formally declared impasse on that date. The County's local employee-relations ordinance (ERO) provides that mediation is the only mandatory impasse procedure, with factfinding optional. If factfinding is not undertaken, the County's negotiator may present the employer's last, best and final offer to the governing board for implementation. The ordinance makes no mention of interest arbitration proceedings as set forth in title 9.5 of the Code of Civil Procedure. (Code Civ. Proc., § 1299 et seq.; Stats. 2000, ch. 906 ["Arbitration of Firefighter and Law Enforcement Officer Disputes"].)

At the first mediation session on July 11, 2007, SCLEA presented a proposal, to which the County did not respond formally at that time. On July 17, 2007, Couch and SCLEA's chief

negotiator, Shaun DuFosee (DuFosee), met at a restaurant where Couch delivered the County's counter-proposal. The County's proposal consisted of two pages and stated:

> Acceptance by the SCLEA results in settlement of all issues raised by the parties in these negotiations for a successor Memorandum Of Understanding (MOU). Tentative agreements (T/As) signed by the parties on March 08, 2007, and the terms and conditions of this counter proposal will comprise the only changes to be incorporated in the successor MOU between the parties. All articles not previously tentatively agreed to, or included in this proposal as detailed below, shall remain unchanged from the current MOU.

The two-page document called for a one-year term (June 19, 2007 through June 16, 2008), the COLA, the equity adjustments, and the same 85-Y plan that had been included in the May 16, 2007 proposal. The proposal further stated that the County would implement the 85-Y plan as soon as possible, including plan design changes implemented on April 10, 2007 for both active and retired bargaining members, and that existing language concerning the retiree/active employee health insurance link would remain unchanged. The proposal further stated that if it was not accepted in writing by July 23, 2007, the offer would be withdrawn in its entirety. DuFosee testified that he did not consider this limitation to have any practical effect, as he believed the July 17, 2007 proposal did not materially differ from the County's May 16, 2007 proposal.

Couch testified that, as he was presenting the proposal to DuFosee, he realized that the version of Article 18 that was attached to the proposal was not the correct one, so he removed it from the rest of the document and promised to e-mail the correct version to DuFosee following the meeting.

Couch testified that on July 18, 2007, he e-mailed DuFosee the corrected version of the Article 18 proposal both at SCLEA and at work. Neither message was returned as undeliverable. Couch's testimony was corroborated by a copy of the e-mail transmission dated

July 18, 2007 stating that the settlement offer was attached, including the correct Article 18 proposal. DuFosee denied both that Couch removed a version of Article 18 from the July 17, 2007 proposal during their meeting or that he received the July 18, 2007, e-mail transmission at either address. He asserted he sometimes had difficulty retrieving e-mails at one of the addresses. Given Couch's credible testimony that he sent the e-mails and that the e-mail transmission was not returned as undeliverable, we adopt the ALJ's credibility determination that, on July 18, 2007, Couch e-mailed DuFosee a complete copy of proposed Article 18 and that DuFosee received it.

The language of Article 18 included in the July 18 transmission is identical to that set forth in the May 16, 2007 proposal with respect to Sections 18.1, 18.2 and 18.3. The cover e-mail states that current language contained in Article 18.16 would replace the County's proposed language in Sections 18.4 and 18.5 concerning retiree health insurance contributions. The July 18, 2007 transmission also appeared to contain the missing pages from the May 16, 2007 proposal concerning, *inter alia*, dental benefits, long-term disability, and unpaid medical/pregnancy disability leave. SCLEA rejected the proposal.

At a second mediation session on August 17, 2007, the County presented SCLEA with a revised offer, consisting of a two-page summary of the County's last offer on the three major issues in dispute: the 85-Y plan, COLAs, and equity adjustments. Couch informed SCLEA that Article 18 was still part of the County's last offer and had not changed since the May 16, 2007 proposal; therefore, it was not attached to the August 17, 2007 offer. The August 17, 2007 summary was substantially the same as the July 17, 2007 offer, but changed the timing of the second equity adjustment due to the passage of time during bargaining. The SCLEA team took this written proposal directly to the membership for a vote. The membership rejected this proposal as well.

After meeting again with SCLEA representatives in an effort to answer questions and come to a resolution on August 30, 2007, the County sent a letter to all bargaining unit employees explaining the County's August 17, 2007 offer and including a copy of the August 17, 2007 two-page proposal.

A final, unsuccessful, mediation session was held on November 13, 2007. On November 19, 2007, DuFosee submitted a request to the chair of the County's governing board that the matter be submitted for interest arbitration pursuant to Code of Civil Procedure section 1299.4. The County refused, asserting that Section 1299.4 was unconstitutional and that many of the bargaining unit classifications were not covered by that statute in any event.

By letter dated December 20, 2007 to the County, SCLEA requested the opening of negotiations for a successor memorandum, while acknowledging the ongoing bargaining impasse. By this time, DuFosee's term as president had expired and he was replaced by Thomas Gordon (Gordon), who had been a member of the bargaining team throughout the negotiations. In addition, Couch had ceased employment with the County and had been replaced by Interim Labor Relations Manager David Mackowiak (Mackowiak).

In late December 2007, Mackowiak attempted unsuccessfully to contact Gordon by telephone to inform him that the County intended to present an implementation resolution to the governing board at its January 8, 2008 meeting. On December 31, 2007, the County's human resources director, Ann Goodrich, sent Gordon and a representative of the law firm representing SCLEA an e-mail notifying them that the County had submitted an agenda item to the County's governing board to implement the County's last offer, and promised to send a copy of the agenda item on January 2, 2008. Gordon was out of town on vacation in late December 2007, but he acknowledged that he did receive the County's e-mail on January 2, 2008, with an attachment containing the finalized board agenda item. The attachment included

the language for Article 18 that was substantially the same as the version Couch sent to DuFosee on July 18, 2007. Gordon did not respond to Mackowiak or communicate any concerns to the County about the proposed implementation prior to January 8, 2008.

DuFosee was out of town on vacation between December 26, 2007 and January 15, 2008. He received an e-mail that included the implemented terms, which he reviewed after his return. DuFosee testified that he never conducted a side-by-side comparison of the existing Article 18 and the County's new proposal, because he felt it was confusing.

The staff recommendation called for implementation of the 3.25 percent COLA, effective January 15, 2008, together with the equity adjustments for identified classifications, one-half to be provided immediately and the remainder on July 15, 2008. In the summary section, the staff report described the health benefit changes as including changes in co-pays and deductibles for all three medical plans that would take effect "as soon as practical," and that changes in the amount of County contributions to premiums under its 85-Y proposal would take effect beginning with the 2008-2009 health plan year. The recommendation noted that the implemented terms would remain in effect through June 15, 2008, "the start of the normal contract cycle for this unit."

Gordon testified that he did not try to compare the proposed Article 18 language with the existing contract language because he was never confident he could ascertain all of the differences.

Gordon appeared at the January 8, 2008 governing board meeting to object to the implementation proposal. Among his comments he asserted:

> Finally, SCLEA has only had a brief time to review the text of this resolution. It appears to us that some changes may have been made after the date for final submission of proposals and/or after the County submitted its last, best, and final offer. We will be researching this issue further and will respond accordingly.

Mackowiak approached Gordon after the meeting to seek clarification about SCLEA's concerns. Gordon replied that he could not tell Mackowiak what the issues were, claiming he had not had sufficient time to review it. After Mackowiak scheduled a meeting with Gordon for January 18, 2008 to identify and address the purported errors, Gordon cancelled the meeting. Mackowiak tried unsuccessfully to reschedule the meeting with Gordon.

Sometime after the January 8, 2008 board action, the County reviewed the agenda item and discovered certain errors in its submission to the board. Therefore, it submitted an agenda item to the board requesting an amendment to the January 8, 2008 resolution. The written submittal identified as errors the omission of subdivision (b)(iii) of Section 18.3 ("Contributions Toward Medical Insurance for Employees"), omissions of the proper revisions to Section 18.5 ("Medical Insurance Eligibility & Contributions for Retirees Employed After January 1, 1990"), and designation of $9.00 per pay period as the employee contribution to dental insurance, when it should have been $11.00. The County notified SCLEA of the proposed changes. SCLEA did not respond to the notification. The board adopted the recommended amendment at its January 29, 2008 meeting.

In February 2008, the County held a special open enrollment period to allow bargaining unit members the opportunity to select other health plan choices in response to the plan design changes for the current year. In May 2008, the County held its customary open enrollment period prior to the 2008-2009 health plan year.

DISCUSSION

Request for Interest Arbitration

The County asserts that it was not required to submit to the binding interest arbitration provisions of Code of Civil Procedure section 1299 et seq. prior to implementing its last, best and final offer because that statute is unconstitutional. In *County of Riverside v. Superior*

Court (2003) 30 Cal.4th 278 (*Riverside*), the Supreme Court held that a prior version of section 1299 et seq. (SB 402, Stats. 2000, ch. 906, § 2) violated Article XI, section 1, subdivision (b) and section 11, subdivision of (a), the California Constitution by delegating to a private body the power to interfere with county financial affairs and to perform a municipal function. (*Riverside*, at p. 282.)[6] In response to the court's decision in *Riverside*, the Legislature adopted SB 440 (Stats. 2003, ch. 877), which amended Section 1299.7 to provide that the arbitrator's decision would be binding unless the county's governing body, by unanimous vote, rejects the arbitration.

While this matter was pending before PERB, the County filed a judicial action challenging the constitutionality of SB 440. On April 24, 2009, the First District Court of Appeal determined that the amendments did not cure the constitutional violation because: (a) it merely gave the county veto power over the arbitrator's decision but did not allow the county to "provide for" the compensation of county employees; and (b) empowered a minority of the governing board, via the requirement of unanimity, to make the arbitrator's decision binding on the county, even if the majority disagreed. (*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 344, 346-347, review denied.)[7]

While we have no authority to declare a statute unconstitutional (Cal. Const., art. III, § 3.5), we are bound by the determination of the court of appeal that Code of Civil Procedure section 1299 et seq., the interest arbitration statute at issue in this case, constitutes an unlawful

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[6] Senate Bill 402, entitled "Arbitration of Firefighter and Law Enforcement Officer Labor Disputes," authorized public safety employee unions to declare an impasse in negotiations and require a local public agency to submit unresolved economic issues to binding interest arbitration.

[7] Given that the judicial proceedings are complete, we deny as moot the County's motion to abate and/or sever the allegation that the County unlawfully refused to submit to interest arbitration.

delegation of power in violation of Article IX of the Constitution. Accordingly, we reverse the ALJ's decision to the extent that it determined that the County violated the MMBA by refusing to submit to interest arbitration prior to implementing its last, best and final offer.[8]

Implementation of Last, Best and Final Offer

PERB has long held that an employer's unilateral change in terms and conditions of employment prior to reaching an impasse in negotiations or completion of statutory impasse resolution procedures is a per se violation of the statutory duty to bargain in good faith. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *Rowland Unified School District* (1994) PERB Decision No. 1053 (*Rowland*).) Once impasse has been reached and the parties have completed statutory impasse resolution procedures, the employer may thereafter implement changes reasonably contemplated within its last, best and final offer. (*Rowland*; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*); *Charter Oak Unified School District* (1991) PERB Decision No. 873 (*Charter Oak*).) "The employer need not implement changes *absolutely identical* with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the preimpasse proposals." (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900 [citations omitted; emphasis in original].) Thus, PERB has stated, "matters reasonably comprehended within pre-impasse negotiations include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the

[8] Because we conclude that the County was not required to submit to interest arbitration, we do not address the issue of whether the interest arbitration procedures of Code of Civil Procedure section 1299 et seq. apply to a mixed unit of public safety and non-public safety employees.

table." (*Modesto.*) PERB will not, however, dissect a package proposal to "separately compare each provision of the package to prior proposals concerning that provision." (*Charter Oak.*)

Under the MMBA, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer. (MMBA, § 3505.4.) The County complied with the mandatory impasse procedure specified in the ERO. As discussed above, we have concluded that the County was not required to proceed to interest arbitration after impasse once it completed the mediation procedures required under the ERO. Therefore, the only remaining question is whether the County unilaterally implemented changes "reasonably contemplated" within its pre-impasse proposals.

SCLEA asserts three exceptions to the ALJ's determination that the County did not violate the MMBA by unilaterally implementing terms of conditions of employment after impasse. First, SCLEA excepts to the ALJ's finding that DuFosee received the correct version of Article 18 on July 18, 2007. As discussed above, we find that the record supports the ALJ's determination that DuFosee received Couch's July 18, 2007 email transmitting Article 18 to him.

Second, SCLEA excepts to the ALJ's finding that the complete language of Article 18 was presented to SCLEA. Third, SCLEA excepts to the ALJ's conclusion of law that the entire Article 18 was reasonably comprehended in the County's last, best, and final offer. We address these two exceptions together.

The record reflects that the County provided SCLEA with copies of revised Article 18 on at least three occasions prior to implementation. First, the County provided SCLEA with a revised Article 18 on May 16, 2007, at the meeting where the parties first reached impasse. Although three pages were missing from the document, it is clear that the primary issues in

negotiations were included in the May 16, 2007 document provided to SCLEA: the health care provisions contained in Sections 18.1, 18.2 and 18.3. The May 16, 2007 proposal also included proposed language on retiree health benefits in Sections 18.4, 18.5 and 18.6.

Second, the County provided SCLEA with a complete copy of its proposed Article 18 on July 18, 2007, when Couch emailed it to DuFosee following their July 17, 2007 meeting. Again, this document included the health care provisions contained in Sections 18.1, 18.2 and 18.3, which remained unchanged from the May 16, 2007 proposal. In addition, both the July 17, 2007 and the August 17, 2007 proposals confirmed the County's agreement that the existing language for retiree health benefits set forth in Section 18.16 of the prior MOU would remain unchanged, but would be moved to Sections 18.4 and 18.5. Both DuFosee and his successor, Gordon, admitted that the County's July 17, 2007 and August 17, 2007 proposals, respectively, did not differ materially from the May 16, 2007 proposal. They admitted, however, that they did not go through the proposals line by line to determine whether any other changes had been proposed.

Finally, the County provided SCLEA with a copy of its proposed implementation of Article 18 prior to the January 8, 2008 governing board meeting. Although given the opportunity to do so, SCLEA never objected to that proposal prior to January 8, 2008. After SCLEA asserted at the governing board meeting that the implementation proposal contained matters not previously included in the County's proposals, the County attempted to meet with SCLEA to discuss this assertion, but SCLEA cancelled a scheduled meeting and did not respond to the County's requests to reschedule.

Although the County again changed some of the language of Article 18 in its January 29, 2008 resolution, we do not find that these changes represented a significant departure from the County's proposals during negotiations. The addition of subdivision (iii) to

Section 18.3(b) discusses the County's implementation of the 85-Y plan and is substantially similar to language contained in the County's July 17, 2007 and August 17, 2007 proposals. The changes to Sections 18.4 and 18.5 incorporate existing language from Section 18.16 of the original MOU. The change in employee dental insurance contributions reflects a return to language contained in the original MOU. We agree with the ALJ that all of the changes were reasonably comprehended within the County's pre-impasse proposals.

SCLEA's argument essentially is that the County failed to provide it with a copy of its final proposal that specifically identified all changes to Article 18 that it intended to implement. Therefore, SCLEA asserts, because the versions of Article 18 provided to it did not specifically highlight the specific language changes to the original agreement, the County's January 2008 implementation violated the MMBA. SCLEA has not, however, identified any specific terms implemented in January 2008 that were not reasonably contemplated within the County's pre-impasse proposals.[9] During the formal hearing, the burden is on the charging party to present evidence to prove the allegations in the complaint. (See, e.g., *Oakland Unified School District* (2009) PERB Decision No. 2061.) SCLEA has not established that the terms implemented in January 2008 deviated in any significant way from the proposals presented or discussed during negotiations. Accordingly, we conclude that SCLEA has failed to establish a violation of the MMBA.

[9] In the proceedings before the ALJ, SCLEA appeared to suggest that the implemented proposal made changes in the area of employee dental benefit contributions, coordination of leave benefits with statutory requirements, and long-term disability benefits. On appeal, SCLEA has not excepted to the ALJ's findings that all of these items were included in the parties' negotiations and were reasonably comprehended within the County's pre-impasse proposals. Therefore, we affirm the ALJ's findings that the County did not violate the MMBA with respect to these issues.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-523-M are hereby DISMISSED.

Members McKeag and Wesley joined in this Decision.

Exhibit 19

National Labor Relations Act
(29 U.S.C. 151, *et seq.*)

National Labor Relations Act

Congress enacted the National Labor Relations Act ("NLRA") in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.

NATIONAL LABOR RELATIONS ACT

Also cited NLRA or the Act; 29 U.S.C. §§ 151-169

[Title 29, Chapter 7, Subchapter II, United States Code]

FINDINGS AND POLICIES

Section 1.[§151.] The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

Sec. 2. [§152.] When used in this Act [subchapter]--

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National Labor Relations Act (NLRA)

Related Agencies

SHARE

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code [under title 11], or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

[Pub. L. 93-360, § 1(a), July 26, 1974, 88 Stat. 395, deleted the phrase "or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" from the definition of "employer."]

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8 [section 158 of this title].

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board provided for in section 3 of this Act [section 153 of this title].

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

(12) The term "professional employee" means--

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

(13) In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance

organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.
[Pub. L. 93-360, § 1(b), July 26, 1974, 88 Stat. 395, added par. (14).]

NATIONAL LABOR RELATIONS BOARD

Sec. 3. [§ 153.] (a) [Creation, composition, appointment, and tenure; Chairman; removal of members] The National Labor Relations Board (hereinafter called the "Board") created by this Act [subchapter] prior to its amendment by the Labor Management Relations Act, 1947 [29 U.S.C. § 141 et seq.], is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) [Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal] The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 [section 159 of this title] to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 [section 159 of this title] and certify the results thereof, except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

(c) [Annual reports to Congress and the President] The Board shall at the close of each fiscal year make a report in writing to Congress and to the President summarizing significant case activities and operations for that fiscal year.

(d) [General Counsel; appointment and tenure; powers and duties; vacancy] There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than administrative law judges and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [section 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

Sec. 4. [§ 154. Eligibility for reappointment; officers and employees; payment of expenses] (a) Each member of the Board and the General Counsel of the Board shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No administrative law judge's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no administrative law judge shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act [subchapter] shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefore approved by the Board or by any individual it designates for that purpose.

Sec. 5. [§ 155. Principal office, conducting inquiries throughout country; participation in decisions or inquiries conducted by member] The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all

of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

Sec. 6. [§ 156. Rules and regulations] The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [by subchapter II of chapter 5 of title 5], such rules and regulations as may be necessary to carry out the provisions of this Act [subchapter].

RIGHTS OF EMPLOYEES

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

UNFAIR LABOR PRACTICES

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act [subchapter];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

(b) [Unfair labor practices by labor organization] It shall be an unfair labor practice for a labor organization or its agents--
(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [section 157 of this title]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) [of subsection (a)(3) of this section] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [section 159(a) of this title];

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is- -

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsection (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title]: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 [section 159 of this title];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) [this subsection] shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act [subchapter]: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) [of this section] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective- bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act [subchapter] any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act [section 159(c) of this title],

(B) where within the preceding twelve months a valid election under section 9(c) of this Act [section 159(c) of this title] has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) [section 159(c) of this title] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [section 159(c)(1) of this title] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

(c) [Expression of views without threat of reprisal or force or promise of benefit] The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the

mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective- bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) [paragraphs (2) to (4) of this subsection] shall become inapplicable upon an intervening certification of the Board, under which the labor

organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [section 159(a) of this title], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act [sections 158, 159, and 160 of this title], but such loss of status for such employee shall terminate if and when he is re-employed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) [this subsection] shall be modified as follows:

(A) The notice of section 8(d)(1) [paragraph (1) of this subsection] shall be ninety days; the notice of section 8(d)(3) [paragraph (3) of this subsection] shall be sixty days; and the contract period of section 8(d)(4) [paragraph (4) of this subsection] shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3) [in paragraph (3) of this subsection].

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

[Pub. L. 93-360, July 26, 1974, 88 Stat. 395, amended the last sentence of Sec. 8(d) by striking the words "the sixty-day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase ", or who engages in any strike within the appropriate period specified in subsection (g) of this section." It also amended the end of paragraph Sec. 8(d) by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."]

(e) [Enforceability of contract or agreement to boycott any other employer; exception] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) [this subsection] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) [this subsection and subsection (b)(4)(B) of this section] the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act [subchapter] shall prohibit the enforcement of any agreement which is within the foregoing exception.

(f) [Agreements covering employees in the building and construction industry] It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

(g) [Notification of intention to strike or picket at any health care institution] A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act [subsection (d) of this section]. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

[Pub. L. 93-360, July 26, 1974, 88 Stat. 396, added subsec. (g).]

REPRESENTATIVES AND ELECTIONS

Sec. 9 [§ 159.] (a) [Exclusive representatives; employees' adjustment of grievances directly with employer] Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) [Determination of bargaining unit by Board] The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act [subchapter], the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit votes against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) [Hearings on questions affecting commerce; rules and regulations] (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsection (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsection (a) of this section]; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsection (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [section 160(c) of this title].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [subchapter] in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) [of this section] the extent to which the employees have organized shall not be controlling.

(d) [Petition for enforcement or review; transcript] Whenever an order of the Board made pursuant to section 10(c) [section 160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f) [subsection (e) or (f) of section 160 of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) [Secret ballot; limitation of elections] (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and labor organization made pursuant to section 8(a)(3) [section 158(a)(3) of this title], of a petition alleging they desire that such authorization be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve- month period, a valid election shall have been held.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(b) [Complaint and notice of hearing; six-month limitation; answer; court rules of evidence inapplicable] Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six- month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code [section 2072 of title 28].

(c) [Reduction of testimony to writing; findings and orders of Board] The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor

practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act [subchapter]: Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2) [subsection (a)(1) or (a)(2) of section 158 of this title], and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become affective as therein prescribed.

[The title "administrative law judge" was adopted in 5 U.S.C. § 3105.]

(d) [Modification of findings or orders prior to filing record in court] Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) [Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

(g) [Institution of court proceedings as stay of Board's order] The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) [Jurisdiction of courts unaffected by limitations prescribed in chapter 6 of this title] When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"].

(i) Repealed.

(j) [Injunctions] The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

(k) [Hearings on jurisdictional strikes] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b) [section 158(b) of this title], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) [Boycotts and strikes to force recognition of uncertified labor organizations; injunctions; notice; service of process] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) [section 158(b) of this title], or section 8(e) [section 158(e) of this title] or section 8(b)(7) [section 158(b)(7) of this title], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) [section 158(b)(7) of this title] if a charge against the employer under section 8(a)(2) [section 158(a)(2) of this title] has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D) [section 158(b)(4)(D) of this title].

(m) [Priority of cases] Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8 [section 158 of this title], such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1) [of this section].

INVESTIGATORY POWERS

Sec. 11. [§ 161.] For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 [sections 159 and 160 of this title]--

(1) [Documentary evidence; summoning witnesses and taking testimony] The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any

agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) [Court aid in compelling production of evidence and attendance of witnesses] In case on contumacy or refusal to obey a subpoena issued to any person, any United States district court or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) Repealed.

[Immunity of witnesses. See 18 U.S.C. § 6001 et seq.]

(4) [Process, service and return; fees of witnesses] Complaints, orders and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefore when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) [Process, where served] All process of any court to which application may be made under this Act [subchapter] may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) [Information and assistance from departments] The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

Sec. 12. [§ 162. Offenses and penalties] Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act [subchapter] shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

Sec. 13. [§ 163. Right to strike preserved] Nothing in this Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

Sec. 14. [§ 164. Construction of provisions] (a) [Supervisors as union members] Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [subchapter] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

(b) [Agreements requiring union membership in violation of State law] Nothing in this Act [subchapter] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

(c) [Power of Board to decline jurisdiction of labor disputes; assertion of jurisdiction by State and Territorial courts] (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act [to subchapter II of chapter 5 of title 5], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act [subchapter] shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

Sec. 15. [§ 165.] Omitted.

[Reference to repealed provisions of bankruptcy statute.]

Sec. 16. [§ 166. Separability of provisions] If any provision of this Act [subchapter], or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act [subchapter], or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 17. [§ 167. Short title] This Act [subchapter] may be cited as the "National Labor Relations Act."

Sec. 18. [§ 168.] Omitted.

[Reference to former sec. 9(f), (g), and (h).]

INDIVIDUALS WITH RELIGIOUS CONVICTIONS

Sec. 19. [§ 169.] Any employee who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required in a contract between such employee's employer and a labor organization in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 of the Internal Revenue Code [section 501(c)(3) of title 26], chosen by such employee from a list of at least three such funds, designated in such contract or if the contract fails to designate such funds, then to any such fund chosen by the employee. If such employee who holds conscientious objections pursuant to this section requests the labor organization to use the grievance-arbitration procedure on the employee's behalf, the labor organization is authorized to charge the employee for the reasonable cost of using such procedure.

[Sec. added, Pub. L. 93-360, July 26, 1974, 88 Stat. 397, and amended, Pub. L. 96-593, Dec. 24, 1980, 94 Stat. 3452.]

LABOR MANAGEMENT RELATIONS ACT

Also cited LMRA; 29 U.S.C. §§ 141-197
[Title 29, Chapter 7, United States Code]

SHORT TITLE AND DECLARATION OF POLICY

Section 1. [§ 141.] (a) This Act [chapter] may be cited as the "Labor Management Relations Act, 1947." [Also known as the "Taft-Hartley Act."]

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act [chapter], in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I, Amendments to

NATIONAL LABOR RELATIONS ACT

29 U.S.C. §§ 151-169 (printed above)

TITLE II

[Title 29, Chapter 7, Subchapter III, United States Code]

CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

Sec. 201. [§ 171. Declaration of purpose and policy] It is the policy of the United States that--

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may by advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective bargaining agreements may be avoided or minimized

by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

Sec. 202. [§ 172. Federal Mediation and Conciliation Service]

(a) [Creation; appointment of Director] There is created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service," except that for sixty days after June 23, 1947, such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall not engage in any other business, vocation, or employment

.(b) [Appointment of officers and employees; expenditures for supplies, facilities, and services] The Director is authorized, subject to the civil service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with sections 5101 to 5115 and sections 5331 to 5338 of title 5, United States Code [chapter 51 and subchapter III of chapter 53 of title 5], and may, without regard to the provisions of the civil service laws, appoint such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefore approved by the Director or by any employee designated by him for that purpose.

(c) [Principal and regional offices; delegation of authority by Director; annual report to Congress] The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act [chapter] to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) [Transfer of all mediation and conciliation services to Service; effective date; pending proceedings unaffected] All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 51 [repealed] of title 29, United States Code [this title], and all functions of the United States Conciliation Service under any other law are transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after June 23, 1947. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

Sec. 203. [§ 173. Functions of Service] (a) [Settlement of disputes through conciliation and mediation] It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) [Intervention on motion of Service or request of parties; avoidance of mediation of minor disputes] The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) [Settlement of disputes by other means upon failure of conciliation] If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lockout, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act [chapter].

(d) [Use of conciliation and mediation services as last resort] Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(e) [Encouragement and support of establishment and operation of joint labor management activities conducted by committees] The Service is authorized and directed to encourage and support the establishment and operation of joint

labor management activities conducted by plant, area, and industry wide committees designed to improve labor management relationships, job security and organizational effectiveness, in accordance with the provisions of section 205A [section 175a of this title].

[Pub. L. 95-524, § 6(c)(1), Oct. 27, 1978, 92 Stat. 2020, added subsec. (e).]

Sec. 204. [§ 174. Co-equal obligations of employees, their representatives, and management to minimize labor disputes] (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall--

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective- bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act [chapter] for the purpose of aiding in a settlement of the dispute.

Sec. 205. [§175. National Labor-Management Panel; creation and composition; appointment, tenure, and compensation; duties] (a) There is created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be elected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of $25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

Sec. 205A. [§ 175a. Assistance to plant, area, and industry wide labor management committees]

(a) [Establishment and operation of plant, area, and industry wide committees] (1) The Service is authorized and directed to provide assistance in the establishment and operation of plant, area and industry wide labor management committees which--

(A) have been organized jointly by employers and labor organizations representing employees in that plant, area, or industry; and

(B) are established for the purpose of improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern.

(2) The Service is authorized and directed to enter into contracts and to make grants, where necessary or appropriate, to fulfill its responsibilities under this section.

(b) [Restrictions on grants, contracts, or other assistance] (1) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to a plant labor management committee unless the employees in that plant are represented by a labor organization and there is in effect at that plant a collective bargaining agreement.

(2) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to an area or industry wide labor management committee unless its participants include any labor organizations certified or recognized as the representative of the employees of an employer participating in such committee. Nothing in this clause shall prohibit participation in an area or industry wide committee by an employer whose employees are not represented by a labor organization.

(3) No grant may be made under the provisions of this section to any labor management committee which the Service finds to have as one of its purposes the discouragement of the exercise of rights contained in section 7 of the National Labor Relations Act (29 U.S.C. § 157) [section 157 of this title], or the interference with collective bargaining in any plant, or industry.

(c) [Establishment of office] The Service shall carry out the provisions of this section through an office established for that purpose.

(d) [Authorization of appropriations] There are authorized to be appropriated to carry out the provisions of this section

$10,000,000 for the fiscal year 1979, and such sums as may be necessary thereafter.

[Pub. L. 95-524, § 6(c)(2), Oct. 27, 1978, 92 Stat. 2020, added Sec. 205A.]

NATIONAL EMERGENCIES

Sec. 206. [§ 176. Appointment of board of inquiry by President; report; contents; filing with Service] Whenever in the opinion of the President of the United States, a threatened or actual strike or lockout affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

Sec. 207. [§ 177. Board of inquiry]

(a) [Composition] A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) [Compensation] Members of a board of inquiry shall receive compensation at the rate of $50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) [Powers of discovery] For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 49 and 50 of title 15, United States Code [sections 49 and 50 of title 15] (relating to the attendance of witnesses and the production of books, papers, and documents) are made applicable to the powers and duties of such board.

Sec. 208. [§ 178. Injunctions during national emergency]

(a) [Petition to district court by Attorney General on direction of President] Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lockout or the continuing thereof, and if the court finds that such threatened or actual strike or lockout--

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lockout, or the continuing thereof, and to make such other orders as may be appropriate.

(b) [Inapplicability of chapter 6] In any case, the provisions of sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"] shall not be applicable.

(c) [Review of orders] The order or orders of the court shall be subject to review by the appropriate United States court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in section 1254 of title 28, United States Code [section 1254 of title 28].

Sec. 209. [§ 179. Injunctions during national emergency; adjustment efforts by parties during injunction period]

(a) [Assistance of Service; acceptance of Service's proposed settlement] Whenever a district court has issued an order under section 208 [section 178 of this title] enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act [chapter]. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) [Reconvening of board of inquiry; report by board; contents; secret ballot of employees by National Labor Relations Board; certification of results to Attorney General] Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer, as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

Sec. 210. [§ 180. Discharge of injunction upon certification of results of election or settlement; report to Congress] Upon

the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE-BARGAINING AGREEMENTS, ETC.

Sec. 211. [§ 181.] (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

Sec. 212. [§ 182.] The provisions of this title [subchapter] shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time.

CONCILIATION OF LABOR DISPUTES IN THE HEALTH CARE INDUSTRY

Sec. 213. [§ 183.] (a) [Establishment of Boards of Inquiry; member- ship] If, in the opinion of the Director of the Federal Mediation and Conciliation Service, a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 8(d) [section 158(d) of this title] (which is required by clause (3) of such section 8(d) [section 158(d) of this title]), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

(b) [Compensation of members of Boards of Inquiry] (1) Members of any board established under this section who are otherwise employed by the Federal Government shall serve without compensation but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in carrying out its duties under this section.

(2) Members of any board established under this section who are not subject to paragraph (1) shall receive compensation at a rate prescribed by the Director but not to exceed the daily rate prescribed for GS-18 of the General Schedule under section 5332 of title 5, United States Code [section 5332 of title 5], including travel for each day they are engaged in the performance of their duties under this section and shall be entitled to reimbursement for travel, subsistence, and other necessary expenses incurred by them in carrying out their duties under this section.

(c) [Maintenance of status quo] After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

(d) [Authorization of appropriations] There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

TITLE III

[Title 29, Chapter 7, Subchapter IV, United States Code]

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. [§ 185.] (a) [Venue, amount, and citizenship] Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act [chapter], or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) [Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments] Any labor organization which represents employees in an industry affecting commerce as defined in this Act [chapter] and any employer whose activities affect commerce as defined in this Act [chapter] shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts

of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) [Jurisdiction] For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) [Service of process] The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) [Determination of question of agency] For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

Sec. 302. [§ 186.] (a) [Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations] It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) [Request, demand, etc., for money or other thing of value]

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) [of this section].

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 U.S.C. § 301 et seq.]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) [Exceptions] The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral

persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, (B) child care centers for preschool and school age dependents of employees, or (C) financial assistance for employee housing: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, or this Act [under subchapter II of this chapter or this chapter]; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor- Management Reporting and Disclosure Act of 1959 [29 U.S.C. § 401 et seq.]; or (9) with respect to money or other things of value paid by an employer to a plant, area or industry wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978.

[Sec. 302(c)(7) was added by Pub. L. 91-86, Oct. 14, 1969, 83 Stat. 133; Sec. 302(c)(8) by Pub. L. 93-95, Aug. 15, 1973, 87 Stat. 314; Sec. 302(c)(9) by Pub. L. 95-524, Oct. 27, 1978, 92 Stat. 2021; and Sec. 302(c)(7) was amended by Pub. L. 101-273, Apr. 18, 1990, 104 Stat. 138.]

(d) [Penalty for violations] Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) [Jurisdiction of courts] The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of rule 65 of the Federal Rules of Civil Procedure [section 381 (repealed) of title 28] (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 7 of title 15 and section 52 of title 29, United States Code [of this title] [known as the "Clayton Act"], and the provisions of sections 101 to 115 of title 29, United States Code [chapter 6 of this title] [known as the "Norris-LaGuardia Act"].

(f) [Effective date of provisions] This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) [Contributions to trust funds] Compliance with the restrictions contained in subsection (c)(5)(B) [of this section] upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) [of this section] be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

Sec. 303. [§ 187.] (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act [section 158(b)(4) of this title].

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) [of this section] may sue therefore in any district court of the United States subject to the limitation and provisions of section 301 hereof [section 185 of this title] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

RESTRICTION ON POLITICAL CONTRIBUTIONS

Sec. 304. Repealed.

[See sec. 316 of the Federal Election Campaign Act of 1972, 2 U.S.C. § 441b.]

Sec. 305.[§ 188.] Strikes by Government employees. Repealed.

[See 5 U.S.C. § 7311 and 18 U.S.C. § 1918.]

TITLE IV

[Title 29, Chapter 7, Subchapter V, United States Code]

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

Secs. 401-407. [§§ 191-197.] Omitted.

TITLE V

[Title 29, Chapter 7, Subchapter I, United States Code]

DEFINITIONS

Sec. 501. [§ 142.] When used in this Act [chapter]--

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

(3) The terms "commerce," "labor disputes," "employer," "employee," "labor organization," "representative," "person," and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act [in subchapter II of this chapter].

SAVING PROVISION

Sec. 502. [§ 143.] [Abnormally dangerous conditions] Nothing in this Act [chapter] shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act [chapter] be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act [chapter].

SEPARABILITY

Sec. 503. [§ 144.] If any provision of this Act [chapter], or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act [chapter], or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Exhibit 20

Gov't. Code § 3501

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

As used in this chapter:

3501. (a) "Employee organization" means either of the following:

(1) Any organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency.

(2) Any organization that seeks to represent employees of a public agency in their relations with that public agency.

(b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

(c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

(d) "Public employee" means any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state.

(e) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(f) "Board" means the Public Employment Relations Board established pursuant to Section 3541.

(Amended by Stats. 2003, Ch. 215, Sec. 2. Effective January 1, 2004.)

Exhibit 21

Govt. Code §3505.4

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

3505.4. (a) The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

(e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

(Amended by Stats. 2012, Ch. 314, Sec. 1. Effective January 1, 2013.)

Exhibit 22

Gov't. Code § 3505.5

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

(Added by Stats. 2011, Ch. 680, Sec. 3. Effective January 1, 2012.)

Exhibit 23

Govt. Code §3505.7

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

(Added by Stats. 2011, Ch. 680, Sec. 4. Effective January 1, 2012.)

Exhibit 24

Gov't. Code § 3507

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10. Local Public Employee Organizations [3500 - 3511] *(Heading of Chapter 10 amended by Stats. 1971, Ch. 254.)*

3507. (a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

The rules and regulations may include provisions for all of the following:

(1) Verifying that an organization does in fact represent employees of the public agency.

(2) Verifying the official status of employee organization officers and representatives.

(3) Recognition of employee organizations.

(4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.

(5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

(6) Access of employee organization officers and representatives to work locations.

(7) Use of official bulletin boards and other means of communication by employee organizations.

(8) Furnishing nonconfidential information pertaining to employment relations to employee organizations.

(9) Any other matters that are necessary to carry out the purposes of this chapter.

(b) Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of recognition.

(c) No public agency shall unreasonably withhold recognition of employee organizations.

(d) Employees and employee organizations shall be able to challenge a rule or regulation of a public agency as a violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive, of Section 3509.

(Amended by Stats. 2003, Ch. 215, Sec. 3. Effective January 1, 2004.)

Exhibit 25

Gov't. Code § 3548.3

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 10.7. Meeting and Negotiating in Public Educational Employment [3540 - 3549.3] *(Chapter 10.7 added by Stats. 1975, Ch. 961.)*

ARTICLE 9. Impasse Procedures [3548 - 3548.8] *(Article 9 added by Stats. 1975, Ch. 961.)*

3548.3. (a) If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses shall be borne by the board.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's resume on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of such interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred costs for the panel member selected by each party, shall be borne by such party.

(Amended by Stats. 1980, Ch. 949.)

Exhibit 26

Gov't. Code § 3593

GOVERNMENT CODE - GOV

TITLE 1. GENERAL [100 - 7914] *(Title 1 enacted by Stats. 1943, Ch. 134.)*
DIVISION 4. PUBLIC OFFICERS AND EMPLOYEES [1000 - 3599] *(Division 4 enacted by Stats. 1943, Ch. 134.)*

CHAPTER 12. Higher Education Employer-Employee Relations [3560 - 3599] *(Chapter 12 added by Stats. 1978, Ch. 744.)*

ARTICLE 9. Impasse Procedure [3590 - 3594] *(Article 9 added by Stats. 1978, Ch. 744.)*

3593. (a) If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The panel, subject to the rules and regulations of the board, may make those findings and recommendations public 10 days thereafter. During this 10-day period, the parties are prohibited from making the panel's findings and recommendations public.

(b) The costs for the services of the panel chairperson, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be borne by the board. Any other mutually incurred costs shall be borne equally by the employer and the exclusive representative. Each party shall bear the costs it incurs for the panel member it selects.

(c) (1) This subdivision applies only to disputes relating to the faculty and librarians of the University of California and the Hastings College of the Law. For the purposes of this subdivision, "faculty" means teachers employed to teach courses and authorize the granting of credit for the successful completion of courses, and excludes employees whose employment is contingent on their status as students.

(2) Irrespective of whether the panel makes its findings and recommendations public pursuant to subdivision (a), the Regents of the University of California and the Directors of the Hastings College of the Law, as appropriate, shall make the findings and recommendations of the panel public after the 10-day period prescribed by subdivision (a) has ended. These findings and recommendations shall be posted in a prominent public place, and copies of the findings and recommendations shall be made available to any person attending the next regularly scheduled public meeting of the regents or the directors, as appropriate. The publicly distributed agenda of the next regularly scheduled meeting of the regents or the directors, as appropriate, shall reference the availability of these findings and recommendations.

(3) It is the intent of the Legislature that the regents or the directors, as appropriate, shall act upon the findings and recommendations of the panel at an open and public meeting within 90 days of their submission to the parties by the panel.

(Amended by Stats. 2003, Ch. 62, Sec. 106. Effective January 1, 2004.)

Exhibit 27

8 CCR § 32802

Barclays Official California Code of Regulations Currentness
Title 8. Industrial Relations
Division 3. Public Employment Relations Board
Chapter 1. Public Employment Relations Board
Subchapter 6. Representation Proceedings
Article 6. Impasse Procedures

8 CCR § 32802

§ 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days,"for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

Note: Authority cited: Sections 3509(a), 3541.3(e) and 3541.3(g), Government Code. Reference: Sections 3505.4, 3505.5 and 3505.7, Government Code.

HISTORY

1. New section filed 12-29-2011 as an emergency; operative 1-1-2012 (Register 2011, No. 52). A Certificate of Compliance must be transmitted to OAL by 6-29-2012 or emergency language will be repealed by operation of law on the following day.

2. Certificate of Compliance as to 12-29-2011 order transmitted to OAL 6-22-2012 and filed 7-30-2012 (Register 2012, No. 31).

3. Repealer of subsection (e) filed 8-22-2013; operative 10-1-2013 (Register 2013, No. 34).

This database is current through 9/2/16 Register 2016, No. 36.

8 CCR § 32802, 8 CA ADC § 32802

End of Document

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On September 16, 2016, I served the:

Claimant's Rebuttal Comments
Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Section 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 16, 2016 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 9/14/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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Exhibit E

State of California

MEMORANDUM

PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124

DATE: June 18, 2012

TO : Eric Stern

FROM : Les Chisholm

SUBJECT : **Proposed Rulemaking—Factfinding under the Meyers-Milias-Brown Act—Request for Approval of Standard Form 399**

The Public Employment Relations Board (PERB or Board) is requesting the Department of Finance's approval for the Form 399 that will accompany the submission of a rulemaking file to the Office of Administrative Law. As described below, the new and amended regulations included in this rulemaking do not have a fiscal impact on state or local government.

Background

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.) Following the enactment of Assembly Bill 646, PERB identified proposed regulation changes that were necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646.

These regulatory changes were adopted first as emergency regulations, and took effect on January 1, 2012. The Board subsequently provided notice of proposed rulemaking for the adoption of the same regulatory changes, held a public hearing on June 14, 2012, and voted to approve the regulations at its public meeting held on June 14, 2012.

Description of Regulatory Changes

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA.

Section 32603 describes unfair practices by a public agency under the MMBA, and Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any

impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language of each of these sections to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. Harmonizing of the statutory changes made by Assembly Bill 646 requires the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted regulations that provide for factfinding both where mediation has occurred, and where it has not.[1]

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson.

Attachments

[1] Currently pending before the Legislature is consideration of Assembly Bill 1606. Assembly Bill 1606 would clarify the language of Government Code section 3505.4 in a manner consistent with the proposed language of PERB Regulation 32802.

TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD

NOTICE OF PROPOSED RULEMAKING

The Public Employment Relations Board (Board) proposes to adopt and amend the regulations described below after considering all comments, objections or recommendations regarding the proposed action.

REGULATORY ACTION

The Board proposes to amend sections 32380, 32603, and 32604, and to add sections 32802 and 32804. Section 32380 identifies types of administrative decisions by Board agents that are not appealable to the Board itself. Section 32603 describes unfair practices by a public agency under the Meyers-Milias-Brown Act (MMBA). Section 32604 describes unfair practices by an employee organization under the MMBA. Proposed section 32802 provides for the filing of requests for factfinding with PERB under the MMBA, describes when a request may be filed and the requirements for filing, and provides that determinations as to sufficiency of a request are not appealable. Proposed section 32804 describes the timelines and procedures for the selection of a neutral chairperson of a factfinding panel pursuant to a sufficient request filed under proposed section 32802.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on June 14, 2012, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period closes at

5:00 p.m. on June 12, 2012. Written comments will also be accepted at the public hearing. Submit written comments to:

Les Chisholm, Division Chief
Office of the General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
FAX: (916) 327-6377
E-mail: lchisholm@perb.ca.gov

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32380 of the Board's regulations: Government Code sections 3505.4, 3509, 3513(h), 3541.3(k) and (n), 3563(j) and (m), 71639.1 and 71825; and Public Utilities Code section 99561(j) and (m). General reference for section 32603 of the Board's regulations: Government Code sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for section 32604 of the Board's regulations: Government Code sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for proposed section 32802 of the Board's regulations: Government Code sections 3505.4, 3505.5,

and 3505.7. General reference for proposed section 32804 of the Board's regulations: Government Code sections 3505.4, 3505.5, and 3505.7.

POLICY STATEMENT OVERVIEW

PERB is a quasi-judicial agency which oversees public sector collective bargaining in California. PERB presently administers seven collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB are: the Meyers-Milias-Brown Act (MMBA) of 1968, which established collective bargaining for California's city, county, and local special district employers and employees; the Educational Employment Relations Act (EERA) of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act), establishing collective bargaining for state government employees; the Higher Education Employer-Employee Relations Act (HEERA) of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law; the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) of 2003, which covers supervisory employees of the Los Angeles County Metropolitan Transportation Authority; and the Trial Court Employment Protection and Governance Act (Trial Court Act) of 2000 and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) of 2002, which together provide for collective bargaining rights for most trial court employees.

Prior to January 1, 2012, the MMBA did not provide for any mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Pursuant to Assembly Bill 646 (Chapter 680, Statutes of 2011), the MMBA was amended to provide for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. Assembly Bill 646, while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7.

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to PERB. This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

INFORMATIVE DIGEST

Section 32380 identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 describes unfair practices by an employee organization under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed section 32802 would describe when and in which office a request for factfinding may be filed with the Board. The new section would further describe the timeline for PERB's determination as to the sufficiency of the request, and would specify that such determinations are not appealable to the Board itself.

Proposed section 32804 would describe the process, in cases where the Board finds a factfinding request to be valid, for the selection or appointment of the neutral chairperson of a factfinding panel. The new section would further specify, consistent with the provisions of MMBA section 3505.5, that PERB will not be responsible in any case for the costs of the panel chairperson.

CONSISTENT AND COMPATIBLE WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, PERB has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the

community at-large benefits from those cost-savings. Finally, the proposed amendments clarify the definition of "unfair practices" under the MMBA.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Initial determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 et seq: Initial determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Initial determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's initial determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California. The adoption of the proposed amendment will benefit public employers, employees, employees' representatives and the community at-large by further facilitating the resolution of public sector labor disputes by providing additional dispute resolution procedures and promoting full and bilateral communication between PERB's constituents. In so doing, California residents' welfare will receive the benefit of stable collective bargaining and dispute resolution, which translates to continuous delivery of the essential services that these employers and employees provide to California communities.

CONSIDERATION OF ALTERNATIVES

A rulemaking agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

PRELIMINARY ACTIVITIES

PERB staff began meeting with interested parties about the statutory changes made by Assembly Bill 646 in October 2011; circulated discussion drafts of possible regulations; held open meetings to take comments and suggestions on November 8, 2011 (Oakland) and November 10, 2011 (Glendale); and posted copies of the discussion drafts, written comments from parties, and the staff recommendations on the Board's web site. Additional public comments were received at the December 8, 2011 public Board meeting, at which time the Board authorized submission of an emergency rulemaking package to implement the provisions of Assembly Bill 646. The Board has also relied upon the Economic Impact Assessment identified in this Notice in proposing regulatory action.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons, when available, may be obtained by contacting Jonathan Levy or Katherine Nyman at the address or phone number listed below, and are also available on the Board's web site (see address below).

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of reasons should be sent to the attention of Jonathan Levy or Katherine Nyman at the address

indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

INTERNET ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. Written comments received during the written comment period will also be posted on the web site. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

Jonathan Levy, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8387

or

Katherine Nyman, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8386

INITIAL STATEMENT OF REASONS

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.)

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to the Public Employment Relations Board (PERB or Board). This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

The proposed regulation changes that have been identified as necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646 are described below.

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. During the workshop process that preceded the adoption of emergency regulations, some parties advocated limiting the application of this regulation and MMBA factfinding to situations where the parties had first engaged in mediation. Based on the language of the MMBA, as amended by Assembly Bill 646, as well as evidence of legislative intent and the comments submitted by most other interested parties, this alternative approach has been rejected for purposes of the proposed regulations. Instead, it appears that harmonizing of the statutory changes made by Assembly Bill 646 requires the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

It is correct that Government Code section 3505.4(a), as re-added by Assembly Bill 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, Assembly Bill 646 also repealed the prior language of section 3505.4, which set forth under what conditions an employer could implement its last, best and final offer. In new section 3505.7, the MMBA provides that such an implementation may only occur, "After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5." (Emphasis added.) In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also highly consistent with the available evidence of legislative intent. For example, the author of Assembly Bill 646 was quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order

to assist them in resolving differences that remain after negotiations have been unsuccessful.

Under proposed Section 32802, where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself, consistent with how impasse determinations under other statutes are treated.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

As discussed above, during the workshop process that preceded the adoption of the related emergency regulations, some parties advocated limiting MMBA factfinding to situations where the parties had first engaged in mediation. This alternative interpretation of Assembly Bill 646 was considered by PERB. However, based on the language of the MMBA, as amended by Assembly Bill 646, as well as the above-referenced evidence of legislative intent and the comments submitted by most other interested parties, this alternative interpretation was rejected for purposes of both the emergency and proposed regulations. PERB concluded, when adopting the emergency regulations, that harmonizing the statutory changes made by Assembly

Bill 646 required PERB to conclude that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

PERB fully intends to solicit further public comments and conduct a public hearing on these issues and interpretations in order to evaluate the possibility and strength of other alternatives through the regular rule making process.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the community at-large benefits from those cost-savings.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

PERB has not identified any alternatives that would lessen any adverse impact on small business and has not identified any adverse impacts on small businesses as a result of these proposed regulations.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

PERB relied upon the Economic Impact Assessment prepared regarding the proposed regulations. PERB did not rely upon any other technical, theoretical, or empirical studies, report or documents in proposing the adoption of these regulations.

MANDATED USE OF SPECIFIC TECHNOLOGIES OR EQUIPMENT

PERB's proposed regulations do not mandate the use of any specific technologies or equipment.

PROPOSED TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k), ~~3541.3~~ and (n), 3563(j), ~~3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j), and (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

ECONOMIC IMPACT ASSESSMENT

(Government Code section 11346.3(b))

As a result of the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012, the Meyers-Milias-Brown Act (MMBA), the collective bargaining statute applicable to local governments (cities, counties, and special districts) in California, provides for a mandatory impasse procedure—factfinding before a tripartite panel—upon the request of an exclusive representative where the parties have not reached a settlement of their dispute. The Public Employment Relations Board (PERB) is responsible for the appointment of the neutral chairperson of the factfinding panel unless the parties mutually agree upon the selection of the chairperson. This new legislation and the duties imposed on PERB under it require amendments to existing regulations as well as the adoption of new regulations in order to fully implement the legislation and PERB's role.

The proposed regulations clarify and interpret California Government Code sections 3505.4, 3505.5 and 3505.7, and provide guidelines for the filing and processing of requests for factfinding under the MMBA.

In accordance with Government Code Section 11346.3(b), the Public Employment Relations Board has made the following assessments regarding the proposed regulations:

Creation or Elimination of Jobs Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no jobs in California will be created or eliminated.

Creation of New or Elimination of Existing Businesses Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no new businesses in California will be created or existing businesses eliminated.

Expansion of Businesses or Elimination of Existing Businesses Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no existing businesses in California will be expanded or eliminated.

Benefits of the Regulations

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. Through the guidelines, the Public Employment Relations Board will ensure improvement of the public sector labor environment by providing additional dispute resolution procedures and promoting full communication between public employers and their employees in resolving disputes over wages, hours and other terms and conditions of employment. The proposed regulations will further the policy of bilateral resolution of public sector labor disputes and help PERB constituents avoid unnecessary and costly unfair practice charges and related litigation. The proposed regulatory action will not adversely affect the health and welfare of California residents, worker safety, or the State's environment. The proposed regulatory action will not benefit the health of California residents, worker safety, or the State's environment. The proposed regulatory action will, as described, benefit the general welfare of California residents by ensuring that public labor disputes are resolved in less costly ways.

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT

(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME	CONTACT PERSON	TELEPHONE NUMBER
Public Employment Relations Board	Les Chisholm	(916) 322-3198
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		**NOTICE FILE NUMBER**
Factfinding under the Meyers-Milias-Brown Act		Z 2012-0416-02

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts businesses and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☐ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (List areas.): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes ☐ No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): $ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☐ No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☐ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of : ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: $_____	Cost: $_____
Alternative 1:	Benefit: $_____	Cost: $_____
Alternative 2:	Benefit: $_____	Cost: $_____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million ? ☐ Yes ☐ No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

   Alternative 1: _____

   Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

   Regulation: $ _____ Cost-effectiveness ratio: $ _____

   Alternative 1: $ _____ Cost-effectiveness ratio: $ _____

   Alternative 2: $ _____ Cost-effectiveness ratio: $ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

   ☐ a. is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____

   ☐ b. will be requested in the _____ (FISCAL YEAR) Governor's Budget for appropriation in Budget Act of _____

☐ 2. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

   ☐ a. implements the Federal mandate contained in _____

   ☐ b. implements the court mandate set forth by the _____

   court in the case of _____ vs. _____

   ☐ c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ (DATE) election;

   ☐ d. is issued only in response to a specific request from the _____

   _____, which is/are the only local entity(s) affected;

   ☐ e. will be fully financed from the _____ (FEES, REVENUE, ETC.) authorized by Section

   _____ of the _____ Code;

   ☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

   ☐ g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Savings of approximately $ _____ annually.

☐ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.

☑ 6. Other. Unaware of any local costs. No reimbursement required per Gov. Code section 17561.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year. It is anticipated that State agencies will:

☐ a. be able to absorb these additional costs within their existing budgets and resources.

☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.

☐ 2. Savings of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any State agency or program.

☐ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year.

☐ 2. Savings of of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.

☐ 4. Other.

FISCAL OFFICER SIGNATURE		DATE
AGENCY SECRETARY [1] APPROVAL/CONCURRENCE		DATE 6.18.12
DEPARTMENT OF FINANCE [2] APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER	DATE

1. *The signature attests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.*

2. *Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.*

FINAL STATEMENT OF REASONS

No written comments were received in response to the Notice of Proposed Rulemaking and the Public Employment Relations Board (PERB or Board) did not rely on any material that was not available for public review prior to close of the public comment period. Additionally, no modification has been made to the text of the proposed regulations originally noticed to the public.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE PUBLIC HEARING

COMMENT NO. 1: Michael Seville, Representative, International Federation of Professional Technical Engineers, Local 21 (IFPTE), appeared before the Board. Mr. Seville stated that IFPTE is a union located in the Bay Area that represents approximately 10,000 civil servants in the city and county, utility and transit districts. Mr. Seville first expressed appreciation for the Board's consideration of this matter, but had questions and concerns regarding the timelines set forth in the proposed regulations. Specifically, in conferring with colleagues in the Bay Area, Mr. Seville stated the belief that while it was felt the 30-day requirement was "a good move", the 45-day back-end filing deadline for factfinding requests is restrictive. The time limits as currently proposed, said Mr. Seville, "may not be enough time and it puts a mediator in a bad place and kind of hamstrings the mediator in dealing with two parties who are engaging in good faith mediation if one party moves for factfinding. It erodes the confidence of both parties of good faith mediation, or could." On behalf of the union, Mr. Seville urged the Board to either (1) wait for Assembly Bill 1606 to go into effect to clarify the time limits and set a legal precedent, or (2) in Assembly Bill 1606's absence, extend the 45-day time limit for filing a request for factfinding.

Response: PERB disagrees with the comment to the extent that Mr. Seville suggested that PERB, through this rulemaking package, extend the 45-day back-end filing deadline for factfinding requests. The reasons being two-fold. First, as discussed at the public hearing and affirmed by Comment Number 3, *infra*, Assembly Bill 1606, last amended on May 17, 2012, and currently before the Senate Appropriations Committee for consideration, seeks to clarify Assembly Bill 646 by explicitly establishing the 45-day back-end filing deadline. Additionally, the 45-day back-end filing deadline was proposed here and previously adopted in PERB's emergency rulemaking package in order to address interested parties' concerns and desire for certainty. During the discussion at the public hearing relating to this rulemaking package, PERB staff noted that if parties are actively engaged in mediation, the exclusive representative can file the factfinding request within the 45-day time limit to preserve its right to factfinding, then request the factfinding request be placed in abeyance pending the outcome of mediation between the parties.

COMMENT NO. 2: Mr. Seville brought a second point to the Board's attention regarding the timelines for the public release of a factfinding report and the amount of time the employer must wait prior to imposition.

Response: This comment does not relate to the proposed regulations. PERB Division Chief Les Chisholm noted that MMBA section 3505.7 already addresses this issue, and that neither the current proposed regulations nor the emergency regulations adopted by the Board address this topic.

COMMENT NO. 3: Eraina Ortega, Representative, California State Association of Counties (CSAC), appeared before the Board. Ms. Ortega addressed Comment Number 1 on behalf of CSAC and employers who attended the regional meetings held by PERB last year during the emergency rulemaking process. The key issue at the regional meetings was the employers' interest in setting an outside date to request factfinding because of their desire to be able to resolve bargaining disputes. Ms. Ortega encouraged the Board to maintain the time limits in the proposed regulations. She also stated that CSAC had worked with the sponsors of Assembly Bill 1606 to amend the bill to reflect the language of the PERB regulations, which would ensure there would be no concerns about the regulation versus the statute, and provide clarity regarding the timeframe for filing a request for factfinding. Ms. Ortega asked that if any further discussions were to be considered regarding these timeframes, that PERB work with those involved with the legislation so that it continues to reflect a common goal.

Response: This is a general comment in support of PERB's currently proposed regulation language and sought to clarify information relating to the back-end date and Assembly Bill 1606 as commented on by Mr. Seville. (See, Comment No. 1 and PERB's response thereto.)

COMMENT NO. 4: Jeffrey Edwards, Attorney, Mastagni, Holstedt, Amick, Miller & Johnsen, appeared before the Board. Following the discussion held today, Mr. Edwards asked about PERB's practice with regard to factfinding requests that have been put into abeyance. He wanted to know whether either party could take the request out of abeyance or whether such request had to be made by mutual consent.

Response: This comment is not directed at and does not relate to the proposed regulations. Typically, cases are taken out of abeyance when the parties have reached resolution of the matter and the request is being withdrawn. There are no specific regulations which address the matter regarding placing cases into or out of abeyance; instead, these issues are resolved on a case-by-case basis.

CONSISTENT AND COMPATIBLE WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, PERB has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and

promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the community at-large benefits from those cost-savings. Finally, the proposed amendments clarify the definition of "unfair practices" under the MMBA.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Final determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 et seq: Final determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Final determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's final determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California. The adoption of the proposed amendment will benefit public employers, employees, employees' representatives and the community at-large by further facilitating the resolution of public sector labor disputes by providing additional dispute resolution procedures and promoting full and bilateral communication between PERB's constituents. In so doing, California residents' welfare will receive the benefit of stable collective bargaining and dispute resolution, which translates to continuous delivery of the essential services that these employers and employees provide to California communities.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

During the workshop process that preceded the adoption of the related emergency regulations, some parties advocated limiting MMBA factfinding to situations where the parties had first engaged in mediation. This alternative interpretation of Assembly Bill 646 was considered by PERB. However, based on the language of the MMBA, as amended by Assembly Bill 646, as well as the above-referenced evidence of legislative intent and the comments submitted by most other interested parties, this alternative interpretation was rejected for purposes of both the emergency and proposed regulations. PERB concluded, when adopting the emergency regulations, that harmonizing the statutory changes made by Assembly Bill 646 required PERB to conclude that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

PERB has not identified any alternatives that would lessen any adverse impact on small business and has not identified any adverse impacts on small businesses as a result of these proposed regulations.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

PERB relied upon the Economic Impact Assessment prepared regarding the proposed regulations. PERB did not rely upon any other technical, theoretical, or empirical studies, report or documents in proposing the adoption of these regulations.

MANDATED USE OF SPECIFIC TECHNOLOGIES OR EQUIPMENT

PERB's proposed regulations do not mandate the use of any specific technologies or equipment.

FINAL REGULATION TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k)~~, 3541.3~~ and (n), 3563(j)~~, 3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j)~~,~~ and (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and ~~3541.3~~(g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and ~~3541.3~~(g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

State of California **PUBLIC EMPLOYMENT RELATIONS BOARD**
Sacramento Regional Office
M E M O R A N D U M **1031 18th Street**
Sacramento, CA 95811-4124

DATE: August 25, 2016

TO **:** Eric Stern

FROM **:** Les Chisholm

SUBJECT **:** **Proposed Rulemaking—Factfinding under the Meyers-Milias-Brown Act—Request for Approval of Standard Form 399**

The Public Employment Relations Board (PERB or Board) is requesting the Department of Finance's approval for the Form 399 that will accompany the submission of a rulemaking file to the Office of Administrative Law. As described below, the new and amended regulations included in this rulemaking do not have a fiscal impact on state or local government.

Background

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.) Following the enactment of Assembly Bill 646, PERB identified proposed regulation changes that were necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646.

These regulatory changes were adopted first as emergency regulations, and took effect on January 1, 2012. The Board subsequently provided notice of proposed rulemaking for the adoption of the same regulatory changes, held a public hearing on June 14, 2012, and voted to approve the regulations at its public meeting held on June 14, 2012.

Description of Regulatory Changes

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA.

Section 32603 describes unfair practices by a public agency under the MMBA, and Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any

impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language of each of these sections to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. Harmonizing of the statutory changes made by Assembly Bill 646 requires the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted regulations that provide for factfinding both where mediation has occurred, and where it has not.[1]

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson.

Attachments

[1] Currently pending before the Legislature is consideration of Assembly Bill 1606. Assembly Bill 1606 would clarify the language of Government Code section 3505.4 in a manner consistent with the proposed language of PERB Regulation 32802.

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT

(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME	CONTACT PERSON	TELEPHONE NUMBER
Public Employment Relations Board	Les Chisholm	(916) 322-3198
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		**NOTICE FILE NUMBER**
Factfinding under the Meyers-Milias-Brown Act		Z 2012-0416-02

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts businesses and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☐ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (List areas.): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes ☐ No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): $ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☐ No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☐ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of : ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: $_____	Cost: $_____
Alternative 1:	Benefit: $_____	Cost: $_____
Alternative 2:	Benefit: $_____	Cost: $_____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million ? ☐ Yes ☐ No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation:	$ _____	Cost-effectiveness ratio: $ _____
Alternative 1:	$ _____	Cost-effectiveness ratio: $ _____
Alternative 2:	$ _____	Cost-effectiveness ratio: $ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

☐ a. is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. will be requested in the _____ (FISCAL YEAR) Governor's Budget for appropriation in Budget Act of _____

☐ 2. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

☐ a. implements the Federal mandate contained in _____

☐ b. implements the court mandate set forth by the _____

court in the case of _____ vs. _____

☐ c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ (DATE) election;

☐ d. is issued only in response to a specific request from the _____

_____, which is/are the only local entity(s) affected;

☐ e. will be fully financed from the _____ (FEES, REVENUE, ETC.) authorized by Section

_____ of the _____ Code;

☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

☐ g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Savings of approximately $ _____ annually.

☐ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.

☑ 6. Other. Unaware of any local costs. The initial determination of the agency is that the proposed action would not impose any new mandate.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year. It is anticipated that State agencies will:

☐ a. be able to absorb these additional costs within their existing budgets and resources.

☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.

☐ 2. Savings of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any State agency or program.

☐ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year.

☐ 2. Savings of of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.

☐ 4. Other.

FISCAL OFFICER SIGNATURE		DATE
AGENCY SECRETARY [1] APPROVAL/CONCURRENCE		DATE
DEPARTMENT OF FINANCE [2] APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER	DATE

1. *The signature attests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.*

2. *Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.*

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z- 2012-0416-02		

For use by Office of Administrative Law (OAL) only

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Public Employment Relations Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)
Factfinding under the Meyers-Milias-Brown Act

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT
32802, 32804

AMEND
32380, 32603, 32604

REPEAL

TITLE(S)
8

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☒ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☒ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Les Chisholm	(916) 327-8383	(916) 327-6377	lchisholm@perb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE

TYPED NAME AND TITLE OF SIGNATORY
Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

INSTRUCTIONS FOR PUBLICATION OF NOTICE AND SUBMISSION OF REGULATIONS

Use the form STD. 400 for submitting notices for publication and regulations for Office of Administrative Law (OAL) review.

ALL FILINGS
Enter the name of the agency with the rulemaking authority and agency's file number, if any.

NOTICES
Complete Part A when submitting a notice to OAL for publication in the California Regulatory Notice Register. Submit two (2) copies of the STD. 400 with four (4) copies of the notice and, if a notice of proposed regulatory action, one copy each of the complete text of the regulations and the statement of reasons. Upon receipt of the notice, OAL will place a number in the box marked "Notice File Number." If the notice is approved, OAL will return the STD. 400 with a copy of the notice and will check "Approved as Submitted" or "Approved as Modified." If the notice is disapproved or withdrawn, that will also be indicated in the space marked "Action on Proposed Notice." Please submit a new form STD. 400 when resubmitting the notice.

REGULATIONS
When submitting regulations to OAL for review, fill out STD. 400, Part B. Use the form that was previously submitted with the notice of proposed regulatory action which contains the "Notice File Number" assigned, or, if a new STD. 400 is used, please include the previously assigned number in the box marked "Notice File Number." In filling out Part B, be sure to complete the certification including the date signed, the title and typed name of the signatory. The following must be submitted when filing regulations: seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification) and the complete rulemaking file with index and sworn statement. (See Gov. Code § 11347.3 for rulemaking file contents.)

RESUBMITTAL OF DISAPPROVED OR WITHDRAWN REGULATIONS
When resubmitting previously disapproved or withdrawn regulations to OAL for review, use a new STD. 400 and fill out Part B, including the signed certification. Enter the OAL file number(s) of all previously disapproved or withdrawn filings in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box lb. of Part B). Submit seven (7) copies of the regulation to OAL with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). Be sure to include an index, sworn statement, and (if returned to the agency) the complete rulemaking file. (See Gov. Code §§ 11349.4 and 11347.3 for more specific requirements.)

EMERGENCY REGULATIONS
Fill out only Part B, including the signed certification, and submit seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). (See Gov. Code §11346.1 for other requirements.)

NOTICE FOLLOWING EMERGENCY ACTION
When submitting a notice of proposed regulatory action after an emergency filing, use a new STD. 400 and complete Part A and insert the OAL file number(s) for the original emergency filing(s) in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). OAL will return the STD. 400 with the notice upon approval or disapproval. If the notice is disapproved, please fill out a new form when resubmitting for publication.

CERTIFICATE OF COMPLIANCE
When filing the certificate of compliance for emergency regulations, fill out Part B, including the signed certification, on the form that was previously submitted with the notice. If a new STD. 400 is used, fill in Part B including the signed certification, and enter the previously assigned notice file number in the box marked "Notice File Number" at the top of the form. The materials indicated in these instructions for "REGULATIONS" must also be submitted.

EMERGENCY REGULATIONS - READOPTION
When submitting previously approved emergency regulations for readoption, use a new STD. 400 and fill out Part B, including the signed certification, and insert the OAL file number(s) related to the original emergency filing in the box marked "All Previous Related OAL Regulatory Action Number (s)" (box 1b. of Part B).

CHANGES WITHOUT REGULATORY EFFECT
When submitting changes without regulatory effect pursuant to California Code of Regulations, Title 1, section 100, complete Part B, including marking the appropriate box in both B.3. and B.5.

ABBREVIATIONS
Cal. Code Regs. - California Code of Regulations
Gov. Code - Government Code
SAM - State Administrative Manual

For questions regarding this form or the procedure for filing notices or submitting regulations to OAL for review, please contact the Office of Administrative Law Reference Attorney at (916) 323-6815.

UPDATED INFORMATIVE DIGEST

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.

WRITTEN COMMENTS RECEIVED DURING COMMENT PERIOD

The Public Employment Relations Board did not receive any written comments during the 45-day comment period.

SUGGESTED PERB REGULATIONS
For
Implementation of Amendments to MMBA by AB 646
Government Code Sections 3505.4 and 3505.7

Submitted by
William F. Kay, M. Carol Stevens, and Janet Cory Sommer

November 8, 2011

I. *Issue: Within what time limit must an employee organization request factfinding under Subsection 3505.4(a)?*

Suggested Regulation:

The employee organization must request factfinding under Subsection 3505.4(a):

(1) Within 40 days of the appointment of the mediator; or

(2) If no mediator has been appointed:

a. Within 40 days from the date of formal written notice of a declaration of impasse by either party; or

b. Within 10 days from the public employer's formal written notice of a public hearing on the impasse as required by Subsection 3505.7; whichever period is longer.

II. *Issue: Once a reasonable time limit has been established for an employee organization to request factfinding as above, what are the triggering events that begin the running of the time limit for requesting factfinding and for starting the factfinding statutory timelines?*

Suggested Regulation (in addition to I. above):

(3) "Appointment of a mediator" as stated in Subsection 3505.4(a) shall mean the date that the parties have been notified in writing of the assignment of a specific mediator, or have written proof of the selection of, and acceptance by a specific mediator to conduct the mediation.

(4) "Unable to effect a settlement of the controversy within 30 days" shall mean that no manifest settlement has been reached within 30 calendar days after the appointment of the mediator.

(5) "May request that the parties' differences be submitted to factfinding panel" shall mean that the employee organization must formally notify PERB and the public agency in writing of the request for factfinding.

III. *Issue: If the negotiating parties do not agree to mediation under Section 3505.2, is the employer excused from factfinding under Subsection 3505(a)?*

No suggested regulation. This may be resolved by legislative amendment or litigation.

IV. *Issue: Regarding the minimum ten-day period referenced in Section 3505.7 between the submission of the factfinding panel's report and the public employer's release of the report pursuant to Section 3505.5.*

(1) How should this release be accomplished?

(2) Should the public agency allow time for the parties to meet during the 10-day period before releasing the report?

Suggested Regulations: Regulations similar to those established for the EERA should clarify the manner of the report release. In addition, PERB should establish regulations preventing premature release by either party by requiring the parties to provide the opportunity to meet and discuss the report before its release.

V. *What are the minimum requirements of a public hearing regarding the impasse under 3505.7?*

Suggested Regulation:

A hearing on the impasse shall be properly noticed and conducted by the public employer and shall include: (a) the release the factfinding report, if any; (b) a brief summary of the elements of the impasse; and (c) a copy of the last, best and final offers, if any; and (d) the opportunity for the public to address the public employer regarding the elements of the impasse.

CALPELRA
moving forward, together

November 26, 2011

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, California 95814

Re: AB 646 Emergency Regulations

Dear Ms. Murphy and Mr. Chisholm:

The CALPELRA Board of Directors writes to comment on the November 14, 2011, revised PERB staff discussion draft of emergency regulations implementing Assembly Bill 646.

Regulations Should Increase Predictability And Provide Procedural Certainty

CALPELRA opposed Assembly Bill 646, and we believe it requires substantial revision and amendments. We understand the difficulty PERB faces given the ambiguities inherent in the final version of AB 646, and we do not expect PERB to conclusively resolve any such ambiguities. Nonetheless we believe that PERB can provide certainty and reduce risks for those agencies opting to participate in factfinding and avoid litigation, while at the same time preserve the litigation option for those agencies with the desire and funds to challenge the statute.

PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty. During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.

The November 14, 2011, staff discussion draft does not increase procedural predictability, and will leave both public employers and employee organizations facing great uncertainty regarding what is required under the new law.

There are two primary issues that PERB should clarify with its emergency regulations:

- **Deadline For Demanding Factfinding When No Mediator Is Appointed:** The regulations should add a deadline by which the exclusive representative must request factfinding. Burke Williams & Sorensen suggested a timeline in their November 8, 2011, submission, but the establishment of a clear deadline is more important than the particular length of the deadline. Without any time limit within which the exclusive representative must request factfinding, public employers will be unable to be sure when the mandatory impasse procedures are complete. Without a clear deadline, public agencies at impasse without mediation will assume the risk of determining an adequate period of time within which the union must request factfinding. Public agencies will face the prospect of holding a public hearing regarding the impasse and adopting a Last, Best, and Final Offer as authorized by Government Code Section 3505.7, only to face a *subsequent* demand from the exclusive representative to engage in the lengthy factfinding process. We urge PERB to add the following to its November 14 proposed regulation:

  > 32802
  > "(a)(2) In cases where the parties were not required to participate in mediation and did not agree to do so voluntarily, a request for factfinding may be filed not sooner than 30 days *nor later than 40 days* from the date that either party has served the other with written notice of a declaration of impasse."

- **Clarify Effect Of Deadline On Impasse Hearing Requirement:** The regulations should also provide that if the exclusive representative does not request factfinding within the prescribed timelines, the public agency may proceed to the public hearing required by Section 3505.7 without violating the agency's good faith duty to participate in the impasse procedures, including factfinding. We urge PERB to adopt the following regulation:

  > 32802
  > "(e) If the exclusive representative does not request factfinding within the limits established in Section 32802 of these regulations, upon exhaustion of any applicable impasse procedures, the public agency may, after holding a public hearing regarding the impasse, implement its last, best, and final offer."

PERB can adopt these regulations that will provide the needed procedural certainty without resolving, or taking a position on the question of whether mediation is a necessary precondition to mandated factfinding. Although we are unsure of the precise language required, we believe that PERB could insert in its regulation a statement such as the following:

> "These regulations are intended solely for the purpose of providing procedural guidance to the MMBA covered agencies, in the absence of participation in mediation: (1) the time period within which the employee organization must request factfinding; and (2) when the factfinding timelines begin running. These regulations shall not be given deference by any party or reviewing court as PERB's construction of Government Code Sections 3505.4 - 3505.7 regarding whether participation in mediation is a precondition to requiring factfinding, or whether the receipt of a factfinding report is a precondition to allowing the employer to unilaterally adopt a last, best, and final offer."[1]

Revised MMBA Should Not Delegate Authority To Mediator To Certify Parties To Factfinding

The November 14, 2011, staff discussion draft adds a requirement that an exclusive representative requesting factfinding must submit evidence that the mediator has informed the parties that further mediation proceedings would be futile. This requirement delegates undue authority to the mediator, and has no statutory basis. Unlike Section 3548.1 of the EERA that specifically requires a declaration from the mediator that factfinding is appropriate to resolve the impasse before the matter will be submitted to factfinding, neither AB 646 nor any preexisting provision of the MMBA grants the mediator such authority. As a matter of labor relations policy, many MMBA agencies might chose not to mediate because such a decision would delegate the impasse timeline to a mediator, without providing any administrative appeal or recourse. In addition, adding to the regulations a requirement that an exclusive representative requesting factfinding must submit evidence that the mediator has informed the parties that further mediation proceedings would be futile would grant the mediator more authority than intended by most of the local agencies with regulations involving mediation or by the legislature.

[1] PERB's factual findings are "conclusive" on reviewing courts as long as those findings are supported by substantial evidence on the record considered as a whole. Government Code Section 3509.5(b). The courts have the ultimate duty to construe the statutes administered by PERB. When an appellate court reviews statutory construction or other questions of law within PERB's expertise, the court ordinarily defers to PERB's construction unless it is "clearly erroneous." See *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575.

Thank you for your assistance in addressing these important matters.

Sincerely,

M. Carol Stevens
Executive Director

MCS/smc

Altarine Vernon, CALPELRA Board President
Delores Turner, CALPELRA Board Vice President
Ivette Peña, CALPELRA Board Secretary
G. Scott Miller, CALPELRA Board Treasurer
Scott Chadwick, CALPELRA Board Member
Ken Phillips, CALPELRA Board Member
Allison Picard, CALPELRA Board Member
William F. Kay, CALPELRA Labor Relations Academy Co-Director
Janet Cory Sommer, Burke Williams & Sorensen

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November 28, 2011

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VIA EMAIL AND REGULAR MAIL

Les Chisholm
Division Chief
Public Employment Relations Board
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174

Re: Comments Concerning Proposed PERB Regulations to Implement Assembly Bill 646

Dear Mr. Chisholm:

We appreciate the opportunity to contribute to the determination of proposed emergency regulations for the Public Employment Relations Board to be utilized in the implementation of the new procedures mandated by recently enacted Assembly Bill 646 ("AB 646"). We weigh in on four issues:

1. **PERB Should Confirm the Applicability of PERB Regulations to Mixed Units (Peace officer/non-sworn; management/non-management)**

The undersigned represent multiple bargaining units consisting of only peace officers, as defined by Penal Code section 830.1. We also represent so-called mixed units—i.e., a bargaining unit consisting of both 830.1(c) peace officers and other employees, either safety or non-safety.

In addition, we represent "management employee" only bargaining units, as well as mixed bargaining units made up of, say, supervisory employees and managers.

In our view, AB 646 applies to both peace officers and managers. But in the absence of PERB jurisdiction (see sections 3509(f) and 3511) over either type of employee, the proposed emergency regulations would not apply to bargaining units comprised solely of either peace officers or managers. (Presumably those employee groups will meet and confer with their employers

over local rules to implement AB 646 for employees not under PERB's jurisdiction.)[1] But PERB should clarify that the regulations apply to employees in mixed units.

2. Applicability of Factfinding in the Absence of Mediation

There is much dispute about whether fact-finding is required in the absence of either an obligation under local rules to mediate in the event of impasse, or an unwillingness to mediate voluntarily. The legislation is not perfectly written, and, not surprisingly, advocates on either side of the labor/management divide are parsing clauses or partial clauses as evidence of legislative intent one way or the other.

We agree with our colleagues at Loenard Carder that notwithstanding the final version of AB 646 being silent on the issue, the legislative history and the purpose behind the Meyers-Milias-Brown Act compel PERB to assume that a covered employer's obligation to participate in factfinding is mandatory, and PERB should draft its emergency regulations accordingly.

The purpose and intent of the Act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov't Code, section 3500.) Factfinding, as required by AB 646, is an extension of this policy of bilateral resolution of labor disputes to include a uniform, nonbinding, process for resolving bargaining impasse.

The idea, floated by some commentators and the City of San Diego, that an employer could simply opt out, or not be bound by, factfinding seems antithetical to the Legislature's whole approach on the subject. It sets up the scenario that an employer would choose not to voluntarily mediate at impasse because the mere agreement to mediate would bind the employer to factfinding *if* the mediation was unsuccessful and *if* the employee organization elected to pursue factfinding. As our colleagues at Rother, Segall and Greenstone point out, such a reading, which would make voluntary mediation less likely, would weaken impasse resolution processes, not strengthen them.

---

[1] PERB should also clarify that to the extent public entities meet and confer with employee associations over local rules to implement AB 646 (certainly with peace office and manager groups, but potentially with other groups, too), and those negotiations end in impasse, the form of the local rules should itself be subject to factfinding before ultimate determination by the public entity.

Mandatory factfinding would not conflict with section 3505.2 since AB 646 does not itself compel mediation, only factfinding. We conclude that notwithstanding whether parties mediate, factfinding is a mandatory impasse resolution procedure if invoked by the employee association.

Accordingly, we support proposed regulation 32802(a)(2), with the following minor suggested edits: "In cases where the parties ~~we~~are not required to participate in mediation and ~~di~~do not agree to do so voluntarily, a request for factfinding may be filed not sooner than 30 days from the date that either party has served the other with written notice of a declaration of impasse."

3. Failure to Participate in Factfinding Should Be an Unfair Labor Practice

We concur with our colleagues at Liebert Cassidy and Loenard Carder that any failure to comply in good faith with the procedures required by AB 646 is an unfair labor practice. We also suggest a revision to PERB Regulation 32603(e) to accomplish this purpose.

4. Factfinding Can Apply to A Charter City With Binding Interest Arbitration in Situations Other Than "Main Table" Negotiations

The undersigned represent employees in the City and County of San Francisco. Those employees enjoy the right to binding interest arbitration—but only for main table negotiations (i.e., negotiations for successor memoranda of understanding). There is no right to binding interest arbitration for disputes that arise during the term of an existing MOU. (CCSF Charter section A8.409-3.) MMBA generally and AB 646 specifically provide no language limiting applicability of factfinding to successor MOU negotiations only. Accordingly, PERB should confirm by regulation that factfinding can apply to a Charter City, County or City and County, where any bargaining impasse is excluded from that entity's binding arbitration provisions.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP

Gary Messing
Gregg McLean Adam

CBM-SF\SF533054.3

City and County of San Francisco

Edwin M. Lee
Mayor

Department of Human Resources

Micki Callahan
Human Resources Director

December 7, 2011

Delivered Via Electronic Mail

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
California Public Employee Relations Board
1031 18th Street
Sacramento, CA 95814
SMurphy@perb.ca.gov
LChisholm@perb.ca.gov

Re: PERB's Implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm:

We appreciate the opportunity to provide input on PERB's proposal of emergency regulations relating to recently enacted Assembly Bill 646 ("AB 646"). To date, PERB has solicited comments regarding its proposed emergency regulations; however, the firm of Carroll, Burdick & McDonough, by its recent electronic submission to PERB dated November 28, 2011, has attempted to expand the scope of the discussion to include debate on the actual application of AB 646.

Carroll, Burdick & McDonough asserts, without any reference to the actual language or legislative intent applicable to AB 626, that AB 646 subjects to mandatory fact-finding all impasse situations, and not just those resulting from negotiations over memoranda of understanding. However, this interpretation not only is contrary to the plain language of the MMBA, but would contravene the clear and expressed intent of the legislature as well as the author of AB 646, Assembly Member Atkins.

First, the new impasse procedures established under AB 646—sections 3505.4, 3505.5 and 3505.7—relate specifically to the preceding sections of the MMBA regarding to the selection of a mediator to resolve impasses over *memoranda of understanding*. Sections 3505.1 and 3505.2 of the MMBA provide as follows:

> 3505.1. If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall **jointly prepare a written memorandum of such understanding**, which shall not be binding, and present it to the governing body or its statutory representative for determination.
>
> 3505.2. If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. [...]
>
> [Emphasis added.]

Section 3505.4 now provides that if the parties have agreed to mediation pursuant to 3505.2, then if the mediator is unable to resolve that controversy, fact-finding may be requested. Thus, the language of Section 3505.4 is concerned with reaching a memorandum of understanding, *not* fact-finding over matters

which do not involve the negotiation of a memorandum of understanding, such as "*Seal Beach*" bargaining (see *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal. 3d 591), or minor changes in working conditions such as the location of a union bulletin board.

Moreover, neither the author of AB 646 nor the legislature intended the legislation to apply in situations other than impasses over memoranda of understanding. Please see the following relevant excerpt from the State Senate Rules Committee analysis dated August 29, 2011 at page 5:

> According to the author, "Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer **when negotiations for collective bargaining agreements fail**. […]" [Emphasis added.]

Likewise, see the State Assembly Floor analysis dated September 1, 2011 at page 3:

> According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in **impasse procedures where efforts to negotiate a collective bargaining agreement have failed.** […] The creation of mandatory impasse procedures is likely to increase the effectiveness of **the collective bargaining process**, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. […]" [Emphasis added.]

(Both legislative analyses can be accessed on the Official California Legislative Information website at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_646&sess=CUR&house=B&author=atkins.)

In addition to the language of the MMBA, and the legislative intent cited above, common sense calls for an interpretation of AB 646 that does not burden the parties with the lengthy proceedings and costs of a three-person fact-finding panel to preside over the small and lower-profile issues that arise outside the negotiation of collective bargaining agreements. Were it otherwise, the interpretation requested by Carroll, Burdick & McDonough would lead to an absurd result, wherein a municipality would be forced into lengthy, multiple and potentially simultaneous fact-finding panels occurring between a public entity and its employee organizations with respect to various routine issues that arise throughout the year. The result would be gridlock on a scale never envisioned by the legislature. PERB should not accept the invitation to endorse such a burdensome scenario.

We strongly urge PERB to add language to the proposed regulations making clear that AB 646 does not apply in circumstances other than impasses reached following negotiations over successor memoranda of understanding.

Respectfully submitted,

Micki Callahan
Human Resources Director

CITY OF LOS ANGELES

CALIFORNIA

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CITY ADMINISTRATIVE OFFICER

ASSISTANT
CITY ADMINISTRATIVE OFFICERS
RAYMOND P. CIRANNA
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ANTONIO R. VILLARAIGOSA
MAYOR

November 7, 2011

Edna E.J. Francis, Chairperson
Los Angeles City Employee Relations Board
200 North Main Street, Suite 1100
Los Angeles, CA 90012

RE: ASSEMBLY BILL 646

Dear Ms. Francis:

The California Legislature recently adopted revisions to the Meyers-Milias-Brown Act (MMBA) which will take effect on January 1, 2012. Specifically, Assembly Bill (AB) 646 added California Government Code Sections 3505.5 and 3505.7, and repealed and added Section 3505.4 of the MMBA. The new procedures mandate particular time schedules for the mediation process and fact finding; standards for consideration by the fact finders; distribution and publication of the fact finder's report; and a public hearing regarding the impasse prior to implementation of the employer's last, best and final offer.

Based on concerns that the provisions of AB 646 could impact employee relations in the City of Los Angeles, I asked the Office of the City Attorney to review the provisions of AB 646 and opine as to their applicability to the City's processes under the Employee Relations Ordinance (ERO). I wanted to share with you and your colleagues on the Employee Relations Board (ERB) that the City Attorney's Office has determined that no changes to the ERO are necessary based on the recently-enacted changes to the MMBA.

The City already has a comprehensive regulatory system in its ERO, Administrative Code, and ERB Rules and Regulations, that substantially achieve the same procedures and ends as the new legislation. In addition, Government Code Section 3509(d) specifically grants the City of Los Angeles permission to utilize its own employee relations commission and to enact its own procedures and rules, consistent with and pursuant to the policies of the MMBA. Therefore, no changes to the City's existing processes or procedures are mandated by the changes to MMBA enacted under AB 646, and the City Attorney's Office recommends that the City continue to follow the dictates of the ERO, and the regulations promulgated there under, just as it has always done.

Please contact me or Maritta Aspen of my staff at (213) 978-7641 or Maritta.Aspen@lacity.org if additional information is required.

Very truly yours,

Miguel A. Santana
City Administrative Officer

MAS:MHA:08110078

Cc: Zna Houston, City Attorney
Janis Barquist, City Attorney
Robert Bergeson, ERB

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November 18, 2011

VIA ELECTRONIC AND U.S. MAIL

Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Proposed Regulations Related to Assembly Bill 646

Dear Mr. Chisholm:

This letter is in response to your request for written comments related to the Public Employment Relations Board (PERB)'s consideration of emergency rulemaking to implement California Assembly Bill 646 (2011-2012 Reg. Session) (Assembly Bill 646), which was recently adopted by the California Legislature and signed by the Governor.

As you are aware, when a statute empowers an administrative agency to adopt regulations, the regulations must be consistent, not in conflict with the statute. *Ontario Community Foundation, Inc. v. State Board of Equalization*, 35 Cal. 3d 811, 816 (1984) (quotations and citations omitted). There is no agency discretion to promulgate a regulation that is inconsistent with the governing statute. *Id.* The California Supreme Court has stated, "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967)).

As attorneys for the City of San Diego, it is our view that there is no language in Assembly Bill 646 that mandates factfinding when a public agency employer and a recognized employee organization are at impasse and they do not mutually agree to mediation.

Assembly Bill 646 left intact California Government Code (Government Code) section 3505.2, which makes mediation between the parties discretionary, not mandatory. Section 3505.2 provides, in pertinent part, with italics added:

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together *may agree* upon the appointment of a mediator mutually agreeable to the parties.

Cal. Gov't Code § 3505.2.

"May" is permissive, not mandatory. Cal. Gov't Code § 14.

Under Assembly Bill 646, if the parties agree to mediation and the mediation does not result in settlement within thirty days after the mediator's appointment, then an employee organization may request that the parties' differences be submitted to factfinding. Assembly Bill 646 does not mandate factfinding where mediation is not agreed upon by the parties, and PERB may not extend a factfinding mandate or authorization beyond the limited circumstances provided in the bill.

The language of the newly-adopted Government Code section 3505.7 supports this interpretation. Section 3505.7, which becomes effective in January 2012, provides, in pertinent part, with italics added:

> After *any applicable* mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties . . . a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding.

If mediation and factfinding procedures are not applicable, then the timing of the submission of the factfinders' written findings is not relevant, and a public agency, not required to proceed to interest arbitration, may implement its last, best, and final offer after holding a public hearing regarding the impasse.

Assembly Bill 646 did not modify the language of Government Code section 3507, which provides, in part, that:

> (a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

> The rules and regulations may include provisions for all of the following:
>
> . . . .
>
> (5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

Cal. Gov't Code § 3507.

Assembly Bill 646 also did not modify Government Code section 3500(a), which provides, in part, that nothing in the Meyers-Milias-Brown Act (MMBA) "shall be deemed to supersede . . . the charters, ordinances, and rules of local public agencies . . . which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter." Cal. Gov't Code § 3500(a).

The City of San Diego has a specific impasse procedure that has been negotiated with the City's recognized employee organizations in accordance with the MMBA, and approved by the San Diego City Council (City Council). The impasse procedure does not mandate or even discuss mediation, and mediation has not been used in the past in the City.

The City's impasse procedure states that if the meet and confer process has resulted in an impasse, either party may initiate the impasse procedure by filing with the City Council a written request for an impasse meeting and a statement of its position on all disputed issues. San Diego City Council Policy 300-06, art. VII, Employee-Employer Relations, at 10 (amended by San Diego Resolution R-301042 (November 14, 2005)). An impasse meeting must then be held to identify and specify in writing the issue or issues that remain in dispute, and to review the position of the parties in a final effort to resolve such disputed issue or issues. *Id.* If the parties do not reach an agreement at the impasse meeting, impasses must then be resolved by a determination of the City's Civil Service Commission or the City Council after a hearing on the merits of the dispute. *Id.* Determination of which body resolves a particular impasse is dependent upon the subject matter of the impasse and applicable provisions of the San Diego Charter and San Diego Municipal Code. *Id.*

It has been suggested by others that Assembly Bill 646 leaves unclear the applicability of factfinding when the public agency employer and employee organization do not agree to mediation. It is this Office's view that the legislation is clear on its face: factfinding is not required when the negotiating parties do not agree to mediation. In our opinion, any PERB regulation that mandates factfinding where it is not required would overstep PERB's rulemaking authority.

Thank you for your consideration of this comment.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By Joan F. Dawson
Joan F. Dawson
Deputy City Attorney

JFD:ccm
cc: Patrick Whitnell, General Counsel, League of California Cities
(*via electronic and U.S. Mail*)

Draft PERB regulation to implement AB 646
Submitted by Don Becker

Renumber current 32800 to 32805 and insert**:**

32800 Factfinders Consideration of Criteria Set Forth in 3505.4(d)

The Factfinders shall consider, weigh, and be guided by the criteria set forth in 3505.4(d) only to the extent that such information has been exchanged by the parties and has been used to endeavor to reach agreement. The Factfinders, may consider such information even if it has not been exchanged by the parties if, in the judgment of the Factfinders, good and sufficient reasons are presented for such omission.

IEDA

2200 Powell Street, Suite 1000, Emeryville, California 94608

November 17, 2011

Mr. Les Chisholm
Division Chief
California Public Employee Relations Board

Delivered via electronic mail to

Dear Mr. Chisholm:

Thank you for the opportunity to review the drafts of PERB's proposed emergency regulations on AB 646. Following are comments for your consideration:

At the November 8, 2011 meeting there were several questions regarding the process of selecting a fact-finder and timelines for completing the fact-finding within the 30 days identified in the legislation. It is our understanding that when PERB appoints a fact-finder, they get assurance from the fact-finder that the 30-day requirement can be met.

The concern is that fact-finders may not be available when needed, thus extending the process for weeks or months. It would be helpful to include in the regulations some type of provision for the parties to select a fact-finder who is available or able to complete the fact-finding within a specific time frame.

On the minimum requirements of a public hearing regarding the impasse under 3505.7, it would be helpful to note that in instances where agencies have duly adopted impasse procedures in place via their Employer-Employee Relations (EER) resolution, that the agency's procedures prevail if they do not specifically conflict with the requirements of the new legislation.

As noted, the legislation is ambiguous on whether mediation is a mandatory step before fact-finding. The consensus seemed to be that this issue would be settled either through litigation or

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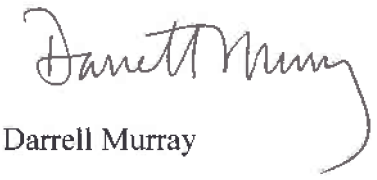
additional legislation. To the extent PERB could suggest clean-up legislation this option would be preferable to costly litigation.

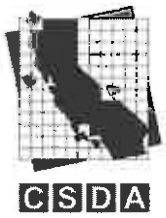
We appreciate your considering these comments. Please contact me at 510-761-9148 if you have any questions.

Yours very truly,



Darrell Murray

C: Bruce Heid



November 30, 2011

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811

Re: PERB's Consideration of Emergency Rulemaking to Implement AB 646 (Atkins)

Dear Ms. Murphy and Mr. Chisholm:

The League of California Cities (League), the California State Association of Counties (CSAC), and the California Special Districts Association (CSDA) want to thank you for the opportunity to respond to the Public Employment Relations Board's (PERB) emergency rulemaking and more specifically to the *Staff Discussion Draft RE AB 646 (November 14 Version)*. Please find attached our recommended edits to the *Staff Discussion Draft RE AB 646 (November 14 Version)*. We would also like to make the following points.

1. We like that two separate subsections were created [32802 (a)(1) and (a)(2)] to distinguish between a situation where fact-finding is requested after mediation and a situation where the request is made after impasse but where the parties did not initiate mediation. You will find in the attached revised draft that we have made clarifying edits to both of these sections.

2. We suggest that for parties who do not use mediation, but still wish to engage in the fact-finding process, timeframes in local rules should prevail. If no local rules are in place we strongly suggest fact-finding should be requested within 10 days following notification by a party that impasse is declared. Requiring a timeframe like this will ensure that the fact-finding process will not be unduly delayed and thus risk untimely resolution of negotiations.

3. For parties who do not use mediation, the staff discussion draft goes further than merely setting a time for when fact-finding must be requested, but rather requires a 30-day waiting period after declaration of impasse, which goes beyond the provisions of AB 646. The purpose of the 30-day waiting time in AB 646 is to provide a reasonable opportunity for mediation to succeed. In situations where no mediation is held, there is no purpose in creating such a waiting period. We suggest revising this provision, as discussed above, to require fact-finding to be requested within 10 days of a declaration of impasse.

4. Our organizations are not taking a position on whether mediation is a precondition to fact-finding under AB 646, but we do think this is an open question that may need to be resolved by the courts or by the Legislature. However, we would like to note that if PERB adopts section 32802(a)(2), this rule in effect interprets the statute to require fact-finding in the absence of mediation, and it is our belief that interpretation goes beyond the provisions of AB 646.

5. We suggest deleting the language in section 32802(a)(1) that reads "...and shall also be accompanied by evidence that the mediator has informed the parties that further mediation proceedings would be futile." AB 646 does not contemplate or provide any provisions related to a mediator's role in determining the appropriateness of fact-finding, therefore we do not think this should be included in the proposed rules. Further, it does not seem appropriate for PERB to empower the mediator to make determinations as to whether further mediation would no longer be successful.

6. We are concerned that if PERB does not require that the Board-appointed chairperson agree to start fact-finding proceedings within 10 days of appointment that the fact-finding process could be delayed, possibly for weeks or months. Thus, we added language to section 32804 that outlines this requirement.

Sincerely,

Natasha M. Karl
Legislative Representative
League of California Cities

Eraina Ortega
Legislative Representative
California State Association of Counties

Iris Herrera
Legislative Advocate
California Special Districts Association

STAFF DISCUSSION DRAFT RE AB 646 (NOVEMBER 14 VERSION)

32802. Appointment of a Factfinder Under MMBA.

(a)(1) Not sooner than 30 days, but no more than 40 days, after the appointment or selection of a mediator, pursuant either to the parties' agreement **to mediate** or a **mediation** process required by a public agency's local rules, an exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by documentation of the date on which a mediator was appointed or selected~~, and shall also be accompanied by evidence that the mediator has informed the parties that further mediation proceedings would be futile.~~

(2) In cases where the parties were not required to participate in mediation and did not agree to do so voluntarily, **in the absence of local rules, an employee organization's** request for factfinding ~~may be filed not sooner than 30~~ **shall be filed within 10** days from the date that either party has served the other with written notice of a declaration of impasse.

(3) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(b) The Board shall, within five working days from the date filed, notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a), above, no further action shall be taken by the Board.

(c) "Working days," for purposes of this Section only, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(d) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under MMBA.

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In each case where the Board appoints the chairperson, the Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties, by alternate strike or other methodology of their choice, select one of the seven persons to serve as chairperson. **The Board shall certify to the parties that the Board-appointed chairperson has agreed to start the factfinding proceedings within 10 days of appointment.** In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

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REFER TO OUR FILE NO.

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November 14, 2011

Suzanne Murphy and Les Chisholm
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Re: Implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm:

We commend PERB for its proactive, thoughtful and transparent efforts in undertaking the task of implementing AB 646, including holding meetings in which you presented several alternative drafts of potential emergency regulations that arose from preliminary agency staff work on this topic. Pursuant to your request, we submit the following comments on issues pertaining to AB 646, including comments on your alternative drafts (hereafter, "the PERB draft proposals") and comments on the draft regulations submitted by Burke, Williams & Sorensen (hereafter "the Burke draft proposals").

I. Events Triggering an Employee Organization's Request for Factfinding

Earlier drafts of AB 646 -- prior to the final draft that was enacted -- included provisions providing an absolute right to request mediation. When those mediation provisions were struck from the bill, the drafters simply neglected to make the necessary corresponding alteration to the opening sentence of §3505.4 (a). In other words, the drafters intended to eliminate any absolute right to mediation, but intended to leave intact the employee organization's absolute right to request factfinding, irrespective of whether any mediation is held. The drafters' oversight is evident not only from comparing successive versions of the bill, but also from the abrupt way in which "the mediator" and his or her appointment appear, devoid of any context, at the outset of the enacted bill.

This conclusion is widely shared by many PERB constituents, in both labor and management.[1] Indeed, while the Burke draft proposals suggest that only a court or the Legislature can have the final word on the meaning of the statute, the Burke draft proposals also suggest that PERB adopt regulations clarifying that an employee organization may request fact-finding following appointment of a mediator ***or*** following written notice of a declaration of impasse ***or*** following notice of a public hearing on impasse. (Burke proposals, §I).

We concur with §I of the Burke draft proposals. Indeed, §I of the Burke proposals makes more sense than either of the PERB drafts for proposed Regulation 32802. Both of the PERB draft proposals leave ambiguous whether an employee organization may request factfinding in those cases in which there is no mediation. Leaving that crucial issue ambiguous would render the regulations terribly uncertain and difficult to interpret, and would create a virtual certainty that numerous charges would be filed by many different parties, all pertaining to the same issue. If, by contrast, PERB adopts §I of the Burke draft proposals, then the parties will be clear as to PERB's position, and it would be up to any party disagreeing with that position to seek additional legislation or court intervention.

II. Procedures for Appointing a Factfinding Panel Chairperson

The PERB draft proposals include three possible alternatives for the method of selecting a chairperson under proposed Regulation 32804 (b). Option Two is the best alternative. Pursuant to Option Two, the Board would submit seven names to the parties drawn from the agency's list of factfinders and the Board would thereafter designate by random selection one of those seven persons to serve as chair, unless the parties select one by alternate strikes or another methodology of their choice. This procedure is preferable for several reasons. First, it is transparent, unlike Option One, which does not provide any insight as to what methodology PERB would use. Moreover, Option Two allows PERB to retain control over the process, rather than involving a second agency as would be the case if Option Three were adopted. Given that PERB already appoints factfinders under HEERA and EERA, it makes abundant sense for the agency to take on an analogous role under the MMBA. Furthermore, by keeping control of the process, PERB will be able to address any obstacles that arise, such as an undersupply of appropriate chairpersons or questions that may arise regarding qualifications, fees, etc.

We encourage PERB to make the complete list of MMBA factfinders public on the PERB website or available to all PERB constituents upon request. This will help to facilitate mutual agreement in the greatest number of cases, even prior to the agency having to send the parties a list of seven potential chairpersons. We also encourage PERB to widely solicit applications for the list, particularly given the very different compensation arrangement provided for under AB 646 and the substantial experience that many interest arbitrators have gained in assisting employers and unions in education, transit, safety and other areas.

---

[1] While it is certainly possible to construct the statute differently if one wanted to do so, there is no other construction that makes sense of the language used, legislative history, and drafters' intent.

III. Public Hearing Regarding Impasse

We largely concur with §V of the Burke draft proposals, concerning impasse hearings. However, there should be two additions. First, for clarity, the word "including" should be replaced by the phrase "including but not limited to." Second, an additional sentence should be added as follows: "The public hearing shall be conducted pursuant to the applicable legal requirements, if any, that otherwise govern public meetings of the public agency's governing body."

IV. Regulation 32603

We have one final recommendation, to make sure it is clear that violation of AB 646 constitutes an unfair practice. This last addition to the agency's regulations perhaps need not be included in the emergency regulations, since in the interim Regulation 32603(g) would surely be interpreted to include any violation of AB 646. However, for the sake of clarity, PERB should in due course amend Regulation 32603(e) as follows:

> (e) Fail to exercise good faith while participating in any impasse procedure <u>that is mutually agreed to by the parties, or that is required under this Chapter or</u> by any local rule adopted pursuant to Government Code section 3507.

We appreciate your consideration of these comments and your attention to these important matters.

Very truly yours,

LEONARD CARDER, LLP

By: _____
Ari Krantz and Margot Rosenberg

LEONARD CARDER, LLP

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November 17, 2011

Via email lchisholm@perb.ca.gov and U.S. Mail

Suzanne Murphy and Les Chisholm
Public Employment Relations Board
1031 – 18th Street
Sacramento, CA 95811-4124

Re: PERB Staff Discussion Draft dated November 14, 2011 re AB 646 Implementation

Dear Ms. Murphy and Mr. Chisholm:

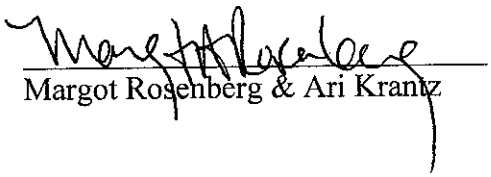
Since we submitted our initial comments on this matter, the PERB staff has revised its draft proposed regulations with respect to the events triggering an employee organization's request for factfinding. (See Staff Discussion Draft Re AB 646[November 14 Version], posted on PERB's website.) We are pleased that the revised draft recognizes the legislative intent to provide subject employee organizations with the absolute right to request factfinding, irrespective of whether any mediation is held. The initial draft proposed regulations issued by the PERB staff appeared only to recognize mediation as the trigger for a factfinding request, a position which we viewed as contrary to the legislative intent and as inviting protracted litigation to seek clarification. Accordingly, we support the PERB staff's November 14 draft, which clarifies that an employee organization may request factfinding following appointment of a mediator ***or*** following written notice of a declaration of impasse.

Once it is clarified that factfinding may be triggered by either mediation or a declaration of impasse, the timelines set forth in the November 14 staff discussion document make sense, as they track the statute itself, which in essence provides for a 30-day period - during which the parties may avail themselves of the assistance of a mediator – to focus their attempt to reach agreement prior to having to change course and prepare for an adversarial factfinding proceeding. (See Government Code § 3505.4(a), providing for a 30-day period to "effect settlement of the controversy," prior to requesting factfinding.) Of course, and perhaps it goes without saying, any time limit set by the regulations would be subject to mutual modification or extension.

We appreciate your continued consideration of these comments and your close attention to these important matters.

Very truly yours,

LEONARD CARDER, LLP

By: 
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November 18, 2011

VIA E-MAIL ONLY
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Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 - 18th Street
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Re: PERB's implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm,

Thank you for the opportunity to provide input regarding PERB's efforts to implement AB 646. The confusion created by this poorly drafted piece of legislation is palpable and makes implementation for all parties, including PERB, difficult. We hope that the California Legislature will quickly draft clarifying legislation so that the parties may focus their time and resources on resolving negotiations disputes rather than speculating on and/or litigating confusing legislative provisions.

Attached please find suggested language regarding potential regulations on the factfinding process. We encourage PERB to maintain its practice of focusing regulations on the procedural aspects of practice before the agency, while allowing the adjudicatory process to be used to determine substantive points of law.

As noted in the materials submitted by the law firms of Burke Williams & Sorensen (management) and Leonard Carder (labor), we think it is essential that there be some reasonable time period in which a labor organization has to request factfinding following the use of mediation. To do otherwise, would be inconsistent with the statutory goal of timely resolution of bargaining disputes (See Govt. Code § 3505). We do not agree, however, with BWS, Leonard Carder or PERB's November 14 staff discussion draft, that an exclusive representative has a right to request factfinding even if mediation is not used. The statute, as drafted, does not so state and, in the absence of a clearer indication of statutory intent through clean-up legislation, we think it would be unwise for PERB to speculate as to the Legislature's intent.

We agree with Leonard Carder's suggestion that PERB Regulation 32603 should be clarified such that a public agency's failure to exercise good faith in MMBA-required impasse procedures would be an unfair practice. In fairness, the same process should apply for labor organizations, and so we have included it in proposed Regulation 32604.

We look forward to working with you and the Board regarding the implementation of this new legislation.

If you have any questions regarding the above please do not hesitate to contact us.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Bruce A. Barsook

Bruce A. Barsook

BAB:tp
Enclosure
cc: Partners, Liebert Cassidy Whitmore

32802 Submission of Negotiations Disputes to a Fa ctfinding Panel under MMBA

(a)(1)Not sooner than 30 days after the appointment or selection of a mediator, pursuant either to the parties' agreement or a process required by a public agency's local rules, an exclusive representative may request that the parties' differences be submitted to a factfinding panel, if:

[a] The parties have failed to reach an agreement;

[b] The exclusive representative submits a written request to proceed to factfinding to the public agency and to PERB within 40 days after the appointment or selection of a mediator; and

[c] The request is accompanied by evidence of the date that the mediator was appointed or selected.

(2) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(b) The Board shall, within five (5) working days from the date the exclusive representative submits its request for factfinding, notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a) above, no factfinding panel will be appointed and no further action will be taken by the Board.

(c) For purposes of this section only, "working days" shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(d) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

32803 Appointment of Person to Chair Factfinding Panel under MMBA

(a) Within five days after the request for factfinding is submitted pursuant to section 32802, the parties will notify the Board of their selection of panel members for the factfinding panel.

(b) Within five days of the selection of the panel members by the parties, the Board will notify the parties that it will select and appoint the chairperson unless notified by the parties that they have agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. The Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties, by alternate strike or other methodology of their choice, select one of the seven persons or someone else to serve as chairperson.

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the submission of a request for factfinding

32603. Employer Unfair Practices under MMBA.
It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

32604. Employee Organization Unfair Practices under MMBA.
It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

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December 2, 2011

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Public Employment Relations Board
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Sacramento, CA 95811

RE: ***Emergency Regulations Implementing AB 646***

Dear Ms. Murphy and Mr. Chisholm:

I am writing in response to the draft discussion regulations implementing AB 646 that the Public Employment Relations Board (PERB) released on November 14, 2011. I know that PERB has already received several letters commenting on the draft discussion regulations. I write only to emphasize the request made by several stakeholders that there must be a deadline by which the employee organization must make a request to proceed to fact-finding. Currently, the draft regulations provide that a request can be made no earlier than thirty (30) days following the appointment of a mediator, but there is no outer time limit by which the employee organization must request fact-finding.

Presumably, PERB staff examined the fact-finding regulations under EERA and HEERA in developing the draft discussion regulations for AB 646. PERB's current fact-finding regulations under EERA and HEERA provide for a time period before which fact-finding can be requested, but do not contain any outer time limit for a fact-finding request. At first blush, it may make sense that fact-finding regulations under the MMBA would be similarly drafted. However, because of significant differences between the MMBA and EERA/HEERA, that is not true.

Under both EERA and HEERA, the employer has the ability to request fact-finding. (Gov. Code, §§ 3548.1, 3591.) Thus, under EERA and HEERA an employer can prevent an employee organization from unreasonably delaying fact-finding proceedings by initiating those proceedings itself. The same is not true under the MMBA. AB 646, by its terms, does not provide for a fact-finding request from an employer. Thus, there is no similar counter-balance under the MMBA as exists under EERA and HEERA. Under the MMBA, without a deadline by

which the employee organization must request fact-finding, it will be extremely difficult for an employer to protect itself against unreasonable delays. This significant difference in statutory language justifies PERB adopting fact-finding regulations under the MMBA that are different than those under EERA and HEERA. Again, I strongly urge PERB to include a deadline in the regulations by which an employee organization must make a fact-finding request.

Very truly yours,

Timothy G. Yeung

TGY/

RENNE SLOAN HOLTZMAN SAKAI LLP
Public Law Group™

Navigating the Mandatory Fact-Finding Process Under AB 646

A Public Law Group™ White Paper

By: Emily Prescott and Charles Sakai

Issued November 2011

Renne Sloan Holtzman Sakai LLP, Public Law Group™, is dedicated to providing effective, innovative legal representation and policy advice to meet the distinctive needs of local governments and non-profit organizations. **The Public Law Group™** represents employers in all facets of labor relations. Our approach melds the decades of experience of labor lawyers and non-attorney professionals, all of whom have had leadership positions in labor relations and personnel for public agencies. We are not just advocates; we are also colleagues with and advisors to labor relations and personnel professionals and their in-house attorneys in connection with labor relations, PERB processes, discipline, and grievance/arbitrations. Our negotiators have wide-ranging experience in impasse resolution procedures, such as mediation, fact-finding and interest arbitration. Throughout negotiations and impasse resolution processes, our multi-disciplinary approach utilizes financial experts, operational experts, and, if necessary, effective public relations strategies to achieve workable settlements. **The Public Law Group's™** experience spans the entire spectrum of public and non-profit employees, including police and fire personnel, teachers, nurses, lawyers, other professional employees, white-collar employees, blue-collar employees and unionized management employees.

Emily Prescott

Ms. Prescott practices labor and employment law on behalf of public sector employers. Her practice focuses on traditional labor relations, including collective bargaining, preventative counseling, and unfair labor practice charges. Ms. Prescott assists senior policy makers and elected officials in developing collective bargaining strategies and has successfully negotiated numerous collective bargaining agreements on behalf of cities, counties, and a community college district in both traditional and interest-based negotiating environments. Ms. Prescott previously was in private practice as a neutral labor arbitrator, hearing officer, and panel member of the California State Mediation & Conciliation Service.

Charles Sakai

Mr. Sakai practices in the areas of employment and labor law, with an emphasis on traditional labor relations, including unit determinations and modifications, representation and decertification elections, collective bargaining, contract grievances and rights arbitration, and unfair labor practice charges. Focusing on collaborative solutions, Mr. Sakai primarily handles complex negotiations and collective bargaining issues, including multi-party negotiations, interest arbitrations, and collective-bargaining-related litigation. He also has extensive experience in addressing difficult fiscal situations, including negotiations under Chapter 9 Bankruptcy protection. Recent negotiations have achieved changes in compensation and benefit cost structures as well as furloughs and other temporary solutions.

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I. INTRODUCTION

Signed by Governor Brown on October 9, 2011, AB 646 (Atkins) institutes a ***new mandatory impasse process*** for negotiations conducted under the Meyers-Milias-Brown Act (MMBA).

Beginning January 1, 2012, if a local public employer and its employee organization are unable to reach agreement in negotiations, the employee organization (but not the employer) "may request that the parties' differences be submitted to a factfinding panel." The panel consists of a union member, a management member, and a neutral chairperson appointed by the Public Relations Employment Board (PERB) – typically someone with interest arbitration or fact-finding[1] experience. The fact-finding panel can ultimately make recommendations but does not have final and binding authority.

The statute may have a significant impact on labor relations and some commentators have argued that it will "fundamentally change" bargaining under the MMBA. However, many public entities, including all of California's public schools, have managed collective bargaining under fact-finding for years. Careful planning and thoughtful execution will allow California's local public entities to integrate fact-finding into the existing meet and confer process with limited impact. Nonetheless, the statute's vague and inconsistent language leaves many questions unanswered as to how this new process will really work. Navigating through the process will impact the timing of negotiations because it can potentially add 50-80 days, or more, to the process of reaching either agreement or the point at which an employer could unilaterally implement its last best offer if no agreement is reached.

In this white paper, we provide a summary of the terms of AB 646 and the changes it makes to current law. We then address the likely resolution of some of the inconsistent provisions of the law and make specific recommendations on how to deal with the terms of this law, including one version of a model local rule to be adopted under Government Code section 3507 to address timing issues and the scope of impasse procedures. In the absence of local rules, PERB's planned emergency regulations on fact-finding will likely control your agency's impasse resolution procedures.

II. HOW DOES AB 646 CHANGE EXISTING LAW?

Before AB 646, the only impasse procedure outlined in the MMBA was an option for mediation by mutual agreement of the parties.[2] Local public agencies had the option to develop their own impasse resolution procedures through local rules adopted pursuant to Government Code section 3507, and local impasse procedures therefore vary widely. Many agencies' local rules provide for mediation – either mandatory or by mutual agreement, some provide for fact-finding

[1] Although the Legislature uses the term "factfinding," most commentators have used the term "fact-finding," in accord with Webster's Dictionary. We use the more accepted spelling in this white paper.

[2] Govt Code § 3505.2.

– again, either mandatory or optional,[3] and a handful of local charters provide for interest arbitration as a method for resolving disputes. These variations are examples of how local agencies over the years have exercised local control by deciding, after meeting and consulting with affected employee organizations, what impasse processes work best given local conditions and history.

AB 646 changes the landscape for public employers covered by the MMBA who do not already have binding interest arbitration.[4] It imposes on local government a state law requirement for fact-finding in any instance in which an employee organization requests it – regardless of the historic process that local agencies and employee organizations have agreed to and followed. It also appears to impose a new requirement that prior to implementation of a last, best, and final offer, the agency must "hold a public hearing regarding the impasse." [5]

AB 646 borrows heavily from the fact-finding provisions of the Educational Employment Relations Act (EERA)[6] and the Higher Education Employer-Employee Relations Act (HEERA)[7] for both the procedural and substantive elements of the new fact-finding procedure,[8] with three key differences:

- If the parties go to mediation, the timeline under the MMBA will be thirty days instead of EERA's fifteen-day timeline;[9]
- Under the MMBA *only* employee organizations may request fact-finding, whereas under EERA and HEERA, the employer also has the right to request; and
- Under EERA and HEERA, PERB pays costs and expenses of the PERB-appointed panel chairperson, whereas under the MMBA those costs and expenses are shared equally by the parties.

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[3] We know of no local agency rules that require fact-finding without prior resort to mediation. This is, however, exactly what AB 646 literally requires.

[4] Charter cities and counties who have binding interest arbitration are exempted from the new law. (Govt. Code § 3505.5)

[5] Because there is no requirement that the public hearing regarding the impasse occur at any time prior to the implementation, we believe that the impasse hearing and implementation of the last best and final offer should occur at the same public meeting.

[6] Govt. Code §3540, et seq.

[7] Govt. Code §3560, et seq. The HEERA does not include any factors for the fact-finding panel to consider. The MMBA factors are borrowed from the EERA factors.

[8] The Ralph C. Dills Act, which covers State employment, is now the only public sector labor relations act in California which does not mandate fact-finding.

[9] Govt. Code §3548 (EERA), and 3590 (HEERA).

III. LEGISLATIVE HISTORY

The early versions of AB 646 included mandatory mediation in addition to fact-finding, provided a 15-day timeline for mediation, and would have applied to all public employers covered by the MMBA. Early on in the amendment process, the bill's author indicated that all provisions related to mediation would be removed, "making no changes to existing law."[10] Although mandatory mediation was removed from the final bill, in the event the parties do mediate, the timeline for mediation was extended from 15 days to 30 days.[11] Finally, in the final bill, charter cities and counties who already provide interest arbitration were exempted from the fact-finding provision.

The author of AB 646, Assembly Member Toni Atkins (D-San Diego) provided the following statement of purpose in support of the legislation:

> Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. This creates an incentive for surface bargaining in which local governments rush through the motions of a meet-and-confer process to unilaterally meet the goal of the agency's management. Although some municipalities have elected to include local impasse rules and procedures, no standard requirement exists for using impasse procedures. This lack of uniformity causes confusion and uncertainty for workers. Fact-finding is an effective tool in labor relations because it can facilitate agreement through objective determinations that help the parties engage in productive discussions and reach reasonable decisions.[12]

AB 646 was opposed by numerous city, county, and special district representatives, who protested that it would impose significant increased costs on agencies for a process that will be triggered at the sole discretion of unions. Additionally, the opposition raised serious concerns that the bill would delay the conclusion of negotiations, inevitably create more adversarial relations rather than promote settlement, and undermine a local agency's authority to establish local rules for resolving impasse. Notwithstanding these concerns, Governor Brown signed AB 646 on October 9, 2011, without comment.

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[10] Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) May 3, 2011, p. 4.

[11] Assem. Amend. to Assem. Bill No. 646 (2011-2012 Reg. Sess.) May 27, 2011.

[12] Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) Aug. 29, 2011, p. 5.

IV. HOW FACT-FINDING WORKS

A. What is Fact-Finding?

The fact-finding process under AB 646 is very similar to that under the EERA and the HEERA. It is also similar to the interest arbitration procedures followed by a handful of California's charter cities and counties.[13] While none of those statutes provide explicit guidance on the conduct of the hearings, the parameters of fact-finding have been well-developed over the years.[14] In general, the fact-finding panel hears evidence on the negotiations issues in dispute and provides findings and recommended terms for settlement. Under AB 646, hearings must start within 10 days of the chairperson's appointment by PERB. Once convened, the panel is to conduct an investigation, hold hearings and issue subpoenas for those purposes.

Because of the short statutory timelines, fact-finding is normally very informal, with evidence presented by only a handful of witnesses, exhibits and testimony being introduced with limited foundation, and without the need for a court reporter. A fact-finding hearing is typically structured as follows:

- In advance of the hearing, the parties will identify the issues in dispute to be presented to the panel;
- Position statements on all issues are submitted at the beginning of the process;
- Evidence regarding the employer's fiscal condition and comparability often is presented at the beginning of the process because such evidence frames the other issues;
- The parties then present their respective cases on each issue in dispute through the introduction of foundational evidence in support of proposals;
- After the hearing, post-hearing briefs or position statements may be submitted to support and summarize the parties' positions;
- Within 30 days after its appointment, the fact-finding panel must make findings of fact and recommend terms of settlement;
- The agency and union share the costs and expenses of the PERB-appointed panel chairperson (and pay their own separately-incurred costs associated with their panel member).

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[13] An understanding of the interest arbitration process can be extremely helpful to the management of a fact-finding case. (See Holtzman & Sloan, *Let's Make a Deal* (June 1, 2005) 2005-6 Bender's Cal. Labor & Employment Law Bulletin 6; but see Tenant, *Interest Arbitration: A Poor Substitute for a Strike* (Nov. 1, 2005), 2005-11 Bender's California Labor & Employment Law Bulletin 4.)

[14] In 1987, PERB issued a "Fact-Finding Resource Manual." However, the manual is no longer available. Another valuable resource is the aptly titled "Interest Arbitration" by Will Aitchison. (Aitchison, Interest Arbitration (2d Ed, 2000).)

B. Fact-Finding Criteria

The bill specifies criteria to be considered by the panel, including comparability in wages, health care benefits, and retirement benefits.[15] AB 646 requires the fact-finding panel to evaluate the parties' positions using the following specific criteria:[16]

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the fact-finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, other excused time, insurance, pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Our experience has shown that comparability is generally afforded significant weight, meaning that local public agencies will now have to consider the expense and time required to manage a comparability study as part of the negotiations process.[17] In addition, employers should prepare, as a key component of any fact-finding presentation, a financial report analyzing the financial condition of the employer and the impact of union proposals on the agency's ability to deliver public services. The oft-neglected criteria of the agency's financial ability and the public interest have a substantial role to play in any fact-finding. The agency must have a strong handle on its fiscal condition, with a view towards anticipated revenues and expenditures during the next several years. Taken together, the financial condition of the employer and the overall

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[15] The criteria are virtually identical to those established under the EERA. (See Govt. Code § 3548.2.)

[16] Govt. Code § 3505.4(d).

[17] Comparability is the key factor relied on by many arbitrators, and will likely carry great weight in a fact-finding process. (See *City of San Jose* (Cossack 2007) [Awarding enhanced retirement benefit based on comparability]; *City of Modesto* (Brand 2002); *City of San Luis Obispo* (Goldberg 2008) [awarding 32.82% wage increases over 3 years].) Will Aitchison's treatise on interest arbitration dedicates four chapters, nearly a third of the book, to issues of comparability. (See Aitchison, *supra* note 13, at pp. 31-120.)

compensation of employees can be used together to provide significant leverage for an agency's proposals.

The second factor, "Local rules, regulations, or ordinances," also provides a significant opportunity for local public agencies to adopt specific criteria for fact-finding and to establish rules or procedures for the fact-finding panel. In addition, other local regulations or ordinances that address pay policies, maintenance of reserves, and fiscal crisis management must also be considered by the panel.

C. Findings and Recommendations – The Panel's Report

AB 646 does not specify the form of the report or how it is organized. For instance, it is not clear that the fact-finder must make findings on an issue-by-issue basis or that the fact-finder must choose between the proposals submitted by the parties. Indeed, because of its informal nature, testimony and evidence are normally presented without oath or transcription, making the recommendations less formal as compared to an interest arbitration decision. As a result, fact-finder reports, along with any dissents by the partisan panel members, are usually brief.

D. Post Fact-Finding: Agreement or Implementation

The public agency must make public the findings and recommendations within 10 days after their receipt. An employer may not unilaterally impose its last best offer until after holding a public hearing and no earlier than 10 days after receipt of the findings and recommendations (i.e., the same time the findings and recommendations must be made public).

V. ADJUSTING NEGOTIATIONS STRATEGY IN LIGHT OF AB 646

A. Negotiations Preparation

In the current environment, many agencies have focused their bargaining preparation on making a strong financial case to support the need for concessions and long-term structural changes. While the financial condition of the agency will continue to remain a centerpiece of bargaining, going forward, negotiations preparation will need to be expanded, because a fact-finding panel will be required to apply the specific criteria noted above when evaluating proposals. Therefore, comparability will move from an important consideration for ensuring the ability to attract and retain talented employees to a key component of bargaining. Moreover, it will be important that the agency prepare a negotiating strategy around every aspect of the fact-finding criteria, including specific reference to the interest and welfare of the public and the financial ability of the employer. The need to prepare competent testimony to support proposals will increase the time and expense required for bargaining preparation. To meet the timelines required by their budgets, public agencies will need to begin bargaining preparation earlier.

B. Negotiations Timelines

A majority of public agencies hope to have new contracts in place by July 1 of each year and plan their negotiations schedule accordingly, including the time necessary for the public adoption process. The potential for fact-finding will now add at least 50-80 days to the timeline, assuming that fact-finders will be available to conduct hearings in the timeframe set forth by the statute. In the first year of this new process, availability of fact-finders during the critical window of time before the end of the fiscal year could be a challenge.

Fact-finding timeline example

Mediation (if parties mediate)*	+30 days
Panel member selection after a union requests fact-finding*	+5 days
Panel chairperson appointed by PERB	+5 days
Time before hearing must begin	+10 days
Findings issued (if no settlement and no agreed-upon extension, 30 days from appointment of chairperson)	+20 days
Earliest possible implementation date (assumes public hearing could be held same day)	+10 days
Total minimum additional time for full process	**+80 days**

**This timeline assumes the parties mediate and the union requests fact-finding at the end of the 30-day period. See below for a discussion regarding mediation and the lack of deadline by which the union must request fact-finding.*

Assuming a governing body has the opportunity to meet in open and closed session on the first and third Wednesday of each month, and assuming that 80 days is an optimistic timeline, employers should conservatively plan on an additional 90-100 days, or about 14 weeks. Here's what the negotiations timeline might look like for a June 30, 2012 expiration:

2012 hypothetical timeline

November 2011	Begin negotiations preparation, including developing support for financial case and conducting comparability study
Early January 2012	Begin negotiations
March 7, 2012	Date by which parties should substantially complete good faith bargaining in order for the employer's team to request authority to declare impasse
March 14, 2012	Date by which parties should reach agreement or impasse (if including mediation)
March 14-April 14	Mediation

April 14-June 6	Fact-finding
June 20, 2012	Last day for governing body to adopt new MOU or implement LBFO for effective date of July 1

VI. PROBLEM AREAS: WHETHER TO MEDIATE, & TIMING OF FACT-FINDING REQUESTS

A. Mediation is Likely not Required

The first line of the new provision, section 3505.4(a) starts out as follows:

> If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.

Despite the opening phrase "if *the* mediator…," there is no provision in the bill requiring the parties to go to mediation. As first introduced, the bill mirrored the EERA's requirement for mandatory mediation as well as fact-finding. The mediation requirement was later removed from the bill, but the reference to mediation preceding fact-finding remained in the legislation, creating ambiguity and contradiction.

We believe the legislative history clearly shows that AB 646 does not require mediation. However, without mediation, there is no clear trigger for fact-finding. Therefore, we recommend that every local public agency identify such a trigger (either mediation or something else) in its local rules.

B. Lack of Explicit Time Limit Within Which the Union Must Request Fact-finding

When the earlier version of the bill required mediation, it also allowed an employee organization to request fact-finding only once a mediator had been unsuccessful at resolving the dispute within 30 days of appointment. When the Legislature removed mandatory mediation from the bill, it failed to clarify that a union can request fact-finding when the parties are at impasse and opt not to go to mediation. And in no versions of the bill did the Legislature define a time period within which a union had to request fact-finding.

Even absent mediation by mutual agreement or pursuant to local rule, fact-finding remains a mandatory impasse procedure, if requested by the employee organization. But whether or not mediation occurs, there is *no provision* to ensure that fact-finding is requested in a timely manner.

Under a technical reading of the statute, a union may argue that absent fact-finding, the employer cannot implement a last best offer. Given the lack of a time by which the union must request fact-finding, it is possible that some unions will attempt to avoid unilateral implementation by failing to request fact-finding and then alleging that the employer is in violation of the statute if it attempts to impose. However, we believe that such an approach

would ultimately fail, because it would violate California Constitution Article XI, Section 1(b), which forbids the Legislature from interfering with a local governing body's determination of the number, compensation, tenure and appointment of employees.[18]

Nonetheless, agencies hoping to avoid being a test case may consider the following options:

1. ***Local Rules.*** Amend local rules (ideally before AB 646 takes effect on January 1). Provide notice to unions and an opportunity for them to meet and consult over revised local rules governing the timing and process for mediation and fact-finding.

2. ***PERB Regulations.*** PERB will likely adopt emergency regulations prior to January 1 that may address many of the open issues. To the extent PERB regulations fill a gap in an agency's local rules, PERB's rules will apply.[19]

3. ***Address it in Ground Rules.*** In negotiating ground rules with employees at the beginning of bargaining, consider adopting timelines for achieving agreement or impasse, for determining whether to use mediation, and perhaps even timelines for going through the fact-finding process.

4. ***Include Reasonable Notice Prior to Implementation to Support a Waiver Argument.*** If after impasse an employer gives reasonable notice of the date for a public hearing on the impasse and subsequent date of imposition of the employer's last, best, and final offer, there is a strong argument that the employee organization will have waived its right to request fact-finding if it fails to do so prior to the date of the public hearing.

VII. DRAFT MODEL LOCAL RULE

AB 646 does not abrogate the right of local public agencies to adopt rules and regulations for the administration of employer-employee relations, including rules involving impasse resolution procedures.[20] Agencies have an opportunity to draft local rules to conform local agency impasse procedures to AB 646 and to establish specific timelines for negotiations, mediation, and fact-finding. The adoption of strict timelines would ensure sufficient time for the parties to negotiate in good faith and reach impasse prior to beginning mediation; set a specific deadline for ending mediation and beginning fact-finding; and require the fact-finding panel to issue a report in time for the agency to adopt changes before the expiration of the contract. For simplicity, the model rule uses a June 30 date to represent the expiration of the contract, end of the budget year, and deadline for completion of the impasse process.

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[18] See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285 (holding that mandatory interest arbitration was an unconstitutional interference with the County's exclusive authority to establish compensation for employees).

[19] See Govt. Code § 3509(a); *County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113.

[20] Govt. Code § 3507.

The draft model local rule presented here represents only one possible version. Other options could be sufficient for your agency's purposes, including something as simple as a rule providing an employer option to request fact-finding. In addition, the model rules provide for mandatory mediation to remove the potential ambiguity in the statute. However, since the statute does not specifically require mediation, your agency may choose not to include those provisions. Therefore, we recommend that you carefully consider your agency's needs and contact labor counsel before deciding on a course of action.

Although AB 646 does not specifically require the completion of fact-finding before an employer can adopt rules pursuant to section 3507, there remains some risk that PERB could require completion of fact-finding under section 3505.7. While we continue to believe, absent a specific timeline for fact-finding, that such a conclusion would be unconstitutional, it may be some time before the courts settle that issue. Because the introduction of fact-finding compressed the timeline for negotiations, we recommend that every agency revise its EERR before January 1, 2012. Please remember that section 3507 requires that you provide your unions notice and an opportunity to consult before adopting local impasse rules. In addition, these model rules may conflict with some of your existing rules. Now may be a good time for a complete review of your Employer-Employee Relations Resolution.

Model Local Rules

Model Language	***Commentary***
Update or create a definitions section:	*Most local rules already include a definitions section. However, local agencies adopting new rules covering fact-finding need to ensure that the definitions section includes definitions for Impasse, Mediation, and Fact-finding.*
Bargaining Timelines and Impasse Resolution Procedures 1. In consideration of the strong public interest in the equitable and efficient resolution of disputes over the wages, hours, and working conditions of public employees, these rules establish specific timelines for the completion of bargaining and any necessary impasse resolution procedures. All deadlines contained herein may be waived by mutual agreement.	
2. The provisions of this section shall apply only so long as state law requires the parties to proceed to fact-finding (as currently required by Section 3505.4 and 3505.5).	*This section is important to protect your agency in the event that AB 646 is found unconstitutional or a future*

Model Language	*Commentary*
	legislature strikes fact-finding from the books. In the absence of this language, a local agency could be bound to continue fact-finding based on its local rules even if fact-finding was no longer required by state law.
3. Initiation of Bargaining. The parties shall begin the meet and confer process no later than January 5 of the budget year in which the parties' memorandum of understanding (MOU) expires.	*The January timeframe may need to be adjusted for compliance with the actual expiration date of your MOU. Check current language in MOUs which may include a provision to start negotiations at a set time later than the proposed new rule.*
4. Declaration of Impasse. Either party may declare impasse and invoke impasse procedures by submitting to the other a written declaration of impasse, together with a statement in detail of its position on all disputed issues.	
5. Mediation When Fact-Finding Has Been Waived. If the parties have AGREED in writing to waive fact-finding, the following timelines for mediation shall apply. All date references are to the year in which the current MOU expires.	*Mandatory mediation removes the potential ambiguity in the new bill, enables statutory timelines to be met, and could provide an incentive for employee organizations to waive fact-finding.*
a. Once the parties have reached the point where further negotiations would be futile, either party may declare an impasse.	***Note** that a set time by which agreement or impasse must be reached will not excuse bad faith or surface bargaining.*
b. Once either party has declared impasse, the parties shall proceed to mediation. Prior to mediation the parties shall exchange statements of their positions on all disputed issues.	
c. As soon as either party declares impasse, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible.	
d. If neither party has declared impasse by May 1, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon	*This rule is intended to permit mediation without the need for a declaration of impasse. In this case, mediation becomes an*

Model Language	*Commentary*
as possible, but no later than the week of May 15.	*extension of bargaining.*
e. Mediation shall be concluded no later than June 15.	
6. Mediation Plus Fact-Finding. If the parties have NOT AGREED to waive fact-finding, the following timelines for mediation and fact-finding shall apply.	*By including mandatory fact-finding in the local rules, the local agency regains the ability to trigger fact-finding and maintains control over the timing of impasse procedures, rather than leaving this important decision solely in the hands of the employee organizations.*
a. Once the parties have reached the point where further negotiations would be futile, either party may declare an impasse.	
b. Once either party has declared impasse, the parties shall proceed to mediation. Prior to mediation the parties shall exchange statements of their positions on all disputed issues.	
c. As soon as either party declares impasse, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible.	
d. If neither party has declared impasse by March 15, the City shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible, but no later than April 1.	
e. If the mediator is unable to effect settlement by April 30, the parties shall proceed to fact-finding.	
7. Fact-finding	
a. Selection of fact-finding panel chairperson	*Pre-selection of a fact-finder can avoid the problem of getting stuck with a PERB-appointed chairperson who cannot meet the statutory timeline. Pre-selection can also encourage employee organizations to evaluate early in the negotiations process whether to waive fact-finding.*
i. On or before February 15, the parties shall mutually agree on and pre-designate a fact-finding chairperson who will certify that he or she will start the fact-finding proceedings within 10 days of notification by the parties. If the parties are unable to mutually agree, the parties shall mutually request that the California State Mediation & Conciliation Service provide a list of seven (7) qualified fact-finders, and the parties will select a fact-finder from this list who will certify that he or she will start the fact-finding hearing within 10 days of notification by the parties. The parties shall confirm the pre-designated chairperson no later	

Model Language	*Commentary*
than March 1.	
ii. If the mediator has been unable to effect agreement within thirty days after appointment and in any event, no later than May 1, the parties shall request that PERB appoint a chairperson for the fact-finding panel. If PERB cannot confirm that the appointed chairperson can begin the fact-finding proceedings within ten (10) days of appointment, the parties shall proceed to fact-finding with the pre-designated chairperson.	
b. Fact-finding Criteria	
i. No later than the first meeting of the fact-finding panel, the Finance Director shall prepare a report on the employer's financial condition, including projections of revenues and expenditures going forward at least three (3) fiscal years.	
ii. In assessing comparability, the fact-finding panel shall consider the wages and benefits paid by private employers as well as public employers.	
iii. The fact-finding report must include specific consideration of the impacts of any recommendation which will result in an increased cost to the employer, including the impact of that additional expense on the ability of the employer to continue to provide services.	
c. Fact-finding report	
i. To the extent the fact-finding panel makes findings and recommendations, those findings and recommendations shall be made on an issue-by-issue basis.	*Requiring the panel to address each issue in controversy may create a longer and more detailed report. However, it ensures that the report addresses each of the parties' proposals*
ii. The fact-finding panel shall limit its findings and recommendations to issues that fall within mandatory subjects of bargaining, unless the parties mutually agree, in writing, to submit issues that are non-mandatory subjects.	
iii. If the dispute is not settled within thirty (30) days of the chairperson's appointment, the panel shall make findings of fact and advisory recommendations for terms of settlement. The	

Model Language	*Commentary*
fact-finding panel shall submit a written report including findings of fact and recommended terms of settlement to the parties no later than June 10. iv. The parties shall maintain the confidentiality of the fact-finders' report for a period of ten (10) days. If the parties have not reached agreement within that time, the employer shall make the report public. d. Costs. Each party shall bear its own costs for mediation and fact-finding, including the costs of their advocates. Any costs for the mediator, neutral fact-finder, facilities, court reporters, or similar costs shall be shared by the parties. 8. Council Action. On or after the date the employer has released the fact-finders' report to the public, or upon conclusion of mediation if the parties waived fact-finding, the Council may hold a public hearing on the impasse and implement the terms of its last best and final offer.	

VIII. TEXT OF THE NEW STATUTE

[*Prior section 3505.4 was repealed; portions of 3505.4 are now in new 3505.7. There is no provision numbered 3505.6*]

3505.4.(a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization

benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last,

best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

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November 18, 2011

By E-Mail

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, California 95814-4174

Re: Regulations Implementing AB 646

Dear Ms. Murphy and Mr. Chisholm:

On behalf of AFSCME District Council 36, SEIU Local 721, LIUNA Local 777, and IUOE Local 501, we offer the following suggestions regarding the proposed regulations implementing AB 646.

1. **Proposed § 32802**.

At the meeting we attended in Glendale on November 10, the union representatives who spoke expressed the view that factfinding should be available whether or not the bargaining parties have participated in mediation. On the management side, opinion on this point was split. For two reasons, we urge you to revise the proposed regulation on this point in order to permit the parties to join this issue at the time particular parties invoke the regulation, rather than preclude at the outset any possibility of factfinding where no mediation has occurred.

First, for most management and union representatives, including the management representative from the City of Long Beach who expressed his views at the meeting, a predictable process is the highest priority. As he explained, for negotiations that reach impasse following January 1, the employer needs to know whether factfinding must be utilized: placing negotiations on hold for many months while litigation runs its course, or running the risk that a rejection of factfinding later results in an unfair practice determination, are unattractive options. Thus, parties who have not first participated in mediation but wish to proceed to factfinding should not be precluded from doing so by the terms of an overly restrictive regulation. On the

other hand, employers who choose to reject factfinding where no mediation has taken place can then take their chances in litigation.

Addressing the merits of requiring factfinding even where no mediation has taken place, adopting a rule that conditions factfinding on prior participation in mediation would have an effect surely not intended by the Legislature. One must presume that in enacting AB 646, the Legislature intended to strengthen the impasse resolution process, not weaken it. But under a narrow interpretation of AB 646, an employer who might otherwise be willing to mediate, but who wishes to oppose factfinding, will also oppose mediation. To do otherwise would necessarily bind that employer to participate in factfinding. Thus, an amendment that was designed to strengthen the impasse resolution process, by adding factfinding as a second, required element, will serve, for some employers, to eliminate the impasse resolution process altogether.

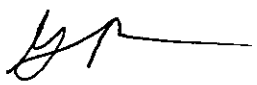
For these reasons, we propose the following substitute language for § 32802:

> In the case of impasse, an exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request may be filed (1) at any time where there is no agreement to mediate, or (2) not sooner than 30 days after the appointment of a mediator.

2. **Proposed § 32804**.

Of the options presented by PERB staff, we prefer Option 2, which entails submission of a list of seven names to the parties, from which the parties may then strike. Over the course of many years, PERB and an advisory panel have vetted applicants for its list of neutrals qualified to conduct factfinding, and we understand that PERB staff intends to expand that list in light of the enactment of AB 646. Seasoned labor relations advocates should be permitted to make their best choice for the particular circumstances they face from among a list seven vetted factfinders, rather than be assigned a single, randomly-chosen individual.

Very truly yours,



Glenn Rothner

GR/vc

PUBLIC NOTICE
Regular Business Meeting Agenda
Public Employment Relations Board
April 12, 2012 ~ 10:00 a.m.

LOCATION: Public Employment Relations Board *
1031 18th Street, First Floor, Room 103, Sacramento, CA

1. Roll Call

2. Adoption of Minutes: February 9, 2012 meeting

3. Public Comment: This is an opportunity for the public to address the Board on issues not scheduled on today's agenda. The Board cannot act on those items but may refer matters to staff for review and possible Board action at a future, publicly noticed meeting.

4. Staff Reports: The following reports will be received. Any matter requiring Board action, and not included on this agenda, will be calendared for a subsequent public Board meeting.

   A. Administrative Report

   B. Legal Reports
      i. General Counsel Report
      ii. Chief Administrative Law Judge Report

   C. Legislative Report

5. Old Business

6. New Business: Consideration of approval for submitting a proposed rulemaking package to the Office of Administrative Law in order to initiate the formal rulemaking process regarding implementation of Assembly Bill 646 (Statutes of 2011, Chapter 680). If authorized by the Board, the rulemaking package, including Notice of Proposed Rulemaking, Proposed Text, and Initial Statement of Reasons, will be forwarded to the Office of Administrative Law for review and publication pursuant to the Administrative Procedures Act. In addition, the Notice of Proposed Rulemaking would be distributed by PERB to interested parties and posted on the PERB website. A public hearing on the proposed regulatory changes would be conducted by the Board on June 14, 2012.

7. Recess to Closed Session: The Board will meet in a continuous closed session each business day beginning immediately upon recess of the open portion of this meeting through June 14, 2012.

   The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code sec. 11126(c)(3)), personnel (Gov. Code sec. 11126(a)), pending litigation (Gov. Code sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code sec. 11126(e)(2)(c)).

**This meeting is accessible to the physically disabled. A person who needs disability-related accommodations or modifications in order to participate in the meeting shall make a request no later than five working days before the meeting to the Board by contacting Ms. Regina Keith at 916.323.8000 or sending a written request to Ms. Keith at PERB, 1031 18th Street, Sacramento, California 95811. Requests for further information should also be directed via telephone or writing to Ms. Keith. Additional information is also available on the internet at www.perb.ca.gov.*

PUBLIC NOTICE
Regular Business Meeting Agenda
Public Employment Relations Board
December 8, 2011 ~ 10:00 a.m.

LOCATION: Public Employment Relations Board *
1031 18th Street, First Floor, Room 103, Sacramento, CA

1. Roll Call

2. Adoption of Minutes: October 13, 2011 Meeting

3. Public Comment: This is an opportunity for the public to address the Board on issues not scheduled on today's agenda. The Board cannot act on those items but may refer matters to staff for review and possible Board action at a future, publicly noticed meeting.

4. Staff Reports: The following reports will be received. Any matter requiring Board action, and not included on this agenda, will be calendared for a subsequent public Board meeting.

   A. Administrative Report

   B. Legal Reports
      i. General Counsel Report
      ii. Chief Administrative Law Judge Report

   C. Legislative Report

5. Old Business

6. New Business: Consideration of a proposal for the adoption of emergency regulations to implement the provisions of Assembly Bill 646 (Chapter 680, Statutes of 2011; effective January 1, 2012). If authorized by the Board, the emergency rulemaking package will be forwarded to the Office of Administrative Law for review and approval pursuant to the Administrative Procedures Act.

7. Recess to Closed Session: The Board will meet in a continuous closed session each business day beginning immediately upon recess of the open portion of this meeting through February 9, 2012.

   The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code sec. 11126(c)(3)), personnel (Gov. Code sec. 11126(a)), pending litigation (Gov. Code sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code sec. 11126(e)(2)(c)).

**This meeting is accessible to the physically disabled. A person who needs disability-related accommodations or modifications in order to participate in the meeting shall make a request no later than five working days before the meeting to the Board by contacting Ms. Regina Keith at 916.322.8226 or sending a written request to Ms. Keith at PERB, 1031 18th Street, Sacramento, California 95811. Requests for further information should also be directed via telephone or writing to Ms. Keith. Additional information is also available on the internet at www.perb.ca.gov.*

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FINDING OF EMERGENCY

The Public Employment Relations Board finds that an emergency exists and that proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of a newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA) would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Specific Facts Showing the Need for Immediate Action

As a result of the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012, the MMBA, the collective bargaining statute applicable to local governments (cities, counties, and special districts) in California, will provide for a mandatory impasse procedure—factfinding before a tripartite panel—upon the request of an exclusive representative where the parties have not reached a settlement of their dispute. PERB will be responsible for the appointment of the neutral chairperson of the factfinding panel unless the parties mutually agree upon the selection of the chairperson. This new legislation and the duties imposed on PERB under it require amendments to existing regulations as well as the adoption of new regulations in order to fully implement the legislation and PERB's role.

The MMBA has not previously mandated the use of any impasse procedures with respect to negotiations between local agencies and unions representing their employees. The current regulations of the Board do not provide for the filing and processing of requests for factfinding under the MMBA. These legislative changes potentially affect hundreds of thousands of public employees in California, their employers, and the employee organizations that represent employees under the MMBA. PERB began receiving inquiries from public employers, employees and employee organizations, who are potentially affected by this new legislation, as soon as the legislation was chaptered. Public meetings were promptly convened by PERB in Northern and Southern California to discuss the legislation and the possible adoption of regulations, both of which were very well attended. The attendees included more than 130 representatives of employers and employee organizations, including numerous law firms that represent hundreds of local agencies and employee organizations that themselves represent multiple bargaining units within local government agencies. Extensive written comments and suggestions were received by PERB in response to the discussions at those meetings and the "discussion drafts" circulated by PERB staff.

In order that the procedural and substantive rights of employers, employees and employee organizations are protected, the Board finds that there exists an emergency need to adopt new regulations providing for the filing and processing of requests for factfinding under the MMBA, and to amend other existing regulations where necessary to conform to newly adopted regulations. In so doing, the Board has attempted to distinguish between those changes that are necessary to the immediate implementation of the statute as amended, and those areas that may be identified as requiring further regulations as the Board and the parties acquire experience with the provisions of the amended statute.

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act. Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act. Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act. Government Code section 3563(f) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act. Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act. Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Employment Protection and Governance Act. Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act.

General reference for section 32380 of the Board's regulations: Sections 3505.4, 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code, and Section 99561(j), (m), Public Utilities Code.

General reference for section 32603 of the Board's regulations: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

General reference for section 32604 of the Board's regulations: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

General reference for proposed section 32802 of the Board's regulations: Sections 3505.4, 3505.5, and 3505.7, Government Code.

General reference for proposed section 32804 of the Board's regulations: Sections 3505.4, 3505.5, and 3505.7, Government Code.

INFORMATIVE DIGEST

Section 32380 of the Board's regulations provides for administrative decisions that are not appealable. The proposed changes update reference citations to reflect the newly enacted provisions of the MMBA. (Chapter 680, Statutes of 2011.) The proposed changes also

conform this section to the text of proposed Section 32802 with regard to the appealability of Board agent determinations as to the sufficiency of a request for factfinding under the MMBA. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA.

Section 32603 defines employer unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Section 32604 defines employee organization unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. Where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well

as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17561: None.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings on federal funding to the state: None

Cost impact on private persons or directly affected businesses: None

Significant adverse economic impact on business including the ability of California businesses to compete with businesses in other states: None

Significant effect on housing costs: None

The proposed regulations will not affect small business because they only affect public employers and public employees.

State of California **PUBLIC EMPLOYMENT RELATIONS BOARD**

M E M O R A N D U M

1031 18th Street
Sacramento, CA 95811-4124

DATE: December 29, 2011

TO : Office of Administrative Law

FROM : Anita I. Martinez, Chair

SUBJECT : Factfinding under the Meyers-Milias-Brown Act
2011-1219-01E

This serves to confirm that, by unanimous vote of its Members at the December 8. 2011 public meeting, the Public Employment Relations Board approved the above-referenced emergency regulations and their submission to the Office of Administrative Law.

Respectfully submitted,

Anita I. Martinez,
Chair

State of California
Office of Administrative Law

In re: Public Employment Relations Board Regulatory Action: Title 8, California Code of Regulations Adopt sections: 32802, 32804 Amend sections: 32380, 32603, 32604 Repeal sections:	NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION Government Code Sections 11346.1 and 11349.6 OAL File No. 2011-1219-01 E

The Public Employment Relations Board (PERB) is adopting two sections and amending three sections in Title 8 of the California Code of Regulations. This emergency rulemaking is the result of AB 646 (CH 680, Stats. 2011) that provides for a mandatory impasse procedure if requested when the parties have not reached a settlement of their dispute following mediation. These regulations establish the impasse procedure and the timelines for the procedure.

OAL approves this emergency regulatory action pursuant to sections 11346.1 and 11349.6 of the Government Code.

This emergency regulatory action is effective on 1/1/2012 and will expire on 6/30/2012. The Certificate of Compliance for this action is due no later than 6/29/2012.

Date: 12/29/2011

Peggy A. Gibson
Staff Counsel

For: DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director

Original: Anita Martinez
Copy: Les Chisholm

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATION SUBMISSION

EMERGENCY

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2011-1219-01E

For use by Office of Administrative Law (OAL) only

2011 DEC 19 AM 10:45

OFFICE OF ADMINISTRATIVE LAW

2011 DEC 29 PM 2:07

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY: Public Employment Relations Board

AGENCY FILE NUMBER (If any):

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Factfinding under the Meyers-Milias-Brown Act

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S):

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT	AMEND	REPEAL
TITLE(S): 8	32802, 32804	32380, 32603, 32604	

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☒ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify)
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☐ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☒ Effective other (Specify): January 1, 2012

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Les Chisholm	(916) 327-8383	(916) 327-6377	lchisholm@perb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE: [signature] DATE: 12.19.11

TYPED NAME AND TITLE OF SIGNATORY: Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

DEC 29 2011

Office of Administrative Law

PROPOSED TEXT -- REGULATION CHANGES RELATED TO
IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
(New language shown in *italics*.)

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections *3505.4,* 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code; and Section 99561(j), (m), Public Utilities Code.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, *3505.4, 3505.5, 3505.7,* 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, *3505.4, 3505.5, 3505.7,* 3506, 3507 and 3509, Government Code; and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-3198
Fax: (916) 327-6377

December 9, 2011

NOTIFICATION OF PROPOSED EMERGENCY REGULATORY ACTION

Subject: Implementation of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012—Factfinding

The Public Employment Relations Board (PERB) is proposing to adopt emergency regulations implementing the newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA).

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency action to OAL, OAL shall allow interested persons five (5) calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. Upon filing, OAL will have ten (10) calendar days within which to review and make a decision on the proposed emergency rules. If approved, OAL will file the regulations with the Secretary of State, and the emergency regulations will become effective for one hundred and eighty (180) days. Within the 180-day effective period, PERB will proceed with a regular rulemaking action, including a public comment period. The emergency regulations will remain in effect during this rulemaking action.

Attached to this notice is the specific regulatory language of PERB's proposed emergency action and Finding of Emergency.

You may also review the proposed regulatory language and Finding of Emergency on PERB's website at the following address: http://www.perb.ca.gov.

If you have any questions regarding this proposed emergency action, please contact Les Chisholm at (916) 327-8383.

OFFICE OF ADMINISTRATIVE LAW
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

DEBRA M. CORNEZ
Director

MEMORANDUM

TO: Les Chisholm
FROM: OAL Front Desk
DATE: 8/7/2012
RE: Return of Approved Rulemaking Materials
OAL File No. 2011-1219-01E

OAL hereby returns this file your agency submitted for our review (OAL File No. 2011-1219-01E regarding Factfinding under the Meyers-Milias-Brown Act).

If this is an approved file, it contains a copy of the regulation(s) stamped "ENDORSED APPROVED" by the Office of Administrative Law and "ENDORSED FILED" by the Secretary of State. The effective date of an approved file is specified on the Form 400 (see item B.5). (Please Note: The 30th Day after filing with the Secretary of State is calculated from the date the Form 400 was stamped "ENDORSED FILED" by the Secretary of State.)

DO NOT DISCARD OR DESTROY THIS FILE

Due to its legal significance, you are required by law to preserve this rulemaking record. Government Code section 11347.3(d) requires that this record be available to the public and to the courts for possible later review. Government Code section 11347.3(e) further provides that "....no item contained in the file shall be removed, altered, or destroyed or otherwise disposed of." See also the Records Management Act (Government Code section 14740 et seq.) and the State Administrative Manual (SAM) section 1600 et seq.) regarding retention of your records.

If you decide not to keep the rulemaking records at your agency/office or at the State Records Center, you may transmit it to the State Archives with instructions that the Secretary of State shall not remove, alter, or destroy or otherwise dispose of any item contained in the file. See Government Code section 11347.3(f).

Enclosures

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATION SUBMISSION EMERGENCY (See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2011-1219-01E

For use by Office of Administrative Law (OAL) only

2011 DEC 19 AM 10:45

OFFICE OF ADMINISTRATIVE LAW

2011 DEC 29 PM 2:07

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Public Employment Relations Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)
Factfinding under the Meyers-Milias-Brown Act

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT	AMEND	REPEAL
TITLE(S) 8	32802, 32804	32380, 32603, 32604	

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☒ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify)
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☐ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☒ Effective other (Specify) January 1, 2012

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Les Chisholm	(916) 327-8383	(916) 327-6377	lchisholm@perb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE 12.19.11

TYPED NAME AND TITLE OF SIGNATORY
Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

DEC 29 2011

Office of Administrative Law

PROPOSED TEXT -- REGULATION CHANGES RELATED TO
IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
(New language shown in *italics*.)

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections *3505.4,* 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code; and Section 99561(j), (m), Public Utilities Code.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, *3505.4, 3505.5, 3505.7,* 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, *3505.4, 3505.5, 3505.7,* 3506, 3507 and 3509, Government Code; and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

State of California **PUBLIC EMPLOYMENT RELATIONS BOARD**

M E M O R A N D U M

1031 18th Street
Sacramento, CA 95811-4124

DATE: December 29, 2011

TO : Office of Administrative Law

FROM : Anita I. Martinez, Chair

SUBJECT : Factfinding under the Meyers-Milias-Brown Act
2011-1219-01E

This serves to confirm that, by unanimous vote of its Members at the December 8. 2011 public meeting, the Public Employment Relations Board approved the above-referenced emergency regulations and their submission to the Office of Administrative Law.

Respectfully submitted,

Anita I. Martinez,
Chair

LEONARD CARDER, LLP

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KATE R. HALLWARD
ESTELLE PAE HUERTA
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December 27, 2011

Via U.S. Mail and Email (staff@oal.ca.gov)
Kathleen Eddy, Reference Attorney
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Via U.S. Mail and Email (smurphy@perb.ca.gov; lchisholm@perb.ca.gov)
Suzanne Murphy, General Counsel, and Les Chisholm, Division Chief
Public Employment Relations Board
1031 – 18th Street
Sacramento, CA 95811-4124

Re: Proposed Emergency Regulations Related to AB 646 Implementation

Dear Ms. Eddy, Ms. Murphy, and Mr. Chisholm:

Leonard Carder, LLP represents scores of labor unions in the California public sector, including many which fall under the jurisdiction of the California Public Employment Relations Board ("PERB"). Accordingly, Leonard Carder, LLP is an "interested person" within the meaning of California Government Code section 11349.6 and submits this comment to the emergency regulations proposed by PERB related to the implementation of Assembly Bill 646, which amends the Meyers-Milias-Brown Act ("MMBA").

As a preliminary matter, we appreciate the opportunity to submit a comment supporting the proposed emergency regulations. To date, we have found PERB's process for soliciting comments on proposed emergency regulations to be proactive, thoughtful and transparent, including holding well-attended meetings across the state to engender discussion on these issues.

Particularly, we support the proposed regulations as consistent with the statute, and importantly, believe that the proposed regulations will provide clarity to the many public entities and labor organizations affected by the new law. (Cal. Gov't Code section 11349(c) & (d).) As noted in the statute, Government Code section 11349(d) defines "consistency" as meaning the

regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decision, or other provisions of law." "Clarity" is defined as "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Cal. Gov't Code section 11349(c).

It is our view that the proposed regulations, particularly proposed regulation 32802, are consistent with the statute. Earlier drafts of AB 646 – prior to the final draft that was enacted – included provisions providing an absolute right to request mediation. When those mediation provisions were struck from the bill, the drafters simply neglected to make the necessary corresponding alteration to the opening sentence of MMBA, Government Code Section 3505.4(a). In other words, the drafters intended to eliminate any absolute right to mediation, but intended to leave intact the employee organization's absolute right to request factfinding, irrespective of whether any mediation is held. The drafters' oversight is evident not only from comparing successive versions of the bill, but also from the abrupt way in which "the mediator" and his or her appointment appear, devoid of any context, at the outset of the enacted bill.

This conclusion is widely shared by many PERB constituents, in both labor and management; it is rare to find such unanimity in the labor relations bar. While one could argue for a different construction of the statute (i.e., that factfinding may be triggered only by voluntary mediation), we view that construction as contrary to the statute's express language, the legislative history, and the drafters' intent. Indeed, we view the alternate position as not only contrary to the legislative intent, but as inviting protracted litigation to seek clarification; clarification is, of course, one sanctioned purpose of the emergency regulations.

In sum, PERB's proposed regulations are consistent with AB 646, and accordingly we urge approval of the emergency regulations; in our view, the proposed emergency regulations are consistent with the statute and will provide much needed clarity for the public sector.

We appreciate your continued consideration of these comments and your close attention to these important matters.

Very truly yours,

LEONARD CARDER, LLP

By: Margot Rosenberg

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ASSISTANT CITY ATTORNEY

JOAN F. DAWSON
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December 22, 2011

By U.S. Mail and Email (staff@oal.ca.gov)

Kathleen Eddy, Reference Attorney
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

By U.S. Mail and Email (lchisholm@perb.ca.gov)

Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Proposed Emergency Regulations Related to Assembly Bill 646

Dear Ms. Eddy and Mr. Chisholm:

The City of San Diego (City) is an interested person within the meaning of California Government Code (Government Code) section 11349.6 and submits this comment to the emergency regulations proposed by the Public Employment Relations Board (PERB) related to implementation of Assembly Bill 646 (A.B. 646).

Under Government Code sections 11349.1 and 11349.6(b), a regulation must meet the standard of "consistency," meaning the regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." Cal. Gov't Code § 11349(d). A regulation must also meet the standard of "clarity," meaning it is "written or displayed so that the meaning of [the] regulation[] will be easily understood by those persons directly affected by them." Cal. Gov't Code § 11349(c). PERB's proposed regulation 32802(a) is not consistent with A.B. 646, nor does it provide clarity to the public agencies subject to it. Therefore, it should be disapproved for the following reasons.

First, PERB's proposed regulation broadens the scope of A.B. 646 by providing that an exclusive representative may request factfinding even when a dispute is not submitted to mediation. The proposed regulation states that "[a]n exclusive representative may request that the parties' differences be submitted to a factfinding panel," without any limitation of circumstances. It also provides, in proposed regulation 32802(a)(2), that a request for factfinding may be submitted "[i]f the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse." This proposed regulation would require a public agency that does not engage in mediation to wait thirty days following the date of a written declaration of impasse to ensure there is no request for factfinding by an employee organization before the public agency proceeds with its own impasse process, or risk an unfair labor practice charge. It is our view that there is nothing in A.B. 646 that requires this waiting period or that requires factfinding when the parties do not engage in mediation.

Second, PERB's conclusion, set forth in its Finding of Emergency, that A.B. 646 provides for "a mandatory impasse procedure – factfinding before a tripartite panel – upon the request of an exclusive representative where the parties have not reached a settlement of their dispute" is not supported by the plain language of the legislation. In its Informative Digest, submitted with its proposed regulations, PERB writes that proposed section 32802 is consistent

> with the express requirements and clear intent of the recent amendments to the MMBA. . . . Where parties have not reached an agreement, an exclusive representative may file its request with PERB. . . . If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse.

That an employee organization may request factfinding following impasse in all circumstances is inconsistent with and expands the scope of A.B. 646. As you are aware, administrative regulations that alter or amend a statute or enlarge or impair its scope are void, and courts not only may, but must strike down the regulations. *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967).

Third, A.B. 646 does not authorize or mandate factfinding when the parties do not engage in mediation of a dispute, nor does A.B. 646 mandate mediation. In fact, the legislative history supports this conclusion. The legislative analysis for A.B. 646 states that the legislation *allows* a local public employee organization to request factfinding *when* mediation has been unsuccessful at effectuating a resolution to a labor dispute within 30 days of appointment of the mediator. *Bill Analysis*, A.B. 646, S. Rules Comm. (June 22, 2011) (emphasis added).

In furtherance of this intent, the Legislature left unchanged those provisions of the Meyers-Milias-Brown Act (MMBA) that allow local public agencies to utilize their own negotiated impasse procedures and implement a last, best, and final offer, without resorting to mediation and factfinding, as long as the public agency holds a public hearing before imposition.

The MMBA, at Government Code section 3505, mandates:

> The governing body of a public agency . . . shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . prior to arriving at a determination of policy or course of action.

Engaging in "meet and confer in good faith" includes the obligation "to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." Government Code section 3505 further provides, with italics added, "The process should include adequate time for the resolution of impasses *where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.*"

In accordance with Government Code section 3505, this City has a long-standing impasse procedure negotiated with the City's recognized employee organizations and adopted by the San Diego City Council (City Council), as Council Policy 300-06, that does not mandate or even contemplate that the parties engage in mediation upon an impasse in bargaining. Council Policy 300-06 provides that if the meet and confer process has reached an impasse, either party may initiate the impasse procedure by filing with the City Council a written request for an impasse meeting. An impasse meeting is then scheduled by the City's Mayor (previously, the City Manager) to review the position of the parties in a final effort to resolve a dispute. If the dispute is not resolved at the impasse meeting, then the impasse is resolved by a determination by the Civil Service Commission or the City Council after a hearing on the merits of the dispute.

Fourth, the Legislature left unchanged Government Code section 3505.2 which does not mandate mediation. It provides, with italics added:

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together *may agree* upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organizations.

Government Code section 14 defines "may" as permissive, not mandatory. There is no language in Government Code section 3505.2, which mandates this City or other public agencies under the MMBA engage in mediation to resolve a dispute. Because this City does not engage in mediation, there is no language in A.B. 646, which mandates this City engage in factfinding. A regulation implementing A.B. 646 that mandates factfinding when there is no mediation is inconsistent with the legislation.

Fifth, Government Code section 3505.4(a), added by A.B. 646, effective January 1, 2012, sets forth the circumstances in which an employee organization may request factfinding. Specifically, factfinding is to follow mediation: "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel." In other words, an employee organization may request factfinding *if* the mediation does not result in settlement in a defined period.

Sixth, Government Code section 3505.5, also added by A.B. 646, relates to the timing and conduct of the factfinding panel and the costs. There is no language in section 3505.5 which can be read to mandate factfinding when the parties do not first mediate a dispute.

Seventh, Government Code section 3505.7, added by A.B. 646, also does not mandate factfinding. It states:

> After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

If the parties do not engage in mediation, then factfinding is not applicable and the timing of the factfinders' report is not relevant. A public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, after holding a public hearing.

This City is required to conduct a public hearing under its established and negotiated impasse procedure. Therefore, it is our view that our process is presently consistent with the MMBA, as amended by A.B. 646. This City is not required to proceed to mediation or factfinding upon an impasse, but the City Council must conduct a public hearing, which it presently does to resolve an impasse. Any regulation that mandates factfinding when there is no mediation is inconsistent with A.B. 646.

PERB's proposed regulations enlarge the scope of A.B. 646. Therefore, this Office urges disapproval of the regulations to the extent they mandate factfinding in the absence of mediation, or, in the alternative, requests that the proposed regulations be clarified for jurisdictions that do not engage in mediation by mutual agreement or by the terms of their negotiated impasse procedures.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By Joan F. Dawson
Joan F. Dawson
Deputy City Attorney

JFD:ccm

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
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December 28, 2011

Peggy J. Gibson, Staff Counsel
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Subject: Response to Comments Received about Proposed Emergency Regulations 2011-1219-01E

Dear Ms. Gibson:

By letter dated December 22, 2011, the City Attorney for the City of San Diego states that the Office of Administrative Law (OAL) should disapprove the emergency regulations submitted by the Public Employment Relations Board (PERB), "to the extent they mandate factfinding in the absence of mediation, or, in the alternative, requests that the proposed regulations be clarified for jurisdictions that do not engage in mediation by mutual agreement or by the terms of their negotiated impasse procedures." In essence, the City Attorney for the City of San Diego asserts that PERB's emergency regulations are not consistent with Assembly Bill 646 (AB 646) and that they do not provide clarity to the public agencies subject thereto.

PERB previously considered the concerns expressed by the City Attorney for the City of San Diego, but rejected the objections raised based on the language of the Meyers-Milias-Brown Act (MMBA), as amended by AB 646, as well as evidence of legislative intent, and the comments submitted by most other interested parties. OAL should consider all of the issues involved and the arguments in support of PERB's emergency regulations from both representatives of local government agencies (employers) and representatives of employee organizations (labor or exclusive representatives)—and approve the emergency regulations.

First, PERB agrees that nothing in AB 646 changes the voluntary nature of mediation under the MMBA. (See Gov. Code, § 3505.2.) Nor do the proposed emergency regulations mandate that parties engage in mediation. However, any attempt to read and harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those *specifically* exempted by Government Code section 3505.5, subdivision (e).

It is correct that Government Code section 3505.4, subdivision (a), as amended by AB 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, it also is important to consider that AB 646 *repealed* the prior language of section 3505.4, which set forth the conditions under which an employer could implement its last, best and final offer (LBFO). In

new section 3505.7, added by AB 646, the MMBA now provides that implementation of the employer's LBFO may occur only "[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5." (Emphasis added.)

In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also consistent with the available evidence of legislative intent. The author of AB 646 is quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful.

(Emphasis added.)

In the attached e-mail message to the undersigned on December 2, 2011, commenting on the proposed emergency regulations which were then pending approval by PERB, a representative of the author's office urged "recognition of the legislative intent of AB 646 to provide an exclusive representative with the absolute right to request factfinding irrespective of whether any mediation was held."

The majority of interested parties, both employer and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not. The following comments are excerpted from those submitted to PERB during the voluntary public discussions held by PERB preceding the submission of its emergency regulations to OAL, copies of which are available on the PERB website at www.perb.ca.gov/news/default.aspx:

Carroll, Burdick & McDonough LLP (letter dated November 28, 2011; representing labor)

We agree with our colleagues at Leonard Carder [in their letters dated November 14 and 17, 2011] that notwithstanding the final version of AB 646 being silent on the issue, the legislative history and the purpose behind the Meyers-Milias-Brown Act compel PERB to assume that a covered employer's obligation to participate in factfinding is mandatory, and PERB should draft its emergency regulation accordingly.

The purpose and intent of the Act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Govt. Code, [§] 3500.) Factfinding, as required by AB 646, is an extension of this policy of bilateral resolution of labor disputes to include a uniform, nonbinding, process for resolving bargaining impasse.

The idea, floated by some commentators and the City of San Diego [in its letter dated November 18, 2011], that an employer could simply opt out, or not be bound by, factfinding seems antithetical to the Legislature's whole approach on the subject. It sets up the scenario that an employer would choose not to voluntarily mediate at impasse because the mere agreement to mediate would bind the employer to factfinding *if* the mediation was unsuccessful and *if* the employee organization elected to pursue factfinding. As our colleagues at Roth[n]er, Segall and Greenstone point out [in their letter dated November 18, 2011], such a reading, which would make voluntary mediation less likely, would weaken impasse resolution processes, not strengthen them.

Mandatory factfinding would not conflict with section 3505.2 since AB 646 does not itself compel mediation, only factfinding. We conclude that notwithstanding whether parties mediate, factfinding is a mandatory impasse resolution procedure if invoked by the employee association.

Burke, Williams & Sorensen, LLP (representing employers)

In a submission dated November 8, 2011, this management-side law firm proposed its own, independently drafted regulations to implement AB 646, which included language expressly providing for requests for factfinding where "no mediator has been appointed."

Renne Sloan Holtzman Sakai LLP (letter dated December 2, 2011; representing employers)

> A.B. 646, by its terms, does not provide for a fact-finding request from an employer. Thus, there is no similar counter-balance under the MMBA as exists under EERA and HEERA. Under the MMBA, without a deadline by which the employee organization must request fact-finding, it will be extremely difficult for an employer to protect itself against unreasonable delays. This significant difference in statutory language justifies PERB adopting fact-finding regulations under the MMBA that are different than those under EERA and HEERA.

A number of interested parties also suggested, and PERB amended its proposed emergency regulations to reflect, that these regulations should include a time limit within which the exclusive representative must request factfinding. (CALPELRA letter dated November 26, 2011, representing employers; Burke, Williams & Sorensen, LLP proposal dated November 8, 2011 representing employers.) PERB added language to its proposed emergency regulations to address these pleas for clarity and consistency.

In its letter dated November 26, 2011, CALPELRA elaborated:

> PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty. During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.

In sum, the proposed emergency regulations presently before OAL are a product of the participation of more than 130 representatives of employers and employee organizations, extensive written comments, and numerous discussions at voluntary public meetings held by

PERB. These proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of the newly enacted factfinding process under the Meyers-Milias-Brown Act would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Without the approval of these proposed emergency regulations, the procedural and substantive rights of employers, employees and employee organizations will be unclear. With numerous threatened strikes on the horizon, public entities may be unable to provide essential public services, public employees will be without redress and/or pay, and the general public will be incontrovertibly harmed by the foregoing.

Both management-side and labor-side representatives have shown support for PERB's emergency regulations and participated in the process of developing the emergency regulations filed with OAL. Based on the foregoing, PERB's proposed emergency regulations should be approved.

Sincerely,

Les Chisholm
Division Chief

Attachment

Les Chisholm

From: Naylor, Cody <Cody.Naylor@asm.ca.gov>
Sent: Friday, December 02, 2011 10:33 AM
To: Les Chisholm
Subject: AB 646 Rulemaking / Dec 8 Mtg

Hi Les –

I was wondering if there are further revisions to the November 14 draft emergency regulations expected before the December PERB meeting. I'd be happy to discuss our office's position with you about the proposed regulations. But in short, we appreciate Staff's recognition of the legislative intent of AB 646 to provide an exclusive representative with the absolute right to request factfinding irrespective of whether any mediation was held and for incorporating that provision into its proposed regulations.

Thank you!

Cody Naylor
Legislative Aide
Office of Assembly Member Toni Atkins
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STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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December 28, 2011

Peggy J. Gibson, Staff Counsel
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Subject: Supplemental Information Regarding Proposed Emergency Regulations 2011-1219-01E

Dear Ms. Gibson:

Prior to the enactment of Assembly Bill 646 (AB 646), the Meyers-Milias-Brown Act (MMBA) did not provide for any mandatory impasse procedures. AB 646 adds a factfinding process, with legislative intent to establish a uniform and mandatory procedure. AB 646 also repealed the prior language establishing when, if the parties did not reach an agreement, the employer could implement its last, best and final offer (LBFO), and enacted a new provision in this regard that references the new factfinding process as a *prerequisite* to implementation of the LBFO.

PERB's role is to administer and enforce the provisions of the MMBA, as well as six other public sector collective bargaining statutes. PERB's role is expanded by AB 646 to include the appointment of the chair of factfinding panels in disputes where the parties, who have been unable to resolve their bargaining dispute, are also unable to agree on the selection of a chairperson. At the present time, PERB does not have regulations in place to govern the procedures by which such an appointment would be made.

PERB currently administers factfinding provisions of the Educational Employment Relations Act (EERA, covering public school employers and employees) and the Higher Education Employer-Employee Relations Act (HEERA, covering higher education employers and employees). EERA and HEERA together cover roughly 1100 employers and some 750,000 employees organized into over 2400 bargaining units. The MMBA and the provisions of AB 646 apply to at least 3000 public employers, upwards of two million employees, and far more bargaining units than under EERA and HEERA. Currently, under EERA and HEERA, there are approximately 40 requests for factfinding each year. When factfinding was a new process under EERA and HEERA, requests occurred on a more frequent basis. Thus, PERB projects that, in the first year under the MMBA as amended by AB 646, there could be more than 100 requests to submit bargaining disputes to factfinding.

From the time that AB 646 was chaptered, PERB began receiving inquiries from both employer and employee organization representatives, wanting to know when and under what

circumstances factfinding could be requested, and how the process would work. While some differences emerged as to how the regulations should read, no party disputed that regulations were necessary, or that regulations should be adopted to go into effect on January 1, 2012. In fact, the disagreements over interpretation of AB 646 helped explain, in part, why interested parties wanted PERB to take action immediately.

For example, in a November 2, 2011 letter to PERB Chair Anita Martinez, the California Public Employers Labor Relations Association (CALPELRA) stated that:

> [CALPELRA] and its Board of Directors support the Public Employment Relations Board's interest in identifying issues that require regulatory action prior to the January 1, 2012, effective date of AB 646. The lack of clarity in some aspects of AB 646's amendments to the MMBA has created substantial uncertainty among MMBA jurisdictions. CALPELRA and its Board of Directors *would like to avoid unnecessary and costly unfair practices and related litigation caused by the imprecision of the statute*. We are confident that well designed PERB regulations could provide the necessary clarity and help MMBA jurisdictions and their employee representatives avoid disputes.

(Emphasis added.)

CALPELRA later stated, in a November 26, 2011 letter:

> PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. *Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty.* During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because *many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.*

(Emphasis added.)

In its November 14, 2011 letter, the labor-side law firm of Leonard Carder, while disagreeing with certain aspects of the initial staff discussion draft, commended PERB for "its proactive, thoughtful and transparent efforts" to adopt emergency regulations. Similar sentiments were expressed at the public meeting of PERB on December 8, 2011, by interested parties who

commented on the proposed emergency regulations. Throughout the process, no interested party urged PERB to take no action as to emergency regulations. On the other hand, PERB declined to take action on emergency regulations with respect to many proposals advanced by interested parties, believing that the emergency standard applied only to those regulations necessary to have procedures in place for the appointment of a factfinding panel chairperson.

The number of unfair practice charges filed under the MMBA has been increasing, as the fiscal constraints faced by local governments make for increasingly contentious bargaining. Likewise, PERB is seeing more requests for injunctive relief under the MMBA, filed by unions asking PERB to seek a court order halting the implementation of the employers' last, best and final offers, or by employers attempting to halt strikes or other work stoppages threatened by employee organizations. It was in this context that the Legislature saw fit to enact a mandatory impasse procedure (factfinding), with the express hope that impasse procedures could help parties to reach agreement, and thus avoid litigation and work actions that can disrupt public services. PERB and the overwhelming majority of interested parties who have weighed in to date believe that it is imperative to have regulations in place as of January 1, 2012, when the provisions of AB 646 take effect, so that the factfinding process may be implemented where requested, and so that this new impasse procedure can help to reduce the instance of the interruption of public services, lessen the amount of costly litigation over the lawfulness of employer implementations of terms and conditions of employment, and make less likely the finding of unfair practices with costly remedial orders.

By definition, whether PERB receives a handful of MMBA factfinding requests within the next six months, or whether 50 or 100 are filed, each such request will occur in the context where a public employer and a public employee union have been unable to reach agreement on a new contract—often after many months of contentious negotiations. Absent an agreement, which factfinding will hopefully facilitate, the employer may decide to implement its last, best and final offer and the members of the public employee union may decide to go on strike. In each case, the employer's action and the union's action will likely form the basis for another unfair practice charge and perhaps a request for injunctive relief. The consequences in any event will be costly, and will further strain labor-management relations.

Without OAL approval of the proposed emergency regulations, PERB will be left with only two options when presented with requests for factfinding: PERB can choose to take no action, until such time as the regular rulemaking process can be completed, including OAL's approval of the regulations adopted; or PERB can seek to assist the parties by appointing a factfinding chairperson and risk being charged with enforcing underground regulations.

PERB would prefer to act on the basis of approved emergency regulations, and believes that the factors described above justify approval of the proposed emergency regulations.

Sincerely,

Les Chisholm
Division Chief

Attachment

FINDING OF EMERGENCY

The Public Employment Relations Board finds that an emergency exists and that proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of a newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA) would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Specific Facts Showing the Need for Immediate Action

As a result of the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012, the MMBA, the collective bargaining statute applicable to local governments (cities, counties, and special districts) in California, will provide for a mandatory impasse procedure—factfinding before a tripartite panel—upon the request of an exclusive representative where the parties have not reached a settlement of their dispute. PERB will be responsible for the appointment of the neutral chairperson of the factfinding panel unless the parties mutually agree upon the selection of the chairperson. This new legislation and the duties imposed on PERB under it require amendments to existing regulations as well as the adoption of new regulations in order to fully implement the legislation and PERB's role.

The MMBA has not previously mandated the use of any impasse procedures with respect to negotiations between local agencies and unions representing their employees. The current regulations of the Board do not provide for the filing and processing of requests for factfinding under the MMBA. These legislative changes potentially affect hundreds of thousands of public employees in California, their employers, and the employee organizations that represent employees under the MMBA. PERB began receiving inquiries from public employers, employees and employee organizations, who are potentially affected by this new legislation, as soon as the legislation was chaptered. Public meetings were promptly convened by PERB in Northern and Southern California to discuss the legislation and the possible adoption of regulations, both of which were very well attended. The attendees included more than 130 representatives of employers and employee organizations, including numerous law firms that represent hundreds of local agencies and employee organizations that themselves represent multiple bargaining units within local government agencies. Extensive written comments and suggestions were received by PERB in response to the discussions at those meetings and the "discussion drafts" circulated by PERB staff.

In order that the procedural and substantive rights of employers, employees and employee organizations are protected, the Board finds that there exists an emergency need to adopt new regulations providing for the filing and processing of requests for factfinding under the MMBA, and to amend other existing regulations where necessary to conform to newly adopted regulations. In so doing, the Board has attempted to distinguish between those changes that are necessary to the immediate implementation of the statute as amended, and those areas that may be identified as requiring further regulations as the Board and the parties acquire experience with the provisions of the amended statute.

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act. Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act. Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act. Government Code section 3563(f) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act. Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act. Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Employment Protection and Governance Act. Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act.

General reference for section 32380 of the Board's regulations: Sections 3505.4, 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code, and Section 99561(j), (m), Public Utilities Code.

General reference for section 32603 of the Board's regulations: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

General reference for section 32604 of the Board's regulations: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

General reference for proposed section 32802 of the Board's regulations: Sections 3505.4, 3505.5, and 3505.7, Government Code.

General reference for proposed section 32804 of the Board's regulations: Sections 3505.4, 3505.5, and 3505.7, Government Code.

INFORMATIVE DIGEST

Section 32380 of the Board's regulations provides for administrative decisions that are not appealable. The proposed changes update reference citations to reflect the newly enacted provisions of the MMBA. (Chapter 680, Statutes of 2011.) The proposed changes also

conform this section to the text of proposed Section 32802 with regard to the appealability of Board agent determinations as to the sufficiency of a request for factfinding under the MMBA. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA.

Section 32603 defines employer unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Section 32604 defines employee organization unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. Where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well

as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17561: None.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings on federal funding to the state: None

Cost impact on private persons or directly affected businesses: None

Significant adverse economic impact on business including the ability of California businesses to compete with businesses in other states: None

Significant effect on housing costs: None

The proposed regulations will not affect small business because they only affect public employers and public employees.

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT

(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME	CONTACT PERSON	TELEPHONE NUMBER
Public Employment Relations Board	Les Chisholm	(916) 327-8383
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		**NOTICE FILE NUMBER**
Factfinding under the Meyers-Milias-Brown Act		Z

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts businesses and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☐ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (List areas.): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes ☐ No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): $ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☐ No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☐ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of : ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: $_____	Cost: $_____
Alternative 1:	Benefit: $_____	Cost: $_____
Alternative 2:	Benefit: $_____	Cost: $_____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million ? ☐ Yes ☐ No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: $ _____ Cost-effectiveness ratio: $ _____

Alternative 1: $ _____ Cost-effectiveness ratio: $ _____

Alternative 2: $ _____ Cost-effectiveness ratio: $ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

☐ a. is provided in _____ Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. will be requested in the _____ (FISCAL YEAR) Governor's Budget for appropriation in Budget Act of _____

☐ 2. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

☐ a. implements the Federal mandate contained in _____

☐ b. implements the court mandate set forth by the _____

court in the case of _____ vs. _____

☐ c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ (DATE) election;

☐ d. is issued only in response to a specific request from the _____

_____, which is/are the only local entity(s) affected;

☐ e. will be fully financed from the _____ (FEES, REVENUE, ETC.) authorized by Section

_____ of the _____ Code;

☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

☐ g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Savings of approximately $ _____ annually.

☐ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.

☑ 6. Other. Unaware of any local costs. No reimbursement required per Gov. Code section 17561.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year. It is anticipated that State agencies will:

☐ a. be able to absorb these additional costs within their existing budgets and resources.

☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.

☐ 2. Savings of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any State agency or program.

☐ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year.

☐ 2. Savings of of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.

☐ 4. Other.

FISCAL OFFICER SIGNATURE		DATE 12-19-11
AGENCY SECRETARY [1] APPROVAL/CONCURRENCE		DATE
DEPARTMENT OF FINANCE [2] APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER	DATE

1. *The signature attests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.*

2. *Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.*

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-3198
Fax: (916) 327-6377

December 9, 2011

NOTIFICATION OF PROPOSED EMERGENCY REGULATORY ACTION

Subject: Implementation of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012—Factfinding

The Public Employment Relations Board (PERB) is proposing to adopt emergency regulations implementing the newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA).

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency action to OAL, OAL shall allow interested persons five (5) calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. Upon filing, OAL will have ten (10) calendar days within which to review and make a decision on the proposed emergency rules. If approved, OAL will file the regulations with the Secretary of State, and the emergency regulations will become effective for one hundred and eighty (180) days. Within the 180-day effective period, PERB will proceed with a regular rulemaking action, including a public comment period. The emergency regulations will remain in effect during this rulemaking action.

Attached to this notice is the specific regulatory language of PERB's proposed emergency action and Finding of Emergency.

You may also review the proposed regulatory language and Finding of Emergency on PERB's website at the following address: http://www.perb.ca.gov.

If you have any questions regarding this proposed emergency action, please contact Les Chisholm at (916) 327-8383.

STATEMENT OF CONFIRMATION OF
MAILING OF FIVE-DAY EMERGENCY NOTICE
(Cal. Code Regs., tit. 1, § 50(a)(5)(A))

The Public Employment Relations Board sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulation to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
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December 28, 2011

Peggy J. Gibson, Staff Counsel
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Subject: Response to Comments Received about Proposed Emergency Regulations 2011-1219-01E

Dear Ms. Gibson:

By letter dated December 22, 2011, the City Attorney for the City of San Diego states that the Office of Administrative Law (OAL) should disapprove the emergency regulations submitted by the Public Employment Relations Board (PERB), "to the extent they mandate factfinding in the absence of mediation, or, in the alternative, requests that the proposed regulations be clarified for jurisdictions that do not engage in mediation by mutual agreement or by the terms of their negotiated impasse procedures." In essence, the City Attorney for the City of San Diego asserts that PERB's emergency regulations are not consistent with Assembly Bill 646 (AB 646) and that they do not provide clarity to the public agencies subject thereto.

PERB previously considered the concerns expressed by the City Attorney for the City of San Diego, but rejected the objections raised based on the language of the Meyers-Milias-Brown Act (MMBA), as amended by AB 646, as well as evidence of legislative intent, and the comments submitted by most other interested parties. OAL should consider all of the issues involved and the arguments in support of PERB's emergency regulations from both representatives of local government agencies (employers) and representatives of employee organizations (labor or exclusive representatives)—and approve the emergency regulations.

First, PERB agrees that nothing in AB 646 changes the voluntary nature of mediation under the MMBA. (See Gov. Code, § 3505.2.) Nor do the proposed emergency regulations mandate that parties engage in mediation. However, any attempt to read and harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those *specifically* exempted by Government Code section 3505.5, subdivision (e).

It is correct that Government Code section 3505.4, subdivision (a), as amended by AB 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, it also is important to consider that AB 646 *repealed* the prior language of section 3505.4, which set forth the conditions under which an employer could implement its last, best and final offer (LBFO). In

new section 3505.7, added by AB 646, the MMBA now provides that implementation of the employer's LBFO may occur only "[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5." (Emphasis added.)

In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also consistent with the available evidence of legislative intent. The author of AB 646 is quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful.

(Emphasis added.)

In the attached e-mail message to the undersigned on December 2, 2011, commenting on the proposed emergency regulations which were then pending approval by PERB, a representative of the author's office urged "recognition of the legislative intent of AB 646 to provide an exclusive representative with the absolute right to request factfinding irrespective of whether any mediation was held."

The majority of interested parties, both employer and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not. The following comments are excerpted from those submitted to PERB during the voluntary public discussions held by PERB preceding the submission of its emergency regulations to OAL, copies of which are available on the PERB website at www.perb.ca.gov/news/default.aspx:

Carroll, Burdick & McDonough LLP (letter dated November 28, 2011; representing labor)

We agree with our colleagues at Leonard Carder [in their letters dated November 14 and 17, 2011] that notwithstanding the final version of AB 646 being silent on the issue, the legislative history and the purpose behind the Meyers-Milias-Brown Act compel PERB to assume that a covered employer's obligation to participate in factfinding is mandatory, and PERB should draft its emergency regulation accordingly.

The purpose and intent of the Act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Govt. Code, [§] 3500.) Factfinding, as required by AB 646, is an extension of this policy of bilateral resolution of labor disputes to include a uniform, nonbinding, process for resolving bargaining impasse.

The idea, floated by some commentators and the City of San Diego [in its letter dated November 18, 2011], that an employer could simply opt out, or not be bound by, factfinding seems antithetical to the Legislature's whole approach on the subject. It sets up the scenario that an employer would choose not to voluntarily mediate at impasse because the mere agreement to mediate would bind the employer to factfinding *if* the mediation was unsuccessful and *if* the employee organization elected to pursue factfinding. As our colleagues at Roth[n]er, Segall and Greenstone point out [in their letter dated November 18, 2011], such a reading, which would make voluntary mediation less likely, would weaken impasse resolution processes, not strengthen them.

Mandatory factfinding would not conflict with section 3505.2 since AB 646 does not itself compel mediation, only factfinding. We conclude that notwithstanding whether parties mediate, factfinding is a mandatory impasse resolution procedure if invoked by the employee association.

Burke, Williams & Sorensen, LLP (representing employers)

In a submission dated November 8, 2011, this management-side law firm proposed its own, independently drafted regulations to implement AB 646, which included language expressly providing for requests for factfinding where "no mediator has been appointed."

Renne Sloan Holtzman Sakai LLP (letter dated December 2, 2011; representing employers)

> A.B. 646, by its terms, does not provide for a fact-finding request from an employer. Thus, there is no similar counter-balance under the MMBA as exists under EERA and HEERA. Under the MMBA, without a deadline by which the employee organization must request fact-finding, it will be extremely difficult for an employer to protect itself against unreasonable delays. This significant difference in statutory language justifies PERB adopting fact-finding regulations under the MMBA that are different than those under EERA and HEERA.

A number of interested parties also suggested, and PERB amended its proposed emergency regulations to reflect, that these regulations should include a time limit within which the exclusive representative must request factfinding. (CALPELRA letter dated November 26, 2011, representing employers; Burke, Williams & Sorensen, LLP proposal dated November 8, 2011 representing employers.) PERB added language to its proposed emergency regulations to address these pleas for clarity and consistency.

In its letter dated November 26, 2011, CALPELRA elaborated:

> PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty. During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.

In sum, the proposed emergency regulations presently before OAL are a product of the participation of more than 130 representatives of employers and employee organizations, extensive written comments, and numerous discussions at voluntary public meetings held by

PERB. These proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of the newly enacted factfinding process under the Meyers-Milias-Brown Act would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Without the approval of these proposed emergency regulations, the procedural and substantive rights of employers, employees and employee organizations will be unclear. With numerous threatened strikes on the horizon, public entities may be unable to provide essential public services, public employees will be without redress and/or pay, and the general public will be incontrovertibly harmed by the foregoing.

Both management-side and labor-side representatives have shown support for PERB's emergency regulations and participated in the process of developing the emergency regulations filed with OAL. Based on the foregoing, PERB's proposed emergency regulations should be approved.

Sincerely,

Les Chisholm
Division Chief

Attachment

Les Chisholm

From: Naylor, Cody <Cody.Naylor@asm.ca.gov>
Sent: Friday, December 02, 2011 10:33 AM
To: Les Chisholm
Subject: AB 646 Rulemaking / Dec 8 Mtg

Hi Les –

I was wondering if there are further revisions to the November 14 draft emergency regulations expected before the December PERB meeting. I'd be happy to discuss our office's position with you about the proposed regulations. But in short, we appreciate Staff's recognition of the legislative intent of AB 646 to provide an exclusive representative with the absolute right to request factfinding irrespective of whether any mediation was held and for incorporating that provision into its proposed regulations.

Thank you!

Cody Naylor
Legislative Aide
Office of Assembly Member Toni Atkins
76th Assembly District
T (916) 319-2076
F (916) 319-2176

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

December 28, 2011

Peggy J. Gibson, Staff Counsel
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Subject: Supplemental Information Regarding Proposed Emergency Regulations 2011-1219-01E

Dear Ms. Gibson:

Prior to the enactment of Assembly Bill 646 (AB 646), the Meyers-Milias-Brown Act (MMBA) did not provide for any mandatory impasse procedures. AB 646 adds a factfinding process, with legislative intent to establish a uniform and mandatory procedure. AB 646 also repealed the prior language establishing when, if the parties did not reach an agreement, the employer could implement its last, best and final offer (LBFO), and enacted a new provision in this regard that references the new factfinding process as a *prerequisite* to implementation of the LBFO.

PERB's role is to administer and enforce the provisions of the MMBA, as well as six other public sector collective bargaining statutes. PERB's role is expanded by AB 646 to include the appointment of the chair of factfinding panels in disputes where the parties, who have been unable to resolve their bargaining dispute, are also unable to agree on the selection of a chairperson. At the present time, PERB does not have regulations in place to govern the procedures by which such an appointment would be made.

PERB currently administers factfinding provisions of the Educational Employment Relations Act (EERA, covering public school employers and employees) and the Higher Education Employer-Employee Relations Act (HEERA, covering higher education employers and employees). EERA and HEERA together cover roughly 1100 employers and some 750,000 employees organized into over 2400 bargaining units. The MMBA and the provisions of AB 646 apply to at least 3000 public employers, upwards of two million employees, and far more bargaining units than under EERA and HEERA. Currently, under EERA and HEERA, there are approximately 40 requests for factfinding each year. When factfinding was a new process under EERA and HEERA, requests occurred on a more frequent basis. Thus, PERB projects that, in the first year under the MMBA as amended by AB 646, there could be more than 100 requests to submit bargaining disputes to factfinding.

From the time that AB 646 was chaptered, PERB began receiving inquiries from both employer and employee organization representatives, wanting to know when and under what

circumstances factfinding could be requested, and how the process would work. While some differences emerged as to how the regulations should read, no party disputed that regulations were necessary, or that regulations should be adopted to go into effect on January 1, 2012. In fact, the disagreements over interpretation of AB 646 helped explain, in part, why interested parties wanted PERB to take action immediately.

For example, in a November 2, 2011 letter to PERB Chair Anita Martinez, the California Public Employers Labor Relations Association (CALPELRA) stated that:

> [CALPELRA] and its Board of Directors support the Public Employment Relations Board's interest in identifying issues that require regulatory action prior to the January 1, 2012, effective date of AB 646. The lack of clarity in some aspects of AB 646's amendments to the MMBA has created substantial uncertainty among MMBA jurisdictions. CALPELRA and its Board of Directors *would like to avoid unnecessary and costly unfair practices and related litigation caused by the imprecision of the statute*. We are confident that well designed PERB regulations could provide the necessary clarity and help MMBA jurisdictions and their employee representatives avoid disputes.

(Emphasis added.)

CALPELRA later stated, in a November 26, 2011 letter:

> PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. *Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty.* During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because *many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.*

(Emphasis added.)

In its November 14, 2011 letter, the labor-side law firm of Leonard Carder, while disagreeing with certain aspects of the initial staff discussion draft, commended PERB for "its proactive, thoughtful and transparent efforts" to adopt emergency regulations. Similar sentiments were expressed at the public meeting of PERB on December 8, 2011, by interested parties who

commented on the proposed emergency regulations. Throughout the process, no interested party urged PERB to take no action as to emergency regulations. On the other hand, PERB declined to take action on emergency regulations with respect to many proposals advanced by interested parties, believing that the emergency standard applied only to those regulations necessary to have procedures in place for the appointment of a factfinding panel chairperson.

The number of unfair practice charges filed under the MMBA has been increasing, as the fiscal constraints faced by local governments make for increasingly contentious bargaining. Likewise, PERB is seeing more requests for injunctive relief under the MMBA, filed by unions asking PERB to seek a court order halting the implementation of the employers' last, best and final offers, or by employers attempting to halt strikes or other work stoppages threatened by employee organizations. It was in this context that the Legislature saw fit to enact a mandatory impasse procedure (factfinding), with the express hope that impasse procedures could help parties to reach agreement, and thus avoid litigation and work actions that can disrupt public services. PERB and the overwhelming majority of interested parties who have weighed in to date believe that it is imperative to have regulations in place as of January 1, 2012, when the provisions of AB 646 take effect, so that the factfinding process may be implemented where requested, and so that this new impasse procedure can help to reduce the instance of the interruption of public services, lessen the amount of costly litigation over the lawfulness of employer implementations of terms and conditions of employment, and make less likely the finding of unfair practices with costly remedial orders.

By definition, whether PERB receives a handful of MMBA factfinding requests within the next six months, or whether 50 or 100 are filed, each such request will occur in the context where a public employer and a public employee union have been unable to reach agreement on a new contract—often after many months of contentious negotiations. Absent an agreement, which factfinding will hopefully facilitate, the employer may decide to implement its last, best and final offer and the members of the public employee union may decide to go on strike. In each case, the employer's action and the union's action will likely form the basis for another unfair practice charge and perhaps a request for injunctive relief. The consequences in any event will be costly, and will further strain labor-management relations.

Without OAL approval of the proposed emergency regulations, PERB will be left with only two options when presented with requests for factfinding: PERB can choose to take no action, until such time as the regular rulemaking process can be completed, including OAL's approval of the regulations adopted; or PERB can seek to assist the parties by appointing a factfinding chairperson and risk being charged with enforcing underground regulations.

PERB would prefer to act on the basis of approved emergency regulations, and believes that the factors described above justify approval of the proposed emergency regulations.

Sincerely,

Les Chisholm
Division Chief

Attachment

Emergency Justification

Prior to the enactment of Assembly Bill 646 (AB 646), the Meyers-Milias-Brown Act (MMBA) did not provide for any mandatory impasse procedures. AB 646 adds a factfinding process, with legislative intent to establish a uniform and mandatory procedure. AB 646 also repealed the prior language establishing when, if the parties did not reach an agreement, the employer could implement its last, best and final offer (LBFO), and enacted a new provision in this regard that references the new factfinding process as a *prerequisite* to implementation of the LBFO.

PERB's role is to administer and enforce the provisions of the MMBA, as well as six other public sector collective bargaining statutes. PERB's role is expanded by AB 646 to include the appointment of the chair of factfinding panels in disputes where the parties, who have been unable to resolve their bargaining dispute, are also unable to agree on the selection of a chairperson. At the present time, PERB does not have regulations in place to govern the procedures by which such an appointment would be made.

PERB currently administers factfinding provisions of the Educational Employment Relations Act (EERA, covering public school employers and employees) and the Higher Education Employer-Employee Relations Act (HEERA, covering higher education employers and employees). EERA and HEERA together cover roughly 1100 employers and some 750,000 employees organized into over 2400 bargaining units. The MMBA and the provisions of AB 646 apply to at least 3000 public employers, upwards of two million employees, and far more bargaining units than under EERA and HEERA. Currently, under EERA and HEERA, there are approximately 40 requests for factfinding each year. When factfinding was a new process under EERA and HEERA, requests occurred on a more frequent basis. Thus, PERB projects that, in the first year under the MMBA as amended by AB 646, there could be more than 100 requests to submit bargaining disputes to factfinding.

From the time that AB 646 was chaptered, PERB began receiving inquiries from both employer and employee organization representatives, wanting to know when and under what circumstances factfinding could be requested, and how the process would work. While some differences emerged as to how the regulations should read, no party disputed that regulations were necessary, or that regulations should be adopted to go into effect on January 1, 2012. In fact, the disagreements over interpretation of AB 646 helped explain, in part, why interested parties wanted PERB to take action immediately.

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(Emphasis added.)

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provisions of AB 646 take effect, so that the factfinding process may be implemented where requested, and so that this new impasse procedure can help to reduce the instance of the interruption of public services, lessen the amount of costly litigation over the lawfulness of employer implementations of terms and conditions of employment, and make less likely the finding of unfair practices with costly remedial orders.

By definition, whether PERB receives a handful of MMBA factfinding requests within the next six months, or whether 50 or 100 are filed, each such request will occur in the context where a public employer and a public employee union have been unable to reach agreement on a new contract---often after many months of contentious negotiations. Absent an agreement, which factfinding will hopefully facilitate, the employer may decide to implement its last, best and final offer and the members of the public employee union may decide to go on strike. In each case, the employer's action and the union's action will likely form the basis for another unfair practice charge and perhaps a request for injunctive relief. The consequences in any event will be costly, and will further strain labor-management relations.

Without OAL approval of the proposed emergency regulations, PERB will be left with only two options when presented with requests for factfinding: PERB can choose to take no action, until such time as the regular rulemaking process can be completed, including OAL's approval of the regulations adopted; or PERB can seek to assist the parties by appointing a factfinding chairperson and risk being charged with enforcing underground regulations.

PERB would prefer to act on the basis of approved emergency regulations, and believes that the factors described above justify approval of the proposed emergency regulations.

STATEMENT OF CONFIRMATION OF
MAILING OF FIVE-DAY EMERGENCY NOTICE
(Cal. Code Regs., tit. 1, § 50(a)(5)(A))

The Public Employment Relations Board sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulation to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).

PROPOSED TEXT -- REGULATION CHANGES RELATED TO
IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
(New language shown in *italics*.)

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code, and Section 99561(f), Public Utilities Code. Reference: Sections *3505.4*, 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code, and Section 99561(j), (m), Public Utilities Code.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, *3505.4, 3505.5, 3505.7,* 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, *3505.4, 3505.5, 3505.7,* 3506, 3507 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. <u>Appointment of Person to Chair Factfinding Panel Under the MMBA</u>.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

PROPOSED TEXT -- REGULATION CHANGES RELATED TO
IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
(New language shown in *italics*.)

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The following administrative decisions shall not be appealable:

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(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections *3505.4*, 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code; and Section 99561(j), (m), Public Utilities Code.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, *3505.4, 3505.5, 3505.7,* 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, *3505.4, 3505.5, 3505.7,* 3506, 3507 and 3509, Government Code; and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

Exhibit 1

32802. Appointment of a Factfinder Under MMBA.

[OPTION 1]

Not sooner than 30 days after the appointment of a mediator, an exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required. The request shall be accompanied by documentation of the date on which a mediator was appointed.

Comments/Notes:

[OPTION 2]

Not sooner than 30 days after the appointment of a mediator, the Board shall appoint a person to chair a factfinding panel if the exclusive representative requests that the parties' differences be submitted to a factfinding panel. The request shall include or be accompanied by documentation of the date on which a mediator was appointed. The request must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

Comments/Notes: what happens if the person appointed says they can do it w/in 30 days and then we find out on day 20 they cannot do it, then when does the 30 days end. Does it restart? Only 10 days — how many days to get new?

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

****

32804. Appointment of Person to Chair Factfinding Panel Under MMBA.

(a) The Board shall, within five working days from the date filed, notify the parties whether the request satisfies the requirements of Section 32802. If the request does not satisfy the requirements of Section 32802, no further action shall be taken by the Board.

Comments/Notes:

(b)

[OPTION 1]

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Revised November 4, 2011

Comments/Notes:

[OPTION 2]

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In each case where Board appoints the chairperson, the Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties select one by alternate strike or other methodology of their choice. In no case will the Board be responsible for the costs of the chairperson.

Comments/Notes:

[OPTION 3]

Unless notified by the parties that they have mutually agreed upon a person to chair the panel, the Board shall refer each sufficient request to the State Mediation and Conciliation Service, for the appointment of a chairperson in accordance with the provisions of California Code of Regulations, title 8, Section 17300, within five working days. In no case will the Board be responsible for the costs of the chairperson or for any fees provided for by Section 17300.

Comments/Notes:

(c) "Working days," for purposes of this Section only, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

Comments/Notes:

(d) The determination as to whether a request satisfies the requirements of Section 32802 shall not be appealable to the Board itself.

Comments/Notes:

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

32802. Appointment of a Factfinder Under MMBA.

[OPTION 1]

Not sooner than 30 days after the appointment of a mediator, an exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required. The request shall be accompanied by documentation of the date on which a mediator was appointed.

Comments/Notes: See comment on option 2.

[OPTION 2]

Not sooner than 30 days after the appointment of a mediator, the Board shall appoint a person to chair a factfinding panel if the exclusive representative requests that the parties' differences be submitted to a factfinding panel. The request shall include or be accompanied by documentation of the date on which a mediator was appointed. The request must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

Comments/Notes: This draft assumes that mediation is a necessary pre-requisite to factfinding; not true.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

****

32804. Appointment of Person to Chair Factfinding Panel Under MMBA.

(a) The Board shall, within five working days from the date filed, notify the parties whether the request satisfies the requirements of Section 32802. If the request does not satisfy the requirements of Section 32802, no further action shall be taken by the Board.

Comments/Notes:

(b)

[OPTION 1]

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Revised November 4, 2011

Comments/Notes:

[OPTION 2]

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In each case where Board appoints the chairperson, the Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties select one by alternate strike or other methodology of their choice. In no case will the Board be responsible for the costs of the chairperson.

Comments/Notes: Like option 2 best, provided the 7 names provided board all agreed to complete fact finding in 30 days, and the panel members are limited to interest arbitrators residing in Region (NoCal/SoCal) where dispute arises.

[OPTION 3]

Unless notified by the parties that they have mutually agreed upon a person to chair the panel, the Board shall refer each sufficient request to the State Mediation and Conciliation Service, for the appointment of a chairperson in accordance with the provisions of California Code of Regulations, title 8, Section 17300, within five working days. In no case will the Board be responsible for the costs of the chairperson or for any fees provided for by Section 17300.

Comments/Notes:

(c) "Working days," for purposes of this Section only, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

Comments/Notes:

(d) The determination as to whether a request satisfies the requirements of Section 32802 shall not be appealable to the Board itself.

Comments/Notes:

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

ANDREW BAKER
BEESON, TAYER + BODINE
483 9th St
Oakland 94607

Revised November 4, 2011

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-3198
Fax: (916) 327-6377

October 25, 2011

Re: Assembly Bill 646 (MMBA factfinding (see attached))

Dear Interested Party:

The Public Employment Relations Board (PERB) invites you to attend a meeting to discuss the implementation of Assembly Bill 646 (AB 646). Meetings will be held as follows:

Tuesday, November 8, 2011
10:00 a.m. – 1:00 p.m.
Elihu Harris State Office Building
1515 Clay Street, 2nd Floor, Room 1
Oakland, California

and

Thursday, November 10, 2011
10:00 a.m. – 1:00 p.m.
PERB Los Angeles Regional Office
700 N. Central Avenue, Suite 230
Glendale, California

The meetings will be conducted by PERB General Counsel Suzanne Murphy and Division Chief Les Chisholm. Representatives of the California State Mediation and Conciliation Service will also attend and participate. The discussion will focus on the issues raised by the enactment of AB 646, and in particular the issues that might require regulatory action by PERB in advance of January 1, 2012, when the legislation takes effect. Among the issues to be discussed are what information PERB should require when a party seeks to initiate factfinding pursuant to the Meyers-Milias-Brown Act, and how PERB will carry out its responsibilities vis-à-vis the appointment process.

We look forward to your insights and thoughts on these issues and any others that you may believe are raised by AB 646. Persons planning to attend either meeting are requested to reply by telephone (916.322.3198) or by e-mail (lchisholm@perb.ca.gov).

Sincerely,

Anita I. Martinez Chair	Sally M. Mc. Keag Member	Alice Dowdin Calvillo Member	A. Eugene Huguenin Member

Assembly Bill 646 (Chapter 680, Statutes of 2011)

Effective January 1, 2012, the following changes to the Meyers-Milias-Brown Act take effect, pursuant to Assembly Bill 646. Newly enacted provisions are shown in **bold** type. Strikeout (~~strikeout~~) of text is used to shown language deleted from the Act.

3505.4.

~~If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.~~

(a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

3505.5.

(a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

3505.7.

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

PUBLIC MEETING MINUTES

December 8, 2011

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:00 a.m.

Members Present

Anita I. Martinez, Chair
Alice Dowdin Calvillo, Member
Sally M. McKeag, Member
A. Eugene Huguenin, Member (Excused)

Staff Present

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief, Office of General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the October 13, 2011 Public Meeting. She reported that the Board met in continuous closed session to deliberate on pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in October. Those were PERB Decision Nos. 2210-S, 2211-M, 2212, 2213, 2214-S, 2215-M, 2216-C, 2217-H, 2218, 2219, 2220, 2221, 2222-M, 2223, 2224, 2225-M, and JR-26, and PERB Order No. Ad-391-M. In Request for Injunctive Relief (IR Request) No. 607 (*SEIU United Healthcare Workers West v. El Camino Hospital District*), the request was denied, IR Request No. 608 (*SEIU Local 1021 v. County of Mendocino*) the request was denied, IR Request No. 609 (*SEIU United Healthcare Workers West v. El Camino Hospital District*) the request was denied, and in IR Request No. 610 (*SEIU Local 1021 v. Mendocino County Superior Court*), the request was denied. A document containing a listing of the aforementioned decisions was made available at the meeting. A list containing the decisions is available on PERB's website.

Motion: Motion by Member McKeag and seconded by Member Dowdin Calvillo, to close the October 13, 2011 Public Meeting.

Ayes: Martinez, McKeag and Dowdin Calvillo.
Motion Adopted – 3 to 0.

Without objection, Chair Martinez adjourned the October 13, 2011 Public Meeting. She then opened and called to order the December 8, 2011 Public Meeting. Member McKeag led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Dowdin Calvillo and seconded by Member McKeag, that the Board adopt the minutes for the October 13, 2011 Public Meeting.

Ayes: Martinez, McKeag and Dowdin Calvillo.
Motion Adopted – 3 to 0.

Comments From Public Participants

None.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

a. Administrative Report

Chief Administrative Officer Eileen Potter stated that she had no items to report.

b. Legal Reports

Suzanne Murphy, General Counsel, reported that the monthly activity and litigation reports had been distributed to the Board for its review. From those reports Ms. Murphy recapped the following information since the Board's last Public Meeting in October. With respect to unfair practice charges during the months of October and November, 168 new cases were filed with the General Counsel's Office (unchanged from the prior two-month period); 209 case investigations were completed (an increase of 31 cases over the prior period); and a total of 42 informal settlement conferences were conducted by staff (a decrease of 6 cases from the prior period). As Chair Martinez mentioned earlier, since the October Public Meeting, Ms. Murphy reported on the disposition of the four IR Requests which were filed:

1. *SEIU United Healthcare Workers West v. El Camino Hospital District*, IR Request No. 607 (Charge No. SF-CE-891-M, filed October 20, 2011). Whether the Hospital violated the Meyers-Milias-Brown Act (MMBA) by processing and setting an election based on a decertification petition that was alleged not to have complied with local rules that prescribe the contents of a valid petition and the procedures for unit modifications. The request was denied on October 27; however, by direction of the Board, administrative proceedings on the above-referenced charge and complaint were expedited and the State Mediation and Conciliation Service (SMCS) was asked to stay the election, then scheduled for November 3, pending completion of the expedited PERB

administrative process. SMCS agreed to stay the election, a complaint promptly issued and an informal conference was scheduled for November 1. The matter did not settle and an expedited hearing was set for November 14. The proposed decision in this matter issued on November 21.

2. *SEIU Local 1021 v. County of Mendocino*, IR Request No. 608 (Charge No. SF-CE-834-M, filed October 28, 2011). Whether the County failed to bargain in good faith by reneging on a tentative agreement that was reached with the assistance of an SMCS mediator and signed by both parties, by prematurely declaring impasse, and by failing to respond to certain requests for information. The request was denied on November 4. Cross-complaints on this charge and a related bad faith bargaining charge filed against the union issued on November 7. An informal settlement conference was scheduled for December 21.

3. *SEIU United Healthcare Workers West v. El Camino Hospital District*, IR Request No. 609 (Charge No. SF-CE-888-M, filed November 10, 2011). Whether the Hospital failed to meet and confer in good faith, unlawfully refused to provide information, violated the impasse procedures in the local rules, and unilaterally implemented a new health plan. The request was denied on November 17. The charge, and a number of related charges, are being processed in the normal rotation in the PERB General Counsel's Office.

4. *SEIU Local 1021 v. Mendocino County Superior Court*, IR Request No. 610 (Charge No. SA-CE-17-C, filed November 15, 2011). Whether the Court failed to meet and confer in good faith by: carrying out a retaliatory layoff of a Jury Services Coordinator and transferring bargaining work, failing or refusing to provide requested information, and various other acts of alleged surface bargaining or bad faith conduct. The request was denied on November 23, and the charge is being processed in General Counsel's Office normal rotation.

In terms of litigation relating to PERB since the October Public Meeting, one new case was filed in the Los Angeles County Superior Court, *Doe v. Deasy*. This litigation is related to charges that have been filed at PERB involving United Teachers Los Angeles (UTLA) and Associated Administrators of Los Angeles (AALA) versus the Los Angeles Unified School District (LAUSD), and also IR Request No. 599 which was filed in May 2011. In *Doe v. Deasy*, the plaintiffs (all but one of whom are named as "DOES") allege that they are students, parents, and taxpayers who reside within the boundaries of LAUSD. They raised a number of claims, including whether: (1) LAUSD, UTLA and AALA should be enjoined from negotiating or entering into any agreement, including a collective bargaining agreement, that does not require that teacher evaluations be tied to student performance on standardized tests as required by the Stull Act; and (2) the PERB administrative proceedings on any charges involving UTLA, AALA and LAUSD should be stayed. On November 1, the Superior Court denied the plaintiff's ex parte application for a temporary restraining order and ordered the parties to appear on November 21 for a trial setting conference. Prior to the conference, the plaintiffs amended their petition deleting UTLA, AALA and PERB as defendants; however, the trial court ordered that UTLA and AALA be added back into the petition as real parties in interest and ordered that PERB be allowed to intervene by stipulation of the parties if PERB decided to seek intervenor status. The hearing on the

amended petition for writ of mandate will be held on June 1, 2012, in Department 85 in the Los Angeles Superior Court.

Regarding case determinations during the time period since the last Public Meeting, PERB received no final court rulings.

Ms. Murphy announced that, for the first time in four years, the entire General Counsel staff met at the Sacramento Office. The November 29 staff meeting was followed by a full-day mediation training session by PERB alumni James Tamm. Mr. Tamm conducted the training at PERB on a pro bono basis.

General Counsel Murphy concluded her report by thanking PERB's Division Chief, Les Chisholm, for his exemplary work on the proposed emergency regulations to implement Assembly Bill 646 that the Board will consider today. She also commended Mr. Chisholm on the statesman-like manner in which he conducted two public meetings with PERB constituents on November 8 and 10 in Oakland and Glendale, respectively. Chair Martinez echoed Ms. Murphy's comments on behalf of the Board.

Chief Administrative Law Judge Shawn Cloughesy reported on the activities of the Division of Administrative Law and stated that the Administrative Law Judge (ALJ) report had been distributed to the Board for its review. Mr. Cloughesy reported on the highlights stating that as compared to the prior year, formal hearing days have increased by 41 percent, proposed decision issuance has increased by 83 percent, and case closures have increased by 71 percent. He stated the importance of the progress made in the scheduling time from informal conference to the date of formal hearing for cases in Sacramento is 3 months, Oakland is 3-1/2 months, and Glendale is 4-1/2 months. Mr. Cloughesy also thanked the General Counsel's Office for settling cases at informal conferences which helps with the ALJ caseload and the aforementioned progress made in scheduling hearings in a timely fashion.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, stated that the Legislature will reconvene in January and PERB will resume following any proposed legislation that might affect its jurisdiction.

With regard to legislation enacted this year, Mr. Chisholm reported there were items that may merit consideration for conforming or possible substantive regulatory changes, beyond the emergency regulations on the agenda for today's meeting as a result of Assembly Bill 646. At the November 29 PERB Advisory Committee meeting, discussion was held with interested parties about PERB conducting a review of existing regulations for possible changes resulting from recently enacted legislation. Specific recommendations for the Board regarding any such changes are targeted for sometime early in 2012.

Motion: Motion by Member McKeag and seconded by Member Dowdin Calvillo that the Legal (including General Counsel and Chief Administrative Law Judge), Administrative, and Legislative Reports be accepted and filed.

Ayes: Martinez, McKeag and Dowdin Calvillo.

Motion Adopted – 3 to 0.

Old Business

None.

New Business

The Board considered the staff proposal for the adoption of emergency regulations to implement the provisions of Assembly Bill 646 (Chapter 680, Statutes of 2011, effective January 1, 2012). If adopted by the Board, the emergency regulations and rulemaking package would be forwarded to the Office of Administrative Law (OAL) for review and approval pursuant to the Administrative Procedures Act.

Mr. Chisholm stated that AB 646 provides, for the first time, a mandatory impasse procedure under the MMBA, repealing and then re-adding section 3505.4 and adding new sections 3505.5 and 3505.7. Under the provisions of AB 646, factfinding may be requested by the exclusive representative, but not by the employer.

Mr. Chisholm provided background stating that PERB is to appoint the chairperson for the three-person factfinding panel, unless the parties mutually select their own chairperson. Additionally, the statute specifies that the parties would bear the costs of factfinding, including the cost of the chairperson, and PERB, while being involved in the role of appointing the chair, would not bear the cost of the chairperson; the criteria the factfinding panel would consider in hearing the dispute; that a report would issue with findings of fact and recommendations for settlement, if no settlement is reached during the factfinding process; that the factfinding report is to be made public 10 days after it is submitted to the parties; and that the employer may impose its last, best and final offer after any applicable mediation and factfinding procedures have been concluded, but not earlier than 10 days after the issuance of the factfinding report. Mr. Chisholm stated that the only specific exemption to the statute is with regard to charter cities and counties where there is a locally adopted process that ends in binding interest arbitration.

Mr. Chisholm then provided insight regarding the rulemaking process. He stated that PERB is requesting the emergency rulemaking at OAL to provide clarification and guidance to PERB constituents. With consideration of written comments received and various informal discussions, the agency was compelled to formulate a process which would address requests for factfinding under the new statute, as none existed. With those comments and discussions in mind, drafts prepared and circulated incorporated many of the ideas advanced by interested parties. The package prepared also allows PERB to fulfill its role and responsibility while being mindful only to recommend changes to its existing regulations or the adoption of new regulations that meet the authority, consistency, clarity, non-duplication and necessity standards that are enforced by OAL.

Mr. Chisholm reported on the specific revisions or additions to PERB regulations. He reported first on PERB's recommendation for conforming changes to existing regulations which were suggested by interested parties:

Section 32380. Deals with limitation on appeals of administrative determinations. Incorporates conforming change consistent with new section 32802.

Sections 32603 and 32604. Defines in PERB regulations the types of unfair practices by employers or by employee organizations, respectively. Amend to acknowledge the new MMBA impasse procedure.

Second, Mr. Chisholm reported on the following proposed sections:

Section 32802 identifies when, where and what information is required when filing a request for factfinding. Regarding when a request for factfinding may be made when the parties do not engage in mediation, this section provides that the request must be filed within 30 days from the date that either party declares impasse. Where mediation occurs, the request may not be filed during the first 30 days that the parties are attempting to resolve the dispute with the mediator's assistance, but not more than 45 days following the date the mediator was appointed or selected. The section sets forth that PERB has five working days to determine whether a request for factfinding meets the requirements of the MMBA and the term "working days" is defined within the text of the proposed regulation. The section states that facftfinding related determinations made by Board agents are not appealable to the Board itself.

Mr. Chisholm acknowledged the comments and discussions held regarding whether factfinding may be requested where mediation has not occurred. PERB, having considered all aspects, including comments and discussions held, related statutes, and legislative history and intent, drafted a regulatory package that would provide certainty and predictability. Mr. Chisholm noted particular constituent interest regarding when lawful procession to implement a last, best and final offer can occur if the parties had not reached agreement.

Section 32804 specifies that where a request is sufficient, PERB would provide a list of seven names to the parties, which is intended to facilitate the parties' selection of a chairperson. If the parties are not able to agree, PERB would then appoint the chairperson for the dispute. This section also defines timeframes in which actions must be taken.

Mr. Chisholm presented the timelines should the Board authorize that this emergency regulatory package be submitted to OAL. He stated that notice would be provided to interested parties by mail and posting on the PERB website. The notice would include the finding of emergency and the proposed text itself. While no comment period is required following notice to interested parties, PERB must wait five working days before the emergency regulatory package can be submitted to OAL. Assuming notice tomorrow, PERB would submit the regulatory package to OAL on Monday, December 19. The anticipated timeline would be as follows:

- Notice, including mailing and posting on PERB website: December 9
- Submission of package to OAL: December 19
- Comments directly to OAL by interested parties: 5 calendar days
  (PERB can, but is not required to, respond to any comments provided to OAL.)

- OAL review and action: 10 calendar days

Mr. Chisholm stated that the above timetable allows the emergency regulations to be in place and effective as of January 1, 2012. The regulations would remain in effect for 180 days. PERB can request re-adoption of the emergency regulations twice, for 90 days each time, pending its completion of the regular rulemaking process.

The Board held discussion regarding OAL procedures and what action OAL might take should it have questions regarding any part of the emergency regulatory package submitted.

Mr. Chisholm continued that PERB is in the process of amending and updating its panel of neutrals applications, document forms and materials to reference factfinding under the MMBA and PERB's role in appointing chairpersons. He provided detail regarding the admission guidelines for persons interested in joining PERB's panel of neutrals.

Glenn Rothner, representing AFSCME Council 36, addressed the Board and had two items on which he wanted to comment. First, he complimented PERB and specifically Mr. Chisholm on the work put into the proposed regulations and the meetings held in that regard. He stated that he had attended the meeting at PERB's Glendale Office and thought it "proactive" and "well [ran]". Second, Mr. Rothner commented about factfinding in the absence of mediation. He stated that over the years he has had management representatives and lawyers give advice about "what's in the best interests of the union." Having represented unions for over 35 years, Mr. Rothner said he rarely gets and is happy to take the opportunity now "to tell management what I think is in their best interests." He stated that at the PERB meeting he attended, the unions agreed that factfinding should be required even when mediation is not required by law. He said that management representatives at the meeting either believed that factfinding should take place in the absence of mediation or wanted clarification from PERB. He stated that there was a distinct minority who viewed that there should be no factfinding in the absence of mediation. Mr. Rothner stated his belief that constituents wanted clarity and guidance from the PERB regulations and hoped that management would not litigate over this issue should the Board adopt the regulations as proposed.

Liberty Sanchez, representing LIUNA Locals 777 and 792, addressed the Board and concurred with the compliments on the processes undertaken by PERB in the preparation of the proposed emergency regulations. She expressed appreciation that "clearly all of the parties were listened to and particularly in response to labor concerns raised regarding when parties may seek factfinding where mediation is not part of the agreement." She stated her support for the adoption of the proposed regulations.

Member Dowdin Calvillo commented on concerns expressed by some constituents with regards to staff's recommendation that factfinding would be required in situations where mediation was not required under law. Specifically, she said she was not sure if the Board had authority to require factfinding in those situations given that AB 646 was silent in that regard but that she was willing to allow the language to move forward as staff proposed and allow OAL to make that determination. She also expressed that the authorization of employers to implement last, best and final offers, if a request for factfinding had not been made, was implicit and need not be stated as suggested by a few constituents.

Member McKeag inquired about a letter received from the City and County of San Francisco. She specifically wanted clarity about the part of the letter which stated:

> "Carroll, Burdick & McDonough asserts, without any reference to the actual language or legislative intent . . . that AB 646 subjects to mandatory fact-finding all impasse situations, and not just those resulting from negotiations over memoranda of understanding. However, this interpretation not only is contrary to the plain language of the MMBA, but would contravene the clear and expressed intent of the legislature as well as the author of AB 646, Assembly Member Atkins."

Mr. Chisholm responded that in the letter from Carroll Burdick, it was requested that PERB clarify that factfinding could be requested over any topic where the parties have an obligation to meet and confer, including in their view, the adoption of amendments of local rules pursuant to MMBA Section 3507. The City and County of San Francisco's letter referenced this as "Seal Beach" type negotiations based on an earlier court case that interpreted that obligation. Ultimately, Mr. Chisholm concluded that this particular recommendation was not addressed, believing it did not meet the "why now" question which was the focus when preparing the emergency regulations. He stated that PERB would review the matter further and decide if it could be addressed in the regular rulemaking process or whether it was a matter that may well be decided through case law.

Member Dowdin Calvillo added that PERB was unique among State agencies in that as a quasi-judicial agency it has the ability to clarify its statutes and regulations through precedential decisions.

Motion: Motion by Member Dowdin Calvillo and seconded by Chair Martinez to forward the emergency rulemaking package to the Office of Administrative Law for review and approval.

Ayes: Martinez, McKeag and Dowdin Calvillo.
Motion Adopted – 3 to 0.

With her term coming to an end, Member McKeag addressed the Board. She provided some humorous memories regarding her confirmation hearing and tenure as a PERB Board Member. She continued, in a serious manner, expressing her appreciation for the challenges and learning experiences regarding labor law and the legal processes. Most importantly, Member McKeag stated that her experiences as a PERB Board Member has been life enhancing, giving her a different perspective of the world around her. She learned how important it is to keep an open mind and not to prejudge situations until you know all the facts. And, when you are making decisions that will ultimately impact people's lives, you need to be extra thoughtful and diligent in your deliberations. She stated that it was a privilege and an honor to serve as a Board Member at PERB. She expressed her high regard and respect for the work accomplished in the labor community despite the difficult economic times by saying, "It is not easy to balance wants and needs in today's realities." She thanked her colleagues -- past and present -- for their collegiality, professional courtesy and for being such "doggone good people to work with." She thanked the "PERB family" for their hard work, dedication, professionalism and, most important of all, their friendship. She specifically thanked her Legal Advisor, Greg Lyall, and Administrative Assistant, Irma Rosado, for putting up with her these past seven years. Member McKeag concluded by expressing her profound gratitude at having

the opportunity to work with her esteemed colleagues, Chair Anita Martinez, Alice Dowdin Cavillo, and Gene Huguenin; and with General Counsel Suzanne Murphy and her team; Chief Administrative Law Judge Shawn Cloughesy and his team of Administrative Law Judges, and Executive Officer Eileen Potter and her administrative team.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through February 9, 2012 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member McKeag and seconded by Dowdin Calvillo to recess the meeting to continuous closed session.

Ayes: Martinez, McKeag and Dowdin Calvillo.
Motion Adopted – 3 to 0.

Respectfully submitted,

_____
Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

_____

_____
Anita I. Martinez, Chair

PUBLIC MEETING MINUTES

October 13, 2011

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:05 a.m.

Members Present

Anita I. Martinez, Chair
Alice Dowdin Calvillo, Member
Sally M. McKeag, Member
A. Eugene Huguenin, Member

Staff Present

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief, Office of General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the August 11, 2011 Public Meeting. She reported that the Board met in continuous closed session to deliberate on pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in August. Those were PERB Decision Nos. 2182a-M, 2194-E, 2195-H, 2196-S, 2197-S, 2198-M, 2199-M, 2200-E, 2201-H, 2202-M, 2203-M, 2204-M, 2205-E, 2206-M, 2207-M, 2208-E, and 2209-M, and Ad-390-M. In Request for Injunctive Relief (I.R.) No. 602 (*San Mateo County Firefighters, IAFF Local 2400 v. Menlo Park Fire Protection District*), the request was denied, I.R. 603 (*City of San Jose v. International Brotherhood Of Electrical Workers, Local 332 & Operating Engineers Local Union #3*), the request was denied, I.R. 604 (*SEIU Local 521 v. County of Kings*), the request was granted, I.R. 605 (*International Association of Firefighters, Local 1319, AFL-CIO v. City of Palo Alto*), the request was denied, and in I.R. 606 (*McFarland Teachers Association v. McFarland Unified School District*), the request was denied. A document containing a listing of the

aforementioned decisions was made available at the meeting. A list containing the decisions is available on PERB's website.

Motion: Motion by Member McKeag and seconded by Member Huguenin, to close the August 11, 2011 Public Meeting.

Ayes: Martinez, McKeag, Dowdin Calvillo and Huguenin.
Motion Adopted – 4 to 0.

Without objection, Chair Martinez adjourned the August 11, 2011 Public Meeting. She then opened and called to order the October 13, 2011 Public Meeting. Member McKeag led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Dowdin Calvillo and seconded by Member McKeag, that the Board adopt the minutes for the August 11, 2011 Public Meeting.

Ayes: Martinez, McKeag, Dowdin Calvillo and Huguenin.
Motion Adopted – 4 to 0.

Comments From Public Participants

Mr. Giorgio Cosentino appeared before the Board, representing himself as a public employee. Mr. Cosentino has worked as a Scientist for the State of California, Department of Public Health for almost 20 years. He stated that he had two matters of concern which prompted his appearance at the Board.

His first concern pertained to PERB's decertification and severance forms and booklets that are available on the website. Mr. Cosentino stated that PERB should review these documents with the intent of making them more user friendly and that information regarding the signature collection process should be clearly spelled out. He expressed frustration regarding the difficulty of contacting union members when they are located throughout the State, lack of cooperation from his union to provide him with member information, and member privacy concerns. His second issue was that PERB should review current mechanisms in place for resolving internal union disputes. Mr. Cosentino stated that there are no clear procedures to resolve such disputes though there are laws that regulate these issues. He expressed frustration regarding the impossibility of circulating petitions to recall officers of the union.
Mr. Cosentino acknowledged that his review of PERB cases in this area demonstrated that many of the cases should not have been filed at PERB. In summary, he asked that the decertification and severance petition documents be reviewed and that PERB also review current mechanisms for internal disputes.

Member Dowdin Calvillo thanked Mr. Cosentino for his appearance before the Board and his request for review of the information and forms provided by PERB regarding severance and

decertification petitions. She stated that PERB was always interested in constituent input to keep PERB processes efficient and clear.

Member Huguenin commented that Mr. Cosentino should continue to look at other available remedies for resolving internal union disputes.

Report by PERB Chair

Chair Martinez announced the date for the PERB Advisory Committee meeting, Tuesday, November 29 at 10 a.m. The meeting is to be held at the PERB Headquarters Office in Sacramento. Chair Martinez encouraged PERB staff and constituents who were interested to submit items for discussion for the agenda that was to be compiled for the meeting.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

a. Administrative Report

Chief Administrative Officer Eileen Potter reported on a couple of items. She stated that the submission of budget schedules for the 2012-2013 Governor's Budget was in its final phases. All schedules had been submitted to the Department of Finance as required. Ms. Potter reported that with assurance from the Department of General Services, Real Estate Design Services, the lease renewals for PERB's Oakland and Sacramento Regional Offices were on track for completion prior to their expiration dates. In the Oakland Regional Office, Ms. Potter stated that surveys were to be ordered for American with Disabilities Act and asbestos compliance. She concluded that a major hurdle had been cleared with the approval of exit plans from that PERB office meeting the State's Fire Code.

b. Legal Reports

Suzanne Murphy, General Counsel, reported that the monthly activity and litigation reports had been distributed to the Board for its review. From those reports Ms. Murphy recapped the following information since the Board's last Public Meeting in August. With respect to unfair practice charges during the months of August and September, Ms. Murphy reported that 170 new cases were filed with the General Counsel's Office (up by four cases over the prior two-month period); 178 case investigations were completed (down by two cases over the prior period); and a total of 48 informal settlement conferences were conducted by staff (down by 31 over the prior period). Ms. Murphy explained that the drop in settlement conferences held had to do with efforts to schedule the conferences closer to available hearing dates, plus vacation schedules, and stepped-up efforts to conclude each conference in a single day to conserve staff resources. She stated the General Counsel's Office was experiencing good results from robust settlement efforts at informal conferences.

Ms. Murphy also reported on the disposition of the five requests for injunctive relief (I.R.) which were filed since the Public Meeting in August as follows:

1. I.R. Request No. 602 (*San Mateo County Firefighters, IAFF Local 2400 v. Menlo Park Fire Protection District*). The issue was whether the district violated the Meyers-Milias-Brown Act (MMBA) by engaging in bad faith piecemeal and regressive bargaining, making an unlawful unilateral change in the terms and conditions of employment, and repudiating two separate settlement agreements. The request was denied on August 24 after early and on-going efforts to resolve the matter, and the charge is being processed in the General Counsel's Office normal rotation.

2. I.R. Request No. 603 (*City of San Jose v. International Brotherhood Of Electrical Workers, Local 332 & Operating Engineers Local Union #3*). The issue was whether the unions representing city employees at the San Jose Water Pollution Control Plant violated the MMBA by initiating a strike or other work stoppage by certain essential employees who left work without completing their assigned shifts or refused to cross an area standards picket line. The picketing was allegedly directed at a private contractor that was performing construction work at the plant on August 18. This I.R. Request was denied on August 25. After informal discussions between PERB and the parties, the unions agreed to give the city prior notice of any future picketing, and to picket only during daytime shifts, for no more than 8 hours per day, and for no more than two consecutive days at a time. In a related court action initiated by the county, a temporary restraining order was entered on August 19 by the Santa Clara Superior Court. By request of the city, that order was promptly vacated to allow for PERB efforts to resolve the matter informally. That case remains pending in superior court.

3. I.R. Request No. 604 (*SEIU Local 521 v. County of Kings*). The issue was whether the county violated the MMBA by: (1) allegedly revoking its three-year contract bar rule in the middle of a multi-year memorandum of understanding with SEIU in order to favor a competing union, the California League of City Employees Association (CLOCEA); (2) moving the remaining window period from January 2012 to July 2011 in order to favor CLOCEA; and (3) scheduling a decertification election with mail ballots to be returned by September 23. Ms. Murphy reported that there was a related charge involving allegations that the county had limited SEIU representatives' access to bargaining unit employees during June and July 2011, and had discouraged employees from supporting SEIU in the scheduled decertification election. This I.R. Request was granted by the Board on September 2, but the matter was placed in abeyance pending a response from the State Mediation and Conciliation Service (SMCS) to a PERB request that SMCS refrain from sending out the ballots in that decertification election until the PERB administrative process could be completed. SMCS notified the General Counsel's Office immediately that it would comply with the Board's request. An expedited hearing was held on Friday, September 9. An administrative law judge's (ALJ) proposed decision issued on September 28, concluding that the county had interfered with SEIU's and the unit members' representational rights, and unlawfully assisted CLOCEA to obtain an early decertification election. The parties subsequently settled the matter accepting the ALJ's

proposed decision as final and binding on the parties only, and the complaint regarding the related access violations was withdrawn.

4. I.R. Request No. 605 (*International Association of Firefighters, Local 1319, AFL-CIO v. City of Palo Alto*). This request was originally filed as I.R. Request No. 601 in early August. The current I.R. Request No. 605 was filed on September 8, 2011. The issue was whether the city violated the MMBA by failing to consult in good faith with Local 1319 before voting to place on the November 8 ballot a measure to repeal a charter provision that has provided for interest arbitration since 1978. The request was denied on September 14. A complaint issued and the matter was set for an expedited hearing that was held on September 26 and 30. The matter is currently under submission.

5. I.R. Request No. 606 (*McFarland Teachers Association v. McFarland Unified School District*). The issue was whether the district violated the Educational Employment Relations Act (EERA) by issuing a subpoena commanding the union president to testify about private communications he had with a unit member who had been discharged and was going through disciplinary proceedings. The request was denied on September 15 and the charge is being processed in the General Counsel's Office normal rotation.

In terms of litigation, since the August Public Meeting, one new litigation matter was filed against PERB in the Alameda County Superior Court. In that case the California Correctional Peace Officers Association (CCPOA) filed a petition for writ of mandate pursuant to California Code of Civil Procedure section 1085, seeking to set aside the dismissal of the unfair practice charge in PERB Decision No. 2196-S. In that PERB decision, the majority held that to state a prima facie claim of bad faith refusal to bargain the effects of a decision by prison authorities to change their policy regarding searches of staff for contraband, CCPOA was required to specifically demand bargaining over the reasonable anticipated effects of that decision, notwithstanding the employer's failure to notify CCPOA of the change before it was implemented.

Regarding case determinations since the last Public Meeting, PERB received one final court ruling. In the *County of Riverside v. PERB; SEIU Local 721*, the California Supreme Court denied review of the decision of the Court of Appeal, Fourth Appellate District, Division Two, which had denied the County's petition for writ of extraordinary relief as to PERB Decision 2119-M. In that case, the Board found that comments by two members of the County Board of Supervisors constituted threats of reprisal and violated the MMBA, among other rulings.

Ms. Murphy concluded by reporting on personnel matters. She announced that two attorney vacancies had been filled in the General Counsel's Office.

In late July, Daniel Trump, a 2010 graduate of the University of Michigan Law School, joined PERB's San Francisco Regional Office as an entry level Regional Attorney. Before coming to PERB, Mr. Trump was a law clerk for the National Transit Employees Union, where he spent a year working on the nationwide organizing drive for airport security officers employed by the Federal Transportation Security Administration Agency.

In late October, PERB will also welcome Bernhard Rohrbacher, who graduated from Loyola Law School in 2001 and has a Ph.D. in Linguistics from the University of Massachusetts, Amherst. Mr. Rohrbacher will be joining PERB's Los Angeles Regional Office as a Supervising Regional Attorney. For the past six years, Mr. Rohrbacher has been the Director of Representation and the General Counsel for the California Faculty Association, and was previously an associate with labor law firms in Los Angeles and New York. Mr. Rohrbacher also clerked for the Honorable Harry Pregerson of the United States of Court of Appeals for the Ninth Circuit.

Chief ALJ Shawn Cloughesy reported on the activities of the Division of Administrative Law and stated that the ALJ report had been distributed to the Board for its review. Mr. Cloughesy reported that the number of cases pending among the six ALJs at PERB is 122. At this same time last year, there were 66 cases. Mr. Cloughesy stated that with an additional ALJ, the number of proposed decisions issued are two and one-half times more than last year. He continued that the number of case closures are up (about 33 percent) and cases are now being scheduled three to four months from the date of the informal settlement conference to the initial date of hearing. In Sacramento and Oakland, hearing dates are scheduled within four months of the informal settlement conference and in Glendale within five months. Mr. Cloughesy gave credit to the General Counsel's Office for the successful settlement of cases at informal conferences which helped to keep the already excessive ALJ caseload from overload.

Chair Martinez congratulated Chief ALJ Cloughesy on his County of Kings proposed decision. That was the decision which was the result of I.R. Request No. 604 reported above. Mr. Cloughesy stated that the parties were very cooperative in the formal hearing processes of this case.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, reported that the Legislative Report was circulated to the Board for its review. Mr. Chisholm reported on one item that was not included in his most recent written report that had to do with the status of the Governor's organization plan. He stated that a new California Department of Human Resources, essentially merging the Department of Personnel Administration (DPA) and the State Personnel Board (SPB), became effective September 9 and takes effect July 1, 2012. Mr. Chisholm also reported that there were nonsubstantive changes to the statutes that PERB administers, particularly with the Dills Act, that will take effect. He will keep the Board updated, and also update PERB statutes, as legislation to conform those statutes actually occurs.

Mr. Chisholm then reported on the following legislative activity since the last Public Meeting, stating that any legislation approved and chaptered would take effect January 1, 2012, except for the DPA/SPB merger mentioned above.

Assembly Bill (AB) 101 (John A. Perez) — Vetoed. This legislation would have created a new collective bargaining statute within PERB jurisdiction, under the Education Code, covering child care providers.

Assembly Bill 195 (Roger Hernandez) — Chaptered. AB 195 adds section 3506.5 to the MMBA which defines unfair practices by an employer.

Assembly Bill 501 (Campos) — Chaptered. AB 501 makes changes to EERA with respect to definitions. It first revises the definition of exclusive representative to expressly include any organization recognized or certified to represent any public school employee that is otherwise defined in the act and taking out the reference to "certificated or classified." The bill also expands the definition of public school employer to include specified auxiliary organizations established in the community colleges and other joint powers agencies that meet certain criteria. In answer to Member McKeag's question, Mr. Chisholm stated that PERB would assess whether any revisions are required to its regulations as a result of this legislation.

Assembly Bill 646 (Atkins) — Chaptered. This legislation amends the MMBA to provide for factfinding and also provides a role for PERB with respect to factfinding among local agencies. The essence of the bill provides a mechanism for an exclusive representative to request, under certain circumstances, that the parties' dispute be submitted to factfinding. PERB would not incur any of the costs associated with the factfinding, the parties would be required to split the cost for the factfinding chair and panel members. The bill is structured like factfinding under EERA with respect to timeframes and spelling out the factors to be considered by the factfinding panel.

Chair Martinez inquired about the bill's intent that PERB take the lead in appointing the chairperson and if the parties were not happy with the PERB-appointed chairperson, they could select their own.

Mr. Chisholm stated that was an issue that would be need to be addressed through regulations. The bill is similar to EERA. That is, PERB shall appoint a chairperson and the parties have a right within five days to select someone in lieu of the person appointed by the Board. He continued that in his experience with factfinding under EERA the parties have normally selected the chairperson and PERB has done so only when the parties could not. The process has worked in this manner even when PERB bore the cost of factfinding.

In response to California Teachers Association Representative Kevin Colbern's statement about policy without reference to the law, Mr. Chisholm explained that there were areas that would require regulatory action by PERB to develop, with input from interested constituents, an efficient process for factfinding.

Member Huguenin commented about his experience with the impasse procedures under EERA in that the mediator held impasse in his hands until he, the mediator, determined that the matter was ready to be certified to factfinding. He stated that it was his understanding of this statute that now the employee organization can trigger, with a request, the matter to

factfinding and that the parties would then proceed to factfinding without regard to certification by the mediator. He stated that while developing regulations for the MMBA, perhaps now would be the time for PERB to assess and unite the procedures in the statutes under its jurisdiction with regard to the triggering mechanisms for both impasse certification and proceeding to factfinding.

Mr. Chisholm agreed there is a difference in the statutory language under EERA versus the MMBA with respect to factfinding and PERB's role, as well as the mediator's role. He clarified that currently, under EERA, the parties proceed to mediation when they mutually agree or it is certified by PERB. There is no such provision in the statute for the MMBA. He continued that although originally written to operate exactly like EERA in this regard, those provisions were deleted from the bill. The bill also does not provide that the mediator certify the matter to factfinding, which is required under EERA and the Higher Education Employer-Employee Relations Act. Mr. Chisholm stated that EERA was simple with regard to PERB's role in factfinding and that there are two parts required when proceeding to factfinding, a request by one of the parties and the mediator's certification. PERB then has no discretion when carrying out its statutory role with respect to the appointment of a chairperson of the panel. He concluded that PERB would need to assess and adopt regulations to address the process to be implemented for the MMBA to minimize any unfair practice charges that may be filed as a result of this legislation.

Senate Bill (SB) 609 (Negrete McLeod) — Chaptered. SB 609 amends each of the seven statutes under PERB jurisdiction to provide that if a decision by an administrative law judge regarding the recognition or certification of an employee organization is appealed to the Board, that decision will become final and binding unless the Board acts on the appeal within 180 days. Mr. Chisholm stated that possible implementation of regulations might prove helpful in terms of clarifying exactly what types of decisions this legislation applies to, particularly where disputes come before the Board as unfair practice charges. He gave as an example the aforementioned Kings County decision where the dispute involved a recognition/certification issue.

Senate Bill 857 (Lieu) — Chaptered. This legislation amends the seven statutes under PERB jurisdiction to provide that PERB does not have authority with regard to recovery of damages due to an unlawful strike or to award strike preparation costs or expenses as damages.

Mr. Chisholm will continue to monitor the aforementioned legislation and keep the Board apprised of future developments.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo that the Legal (including General Counsel and Chief Administrative Law Judge), Administrative, and Legislative Reports be accepted and filed.

Ayes: Martinez, McKeag, Dowdin Calvillo and Huguenin.
Motion Adopted – 4 to 0.

Old Business

None.

New Business

None.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through December 8, 2011 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member McKeag and seconded by Member Dowdin Calvillo to recess the meeting to continuous closed session.

Ayes: Martinez, McKeag, Dowdin Calvillo and Huguenin.
Motion Adopted – 4 to 0.

Respectfully submitted,

_____
Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

_____

_____
Anita I. Martinez, Chair

PUBLIC MEETING MINUTES

June 14, 2012

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:00 a.m.

Members Present

Anita I. Martinez, Chair
Alice Dowdin Calvillo, Member
A. Eugene Huguenin, Member

Staff Present

Wendi L. Ross, Deputy General Counsel
Les Chisholm, Division Chief, Office of General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer (Excused)

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the April 12, 2012 Public Meeting. She reported that the Board met in continuous closed session to deliberate the pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in April. Those were PERB Decision Nos. 2231a-M, 2236a-M, 2249-M, 2250-S, 2251-M, 2252-M, 2253-H, 2254-H, 2255-H, 2256, 2257-H, 2258-M, 2259, 2260, 2261-M, 2262, 2263-M, 2264, 2265, 2266, 2267-M, 2268, 2269, 2270, 2271-M, and 2272-M, and PERB Order No. Ad-394. In Request for Injunctive Relief (IR Request) No. 618 (*Melvin Jones Jr. v. County of Santa Clara*), the request was denied, IR Request No. 619 (*Public Employees Union Local 1 v. City of Yuba City*), the request was withdrawn, IR Request No. 620 (*Melvin Jones Jr. v. County of Santa Clara*), the request was denied, and in IR Request No. 621 (*Wenjiu Liu v. Trustees of the California State University (East Bay)*), the request was denied. A document containing a listing of the aforementioned decisions was made available at the meeting. A list containing the decisions is available on PERB's website.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo, to close the April 12, 2012 Public Meeting.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Without objection, Chair Martinez adjourned the April 12, 2012 Public Meeting. She then opened and called to order the June 14, 2012 Public Meeting. Member Dowdin Calvillo led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin, that the Board adopt the minutes for the April 12, 2012 Public Meeting.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Comments From Public Participants

Wenjiu Liu, an Assistant Professor of Finance at the California State University, East Bay, appeared before the Board. Mr. Liu stated that prior to his recent filings with the Board, he was unfamiliar with PERB and its processes. He expressed respect and appreciation for the handling of his cases by PERB staff, including an unfair practice charge and a request for injunctive relief. Mr. Liu provided background regarding both his employment experiences at the university and the resultant filings at PERB. He expressed extensive suffering and grief from retaliation by the university which culminated in his denial of tenure and promotion, among other things, and ultimately in his termination. Mr. Liu stated that he filed the request for injunctive relief with PERB in hopes of an expedient resolution to this matter. He stated his belief that a decision by PERB in 2-3 years of his unfair practice charge would cause irreparable harm to his career and ability to research.

As a Board agent who might possibly preside over the unfair practice charge filed by Mr. Liu, Chief Administrative Law Judge Shawn Cloughesy physically removed himself from the Public Meeting during Mr. Liu's appearance before the Board.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

a. Administrative Report

In Chief Administrative Officer Eileen Potter's absence, Chair Martinez reported that the Administrative Services Division is in the process of completing Fiscal Year 2011-2012 expenditures and projects by staff, Stephanie Gustin and Ben Damian.

Chair Martinez reported on the progress of the lease renewals in PERB's Oakland and Sacramento offices. Tenant improvements and designs for floor plans have been approved by PERB for both offices. She stated that PERB's overall expense for rent in the Oakland office will not increase with the acquisition of additional space for a witness and hearing room. The anticipated completion of the improvements in that office is September 2012. With contract bids received, the lease renewal of PERB's Sacramento office is at the

Department of General Services for review and finalization. Tenant improvements in that office have not yet been scheduled, but it is anticipated that such work will be performed after hours to avoid interruption to PERB business.

Chair Martinez concluded by reporting on the budget. She stated that PERB's 2012-2013 budget remains as submitted which includes the transfer of State Mediation and Conciliation Service from the Department of Industrial Relations to PERB.

b. Legal Reports

Wendi Ross, Deputy General Counsel, reported that the monthly activity and litigation reports had been distributed to the Board for its review. From those reports Ms. Ross recapped the following information since the Board's last Public Meeting in April. With respect to unfair practice charges during the months of April and May, 200 new cases were filed with the General Counsel's Office (an increase of 8 over the prior two-month period and by 45 over the two-month period prior to that); 203 case investigations were completed, and during the same period a total of 61 informal settlement conferences were conducted by staff (down by 4 over the prior, but up by 6 over the two month period prior to that). Ms. Ross stated that fiscal year end data would be reported at the PERB's Public Meeting in August. However, as compared to Fiscal Year 2011-2012, it is significantly clear that the General Counsel's office was experiencing a significant increase in the number of charge filings (an increase of 9 percent), requests for injunctive relief (an increase of 37 percent), mediation requests (38 percent increase), and factfinding requests (16 percent increase). Ms. Ross reported that the amount of time General Counsel staff has spent on litigation matters has also taken a leap from last year. She continued, as mentioned by the Chair, since the last Public Meeting in April, the Board issued determinations in four requests for injunctive relief:

1. *Jones v. County of Santa Clara*, IR Request No. 618. The Board denied the request on April 30, 2012.

2. *Public Employees Union #1 v. City of Yuba City*, IR Request No. 619. This request was withdrawn on May 2, 2012. The matter was settled during a voluntary pre-complaint conference convened by PERB's Office of General Counsel staff on May 4, 2012, and the unfair practice charge was withdrawn on June 6, 2012.

3. *Jones v. County of Santa Clara*, IR Request No. 620. The Board denied the request on May 14, 2012.

4. *Liu v. Trustees of California State University (East Bay)*, IR Request No. 621. The Board denied the request on June 5, 2012.

In terms of litigation relating to PERB, since the April Public Meeting, three new litigation matters were filed:

1. *Moore v. PERB; Housing Authority of the County of Los Angeles & AFSCME, Council 36*, California Court of Appeal, Second Appellate District. This case has since been dismissed by the Court.

2. *Grace v. PERB; Beaumont Teachers Association & Beaumont Unified School District,* California Court of Appeal, Fourth Appellate District, Division Two. Contact has been made with counsel as PERB believes that this matter should have been filed in Superior Court under the rule of the California Supreme Court's decision in the *Richmond Firefighters* case, and is subject to dismissal.

3. *City of San Diego v. PERB; San Diego Municipal Employees Association*, California Court of Appeal, Fourth Appellate District. In its new writ petition, the city essentially seeks a permanent injunction against any further administrative action on the association's charge.

Chief Administrative Law Judge Shawn Cloughesy reported on the activities of the Division of Administrative Law and stated that the ALJ report had been distributed to the Board for its review. He reported that hearings are continuing to be set within three months from the date of informal conference in all three offices, a trend that he anticipated keeping. Within the division, as compared to one year ago, proposed decisions written are up 81 percent and total cases closed are up 74 percent. With regard to total cases closed, Chief ALJ Cloughesy reported that the division had already passed the highest number for cases closed by 50 percent (at the end of May the division had 172 cases closed compared to 114 two years ago; that is since the MMBA came into PERB jurisdiction). Additionally, the division is approaching the highest number of proposed decisions issued since PERB acquired the MMBA. In conclusion, Chief ALJ Cloughesy reported that the number of proposed decisions appealed to the Board itself is under 30 percent, and below historic averages.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, reported that the Legislative Report was circulated to the Board for its review. He stated that written reports are currently being provided regularly to the Board regarding the status of pending legislation. With regard to legislation, Mr. Chisholm reported the following:

Assembly Bill 1466 (Committee on Budget) – Although not yet included in the written report circulated to the Board, Mr. Chisholm stated that this bill was amended to be a budget trailer bill and includes the various statutory changes that are associated with transferring the State Mediation and Conciliation Service from the Department of Industrial Relations to PERB. The bill was to be heard today.

Assembly Bill 1244 (Chesbro) – With respect to self-determination support workers, this bill creates collective bargaining rights and an additional jurisdiction for PERB. After a period of long inactivity, the bill is currently scheduled for hearing in the Senate Human Services Committee on June 26.

Assembly Bill 1606 (Perea) – There has been no change in status regarding this legislation. This bill is a proposal to amend further the language of section 3505.4(a) and relates to Assembly Bill 646, factfinding under the MMBA. The bill is pending action in the Senate Appropriations Committee.

Assembly Bill 1659 (Butler) – Amends the language that presently excludes both the City of Los Angeles and the County of Los Angeles from the jurisdiction of PERB with respect to unfair practice charges and provides that they are excluded from PERB jurisdiction only if they meet the standards for independence that are described in this legislation. The bill was approved in the Senate Public Employment & Retirement Committee on Monday on a 3-2 vote. The bill was previously approved in the Assembly and is not going to Appropriations, and currently awaits a final vote on the floor of the Senate.

In answer to a question by Member Dowdin Cavillo, Mr. Chisholm stated that Assembly Bill 1659 was sponsored by the American Federation of State, County and Municipal Employees, Council 36. The Board continued and had further discussion regarding this legislation.

Governor's Reorganization Plan 2 (Achadjian) – Subject of hearings and a special committee of the Assembly on June 6-7 and 13.

Senate Bill 252 (Vargas) – Provides for a separation of bargaining unit 7, upon a petition, into two units. This bill is scheduled for hearing on June 20 in the Assembly Committee on Public Employees, Retirement and Social Security.

Senate Bill 259 (Hancock) – Amends the definition of employee under the Higher Education Employer-Employee Relations Act to remove the balancing test for student employees. This bill is scheduled for hearing next week in the Assembly Committee on Higher Education.

Mr. Chisholm reported that this year's maintenance of the codes bill which includes changes to one or more PERB statutes is in the Assembly Judiciary Committee and will be heard on June 19.

AB 2381 (Hernández, Roger) – Brings employees of the Judicial Council, including employees of the Administrative Office of the Courts, under the Ralph C. Dills Act and requires that PERB not include Judicial Council employees in a bargaining unit that includes other employees. The bill is currently in Senate Rules awaiting committee assignment.

Mr. Chisholm concluded his report on legislation which had not yet been introduced regarding in-home support service workers. He reported that this legislation could come in the form of budget trailer language and would provide that the state, rather than individual counties or public authorities, would bargain on behalf of in-home support service workers. As such workers are currently under PERB, this legislation would not be an increase to the agency's jurisdiction.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo that the Legal (including General Counsel and Chief Administrative Law Judge), Administrative, and Legislative Reports be accepted and filed.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Public Hearing on Proposed Rulemaking

Chair Martinez opened the hearing on proposed rulemaking for consideration of changes and additions to regulations (California Code of Regulations, Title 8, amending sections 32380, 32603, and 32604, and adding sections 32802 and 32804), implementing factfinding procedures under the Meyers-Milias-Brown Act pursuant to the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011). She directed PERB's Division Chief, Les Chisholm, to comment on the staff proposal.

Mr. Chisholm reported that the current staff proposal is the same as the emergency regulations adopted by PERB at the end of last year. He stated that prior to January 1, 2012, the MMBA did not provide for mandatory impasse procedures. Assembly Bill 646, enacted last year and effective January 1, 2012, provides for factfinding before an employer can impose its last, best and final offer.

Mr. Chisholm provided detail regarding the proposed regulatory package. New Regulation Section 32802 would define the process and the timelines for filing a request for factfinding under the MMBA. Section 32804 would state the process and timeline with respect to factfinding requests that are deemed to be sufficient under Section 32802. Specifically, Section 32802 provides that a request for factfinding can be filed either (1) within 30 days of the date impasse is declared, or (2) where there is mediation, which is voluntary under the MMBA, requests must be filed between the time period of 30 days after the appointment or selection of the mediator, but not later than 45 days. Mr. Chisholm stated that there are occasions where the parties to a case have mutually agreed to waive or extend those timelines.

Mr. Chisholm stated that to date, PERB has had 17 requests for factfinding under the emergency regulations. In most cases, the requests have been un-opposed and have proceeded forward, although PERB had dismissed a few requests as untimely. The agency recently received its first factfinding report issued under the MMBA.

Mr. Chisholm continued reporting on the regulatory package stating that staff are proposing to amend three existing regulation sections. Consistent with other statutes that PERB administers, in Section 32380, PERB staff propose to add language that would specify that determinations made under Section 32802 would not be appealable to the Board itself. Further, under the MMBA, Section 32603 describes unfair practices by a public agency, and Section 32604 defines employee organization unfair practices, and staff proposes that both be amended to include reference to the new requirement for factfinding.

Mr. Chisholm then commented on an issue that was a point of controversy when the Board considered the emergency regulatory package. Specifically, the proposed emergency regulations contained provisions stating that a request for factfinding could be filed after a declaration of impasse and where there had not been mediation. As mentioned in the legislative report there is pending legislation which addresses this issue, Assembly Bill 1606. Assembly Bill 1606 would amend Section 3505.4 to incorporate language that is found in the existing emergency regulations to provide that a request for factfinding may be filed between 30 and 45 days after the appointment of a mediator. The author and sponsors of this legislation contend that the amendment proposed by Assembly Bill 1606 is technical and clarifies existing

law. PERB staff, stated Mr. Chisholm, advocated for the emergency regulations, with the provisions for factfinding even where there has not been mediation, as consistent with the reading of Assembly Bill 646 in its entirety and all of the provisions enacted by that legislation. He stated that PERB staff found support in Assembly Bill 1606 for its position even though it is not yet law.

Mr. Chisholm concluded by stating that no written comments to the proposed regulatory package had been received in response to the Notice of Proposed Rulemaking that is before the Board today for consideration. For the reasons offered for the emergency regulatory package, including information provided to the Office of Administrative Law in its review of those regulations, PERB staff urged the Board to adopt the proposed regulations in their current form, which are identical to emergency regulations that are currently in effect.

Chair Martinez invited members of the public to appear before the Board for comment regarding the regulatory package proposed by PERB staff.

Michael Seville, Representative, International Federation of Professional Technical Engineers, Local 21 (IFPTE), appeared before the Board. Mr. Seville stated that IFPTE is a union located in the Bay Area which represents approximately 10,000 civil servants in the city and county, utility and transit districts. Mr. Seville first expressed appreciation for the Board's consideration of this matter, but had questions and concerns regarding the timelines. Specifically, in conferring with colleagues in the Bay Area, Mr. Seville stated the belief that while it was felt the 30-day requirement was "a good move", the 45-day requirement, the back-end date to file, was restrictive. The time limits as currently proposed, said Mr. Seville "may not be enough time and it puts a mediator in a bad place and kind of hamstrings the mediator in dealing with two parties who are engaging in good faith mediation if one party moves for factfinding. It erodes the confidence of both parties of good faith mediation, or could." On behalf of the union, Mr. Seville urged the Board that either (1) Assembly Bill 1606 would go into effect to clarify the time limits and would set a legal precedent, or in Assembly Bill 1606's absence (2) requests that PERB extend the 45-day time limit for filing a request for factfinding.

Mr. Seville brought a second point to the Board's attention regarding the timelines for the public release of information and the amount of time the employer must wait prior to imposition.

Extensive discussion was held regarding Mr. Seville's questions and concerns, where scenarios were introduced under which the time limit to file a request for factfinding might or might not affect parties engaged in good faith mediation, including the parties' mutual agreement to put the request for factfinding in abeyance. Also, Mr. Chisholm noted that regarding Mr. Seville's second point, the statute already addresses this issue, and that neither the current proposed regulations nor the emergency regulations adopted by the Board addressed this topic.

Eraina Ortega, Representative, California State Association of Counties (CSAC), appeared before the Board. Ms. Ortega commented on the above-mentioned issue on behalf of CSAC and employers who attended the regional meetings held by PERB last year regarding the emergency regulations which were adopted. At the regional meetings, she stated as a key issue the employers' interest in setting an outside date to request factfinding because of their desire to be able to resolve the issue. Ms. Ortega encouraged the Board to maintain the time limits in

the regulations. As another point, she then commented that CSAC had worked with the sponsors of Assembly Bill 1606, currently all of the major statewide union representatives, to amend the bill to reflect the language of the PERB regulations, which would ensure there would be no concerns about the regulation versus the statute, and provide clarity regarding the timeframe for filing a request for factfinding. Ms. Ortega asked that if any further discussions were to be considered regarding these timeframes, that PERB work with those involved with the legislation so that it continues to reflect a common goal.

Jeffrey Edwards, Attorney, Mastagni, Holstedt, Amick, Miller & Johnsen, appeared before the Board. Following the discussion held today, Mr. Edwards asked about PERB's practice with regard to factfinding requests that have been put into abeyance. He wanted to know whether either party could take the request out of abeyance or whether such request had to be made by mutual consent.

Mr. Chisholm stated that generally, and with a limited sample with regard to factfinding under the MMBA, parties in an unfair practice proceeding that has been put into abeyance are invited individually to request that a case be taken out of abeyance. Typically, cases are taken out of abeyance when the parties have reached resolution of the matter and the request is being withdrawn. There are no specific regulations which address the matter regarding placing cases into or out of abeyance.

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin to close the public hearing on proposed rulemaking concerning factfinding procedures under the Meyers-Milias-Brown Act.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Old Business

Chair Martinez closed the public hearing and no further public comments regarding the proposed regulatory package would hereafter be taken. The Board considered the adoption and amendment of regulations (California Code of Regulations, title 8, amending Sections 32380, 32603 and 32604 and adding Sections 32802 and 32804) as included in the Notice of Proposed Rulemaking published in the April 27, 2012, California Regulatory Notice Register.

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin to forward the rulemaking package to the Office of Administrative Law for review and approval.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

New Business

Chair Martinez announced that PERB has scheduled an Advisory Committee Meeting for Thursday, June 28, at 10 am in Sacramento. The following were noted as items that would be on the agenda for topics of discussion at that meeting:

1. The transfer to State Mediation and Conciliation Service into PERB.

2. An additional regulatory package which would soon be available on PERB's website.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through August 9, 2012 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo to recess the meeting to continuous closed session.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Respectfully submitted,

_____
Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

_____

_____
Anita I. Martinez, Chair

PUBLIC NOTICE
Regular Business Meeting Agenda
Public Employment Relations Board
December 8, 2011 ~ 10:00 a.m.

LOCATION: Public Employment Relations Board *
1031 18th Street, First Floor, Room 103, Sacramento, CA

1. Roll Call

2. Adoption of Minutes: October 13, 2011 Meeting

3. Public Comment: This is an opportunity for the public to address the Board on issues not scheduled on today's agenda. The Board cannot act on those items but may refer matters to staff for review and possible Board action at a future, publicly noticed meeting.

4. Staff Reports: The following reports will be received. Any matter requiring Board action, and not included on this agenda, will be calendared for a subsequent public Board meeting.

   A. Administrative Report

   B. Legal Reports
      i. General Counsel Report
      ii. Chief Administrative Law Judge Report

   C. Legislative Report

5. Old Business

6. New Business: Consideration of a proposal for the adoption of emergency regulations to implement the provisions of Assembly Bill 646 (Chapter 680, Statutes of 2011; effective January 1, 2012). If authorized by the Board, the emergency rulemaking package will be forwarded to the Office of Administrative Law for review and approval pursuant to the Administrative Procedures Act.

7. Recess to Closed Session: The Board will meet in a continuous closed session each business day beginning immediately upon recess of the open portion of this meeting through February 9, 2012.

   The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code sec. 11126(c)(3)), personnel (Gov. Code sec. 11126(a)), pending litigation (Gov. Code sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code sec. 11126(e)(2)(c)).

**This meeting is accessible to the physically disabled. A person who needs disability-related accommodations or modifications in order to participate in the meeting shall make a request no later than five working days before the meeting to the Board by contacting Ms. Regina Keith at 916.322.8226 or sending a written request to Ms. Keith at PERB, 1031 18th Street, Sacramento, California 95811. Requests for further information should also be directed via telephone or writing to Ms. Keith. Additional information is also available on the internet at www.perb.ca.gov.*

PUBLIC NOTICE
Regular Business Meeting Agenda
Public Employment Relations Board
June 14, 2012 ~ 10:00 a.m.

LOCATION: Public Employment Relations Board *
1031 18th Street, First Floor, Room 103, Sacramento, CA

1. Roll Call

2. Adoption of Minutes: April 12, 2012 meeting

3. Public Comment: This is an opportunity for the public to address the Board on issues not scheduled on today's agenda. The Board cannot act on those items but may refer matters to staff for review and possible Board action at a future, publicly noticed meeting.

4. Staff Reports: The following reports will be received. Any matter requiring Board action, and not included on this agenda, will be calendared for a subsequent public Board meeting.

   A. Administrative Report

   B. Legal Reports
      i. General Counsel Report
      ii. Chief Administrative Law Judge Report

   C. Legislative Report

5. Public Hearing on Proposed Rulemaking: Staff presentation of the proposed changes and additions to its regulations (California Code of Regulations, Title 8, amending sections 32380, 32603, and 32604, and adding sections 32802 and 32804) implementing factfinding procedures under the Meyers-Milias-Brown Act (pursuant to enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011)). Immediately following the staff presentation, the public will have the opportunity to comment on the proposed changes and additions to the regulations.

6. Old Business: After closing the public hearing, the Board will consider the adoption and amendment of regulations (California Code of Regulations, Title 8, amending sections 32380, 32603, and 32604, and adding sections 32802 and 32804) as included in the Notice of Proposed Rulemaking published in the April 27, 2012 California Regulatory Notice Register.

7. New Business: **SAVE THE DATE: Advisory Committee Meeting, Thursday, June 28, 2012, 10 a.m., Sacramento**

8. Recess to Closed Session: The Board will meet in a continuous closed session each business day beginning immediately upon recess of the open portion of this meeting through August 9, 2012.

The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code sec. 11126(c)(3)), personnel (Gov. Code sec. 11126(a)), pending litigation (Gov. Code sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code sec. 11126(e)(2)(c)).

**This meeting is accessible to the physically disabled. A person who needs disability-related accommodations or modifications in order to participate in the meeting shall make a request no later than five working days before the meeting to the Board by contacting Ms. Regina Keith at 916.322.8226 or sending a written request to Ms. Keith at PERB, 1031 18th Street, Sacramento, California 95811. Requests for further information should also be directed via telephone or writing to Ms. Keith. Additional information is also available on the internet at www.perb.ca.gov.*

PUBLIC NOTICE
Regular Business Meeting Agenda
Public Employment Relations Board
October 13, 2011 ~ 10:00 a.m.

LOCATION: Public Employment Relations Board *
1031 18th Street, First Floor, Room 103, Sacramento, CA

1. Roll Call

2. Adoption of the Minutes for the August 11, 2011 meeting.

3. Public Comment:

   This is an opportunity for the public to address the Board on issues not scheduled on today's agenda. The Board cannot act on those items but may refer matters to staff for review and possible Board action at a future, publicly noticed meeting.

4. Chair's Report: **Announcement: Advisory Committee meeting, Tuesday, November 29, 2011**

5. Staff Reports: The following reports will be received. Any matter requiring Board action, and not included on this agenda, will be calendared for a subsequent public Board meeting.

   A. Administrative Report

   B. Legal Reports
      i. General Counsel Report
      ii. Chief Administrative Law Judge Report

   C. Legislative Report

6. Old Business

7. New Business

8. Recess to closed session. The Board will meet in a continuous closed session each business day beginning immediately upon recess of the open portion of this meeting through December 8, 2011.

   The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code sec. 11126(c)(3)), personnel (Gov. Code sec. 11126(a)), pending litigation (Gov. Code sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code sec. 11126(e)(2)(c)).

**This meeting is accessible to the physically disabled. A person who needs disability-related accommodations or modifications in order to participate in the meeting shall make a request no later than five working days before the meeting to the Board by contacting Ms. Regina Keith at 916.322.8226 or sending a written request to Ms. Keith at PERB, 1031 18th Street, Sacramento, California 95811. Requests for further information should also be directed via telephone or writing to Ms. Keith. Additional information is also available on the internet at www.perb.ca.gov.*

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT

(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME	CONTACT PERSON	TELEPHONE NUMBER
Public Employment Relations Board	Les Chisholm	(916) 322-3198
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		**NOTICE FILE NUMBER**
Factfinding under the Meyers-Milias-Brown Act		Z 2012-0416-02

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts businesses and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☐ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (List areas.): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes ☐ No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): $ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☐ No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☐ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of : ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: $_____	Cost: $_____
Alternative 1:	Benefit: $_____	Cost: $_____
Alternative 2:	Benefit: $_____	Cost: $_____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million ? ☐ Yes ☐ No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: $ _____ Cost-effectiveness ratio: $ _____

Alternative 1: $ _____ Cost-effectiveness ratio: $ _____

Alternative 2: $ _____ Cost-effectiveness ratio: $ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

☐ a. is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. will be requested in the _____ (FISCAL YEAR) Governor's Budget for appropriation in Budget Act of _____

☐ 2. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

☐ a. implements the Federal mandate contained in _____

☐ b. implements the court mandate set forth by the _____

court in the case of _____ vs. _____

☐ c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ (DATE) election;

☐ d. is issued only in response to a specific request from the _____

_____, which is/are the only local entity(s) affected;

☐ e. will be fully financed from the _____ (FEES, REVENUE, ETC.) authorized by Section

_____ of the _____ Code;

☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

☐ g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Savings of approximately $ _____ annually.

☐ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.

☑ 6. Other. Unaware of any local costs. The initial determination of the agency is that the proposed action would not impose any new mandate.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year. It is anticipated that State agencies will:

- ☐ a. be able to absorb these additional costs within their existing budgets and resources.
- ☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.

☐ 2. Savings of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any State agency or program.

☐ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year.

☐ 2. Savings of of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.

☐ 4. Other.

FISCAL OFFICER SIGNATURE		DATE
AGENCY SECRETARY [1] APPROVAL/CONCURRENCE		DATE 6.18.12
DEPARTMENT OF FINANCE [2] APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER	DATE 6/20/12

1. *The signature attests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.*

2. *Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.*

CERT

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z- 2012-0416-02	2012 0622 02C	

For use by Office of Administrative Law (OAL) only

2012 JUN 22 P 2:08

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Public Employment Relations Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)
Factfinding under the Meyers-Milias-Brown Act

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
2011-1219-01E

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT: 32802, 32804

AMEND: 32380, 32603, 32604

TITLE(S): 8

REPEAL:

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☒ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☒ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Les Chisholm	(916) 327-8383	(916) 327-6377	lchisholm@perb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE: 6.18.12

TYPED NAME AND TITLE OF SIGNATORY
Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

INSTRUCTIONS FOR PUBLICATION OF NOTICE AND SUBMISSION OF REGULATIONS

Use the form STD. 400 for submitting notices for publication and regulations for Office of Administrative Law (OAL) review.

ALL FILINGS
Enter the name of the agency with the rulemaking authority and agency's file number, if any.

NOTICES
Complete Part A when submitting a notice to OAL for publication in the California Regulatory Notice Register. Submit two (2) copies of the STD. 400 with four (4) copies of the notice and, if a notice of proposed regulatory action, one copy each of the complete text of the regulations and the statement of reasons. Upon receipt of the notice, OAL will place a number in the box marked "Notice File Number." If the notice is approved, OAL will return the STD. 400 with a copy of the notice and will check "Approved as Submitted" or "Approved as Modified." If the notice is disapproved or withdrawn, that will also be indicated in the space marked "Action on Proposed Notice." Please submit a new form STD. 400 when resubmitting the notice.

REGULATIONS
When submitting regulations to OAL for review, fill out STD. 400, Part B. Use the form that was previously submitted with the notice of proposed regulatory action which contains the "Notice File Number" assigned, or, if a new STD. 400 is used, please include the previously assigned number in the box marked "Notice File Number." In filling out Part B, be sure to complete the certification including the date signed, the title and typed name of the signatory. The following must be submitted when filing regulations: seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification) and the complete rulemaking file with index and sworn statement. (See Gov. Code § 11347.3 for rulemaking file contents.)

RESUBMITTAL OF DISAPPROVED OR WITHDRAWN REGULATIONS
When resubmitting previously disapproved or withdrawn regulations to OAL for review, use a new STD. 400 and fill out Part B, including the signed certification. Enter the OAL file number(s) of all previously disapproved or withdrawn filings in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). Submit seven (7) copies of the regulation to OAL with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). Be sure to include an index, sworn statement, and (if returned to the agency) the complete rulemaking file. (See Gov. Code §§ 11349.4 and 11347.3 for more specific requirements.)

EMERGENCY REGULATIONS
Fill out only Part B, including the signed certification, and submit seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). (See Gov. Code §11346.1 for other requirements.)

NOTICE FOLLOWING EMERGENCY ACTION
When submitting a notice of proposed regulatory action after an emergency filing, use a new STD. 400 and complete Part A and insert the OAL file number(s) for the original emergency filing(s) in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). OAL will return the STD. 400 with the notice upon approval or disapproval. If the notice is disapproved, please fill out a new form when resubmitting for publication.

CERTIFICATE OF COMPLIANCE
When filing the certificate of compliance for emergency regulations, fill out Part B, including the signed certification, on the form that was previously submitted with the notice. If a new STD. 400 is used, fill in Part B including the signed certification, and enter the previously assigned notice file number in the box marked "Notice File Number" at the top of the form. The materials indicated in these instructions for "REGULATIONS" must also be submitted.

EMERGENCY REGULATIONS - READOPTION
When submitting previously approved emergency regulations for readoption, use a new STD. 400 and fill out Part B, including the signed certification, and insert the OAL file number(s) related to the original emergency filing in the box marked "All Previous Related OAL Regulatory Action Number (s)" (box 1b. of Part B).

CHANGES WITHOUT REGULATORY EFFECT
When submitting changes without regulatory effect pursuant to California Code of Regulations, Title 1, section 100, complete Part B, including marking the appropriate box in both B.3. and B.5.

ABBREVIATIONS
Cal. Code Regs. - California Code of Regulations
Gov. Code - Government Code
SAM - State Administrative Manual

For questions regarding this form or the procedure for filing notices or submitting regulations to OAL for review, please contact the Office of Administrative Law Reference Attorney at (916) 323-6815.

FINAL REGULATION TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k)~~, 3541.3~~ and (n), 3563(j)~~, 3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j)~~,~~ and (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and ~~3541.3~~(g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and ~~3541.3~~(g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

Les Chisholm

From: Gibson, Peggy@OAL <Peggy.Gibson@oal.ca.gov>
Sent: Wednesday, August 08, 2012 3:23 PM
To: Les Chisholm
Subject: RE: Regulatory Action No. 2012-0622-02C

Good afternoon,

Sounds like a good idea. There's no other action that I know of that needs to be taken.

Thank you,

Peggy J. Gibson
Senior Counsel
916-323-6805
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

From: Les Chisholm [mailto:LChisholm@perb.ca.gov]
Sent: Wednesday, August 08, 2012 3:21 PM
To: Gibson, Peggy@OAL
Subject: FW: Regulatory Action No. 2012-0622-02C

Ms. Gibson,

We intend to correct our records as to how the regulations' authority citations read, consistent with the message below, unless there is a reason we should do otherwise. Please advise if there is any other action we need to take in this regard.

Thank you.

Les Chisholm
Division Chief, Office of the General Counsel
Public Employment Relations Board
(916) 327-8383

From: kathryn.ayres@thomsonreuters.com [mailto:kathryn.ayres@thomsonreuters.com]
Sent: Wednesday, August 01, 2012 5:12 PM
To: Les Chisholm; Peggy.Gibson@oal.ca.gov
Cc: stefan.vasiliou@thomsonreuters.com; katherine.vansant@thomsonreuters.com; ruth.lafler@thomsonreuters.com
Subject: Regulatory Action No. 2012-0622-02C

Dear Mr. Chisholm,

I am an editor with Barclays Official California Code of Regulations.

Unfortunately, we are not able to make all of the changes included in the Certificate of Compliance action regarding factfinding under the Meyers-Milias-Brown Act (Title 8, sections 32380, 32603, 32604, 32802, 32804).

We publish a bound-volume Table of Statutes to Regulations that shows all statutes that are included in the authority and reference citations for the regulations. This table is sorted automatically. We must publish the citations in a consistent style for the sorting program to work properly.

Therefore, for example, in regulations 32802 and 32804, we must publish the authority citation as it stands:

Sections 3509(a), 3541.3(e) and 3541.3(g), Government Code.

The underline and strikeout indicated the listing as follows:

Sections 3509(a) and 3541.3(e) and (g), Government Code.

We apologize, but we must impose a consistent style, so the former citation (highlighted in red) will remain. There is, of course, a similar situation in 32380.

Kathryn Ayres
Sr Publishing Specialist, Barclays California Code of Regulations

Thomson Reuters

Phone: 415 344-5152

kathryn.ayres@thomsonreuters.com
thomsonreuters.com

Les Chisholm

From: kathryn.ayres@thomsonreuters.com
Sent: Wednesday, August 01, 2012 5:12 PM
To: Les Chisholm; Peggy.Gibson@oal.ca.gov
Cc: stefan.vasiliou@thomsonreuters.com; katherine.vansant@thomsonreuters.com; ruth.lafler@thomsonreuters.com
Subject: Regulatory Action No. 2012-0622-02C

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Sections 3509(a) and 3541.3(e) and (g), Government Code.

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Kathryn Ayres
Sr Publishing Specialist, Barclays California Code of Regulations

Thomson Reuters

Phone: 415 344-5152

kathryn.ayres@thomsonreuters.com
thomsonreuters.com

State of California
Office of Administrative Law

In re: **Public Employment Relations Board** **Regulatory Action:** **Title 8, California Code of Regulations** **Adopt sections: 32802, 32804** **Amend sections: 32380, 32603, 32604** **Repeal sections:**	**NOTICE OF APPROVAL OF CERTIFICATE OF COMPLIANCE** **Government Code Section 11349.1 and 11349.6(d)** **OAL File No. 2012-0622-02 C**

The Public Employment Relations Board (PERB) submitted this timely Certificate of Compliance action to make permanent the adoption of two sections and amendment of three sections in Title 8 of the California Code of Regulations. This rulemaking is the result of AB 646 (CH 680, Stats. 2011) that provides for a mandatory impasse procedure if requested when the parties have not reached a settlement of their dispute following mediation. These regulations establish the impasse procedure and the timelines for the procedure.

OAL approves this regulatory action pursuant to section 11349.6(d) of the Government Code.

Date: 7/30/2012

Peggy J. Gibson
Senior Counsel

For: DEBRA M. CORNEZ
Director

Original: Anita Martinez
Copy: Les Chisholm

State of California
Office of Administrative Law

In re:	**NOTICE OF APPROVAL OF CERTIFICATE OF COMPLIANCE**
Public Employment Relations Board	
Regulatory Action:	**Government Code Section 11349.1 and 11349.6(d)**
Title 8, California Code of Regulations	
Adopt sections: 32802, 32804 **Amend sections:** 32380, 32603, 32604 **Repeal sections:**	**OAL File No. 2012-0622-02 C**

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OAL approves this regulatory action pursuant to section 11349.6(d) of the Government Code.

Date: 7/30/2012

Peggy J. Gibson
Senior Counsel

For: DEBRA M. CORNEZ
Director

Original: Anita Martinez
Copy: Les Chisholm

Les Chisholm

From: Welton, Lori@OAL <Lori.Welton@oal.ca.gov>
Sent: Friday, June 22, 2012 3:25 PM
To: Les Chisholm
Subject: RE: Regulatory Action Number 2012-0622-02C -- Public Employment Relations Board (PERB)

The previous related OAL file number 2011-1219-01E was moved to 1b of the Form 400.

Thank you,

Lori Welton
OFFICE OF ADMINISTRATIVE LAW
300 Capital Mall, Suite 1250
Sacramento, CA 95814-4339
www.oal.ca.gov
(916) 323-6225

From: Les Chisholm [mailto:LChisholm@perb.ca.gov]
Sent: Friday, June 22, 2012 2:36 PM
To: Welton, Lori@OAL
Cc: Katharine Nyman; Jonathan Levy
Subject: Regulatory Action Number 2012-0622-02C -- Public Employment Relations Board (PERB)

This confirms our telephone conversation regarding a correction needed to the Form 400 submitted by PERB in this matter, and our agreement that the correction will be made by you, as follows:

> The "Emergency Number" entered at the top of the form (2011-1219-01E) will be deleted, and that number will instead by entered in Part B, section 1.b of the form.

Thank you for your assistance in this matter. Please feel free to contact me if there are any other questions or concerns regarding our submission.

Les Chisholm
Division Chief, Office of the General Counsel
Public Employment Relations Board
(916) 327-8383

Jonathan Levy

From: Les Chisholm
Sent: Friday, June 22, 2012 2:36 PM
To: lwelton@oal.ca.gov
Cc: Katharine Nyman; Jonathan Levy
Subject: Regulatory Action Number 2012-0622-02C -- Public Employment Relations Board (PERB)

This confirms our telephone conversation regarding a correction needed to the Form 400 submitted by PERB in this matter, and our agreement that the correction will be made by you, as follows:

> The "Emergency Number" entered at the top of the form (2011-1219-01E) will be deleted, and that number will instead by entered in Part B, section 1.b of the form.

Thank you for your assistance in this matter. Please feel free to contact me if there are any other questions or concerns regarding our submission.

Les Chisholm
Division Chief, Office of the General Counsel
Public Employment Relations Board
(916) 327-8383

PUBLIC EMPLOYMENT RELATIONS BOARD
PUBLIC MEETING

Thursday,
10:00 a.m.
June 14, 2012
1031 - 18th Street
Sacramento, CA 95811

PLEASE SIGN IN - PLEASE PRINT

NAME	REPRESENTING	ADDRESS AND PHONE NUMBER
James MacDonald	CSDA	(916) 769-3314 1112 I St. #200
Kevin Colburn	CTA	7785 Hanford Ave. Yucca Valley 92284
Greg Eddy	CFT	1127 11 St #6, Sacramento CA 95814
WENJIU LIU	SBLP	3521 LLOYD BLVD. G. WEAK, CA
DENNIESEN	CNA/NNU	5477 N. Fresno St. #104 Fresno, CA
Erana Ortega	CSAC	on file
Chris Howard	Vacaville	707 449 5101
Michael Seville	IFPTE Local 21	1182 Market St. #425

APPEARANCE CARD PERB PUBLIC BOARD MEETING

NAME: Erica Ortega DATE: 6/14

REPRESENTING: CSAC - Ca State Assoc of Counties

AGENDA ITEM(S) Regulations

ADDRESS: On file

PHONE:

PERB #81 (3/83)

APPEARANCE CARD PERB PUBLIC BOARD MEETING

NAME: Jeffrey Edwards DATE: 6/14

REPRESENTING: Mastagni, Holstedt et al.

AGENDA ITEM(S)

ADDRESS: 1912 I Street Sacto 95811

PHONE: 491-4217

PERB #81 (3/83)

APPEARANCE CARD PERB PUBLIC BOARD MEETING

NAME: WENJIU LIU DATE: JUNE 11

REPRESENTING: SELF

AGENDA ITEM(S)

ADDRESS: 35214 LIDO BLVD. UNIT, NEWARK, CA 94560

PHONE: 510-688-0626

PERB #81 (3/83)

APPEARANCE CARD PERB PUBLIC BOARD MEETING

NAME: Michael Seville DATE: 6/14

REPRESENTING: IFPTE Local 21

AGENDA ITEM(S) Public Hearing on AB 646

ADDRESS: 1182 Market St. Suite 425 SF CA 94102

PHONE: 415-864-8100

PERB #81 (3/83)

City and County of San Francisco

Edwin M. Lee
Mayor

Department of Human Resources

Micki Callahan
Human Resources Director

December 7, 2011

Delivered Via Electronic Mail

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
California Public Employee Relations Board
1031 18th Street
Sacramento, CA 95814
SMurphy@perb.ca.gov
LChisholm@perb.ca.gov

Re: PERB's Implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm:

We appreciate the opportunity to provide input on PERB's proposal of emergency regulations relating to recently enacted Assembly Bill 646 ("AB 646"). To date, PERB has solicited comments regarding its proposed emergency regulations; however, the firm of Carroll, Burdick & McDonough, by its recent electronic submission to PERB dated November 28, 2011, has attempted to expand the scope of the discussion to include debate on the actual application of AB 646.

Carroll, Burdick & McDonough asserts, without any reference to the actual language or legislative intent applicable to AB 626, that AB 646 subjects to mandatory fact-finding all impasse situations, and not just those resulting from negotiations over memoranda of understanding. However, this interpretation not only is contrary to the plain language of the MMBA, but would contravene the clear and expressed intent of the legislature as well as the author of AB 646, Assembly Member Atkins.

First, the new impasse procedures established under AB 646—sections 3505.4, 3505.5 and 3505.7—relate specifically to the preceding sections of the MMBA regarding to the selection of a mediator to resolve impasses over *memoranda of understanding*. Sections 3505.1 and 3505.2 of the MMBA provide as follows:

> 3505.1. If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall **jointly prepare a written memorandum of such understanding**, which shall not be binding, and present it to the governing body or its statutory representative for determination.
>
> 3505.2. If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. […]
>
> [Emphasis added.]

Section 3505.4 now provides that if the parties have agreed to mediation pursuant to 3505.2, then if the mediator is unable to resolve that controversy, fact-finding may be requested. Thus, the language of Section 3505.4 is concerned with reaching a memorandum of understanding, *not* fact-finding over matters

which do not involve the negotiation of a memorandum of understanding, such as "*Seal Beach*" bargaining (see *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal. 3d 591), or minor changes in working conditions such as the location of a union bulletin board.

Moreover, neither the author of AB 646 nor the legislature intended the legislation to apply in situations other than impasses over memoranda of understanding. Please see the following relevant excerpt from the State Senate Rules Committee analysis dated August 29, 2011 at page 5:

> According to the author, "Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer **when negotiations for collective bargaining agreements fail**. […]" [Emphasis added.]

Likewise, see the State Assembly Floor analysis dated September 1, 2011 at page 3:

> According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in **impasse procedures where efforts to negotiate a collective bargaining agreement have failed.** […] The creation of mandatory impasse procedures is likely to increase the effectiveness of **the collective bargaining process**, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. […]" [Emphasis added.]

(Both legislative analyses can be accessed on the Official California Legislative Information website at http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_646&sess=CUR&house=B&author=atkins.)

In addition to the language of the MMBA, and the legislative intent cited above, common sense calls for an interpretation of AB 646 that does not burden the parties with the lengthy proceedings and costs of a three-person fact-finding panel to preside over the small and lower-profile issues that arise outside the negotiation of collective bargaining agreements. Were it otherwise, the interpretation requested by Carroll, Burdick & McDonough would lead to an absurd result, wherein a municipality would be forced into lengthy, multiple and potentially simultaneous fact-finding panels occurring between a public entity and its employee organizations with respect to various routine issues that arise throughout the year. The result would be gridlock on a scale never envisioned by the legislature. PERB should not accept the invitation to endorse such a burdensome scenario.

We strongly urge PERB to add language to the proposed regulations making clear that AB 646 does not apply in circumstances other than impasses reached following negotiations over successor memoranda of understanding.

Respectfully submitted,

Micki Callahan
Human Resources Director

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

JOAN F. DAWSON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL ADVISORY DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

December 22, 2011

By U.S. Mail and Email (staff@oal.ca.gov)

Kathleen Eddy, Reference Attorney
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

By U.S. Mail and Email (lchisholm@perb.ca.gov)

Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Proposed Emergency Regulations Related to Assembly Bill 646

Dear Ms. Eddy and Mr. Chisholm:

The City of San Diego (City) is an interested person within the meaning of California Government Code (Government Code) section 11349.6 and submits this comment to the emergency regulations proposed by the Public Employment Relations Board (PERB) related to implementation of Assembly Bill 646 (A.B. 646).

Under Government Code sections 11349.1 and 11349.6(b), a regulation must meet the standard of "consistency," meaning the regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." Cal. Gov't Code § 11349(d). A regulation must also meet the standard of "clarity," meaning it is "written or displayed so that the meaning of [the] regulation[] will be easily understood by those persons directly affected by them." Cal. Gov't Code § 11349(c). PERB's proposed regulation 32802(a) is not consistent with A.B. 646, nor does it provide clarity to the public agencies subject to it. Therefore, it should be disapproved for the following reasons.

First, PERB's proposed regulation broadens the scope of A.B. 646 by providing that an exclusive representative may request factfinding even when a dispute is not submitted to mediation. The proposed regulation states that "[a]n exclusive representative may request that the parties' differences be submitted to a factfinding panel," without any limitation of circumstances. It also provides, in proposed regulation 32802(a)(2), that a request for factfinding may be submitted "[i]f the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse." This proposed regulation would require a public agency that does not engage in mediation to wait thirty days following the date of a written declaration of impasse to ensure there is no request for factfinding by an employee organization before the public agency proceeds with its own impasse process, or risk an unfair labor practice charge. It is our view that there is nothing in A.B. 646 that requires this waiting period or that requires factfinding when the parties do not engage in mediation.

Second, PERB's conclusion, set forth in its Finding of Emergency, that A.B. 646 provides for "a mandatory impasse procedure – factfinding before a tripartite panel – upon the request of an exclusive representative where the parties have not reached a settlement of their dispute" is not supported by the plain language of the legislation. In its Informative Digest, submitted with its proposed regulations, PERB writes that proposed section 32802 is consistent

> with the express requirements and clear intent of the recent amendments to the MMBA. . . . Where parties have not reached an agreement, an exclusive representative may file its request with PERB. . . . If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse.

That an employee organization may request factfinding following impasse in all circumstances is inconsistent with and expands the scope of A.B. 646. As you are aware, administrative regulations that alter or amend a statute or enlarge or impair its scope are void, and courts not only may, but must strike down the regulations. *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967).

Third, A.B. 646 does not authorize or mandate factfinding when the parties do not engage in mediation of a dispute, nor does A.B. 646 mandate mediation. In fact, the legislative history supports this conclusion. The legislative analysis for A.B. 646 states that the legislation *allows* a local public employee organization to request factfinding *when* mediation has been unsuccessful at effectuating a resolution to a labor dispute within 30 days of appointment of the mediator. *Bill Analysis*, A.B. 646, S. Rules Comm. (June 22, 2011) (emphasis added).

In furtherance of this intent, the Legislature left unchanged those provisions of the Meyers-Milias-Brown Act (MMBA) that allow local public agencies to utilize their own negotiated impasse procedures and implement a last, best, and final offer, without resorting to mediation and factfinding, as long as the public agency holds a public hearing before imposition.

The MMBA, at Government Code section 3505, mandates:

> The governing body of a public agency . . . shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . prior to arriving at a determination of policy or course of action.

Engaging in "meet and confer in good faith" includes the obligation "to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." Government Code section 3505 further provides, with italics added, "The process should include adequate time for the resolution of impasses *where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.*"

In accordance with Government Code section 3505, this City has a long-standing impasse procedure negotiated with the City's recognized employee organizations and adopted by the San Diego City Council (City Council), as Council Policy 300-06, that does not mandate or even contemplate that the parties engage in mediation upon an impasse in bargaining. Council Policy 300-06 provides that if the meet and confer process has reached an impasse, either party may initiate the impasse procedure by filing with the City Council a written request for an impasse meeting. An impasse meeting is then scheduled by the City's Mayor (previously, the City Manager) to review the position of the parties in a final effort to resolve a dispute. If the dispute is not resolved at the impasse meeting, then the impasse is resolved by a determination by the Civil Service Commission or the City Council after a hearing on the merits of the dispute.

Fourth, the Legislature left unchanged Government Code section 3505.2 which does not mandate mediation. It provides, with italics added:

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together *may agree* upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organizations.

Government Code section 14 defines "may" as permissive, not mandatory. There is no language in Government Code section 3505.2, which mandates this City or other public agencies under the MMBA engage in mediation to resolve a dispute. Because this City does not engage in mediation, there is no language in A.B. 646, which mandates this City engage in factfinding. A regulation implementing A.B. 646 that mandates factfinding when there is no mediation is inconsistent with the legislation.

Fifth, Government Code section 3505.4(a), added by A.B. 646, effective January 1, 2012, sets forth the circumstances in which an employee organization may request factfinding. Specifically, factfinding is to follow mediation: "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel." In other words, an employee organization may request factfinding *if* the mediation does not result in settlement in a defined period.

Sixth, Government Code section 3505.5, also added by A.B. 646, relates to the timing and conduct of the factfinding panel and the costs. There is no language in section 3505.5 which can be read to mandate factfinding when the parties do not first mediate a dispute.

Seventh, Government Code section 3505.7, added by A.B. 646, also does not mandate factfinding. It states:

> After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

If the parties do not engage in mediation, then factfinding is not applicable and the timing of the factfinders' report is not relevant. A public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, after holding a public hearing.

This City is required to conduct a public hearing under its established and negotiated impasse procedure. Therefore, it is our view that our process is presently consistent with the MMBA, as amended by A.B. 646. This City is not required to proceed to mediation or factfinding upon an impasse, but the City Council must conduct a public hearing, which it presently does to resolve an impasse. Any regulation that mandates factfinding when there is no mediation is inconsistent with A.B. 646.

PERB's proposed regulations enlarge the scope of A.B. 646. Therefore, this Office urges disapproval of the regulations to the extent they mandate factfinding in the absence of mediation, or, in the alternative, requests that the proposed regulations be clarified for jurisdictions that do not engage in mediation by mutual agreement or by the terms of their negotiated impasse procedures.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By Joan F. Dawson
Joan F. Dawson
Deputy City Attorney

JFD:ccm

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15 April 2011

Wendi L. Ross, Interim General Counsel
Public Employment Relations Board
1031 - 18th Street
Sacramento CA 95811-4124

Re: *Request for Proposed Amendment to Board Regulations*

Dear Ms. Ross:

Request: My thirty-nine years as a litigator, and my present experience at the Board, cause me to write to request that the Board propose to the Office of Administrative Law an amendment to 8 Cal.Code Regs., sections 32620(c) and 32635(c). These requested amendments, if adopted, would permit an unfair practice charging complainant to file and serve a reply to, respectively, a respondent's position statement and a respondent's opposition to a charging party's appeal from dismissal. If someone has previously made this request, I apologize for the repetition.

Background: I represent a laid-off employee who filed an unfair practice charge ("UPC") against her government employer based on an egregious violation of its good faith meet and confer obligation. The employer filed its position statement, and I then filed an amended charge. The employer filed another position statement, and I filed a reply. I don't know if the reply was considered by the regional attorney before she dismissed the amended charge on the ground of lack of standing.

I filed an appeal on behalf of the employee. The employer filed its opposition. Two business days thereafter, I filed a reply to that opposition. During a telephone conversation with the Board's appeals assistant, I learned that my reply was considered to be a "late filing" which, in the Board's discretion, may or not be considered on appeal. (8 Cal.Code Regs., § 32136.) Literally, it was not a late filing because there is no provision in current Board rules which permits the filing of a reply.

Reasons: As relevant here, Title 8 affords to an employee whose UPC has been dismissed and upheld by the Board on appeal no more process than is provided to a small

claims court plaintiff. If a plaintiff loses on a small claim after an adversary hearing, there is no appeal available. (Code Civ. Proc., § 116.710(a).) Similarly, if the Board refuses to issue a complaint against an employer after the employee appeals from dismissal of her UPC, there is no available judicial review by way of appeal or a petition for a writ of mandate. (Govt. Code, § 71639.4(a).) At least in small claims court, a plaintiff gets a hearing. Not so at the Board (8 Cal.Code Regs., § 32635 [no provision for oral argument on UPC dismissal appeal]) even though, as in the case of my client, she lost her full-time job worth around $110,000 per year. But, as incongruous as that may be, this correspondence addresses only the unavailability of a right to reply.

The absence from the subject Board rules of a right to reply contrasts sharply with civil litigation. Let's say a plaintiff files a motion to amend her complaint after the defendant has answered. (Code Civ. Proc., § 473(a)(1).) The defendant opposes. Plaintiff has a right to file a reply. (Code Civ. Proc., § 1005(b).) Or, thinking a defendant's answers to interrogatories insufficient, a plaintiff files a motion to compel further responses. (Code Civ. Proc., § 2030.300(a).) The defendant opposes. Again, based on the same authority, the plaintiff has the right to file a reply to the opposition.

Now, one step further in the civil litigation process. An employer's position statement in response to a UPC at the Board can serve the same function as a demurrer to a civil complaint based on a claimed failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc., § 430.10(e).) Assume that the defendant's demurrer is sustained on that ground without leave to amend. Sustentation gives plaintiff a right of appeal. (Code Civ. Proc., § 472c(a).) After she files her opening brief in the appellate court and the defendant files its respondent's brief, plaintiff has a right to file a brief in reply. (Cal. Rules of Court, Rule 8.200(a)(3).)

For a UPC employee, the Board is her court of last resort. Not only is there no appeal or mandate review available when the Board refuses to issue a complaint after appeal from dismissal of a UPC, but there is no right to file a lawsuit, either. The Board has exclusive jurisdiction over UPCs. (E.g., Govt. Code, § 71639.1(c).) Contrast that with a government employee who files an administrative charge with the Department of Fair Employment and Housing alleging discrimination or retaliation by her government employer. (Govt. Code, § 12960(b).) If the Department decides to not file an accusation, it issues to the complaining employee a right-to-sue notice which entitles her to file a lawsuit against her employer. (Govt. Code, § 12965(b).) Similarly, any person injured by a state employee

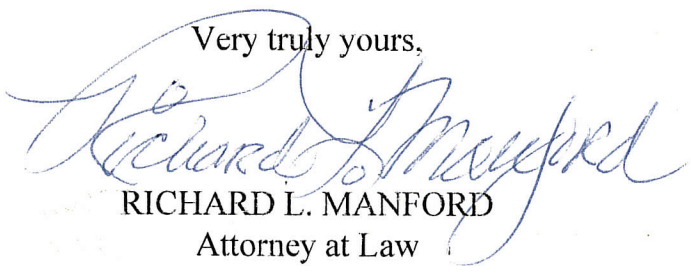
acting in the scope of employment must first file a verified claim with the Victim Compensation and Government Claims Board. (Govt. Code, § 910.) If that board rejects the claim, it notifies the claimant that she may then file a lawsuit against the offender. (Govt. Code, § 913(b).) With PERB, however, no such right exists for a UPC employee, even though her economic injury, and the employer conduct which inflicted it, may be much more substantial than that suffered by the hypothetical DFEH and Government Claims Board claimants and the civil litigation plaintiff.

The foregoing illustrations point up the significant comparative unfairness to a UPC employee who, under Board rules 32620(c) and 32635(c), is not authorized to reply to an employer's responsive pleading which may result in the end of her claim, even if that pleading were to raise matters beyond the scope of the UPC or assert new matter on the employee's appeal from dismissal. I can think of no sound policy reason why a Board UPC claimant should be subject to process so adversely disparate from the hypothetical Government Code claimants and civil plaintiff discussed above, especially when an adverse result at the Board is so terminal. Come to think of it, it does seem rather inconsistent that, on the one hand, a UPC employee has a right to file an amended charge after the employer's position statement is filed but before the board agent rules (8 Cal.Code Regs., § 32621) but, on the other hand, has no right of reply to the position statement or to the employer's opposition on appeal from dismissal.

I'm not asking that the Board's procedure undergo major revision or that it be unduly lengthened. The requested amendments represent such fundamental and logical fairness adding only maybe ten days to the process, the absence of which could conceivably result in a substantial injustice in view of potentially high stakes. If you find merit in my analysis, please present this request to the Board.

Thanking you for your consideration, I am

Very truly yours,



RICHARD L. MANFORD
Attorney at Law

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8385
Fax: (916) 327-6377

SENT VIA FACSIMILE AND REGULAR MAIL

May 17, 2011

Richard L. Manford, Attorney
3081 Swallows Nest Drive
Sacramento, CA 95833-9723

Re: Request for Proposed Amendment to Board Regulations

Dear Mr. Manford:

We are in receipt of your letter to the Public Employment Relations Board (PERB or Board) dated April 15, 2011 and received in our office on April 18, 2011. In essence, your letter states that you are requesting an amendment to PERB's regulations, and more specifically to sections 32620(c) and 32635(c). (Cal. Code Regs., tit 8, §§ 32620(c), 32635(c).) Your letter states in pertinent part, "[t]hese requested amendments, if adopted, would permit an unfair practice charging complainant to file and serve a reply to, respectively, a respondent's position statement and a respondent's opposition to a charging party's appeal from dismissal."

We sincerely appreciate your request, as well as your concerns with this agency's filing process/procedure. First, we do not necessarily agree that PERB's filing process, either with the Office of the General Counsel or with the Board itself, is problematic. We direct your attention to the Board's decision in *County of San Bernardino (County Library)* (2009) PERB Decision No. 2023-M[1] as well as PERB Regulations 32135, 32136, 32350, 32360. (Cal. Code Regs., tit. 8, §§ 32135, 32136, 32350, 32360.) Second, while PERB is not currently undergoing regulation review/changes at this time, we will maintain your letter and request for future consideration.

I would also like to take this opportunity to clarify one point you made in your letter. You state that a PERB dismissal of an unfair practice charge cannot be appealed to court. However, the Supreme Court recently rendered a decision regarding this issue. (*International Association of Fire Fighters Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011)

[1] In that case, the Board found good cause to excuse the late filing of an amended charge and ordered the Board agent to review the new filing, where the charging party made a conscientious attempt to timely file the amended charge, the amended charge was postmarked on the date due for filing as a result of honest error based on "misunderstood communications" between the charging party and the Board agent, and there was no evidence of prejudice resulting from the brief delay. (*Ibid.*)

51 Cal.4th 259.) The Court—relying on its earlier decision in *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal.3d 551—ruled that there are three narrow exceptions under which PERB's refusal to issue an unfair practice complaint may be subject to judicial review, namely, if PERB's decision: (1) violates a constitutional right; (2) exceeds a specific grant of authority; or (3) is based on an erroneous statutory construction. (*Id.* at p. 271.)

I hope that you find this information helpful and again, thank you for your letter.

Sincerely,

Wendi L. Ross

Wendi L. Ross
Deputy General Counsel

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On May 17, 2011, I served the letter regarding Request for Proposed Amendment to Board Regulations dated May 17, 2011 on the party listed below by

_X_ placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

___ personal delivery.

_X_ facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

Richard L. Manford, Attorney
3081 Swallows Nest Drive
Sacramento, CA 95833-9723

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 17, 2011, at Sacramento, California.

C. Shelly
(Type or print name)

C. Shelly
(Signature)

14. **Can I ask for a change in an agency's regulations? How?**

Yes. You may ask an agency to repeal or amend an existing regulation, or to adopt a new regulation by petitioning the agency, using the method described in Government Code sections 11340.6 and 11340.7.

A petition is simply a letter that requests the change and contains certain information. Specifically, the petition must identify the nature of the regulation change, the reason for the request, and the agency's rulemaking power (a reference to the law giving the agency the power to adopt rules and regulations).

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15. **What happens after I have petitioned an agency, as outlined above?**

By law, the agency must notify you in writing of the receipt and any denial of the petition within 30 calendar days. Any denial must be in writing and include the reasons the agency reached its decision. If the agency does not deny the petition it must schedule the matter for a public hearing.

Any decision denying or granting a petition, in whole or in part, must be in writing and transmitted to OAL for publication in the Notice Register. The agency may also take any other action it may determine necessary by the petition, but is required to notify the petitioner in writing of any such action.

See Government Code sections 11340.6 and 11340.7, which describe the complete petition process.

PUBLIC EMPLOYMENT RELATIONS BOARD
FACSIMILE TRANSMITTAL SHEET

DATE: 5/17/11

TO: Richard L. Manford

TITLE: Attorney

OFFICE:

FAX: 916/923-3660

FROM:

Wendi L. Ross
Deputy General Counsel
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124

Telephone: 916-322-3198
Fax: 916-327-6377

TOTAL NO. OF PAGES INCLUDING COVER:

RE:

NOTES/COMMENTS:

See attached letter dated 5/17/11.

Les C.

PHILIP TAMOUSH

Arbitrator-Factfinder

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Torrance, California 90505-0128
(800) 747-9245 (Voice) (800) 903-4266 (Fax)
(www.finaldisputeresolution.com philip@tamoush.com)
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San Francisco/East Bay
249 W. Jackson St., #130
Hayward, CA 94544

December 14, 2011

TO: Anita Martinez, Chair, Public Employment Relations Board
Editor, California Public Employee Relations (CPER)

Dear Friends:

It was a special pleasure to attend the brief PERB gathering in Glendale on the pending rules and regulations for the implementation of AB 646 provisions for factfinding in local government and to be re-introduced to many of my old friends in the field.

While I had no special comments regarding the rules and regulations for implementation of factfinding, the emergency rules I received is very nice and seems to emulate the elements found in PERB's regs dealing with other rules regulating factfinding under EERA, HEERA and SEERA.

I do have some more sweeping generic suggestions which PERB, perhaps in association with groups like CPER, the Governor's Office and maybe even funding from the various County and City associations, could implement or at least look at:

1. Update and reproduce the PERB Factfinding Manual which a few of us helped produce back in the mid-1980's (I think Geraldine Randall, Doug Collins and I were the subject matter folks and Janet Walden, then of PERB, handled the procedural elements). It could be valuable for advocates as well as newer neutrals.
2. Review, update and republish the Factfinding Video of Six or Seven Vignettes which I and about four other factfinders made. These were mock sessions with a series of questions that the advocate audiences would discuss. These provide an easy opportunity for persons who had never seen a factfinding before to get a quick picture of how the process works through these short exercises.
3. Approx. 20+ years ago, I authored a CPER Monograph, titled something like 'Local Government Employer-Employee Relations Options Under the MMBA', which analyzed all of the city and county local option ordinances and rules. It really is time for another comprehensive study of local governments in light of AB 646 and determine what the situation is with local government agencies, especially regarding their impasse processes. It might also provide local governments with some impetus to adopt local rules rather than have to depend on PERB to resolve important issues.

4. Finally, back in the 1970's when the current governor was in his first term, he and Assembly Speaker Bob Morretti established the Advisory Council on Public Sector Employee Relations, a prestigious group of neutral labor relations experts, including Benjamin Aaron, Chair, Howard Block, Don Vial, Morris Myers and Don Wollett. I acted as the technical staff during the year of the Council's work. The Council proposed a comprehensive labor relations law and several hundred page report. Much of the information in that law and report are definitely useful and useable today, with just some updating in light of current events, at least for consideration and study, aiming towards the goal of one single comprehensive law rather than the four or so we have now. Marty Morgenstern, one of the Governor's top advisors in Human Resources today, who was involved as an advocate in this project, could be interested in re-introducing this subject. I would strongly recommend that perhaps even CPER could do a short article reviving the Advisory Council's Report, with PERB's backing. Howard Block and Don Wollett are still around and could possibly comment on what changes might be required to make the report more current. Unfortunately, Ben Aaron, Morrie Myers and Don Vial are deceased.

Well, these suggestions have been on my mind for several years. I know some may seem irrelevant now, but the time may be right to look at some of them more seriously. Obviously, I wanted to get them out to the light for at least one last look now that 646 has introduced some new elements. I hope these suggestions are worthy of some thoughtful consideration. Any assistance by way of discussion I can offer would be a pleasure. Have a wonderful holiday season.

Sincerely,

Phil Tamoush

Cc: Les Chisolm, Division Chief, PERB
Marty Morgenstern, Governor's Office

City and County of San Francisco

Edwin M. Lee
Mayor

Department of Human Resources

Micki Callahan
Human Resources Director

December 7, 2011

Delivered Via Electronic Mail

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
California Public Employee Relations Board
1031 18th Street
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SMurphy@perb.ca.gov
LChisholm@perb.ca.gov

Re: PERB's Implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm:

We appreciate the opportunity to provide input on PERB's proposal of emergency regulations relating to recently enacted Assembly Bill 646 ("AB 646"). To date, PERB has solicited comments regarding its proposed emergency regulations; however, the firm of Carroll, Burdick & McDonough, by its recent electronic submission to PERB dated November 28, 2011, has attempted to expand the scope of the discussion to include debate on the actual application of AB 646.

Carroll, Burdick & McDonough asserts, without any reference to the actual language or legislative intent applicable to AB 626, that AB 646 subjects to mandatory fact-finding all impasse situations, and not just those resulting from negotiations over memoranda of understanding. However, this interpretation not only is contrary to the plain language of the MMBA, but would contravene the clear and expressed intent of the legislature as well as the author of AB 646, Assembly Member Atkins.

First, the new impasse procedures established under AB 646—sections 3505.4, 3505.5 and 3505.7—relate specifically to the preceding sections of the MMBA regarding to the selection of a mediator to resolve impasses over *memoranda of understanding*. Sections 3505.1 and 3505.2 of the MMBA provide as follows:

> 3505.1. If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall **jointly prepare a written memorandum of such understanding**, which shall not be binding, and present it to the governing body or its statutory representative for determination.
>
> 3505.2. If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. […]
>
> [Emphasis added.]

Section 3505.4 now provides that if the parties have agreed to mediation pursuant to 3505.2, then if the mediator is unable to resolve that controversy, fact-finding may be requested. Thus, the language of Section 3505.4 is concerned with reaching a memorandum of understanding, *not* fact-finding over matters

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December 2, 2011

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tyeung@rshslaw.com

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811

RE: ***Emergency Regulations Implementing AB 646***

Dear Ms. Murphy and Mr. Chisholm:

I am writing in response to the draft discussion regulations implementing AB 646 that the Public Employment Relations Board (PERB) released on November 14, 2011. I know that PERB has already received several letters commenting on the draft discussion regulations. I write only to emphasize the request made by several stakeholders that there must be a deadline by which the employee organization must make a request to proceed to fact-finding. Currently, the draft regulations provide that a request can be made no earlier than thirty (30) days following the appointment of a mediator, but there is no outer time limit by which the employee organization must request fact-finding.

Presumably, PERB staff examined the fact-finding regulations under EERA and HEERA in developing the draft discussion regulations for AB 646. PERB's current fact-finding regulations under EERA and HEERA provide for a time period before which fact-finding can be requested, but do not contain any outer time limit for a fact-finding request. At first blush, it may make sense that fact-finding regulations under the MMBA would be similarly drafted. However, because of significant differences between the MMBA and EERA/HEERA, that is not true.

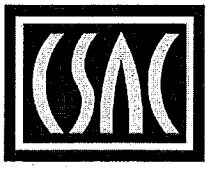
Under both EERA and HEERA, the employer has the ability to request fact-finding. (Gov. Code, §§ 3548.1, 3591.) Thus, under EERA and HEERA an employer can prevent an employee organization from unreasonably delaying fact-finding proceedings by initiating those proceedings itself. The same is not true under the MMBA. AB 646, by its terms, does not provide for a fact-finding request from an employer. Thus, there is no similar counter-balance under the MMBA as exists under EERA and HEERA. Under the MMBA, without a deadline by

which the employee organization must request fact-finding, it will be extremely difficult for an employer to protect itself against unreasonable delays. This significant difference in statutory language justifies PERB adopting fact-finding regulations under the MMBA that are different than those under EERA and HEERA. Again, I strongly urge PERB to include a deadline in the regulations by which an employee organization must make a fact-finding request.

Very truly yours,

Timothy G. Yeung

TGY/



November 30, 2011

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811

Re: PERB's Consideration of Emergency Rulemaking to Implement AB 646 (Atkins)

Dear Ms. Murphy and Mr. Chisholm:

The League of California Cities (League), the California State Association of Counties (CSAC), and the California Special Districts Association (CSDA) want to thank you for the opportunity to respond to the Public Employment Relations Board's (PERB) emergency rulemaking and more specifically to the *Staff Discussion Draft RE AB 646 (November 14 Version).* Please find attached our recommended edits to the *Staff Discussion Draft RE AB 646 (November 14 Version).* We would also like to make the following points.

1. We like that two separate subsections were created [32802 (a)(1) and (a)(2)] to distinguish between a situation where fact-finding is requested after mediation and a situation where the request is made after impasse but where the parties did not initiate mediation. You will find in the attached revised draft that we have made clarifying edits to both of these sections.

2. We suggest that for parties who do not use mediation, but still wish to engage in the fact-finding process, timeframes in local rules should prevail. If no local rules are in place we strongly suggest fact-finding should be requested within 10 days following notification by a party that impasse is declared. Requiring a timeframe like this will ensure that the fact-finding process will not be unduly delayed and thus risk untimely resolution of negotiations.

3. For parties who do not use mediation, the staff discussion draft goes further than merely setting a time for when fact-finding must be requested, but rather requires a 30-day waiting period after declaration of impasse, which goes beyond the provisions of AB 646. The purpose of the 30-day waiting time in AB 646 is to provide a reasonable opportunity for mediation to succeed. In situations where no mediation is held, there is no purpose in creating such a waiting period. We suggest revising this provision, as discussed above, to require fact-finding to be requested within 10 days of a declaration of impasse.

4. Our organizations are not taking a position on whether mediation is a precondition to fact-finding under AB 646, but we do think this is an open question that may need to be resolved by the courts or by the Legislature. However, we would like to note that if PERB adopts section 32802(a)(2), this rule in effect interprets the statute to require fact-finding in the absence of mediation, and it is our belief that interpretation goes beyond the provisions of AB 646.

5. We suggest deleting the language in section 32802(a)(1) that reads "...and shall also be accompanied by evidence that the mediator has informed the parties that further mediation proceedings would be futile." AB 646 does not contemplate or provide any provisions related to a mediator's role in determining the appropriateness of fact-finding, therefore we do not think this should be included in the proposed rules. Further, it does not seem appropriate for PERB to empower the mediator to make determinations as to whether further mediation would no longer be successful.

6. We are concerned that if PERB does not require that the Board-appointed chairperson agree to start fact-finding proceedings within 10 days of appointment that the fact-finding process could be delayed, possibly for weeks or months. Thus, we added language to section 32804 that outlines this requirement.

Sincerely,

Natasha M. Karl

Natasha M. Karl
Legislative Representative
League of California Cities

Eraina Ortega

Eraina Ortega
Legislative Representative
California State Association of Counties

Iris Herrera
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California Special Districts Association

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November 28, 2011

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VIA EMAIL AND REGULAR MAIL

Les Chisholm
Division Chief
Public Employment Relations Board
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95814-4174

Re: Comments Concerning Proposed PERB Regulations to Implement Assembly Bill 646

Dear Mr. Chisholm:

We appreciate the opportunity to contribute to the determination of proposed emergency regulations for the Public Employment Relations Board to be utilized in the implementation of the new procedures mandated by recently enacted Assembly Bill 646 ("AB 646"). We weigh in on four issues:

1. **PERB Should Confirm the Applicability of PERB Regulations to Mixed Units (Peace officer/non-sworn; management/non-management)**

The undersigned represent multiple bargaining units consisting of only peace officers, as defined by Penal Code section 830.1. We also represent so-called mixed units—i.e., a bargaining unit consisting of both 830.1(c) peace officers and other employees, either safety or non-safety.

In addition, we represent "management employee" only bargaining units, as well as mixed bargaining units made up of, say, supervisory employees and managers.

In our view, AB 646 applies to both peace officers and managers. But in the absence of PERB jurisdiction (see sections 3509(f) and 3511) over either type of employee, the proposed emergency regulations would not apply to bargaining units comprised solely of either peace officers or managers. (Presumably those employee groups will meet and confer with their employers

over local rules to implement AB 646 for employees not under PERB's jurisdiction.)[1] But PERB should clarify that the regulations apply to employees in mixed units.

2. Applicability of Factfinding in the Absence of Mediation

There is much dispute about whether fact-finding is required in the absence of either an obligation under local rules to mediate in the event of impasse, or an unwillingness to mediate voluntarily. The legislation is not perfectly written, and, not surprisingly, advocates on either side of the labor/management divide are parsing clauses or partial clauses as evidence of legislative intent one way or the other.

We agree with our colleagues at Loenard Carder that notwithstanding the final version of AB 646 being silent on the issue, the legislative history and the purpose behind the Meyers-Milias-Brown Act compel PERB to assume that a covered employer's obligation to participate in factfinding is mandatory, and PERB should draft its emergency regulations accordingly.

The purpose and intent of the Act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov't Code, section 3500.) Factfinding, as required by AB 646, is an extension of this policy of bilateral resolution of labor disputes to include a uniform, nonbinding, process for resolving bargaining impasse.

The idea, floated by some commentators and the City of San Diego, that an employer could simply opt out, or not be bound by, factfinding seems antithetical to the Legislature's whole approach on the subject. It sets up the scenario that an employer would choose not to voluntarily mediate at impasse because the mere agreement to mediate would bind the employer to factfinding *if* the mediation was unsuccessful and *if* the employee organization elected to pursue factfinding. As our colleagues at Rother, Segall and Greenstone point out, such a reading, which would make voluntary mediation less likely, would weaken impasse resolution processes, not strengthen them.

---

[1] PERB should also clarify that to the extent public entities meet and confer with employee associations over local rules to implement AB 646 (certainly with peace office and manager groups, but potentially with other groups, too), and those negotiations end in impasse, the form of the local rules should itself be subject to factfinding before ultimate determination by the public entity.

Mandatory factfinding would not conflict with section 3505.2 since AB 646 does not itself compel mediation, only factfinding. We conclude that notwithstanding whether parties mediate, factfinding is a mandatory impasse resolution procedure if invoked by the employee association.

Accordingly, we support proposed regulation 32802(a)(2), with the following minor suggested edits: "In cases where the parties ~~we~~are not required to participate in mediation and ~~di~~do not agree to do so voluntarily, a request for factfinding may be filed not sooner than 30 days from the date that either party has served the other with written notice of a declaration of impasse."

3. Failure to Participate in Factfinding Should Be an Unfair Labor Practice

We concur with our colleagues at Liebert Cassidy and Loenard Carder that any failure to comply in good faith with the procedures required by AB 646 is an unfair labor practice. We also suggest a revision to PERB Regulation 32603(e) to accomplish this purpose.

4. Factfinding Can Apply to A Charter City With Binding Interest Arbitration in Situations Other Than "Main Table" Negotiations

The undersigned represent employees in the City and County of San Francisco. Those employees enjoy the right to binding interest arbitration—but only for main table negotiations (i.e., negotiations for successor memoranda of understanding). There is no right to binding interest arbitration for disputes that arise during the term of an existing MOU. (CCSF Charter section A8.409-3.) MMBA generally and AB 646 specifically provide no language limiting applicability of factfinding to successor MOU negotiations only. Accordingly, PERB should confirm by regulation that factfinding can apply to a Charter City, County or City and County, where any bargaining impasse is excluded from that entity's binding arbitration provisions.

Very truly yours,

CARROLL, BURDICK & McDONOUGH LLP

Gary Messing
Gregg McLean Adam

CBM-SF\SF533054.3

CALPELRA
moving forward, together

November 26, 2011

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, California 95814

Re: AB 646 Emergency Regulations

Dear Ms. Murphy and Mr. Chisholm:

The CALPELRA Board of Directors writes to comment on the November 14, 2011, revised PERB staff discussion draft of emergency regulations implementing Assembly Bill 646.

Regulations Should Increase Predictability And Provide Procedural Certainty

CALPELRA opposed Assembly Bill 646, and we believe it requires substantial revision and amendments. We understand the difficulty PERB faces given the ambiguities inherent in the final version of AB 646, and we do not expect PERB to conclusively resolve any such ambiguities. Nonetheless we believe that PERB can provide certainty and reduce risks for those agencies opting to participate in factfinding and avoid litigation, while at the same time preserve the litigation option for those agencies with the desire and funds to challenge the statute.

PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty. During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.

The November 14, 2011, staff discussion draft does not increase procedural predictability, and will leave both public employers and employee organizations facing great uncertainty regarding what is required under the new law.

There are two primary issues that PERB should clarify with its emergency regulations:

- **Deadline For Demanding Factfinding When No Mediator Is Appointed:** The regulations should add a deadline by which the exclusive representative must request factfinding. Burke Williams & Sorensen suggested a timeline in their November 8, 2011, submission, but the establishment of a clear deadline is more important than the particular length of the deadline. Without any time limit within which the exclusive representative must request factfinding, public employers will be unable to be sure when the mandatory impasse procedures are complete. Without a clear deadline, public agencies at impasse without mediation will assume the risk of determining an adequate period of time within which the union must request factfinding. Public agencies will face the prospect of holding a public hearing regarding the impasse and adopting a Last, Best, and Final Offer as authorized by Government Code Section 3505.7, only to face a *subsequent* demand from the exclusive representative to engage in the lengthy factfinding process. We urge PERB to add the following to its November 14 proposed regulation:

  > 32802
  > "(a)(2) In cases where the parties were not required to participate in mediation and did not agree to do so voluntarily, a request for factfinding may be filed not sooner than 30 days *nor later than 40 days* from the date that either party has served the other with written notice of a declaration of impasse."

- **Clarify Effect Of Deadline On Impasse Hearing Requirement:** The regulations should also provide that if the exclusive representative does not request factfinding within the prescribed timelines, the public agency may proceed to the public hearing required by Section 3505.7 without violating the agency's good faith duty to participate in the impasse procedures, including factfinding. We urge PERB to adopt the following regulation:

  > 32802
  > "(e) If the exclusive representative does not request factfinding within the limits established in Section 32802 of these regulations, upon exhaustion of any applicable impasse procedures, the public agency may, after holding a public hearing regarding the impasse, implement its last, best, and final offer."

PERB can adopt these regulations that will provide the needed procedural certainty without resolving, or taking a position on the question of whether mediation is a necessary precondition to mandated factfinding. Although we are unsure of the precise language required, we believe that PERB could insert in its regulation a statement such as the following:

> "These regulations are intended solely for the purpose of providing procedural guidance to the MMBA covered agencies, in the absence of participation in mediation: (1) the time period within which the employee organization must request factfinding; and (2) when the factfinding timelines begin running. These regulations shall not be given deference by any party or reviewing court as PERB's construction of Government Code Sections 3505.4 - 3505.7 regarding whether participation in mediation is a precondition to requiring factfinding, or whether the receipt of a factfinding report is a precondition to allowing the employer to unilaterally adopt a last, best, and final offer."[1]

Revised MMBA Should Not Delegate Authority To Mediator To Certify Parties To Factfinding

The November 14, 2011, staff discussion draft adds a requirement that an exclusive representative requesting factfinding must submit evidence that the mediator has informed the parties that further mediation proceedings would be futile. This requirement delegates undue authority to the mediator, and has no statutory basis. Unlike Section 3548.1 of the EERA that specifically requires a declaration from the mediator that factfinding is appropriate to resolve the impasse before the matter will be submitted to factfinding, neither AB 646 nor any preexisting provision of the MMBA grants the mediator such authority. As a matter of labor relations policy, many MMBA agencies might chose not to mediate because such a decision would delegate the impasse timeline to a mediator, without providing any administrative appeal or recourse. In addition, adding to the regulations a requirement that an exclusive representative requesting factfinding must submit evidence that the mediator has informed the parties that further mediation proceedings would be futile would grant the mediator more authority than intended by most of the local agencies with regulations involving mediation or by the legislature.

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[1] PERB's factual findings are "conclusive" on reviewing courts as long as those findings are supported by substantial evidence on the record considered as a whole. Government Code Section 3509.5(b). The courts have the ultimate duty to construe the statutes administered by PERB. When an appellate court reviews statutory construction or other questions of law within PERB's expertise, the court ordinarily defers to PERB's construction unless it is "clearly erroneous." See *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575.

Thank you for your assistance in addressing these important matters.

Sincerely,

M. Carol Stevens

M. Carol Stevens
Executive Director

MCS/smc

Altarine Vernon, CALPELRA Board President
Delores Turner, CALPELRA Board Vice President
Ivette Peña, CALPELRA Board Secretary
G. Scott Miller, CALPELRA Board Treasurer
Scott Chadwick, CALPELRA Board Member
Ken Phillips, CALPELRA Board Member
Allison Picard, CALPELRA Board Member
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November 18, 2011

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Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 - 18th Street
Sacramento, CA 95811-4124

Re: PERB's implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm,

Thank you for the opportunity to provide input regarding PERB's efforts to implement AB 646. The confusion created by this poorly drafted piece of legislation is palpable and makes implementation for all parties, including PERB, difficult. We hope that the California Legislature will quickly draft clarifying legislation so that the parties may focus their time and resources on resolving negotiations disputes rather than speculating on and/or litigating confusing legislative provisions.

Attached please find suggested language regarding potential regulations on the factfinding process. We encourage PERB to maintain its practice of focusing regulations on the procedural aspects of practice before the agency, while allowing the adjudicatory process to be used to determine substantive points of law.

As noted in the materials submitted by the law firms of Burke Williams & Sorensen (management) and Leonard Carder (labor), we think it is essential that there be some reasonable time period in which a labor organization has to request factfinding following the use of mediation. To do otherwise, would be inconsistent with the statutory goal of timely resolution of bargaining disputes (See Govt. Code § 3505). We do not agree, however, with BWS, Leonard Carder or PERB's November 14 staff discussion draft, that an exclusive representative has a right to request factfinding even if mediation is not used. The statute, as drafted, does not so state and, in the absence of a clearer indication of statutory intent through clean-up legislation, we think it would be unwise for PERB to speculate as to the Legislature's intent.

We agree with Leonard Carder's suggestion that PERB Regulation 32603 should be clarified such that a public agency's failure to exercise good faith in MMBA-required impasse procedures would be an unfair practice. In fairness, the same process should apply for labor organizations, and so we have included it in proposed Regulation 32604.

We look forward to working with you and the Board regarding the implementation of this new legislation.

If you have any questions regarding the above please do not hesitate to contact us.

Very truly yours,

LIEBERT CASSIDY WHITMORE

Bruce A. Barsook

Bruce A. Barsook

BAB:tp
Enclosure
cc: Partners, Liebert Cassidy Whitmore

32802 Submission of Negotiations Disputes to a Fa ctfinding Panel under MMBA

(a)(1)Not sooner than 30 days after the appointment or selection of a mediator, pursuant either to the parties' agreement or a process required by a public agency's local rules, an exclusive representative may request that the parties' differences be submitted to a factfinding panel, if:

[a] The parties have failed to reach an agreement;

[b] The exclusive representative submits a written request to proceed to factfinding to the public agency and to PERB within 40 days after the appointment or selection of a mediator; and

[c] The request is accompanied by evidence of the date that the mediator was appointed or selected.

(2) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(b) The Board shall, within five (5) working days from the date the exclusive representative submits its request for factfinding, notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a) above, no factfinding panel will be appointed and no further action will be taken by the Board.

(c) For purposes of this section only, "working days" shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(d) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

32803 Appointment of Person to Chair Factfinding Panel under MMBA

(a) Within five days after the request for factfinding is submitted pursuant to section 32802, the parties will notify the Board of their selection of panel members for the factfinding panel.

(b) Within five days of the selection of the panel members by the parties, the Board will notify the parties that it will select and appoint the chairperson unless notified by the parties that they have agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. The Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties, by alternate strike or other methodology of their choice, select one of the seven persons or someone else to serve as chairperson.

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the submission of a request for factfinding

32603. Employer Unfair Practices under MMBA.
It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

32604. Employee Organization Unfair Practices under MMBA.
It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

JOAN F. DAWSON
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OFFICE OF
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November 18, 2011

VIA ELECTRONIC AND U.S. MAIL

Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Proposed Regulations Related to Assembly Bill 646

Dear Mr. Chisholm:

This letter is in response to your request for written comments related to the Public Employment Relations Board (PERB)'s consideration of emergency rulemaking to implement California Assembly Bill 646 (2011-2012 Reg. Session) (Assembly Bill 646), which was recently adopted by the California Legislature and signed by the Governor.

As you are aware, when a statute empowers an administrative agency to adopt regulations, the regulations must be consistent, not in conflict with the statute. *Ontario Community Foundation, Inc. v. State Board of Equalization*, 35 Cal. 3d 811, 816 (1984) (quotations and citations omitted). There is no agency discretion to promulgate a regulation that is inconsistent with the governing statute. *Id.* The California Supreme Court has stated, "Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations." *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967)).

As attorneys for the City of San Diego, it is our view that there is no language in Assembly Bill 646 that mandates factfinding when a public agency employer and a recognized employee organization are at impasse and they do not mutually agree to mediation.

Assembly Bill 646 left intact California Government Code (Government Code) section 3505.2, which makes mediation between the parties discretionary, not mandatory. Section 3505.2 provides, in pertinent part, with italics added:

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together *may agree* upon the appointment of a mediator mutually agreeable to the parties.

Cal. Gov't Code § 3505.2.

"May" is permissive, not mandatory. Cal. Gov't Code § 14.

Under Assembly Bill 646, if the parties agree to mediation and the mediation does not result in settlement within thirty days after the mediator's appointment, then an employee organization may request that the parties' differences be submitted to factfinding. Assembly Bill 646 does not mandate factfinding where mediation is not agreed upon by the parties, and PERB may not extend a factfinding mandate or authorization beyond the limited circumstances provided in the bill.

The language of the newly-adopted Government Code section 3505.7 supports this interpretation. Section 3505.7, which becomes effective in January 2012, provides, in pertinent part, with italics added:

> After *any applicable* mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties . . . a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding.

If mediation and factfinding procedures are not applicable, then the timing of the submission of the factfinders' written findings is not relevant, and a public agency, not required to proceed to interest arbitration, may implement its last, best, and final offer after holding a public hearing regarding the impasse.

Assembly Bill 646 did not modify the language of Government Code section 3507, which provides, in part, that:

> (a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

> The rules and regulations may include provisions for all of the following:
>
> . . . .
>
> (5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

Cal. Gov't Code § 3507.

Assembly Bill 646 also did not modify Government Code section 3500(a), which provides, in part, that nothing in the Meyers-Milias-Brown Act (MMBA) "shall be deemed to supersede . . . the charters, ordinances, and rules of local public agencies . . . which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies that provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter." Cal. Gov't Code § 3500(a).

The City of San Diego has a specific impasse procedure that has been negotiated with the City's recognized employee organizations in accordance with the MMBA, and approved by the San Diego City Council (City Council). The impasse procedure does not mandate or even discuss mediation, and mediation has not been used in the past in the City.

The City's impasse procedure states that if the meet and confer process has resulted in an impasse, either party may initiate the impasse procedure by filing with the City Council a written request for an impasse meeting and a statement of its position on all disputed issues. San Diego City Council Policy 300-06, art. VII, Employee-Employer Relations, at 10 (amended by San Diego Resolution R-301042 (November 14, 2005)). An impasse meeting must then be held to identify and specify in writing the issue or issues that remain in dispute, and to review the position of the parties in a final effort to resolve such disputed issue or issues. *Id.* If the parties do not reach an agreement at the impasse meeting, impasses must then be resolved by a determination of the City's Civil Service Commission or the City Council after a hearing on the merits of the dispute. *Id.* Determination of which body resolves a particular impasse is dependent upon the subject matter of the impasse and applicable provisions of the San Diego Charter and San Diego Municipal Code. *Id.*

It has been suggested by others that Assembly Bill 646 leaves unclear the applicability of factfinding when the public agency employer and employee organization do not agree to mediation. It is this Office's view that the legislation is clear on its face: factfinding is not required when the negotiating parties do not agree to mediation. In our opinion, any PERB regulation that mandates factfinding where it is not required would overstep PERB's rulemaking authority.

Thank you for your consideration of this comment.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By Joan F. Dawson
Joan F. Dawson
Deputy City Attorney

JFD:ccm
cc: Patrick Whitnell, General Counsel, League of California Cities
(*via electronic and U.S. Mail*)

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November 18, 2011

By E-Mail

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Re: Regulations Implementing AB 646

Dear Ms. Murphy and Mr. Chisholm:

On behalf of AFSCME District Council 36, SEIU Local 721, LIUNA Local 777, and IUOE Local 501, we offer the following suggestions regarding the proposed regulations implementing AB 646.

1. **Proposed § 32802**.

At the meeting we attended in Glendale on November 10, the union representatives who spoke expressed the view that factfinding should be available whether or not the bargaining parties have participated in mediation. On the management side, opinion on this point was split. For two reasons, we urge you to revise the proposed regulation on this point in order to permit the parties to join this issue at the time particular parties invoke the regulation, rather than preclude at the outset any possibility of factfinding where no mediation has occurred.

First, for most management and union representatives, including the management representative from the City of Long Beach who expressed his views at the meeting, a predictable process is the highest priority. As he explained, for negotiations that reach impasse following January 1, the employer needs to know whether factfinding must be utilized: placing negotiations on hold for many months while litigation runs its course, or running the risk that a rejection of factfinding later results in an unfair practice determination, are unattractive options. Thus, parties who have not first participated in mediation but wish to proceed to factfinding should not be precluded from doing so by the terms of an overly restrictive regulation. On the

other hand, employers who choose to reject factfinding where no mediation has taken place can then take their chances in litigation.

Addressing the merits of requiring factfinding even where no mediation has taken place, adopting a rule that conditions factfinding on prior participation in mediation would have an effect surely not intended by the Legislature. One must presume that in enacting AB 646, the Legislature intended to strengthen the impasse resolution process, not weaken it. But under a narrow interpretation of AB 646, an employer who might otherwise be willing to mediate, but who wishes to oppose factfinding, will also oppose mediation. To do otherwise would necessarily bind that employer to participate in factfinding. Thus, an amendment that was designed to strengthen the impasse resolution process, by adding factfinding as a second, required element, will serve, for some employers, to eliminate the impasse resolution process altogether.

For these reasons, we propose the following substitute language for § 32802:

> In the case of impasse, an exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request may be filed (1) at any time where there is no agreement to mediate, or (2) not sooner than 30 days after the appointment of a mediator.

2. **Proposed § 32804**.

Of the options presented by PERB staff, we prefer Option 2, which entails submission of a list of seven names to the parties, from which the parties may then strike. Over the course of many years, PERB and an advisory panel have vetted applicants for its list of neutrals qualified to conduct factfinding, and we understand that PERB staff intends to expand that list in light of the enactment of AB 646. Seasoned labor relations advocates should be permitted to make their best choice for the particular circumstances they face from among a list seven vetted factfinders, rather than be assigned a single, randomly-chosen individual.

Very truly yours,

Glenn Rothner

GR/vc

IEDA

2200 Powell Street, Suite 1000, Emeryville, California 94608

November 17, 2011

Mr. Les Chisholm
Division Chief
California Public Employee Relations Board

Delivered via electronic mail to

Dear Mr. Chisholm:

Thank you for the opportunity to review the drafts of PERB's proposed emergency regulations on AB 646. Following are comments for your consideration:

At the November 8, 2011 meeting there were several questions regarding the process of selecting a fact-finder and timelines for completing the fact-finding within the 30 days identified in the legislation. It is our understanding that when PERB appoints a fact-finder, they get assurance from the fact-finder that the 30-day requirement can be met.

The concern is that fact-finders may not be available when needed, thus extending the process for weeks or months. It would be helpful to include in the regulations some type of provision for the parties to select a fact-finder who is available or able to complete the fact-finding within a specific time frame.

On the minimum requirements of a public hearing regarding the impasse under 3505.7, it would be helpful to note that in instances where agencies have duly adopted impasse procedures in place via their Employer-Employee Relations (EER) resolution, that the agency's procedures prevail if they do not specifically conflict with the requirements of the new legislation.

As noted, the legislation is ambiguous on whether mediation is a mandatory step before fact-finding. The consensus seemed to be that this issue would be settled either through litigation or

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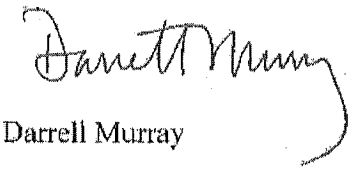
additional legislation. To the extent PERB could suggest clean-up legislation this option would be preferable to costly litigation.

We appreciate your considering these comments. Please contact me at 510-761-9148 if you have any questions.

Yours very truly,



Darrell Murray

C: Bruce Heid

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REFER TO OUR FILE NO. 83-1

November 17, 2011

Via email lchisholm@perb.ca.gov and U.S. Mail

Suzanne Murphy and Les Chisholm
Public Employment Relations Board
1031 – 18th Street
Sacramento, CA 95811-4124

Re: PERB Staff Discussion Draft dated November 14, 2011 re AB 646 Implementation

Dear Ms. Murphy and Mr. Chisholm:

Since we submitted our initial comments on this matter, the PERB staff has revised its draft proposed regulations with respect to the events triggering an employee organization's request for factfinding. (See Staff Discussion Draft Re AB 646[November 14 Version], posted on PERB's website.) We are pleased that the revised draft recognizes the legislative intent to provide subject employee organizations with the absolute right to request factfinding, irrespective of whether any mediation is held. The initial draft proposed regulations issued by the PERB staff appeared only to recognize mediation as the trigger for a factfinding request, a position which we viewed as contrary to the legislative intent and as inviting protracted litigation to seek clarification. Accordingly, we support the PERB staff's November 14 draft, which clarifies that an employee organization may request factfinding following appointment of a mediator ***or*** following written notice of a declaration of impasse.

Once it is clarified that factfinding may be triggered by either mediation or a declaration of impasse, the timelines set forth in the November 14 staff discussion document make sense, as they track the statute itself, which in essence provides for a 30-day period - during which the parties may avail themselves of the assistance of a mediator – to focus their attempt to reach agreement prior to having to change course and prepare for an adversarial factfinding proceeding. (See Government Code § 3505.4(a), providing for a 30-day period to "effect settlement of the controversy," prior to requesting factfinding.) Of course, and perhaps it goes without saying, any time limit set by the regulations would be subject to mutual modification or extension.

We appreciate your continued consideration of these comments and your close attention to these important matters.

Very truly yours,

LEONARD CARDER, LLP

By: _____
Margot Rosenberg & Ari Krantz

LEONARD CARDER, LLP

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November 14, 2011

Suzanne Murphy and Les Chisholm
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Re: Implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm:

We commend PERB for its proactive, thoughtful and transparent efforts in undertaking the task of implementing AB 646, including holding meetings in which you presented several alternative drafts of potential emergency regulations that arose from preliminary agency staff work on this topic. Pursuant to your request, we submit the following comments on issues pertaining to AB 646, including comments on your alternative drafts (hereafter, "the PERB draft proposals") and comments on the draft regulations submitted by Burke, Williams & Sorensen (hereafter "the Burke draft proposals").

I. Events Triggering an Employee Organization's Request for Factfinding

Earlier drafts of AB 646 -- prior to the final draft that was enacted -- included provisions providing an absolute right to request mediation. When those mediation provisions were struck from the bill, the drafters simply neglected to make the necessary corresponding alteration to the opening sentence of §3505.4 (a). In other words, the drafters intended to eliminate any absolute right to mediation, but intended to leave intact the employee organization's absolute right to request factfinding, irrespective of whether any mediation is held. The drafters' oversight is evident not only from comparing successive versions of the bill, but also from the abrupt way in which "the mediator" and his or her appointment appear, devoid of any context, at the outset of the enacted bill.

This conclusion is widely shared by many PERB constituents, in both labor and management.[1] Indeed, while the Burke draft proposals suggest that only a court or the Legislature can have the final word on the meaning of the statute, the Burke draft proposals also suggest that PERB adopt regulations clarifying that an employee organization may request fact-finding following appointment of a mediator ***or*** following written notice of a declaration of impasse ***or*** following notice of a public hearing on impasse. (Burke proposals, §I).

We concur with §I of the Burke draft proposals. Indeed, §I of the Burke proposals makes more sense than either of the PERB drafts for proposed Regulation 32802. Both of the PERB draft proposals leave ambiguous whether an employee organization may request factfinding in those cases in which there is no mediation. Leaving that crucial issue ambiguous would render the regulations terribly uncertain and difficult to interpret, and would create a virtual certainty that numerous charges would be filed by many different parties, all pertaining to the same issue. If, by contrast, PERB adopts §I of the Burke draft proposals, then the parties will be clear as to PERB's position, and it would be up to any party disagreeing with that position to seek additional legislation or court intervention.

II. Procedures for Appointing a Factfinding Panel Chairperson

The PERB draft proposals include three possible alternatives for the method of selecting a chairperson under proposed Regulation 32804 (b). Option Two is the best alternative. Pursuant to Option Two, the Board would submit seven names to the parties drawn from the agency's list of factfinders and the Board would thereafter designate by random selection one of those seven persons to serve as chair, unless the parties select one by alternate strikes or another methodology of their choice. This procedure is preferable for several reasons. First, it is transparent, unlike Option One, which does not provide any insight as to what methodology PERB would use. Moreover, Option Two allows PERB to retain control over the process, rather than involving a second agency as would be the case if Option Three were adopted. Given that PERB already appoints factfinders under HEERA and EERA, it makes abundant sense for the agency to take on an analogous role under the MMBA. Furthermore, by keeping control of the process, PERB will be able to address any obstacles that arise, such as an undersupply of appropriate chairpersons or questions that may arise regarding qualifications, fees, etc.

We encourage PERB to make the complete list of MMBA factfinders public on the PERB website or available to all PERB constituents upon request. This will help to facilitate mutual agreement in the greatest number of cases, even prior to the agency having to send the parties a list of seven potential chairpersons. We also encourage PERB to widely solicit applications for the list, particularly given the very different compensation arrangement provided for under AB 646 and the substantial experience that many interest arbitrators have gained in assisting employers and unions in education, transit, safety and other areas.

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[1] While it is certainly possible to construct the statute differently if one wanted to do so, there is no other construction that makes sense of the language used, legislative history, and drafters' intent.

III. Public Hearing Regarding Impasse

We largely concur with §V of the Burke draft proposals, concerning impasse hearings. However, there should be two additions. First, for clarity, the word "including" should be replaced by the phrase "including but not limited to." Second, an additional sentence should be added as follows: "The public hearing shall be conducted pursuant to the applicable legal requirements, if any, that otherwise govern public meetings of the public agency's governing body."

IV. Regulation 32603

We have one final recommendation, to make sure it is clear that violation of AB 646 constitutes an unfair practice. This last addition to the agency's regulations perhaps need not be included in the emergency regulations, since in the interim Regulation 32603(g) would surely be interpreted to include any violation of AB 646. However, for the sake of clarity, PERB should in due course amend Regulation 32603(e) as follows:

> (e) Fail to exercise good faith while participating in any impasse procedure <u>that is mutually agreed to by the parties, or that is required under this Chapter or</u> by any local rule adopted pursuant to Government Code section 3507.

We appreciate your consideration of these comments and your attention to these important matters.

Very truly yours,

LEONARD CARDER, LLP

By: _____
Ari Krantz and Margot Rosenberg

SUGGESTED PERB REGULATIONS
For
Implementation of Amendments to MMBA by AB 646
Government Code Sections 3505.4 and 3505.7

Submitted by
William F. Kay, M. Carol Stevens, and Janet Cory Sommer

November 8, 2011

I. *Issue: Within what time limit must an employee organization request factfinding under Subsection 3505.4(a)?*

Suggested Regulation:

The employee organization must request factfinding under Subsection 3505.4(a):

(1) Within 40 days of the appointment of the mediator; or

(2) If no mediator has been appointed:

a. Within 40 days from the date of formal written notice of a declaration of impasse by either party; or

b. Within 10 days from the public employer's formal written notice of a public hearing on the impasse as required by Subsection 3505.7; whichever period is longer.

II. *Issue: Once a reasonable time limit has been established for an employee organization to request factfinding as above, what are the triggering events that begin the running of the time limit for requesting factfinding and for starting the factfinding statutory timelines?*

Suggested Regulation (in addition to I. above):

(3) "Appointment of a mediator" as stated in Subsection 3505.4(a) shall mean the date that the parties have been notified in writing of the assignment of a specific mediator, or have written proof of the selection of, and acceptance by a specific mediator to conduct the mediation.

(4) "Unable to effect a settlement of the controversy within 30 days" shall mean that no manifest settlement has been reached within 30 calendar days after the appointment of the mediator.

(5) "May request that the parties' differences be submitted to factfinding panel" shall mean that the employee organization must formally notify PERB and the public agency in writing of the request for factfinding.

III. *Issue: If the negotiating parties do not agree to mediation under Section 3505.2, is the employer excused from factfinding under Subsection 3505(a)?*

No suggested regulation. This may be resolved by legislative amendment or litigation.

IV. *Issue: Regarding the minimum ten-day period referenced in Section 3505.7 between the submission of the factfinding panel's report and the public employer's release of the report pursuant to Section 3505.5.*

(1) How should this release be accomplished?

(2) Should the public agency allow time for the parties to meet during the 10-day period before releasing the report?

Suggested Regulations: Regulations similar to those established for the EERA should clarify the manner of the report release. In addition, PERB should establish regulations preventing premature release by either party by requiring the parties to provide the opportunity to meet and discuss the report before its release.

V. *What are the minimum requirements of a public hearing regarding the impasse under 3505.7?*

Suggested Regulation:

A hearing on the impasse shall be properly noticed and conducted by the public employer and shall include: (a) the release the factfinding report, if any; (b) a brief summary of the elements of the impasse; and (c) a copy of the last, best and final offers, if any; and (d) the opportunity for the public to address the public employer regarding the elements of the impasse.

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ASSISTANT
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PATRICIA J. HUBER

ANTONIO R. VILLARAIGOSA
MAYOR

November 7, 2011

Edna E.J. Francis, Chairperson
Los Angeles City Employee Relations Board
200 North Main Street, Suite 1100
Los Angeles, CA 90012

RE: ASSEMBLY BILL 646

Dear Ms. Francis:

The California Legislature recently adopted revisions to the Meyers-Milias-Brown Act (MMBA) which will take effect on January 1, 2012. Specifically, Assembly Bill (AB) 646 added California Government Code Sections 3505.5 and 3505.7, and repealed and added Section 3505.4 of the MMBA. The new procedures mandate particular time schedules for the mediation process and fact finding; standards for consideration by the fact finders; distribution and publication of the fact finder's report; and a public hearing regarding the impasse prior to implementation of the employer's last, best and final offer.

Based on concerns that the provisions of AB 646 could impact employee relations in the City of Los Angeles, I asked the Office of the City Attorney to review the provisions of AB 646 and opine as to their applicability to the City's processes under the Employee Relations Ordinance (ERO). I wanted to share with you and your colleagues on the Employee Relations Board (ERB) that the City Attorney's Office has determined that no changes to the ERO are necessary based on the recently-enacted changes to the MMBA.

The City already has a comprehensive regulatory system in its ERO, Administrative Code, and ERB Rules and Regulations, that substantially achieve the same procedures and ends as the new legislation. In addition, Government Code Section 3509(d) specifically grants the City of Los Angeles permission to utilize its own employee relations commission and to enact its own procedures and rules, consistent with and pursuant to the policies of the MMBA. Therefore, no changes to the City's existing processes or procedures are mandated by the changes to MMBA enacted under AB 646, and the City Attorney's Office recommends that the City continue to follow the dictates of the ERO, and the regulations promulgated there under, just as it has always done.

Please contact me or Maritta Aspen of my staff at (213) 978-7641 or Maritta.Aspen@lacity.org if additional information is required.

Very truly yours,

Miguel A. Santana
City Administrative Officer

MAS:MHA:08110078

Cc: Zna Houston, City Attorney
Janis Barquist, City Attorney
Robert Bergeson, ERB

Draft PERB regulation to implement AB 646
Submitted by Don Becker

Renumber current 32800 to 32805 and insert:

32800 Factfinders Consideration of Criteria Set Forth in 3505.4(d)

The Factfinders shall consider, weigh, and be guided by the criteria set forth in 3505.4(d) only to the extent that such information has been exchanged by the parties and has been used to endeavor to reach agreement. The Factfinders, may consider such information even if it has not been exchanged by the parties if, in the judgment of the Factfinders, good and sufficient reasons are presented for such omission.

CALPELRA
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November 2, 2011

Anita I. Martinez
Chair
Public Employment Relations Board
1031 18th Street
Sacramento, California 95811-4124

Re: Support For Regulatory Action Prior To Effective Date Of AB 646 Factfinding (MMBA)

Dear PERB Chair Martinez:

The California Public Employers Labor Relations Association (CALPELRA) and its Board of Directors support the Public Employment Relations Board's interest in identifying issues that require regulatory action prior to the January 1, 2012, effective date of AB 646. The lack of clarity in some aspects of AB 646's amendments to the MMBA has created substantial uncertainty among MMBA jurisdictions. CALPELRA and its Board of Directors would like to avoid unnecessary and costly unfair practices and related litigation caused by the imprecision of the statute. We are confident that well designed PERB regulations could provide the necessary clarity and help MMBA jurisdictions and their employee representatives avoid disputes.

CALPELRA is a professional, nonprofit California association established in 1975, comprised of public sector professional management representatives responsible for carrying out the labor relations/human resource programs for their jurisdictions. CALPELRA's members work in city, county, or state government, school districts, state university systems, trial courts, and special districts, representing management in employee relations, bargaining, and other activities involving public employee unions and associations. Members also include lawyers and private consultants exclusively serving management in all facets of employer-employee relations. CALPELRA trains the best and brightest of California's labor and employee relations professionals in its Labor Relations Academy, and CALPELRA's Labor Relations Academy Master (CLRM) certification has become a desired employment qualification in many California public agencies. Many members of bargaining units attend CALPELRA's trainings and Annual Conferences.

In their role as professional management representatives, hundreds of CALPELRA members negotiate under the Meyers-Milias-Brown Act ("MMBA"), and will be the agency negotiators implementing AB 646's amendments to the MMBA. To make the implementation of AB 646 more successful, CALPELRA would like to help PERB identify issues that require regulatory action, and share its members' expertise and experiences with PERB to help formulate PERB's regulations.

CALPELRA is pleased that PERB is holding meetings on November 8 and November 10, 2011. CALPELRA Board members, its Executive Director, and its Labor Relations Academy Director plan to attend and participate in the November 8 meeting in Oakland.

Although CALPELRA has not formulated precise positions on potential regulations, we provide in advance of the November 8 and 10 meetings the attached questions and descriptions of areas of the amended MMBA that lack sufficient clarity. We hope that PERB will address these questions in PERB's rule making capacity. See Attachment A.

When PERB begins the rule making process, CALPELRA will participate by offering suggestions and comments on specific proposed rules and regulations.

CALPELRA would like to attend PERB's Advisory Committee Meeting scheduled for November 29, 2011, but that date conflicts with CALPELRA's full day training on AB 646, Labor Relations Academy entitled, "The Road Ahead: New Impasse Issues Impasse Declaration, Mediation, Fact-Finding, Post-Fact-Finding, Revival Of Negotiations, Unilateral Adoption." CALPELRA'S 2011 Annual Conference is schedule for November 30 through December 2, 2011. PERB Board members and staff are welcome to attend our Academy on November 29. CSMCS has registered a representative, and will be learning about our members' preparation for implementing AB 646.

CALPELRA understands that some of our attached questions could be addressed through legislative action and clarifying amendments to the MMBA. Legislation will not be enacted before January 1, 2012, when AB 646 becomes effective. For that reason, CALPELRA supports and encourages PERB's interest in considering regulatory action prior to the implementation of AB 646.

As soon as practical, CALPELRA will prepare and submit additional and more precise questions. Thank you for considering CALPELRA's initial questions and more detailed questions.

Sincerely,

By _____
Altarine Vernon
President, CALPELRA

AV/rjo

cc: Sally M. McKeag, PERB Board Member
Alice Dowdin Calvillo, PERB Board Member
A. Eugene Huguenin, PERB Board Member
Suzanne Murphy, PERB General Counsel
Les Chisholm, PERB Division Chief
CALPELRA Board Members
Paul Roose, California State Mediation and Conciliation Service
M. Carol Stevens, CALPELRA Executive Director
William F. Kay, CALPELRA Labor Relations Academy Director

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ATTACHMENT A

CALPELRA's Initial Questions About The Implementation Of AB 646

A. Regarding Section 3505.4(a)

1. Is mediation a prerequisite for factfinding?

   - The first paragraph of new Section 3505.4 (a) states, "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel." Section 3505.2 and cases interpreting this statute make it clear that mediation is not required, but the negotiating parties may mutually agree to use mediation. Is factfinding required if the parties do not agree to use mediation?

   - May an agency avoid factfinding by not engaging in mediation?

2. If factfinding is required even without mediation, in the absence of a mediator, what event(s) would trigger the running of the 30-day period? Would the 30-day period be triggered by: (1) the declaration of impasse by one or both parties; (2) a determination by PERB that a bona fide impasse exists; or (3) some other event?

3. If factfinding is required even without mediation, and the agency's local rules involve an impasse procedure that does not mandate mediation, must those impasse procedures be exhausted before the start of the factfinding timelines contained in Section 3505.4? (Please note that the language of previous Section 3505.4 was deleted that stated, "[I]f after meeting and conferring in good faith, and impasse has been reached between the public agency and the recognized employee organization, and impasse procedures where applicable, have been exhausted....")

4. If the union does not request the submission of the dispute to factfinding shortly after the 30-day time limit, does the union waive the right to engage in factfinding for the current round of negotiations? How long could the union wait before requesting factfinding without waiving the right to factfinding? Can the factfinding request be revived if the negotiations are lawfully revived by changed circumstances, or does the employee organization waive the right in the initial phase sometime shortly after the 30-day period?

5. What constitutes the 30-day period that begins the factfinding timeline?

   - If a mediator is appointed by agreement or under local rules, what constitutes "30 days after his or her appointment" that begins the factfinding timeline under Section 3505.4?
   - Is it the date a notice is sent to, or received by, the parties from the California State Mediation and Conciliation Service ("CSMCS") of the appointment of a particular mediator?
   - Are the agency and the union required to use the CSMCS to appoint a mediator, or can they mutually select a mediator without consulting or using the CSMCS?
   - If the parties select a mediator that is not appointed by the CSMCS, what event would trigger the timeline?

6. Who or what determines that a mediator has been "unable to effect settlement of the controversy within 30 days"?

   - Is this determination a simple factual determination that 30 days have passed and no tangible settlement exists?
   - Could PERB or CSMCS or the parties make a determination in less than 30 days that a bona fide deadlock exists?
   - Will the determination that a mediator has been "unable to effect settlement" within 30 days require the mediator's certification or a PERB agent's factual determination? If the PERB agent's factual determination is required, will the agent consult with CSMCS, an individual mediator, and/or the parties?

7. Absent mutual agreement to extend the timelines, what should be the consequences, if any, for failure to meet the defined deadlines? Are these jurisdictional or hortatory?

B. <u>Regarding Section 3505.4(c)</u>

8. Section 3505.4(c) requires that the various local and state agencies "shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel." Will the limits and procedures for any information requests and subpoenas be the same as established for factfinding under the EERA?

9. Does the general charge to the factfinding panel to "make inquiries and investigations, hold hearings, and take any other steps it deems

appropriate..." allow for a brief mediation step or "med-arb" process frequently used in interest arbitration?

10. Will PERB establish guidelines and internal timelines that would place limits on the amount of time dedicated to such a process?

C. **Regarding Sections 3505.5(a) And 3505.7**

11. When read together, Section 35055(a) and 3505.7 require that "[T]he public agency shall make these findings and recommendations publically available within 10 days after receipt..." and that "... no earlier that 10 days after the fact-finders' written findings of fact and recommended terms of a settlement have been submitted to the parties ... a public agency ... may ... after holding a public hearing regarding the impasse, implement its last, best, and final offer." Will PERB apply the same regulations for this post-factfinding process as established for the EERA?

D. **Overall Application Of The Recent Amendments To Sections 3505.4 And 3505.5**

12. To what extent should the local agency's rules be allowed to define the access to and the process of factfinding if those rules are adopted under Section 3507(a)(5)?

13. Will PERB establish some regulatory guidelines, or will these boundaries between local impasse rules and PERB's be established through a case-by-case unfair practice process?

14. Will PERB exercise its jurisdiction over the appointment of fact-finders and enforcement of this process for peace officers disputes, even though Section 3511 excludes PERB's jurisdiction over peace officers as defined in Section 830.1 of the Penal Code?

15. Although strictly an administrative process question, will PERB attempt to inform the community of labor relations neutrals regarding the opportunities to serve as a factfinding panel chair?

16. Will PERB keep a list of those neutrals who have expressed interest to serve as a factfinding chair not appointed by PERB but mutually selected by the parties under Subsection 3505.4(b)?

32802. Appointment of a Factfinder Under MMBA.

(a)(1) Not sooner than 30 days, but no more than 40 days, after the appointment or selection of a mediator, pursuant either to the parties' agreement **to mediate** or a **mediation** process required by a public agency's local rules, an exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by documentation of the date on which a mediator was appointed or selected~~, and shall also be accompanied by evidence that the mediator has informed the parties that further mediation proceedings would be futile.~~

(2) In cases where the parties were not required to participate in mediation and did not agree to do so voluntarily, **in the absence of local rules, an employee organization's** request for factfinding ~~may be filed not sooner than 30~~ **shall be filed within 10** days from the date that either party has served the other with written notice of a declaration of impasse.

(3) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(b) The Board shall, within five working days from the date filed, notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a), above, no further action shall be taken by the Board.

(c) "Working days," for purposes of this Section only, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(d) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under MMBA.

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In each case where the Board appoints the chairperson, the Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties, by alternate strike or other methodology of their choice, select one of the seven persons to serve as chairperson. **The Board shall certify to the parties that the Board-appointed chairperson has agreed to start the factfinding proceedings within 10 days of appointment.** In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

EMERGENCY

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2011-1219-01 E

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2011 DEC 19 AM 10:42

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Public Employment Relations Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)
Factfinding under the Meyers-Milias-Brown Act

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT: 32802, 32804

AMEND: 32380, 32603, 32604

REPEAL:

TITLE(S): 8

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☒ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify)
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☐ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☒ Effective other (Specify) January 1, 2012

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Les Chisholm	(916) 327-8383	(916) 327-6377	lchisholm@perb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE: 12.19.11

TYPED NAME AND TITLE OF SIGNATORY
Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

PROPOSED TEXT -- REGULATION CHANGES RELATED TO IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
(New language shown in *italics*.)

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code, and Section 99561(f), Public Utilities Code. Reference: Sections *3505.4,* 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code, and Section 99561(j), (m), Public Utilities Code.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, *3505.4, 3505.5, 3505.7,* 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

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(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

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32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

FINDING OF EMERGENCY

The Public Employment Relations Board finds that an emergency exists and that proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of a newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA) would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Specific Facts Showing the Need for Immediate Action

As a result of the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012, the MMBA, the collective bargaining statute applicable to local governments (cities, counties, and special districts) in California, will provide for a mandatory impasse procedure—factfinding before a tripartite panel—upon the request of an exclusive representative where the parties have not reached a settlement of their dispute. PERB will be responsible for the appointment of the neutral chairperson of the factfinding panel unless the parties mutually agree upon the selection of the chairperson. This new legislation and the duties imposed on PERB under it require amendments to existing regulations as well as the adoption of new regulations in order to fully implement the legislation and PERB's role.

The MMBA has not previously mandated the use of any impasse procedures with respect to negotiations between local agencies and unions representing their employees. The current regulations of the Board do not provide for the filing and processing of requests for factfinding under the MMBA. These legislative changes potentially affect hundreds of thousands of public employees in California, their employers, and the employee organizations that represent employees under the MMBA. PERB began receiving inquiries from public employers, employees and employee organizations, who are potentially affected by this new legislation, as soon as the legislation was chaptered. Public meetings were promptly convened by PERB in Northern and Southern California to discuss the legislation and the possible adoption of regulations, both of which were very well attended. The attendees included more than 130 representatives of employers and employee organizations, including numerous law firms that represent hundreds of local agencies and employee organizations that themselves represent multiple bargaining units within local government agencies. Extensive written comments and suggestions were received by PERB in response to the discussions at those meetings and the "discussion drafts" circulated by PERB staff.

In order that the procedural and substantive rights of employers, employees and employee organizations are protected, the Board finds that there exists an emergency need to adopt new regulations providing for the filing and processing of requests for factfinding under the MMBA, and to amend other existing regulations where necessary to conform to newly adopted regulations. In so doing, the Board has attempted to distinguish between those changes that are necessary to the immediate implementation of the statute as amended, and those areas that may be identified as requiring further regulations as the Board and the parties acquire experience with the provisions of the amended statute.

conform this section to the text of proposed Section 32802 with regard to the appealability of Board agent determinations as to the sufficiency of a request for factfinding under the MMBA. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA.

Section 32603 defines employer unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Section 32604 defines employee organization unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. Where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well

as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17561: None.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings on federal funding to the state: None

Cost impact on private persons or directly affected businesses: None

Significant adverse economic impact on business including the ability of California businesses to compete with businesses in other states: None

Significant effect on housing costs: None

The proposed regulations will not affect small business because they only affect public employers and public employees.

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-3198
Fax: (916) 327-6377

December 9, 2011

NOTIFICATION OF PROPOSED EMERGENCY REGULATORY ACTION

Subject: Implementation of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012—Factfinding

The Public Employment Relations Board (PERB) is proposing to adopt emergency regulations implementing the newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA).

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency action to OAL, OAL shall allow interested persons five (5) calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. Upon filing, OAL will have ten (10) calendar days within which to review and make a decision on the proposed emergency rules. If approved, OAL will file the regulations with the Secretary of State, and the emergency regulations will become effective for one hundred and eighty (180) days. Within the 180-day effective period, PERB will proceed with a regular rulemaking action, including a public comment period. The emergency regulations will remain in effect during this rulemaking action.

Attached to this notice is the specific regulatory language of PERB's proposed emergency action and Finding of Emergency.

You may also review the proposed regulatory language and Finding of Emergency on PERB's website at the following address: http://www.perb.ca.gov.

If you have any questions regarding this proposed emergency action, please contact Les Chisholm at (916) 327-8383.

STATEMENT OF CONFIRMATION OF MAILING OF FIVE-DAY EMERGENCY NOTICE
(Cal. Code Regs., tit. 1, § 50(a)(5)(A))

The Public Employment Relations Board sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulation to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).

State of California
Office of Administrative Law

In re: **Public Employment Relations Board** **Regulatory Action:** **Title 8, California Code of Regulations** **Adopt sections: 32802, 32804** **Amend sections: 32380, 32603, 32604** **Repeal sections:**	**NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION** **Government Code Sections 11346.1 and 11349.6** **OAL File No. 2011-1219-01 E**

The Public Employment Relations Board (PERB) is adopting two sections and amending three sections in Title 8 of the California Code of Regulations. This emergency rulemaking is the result of AB 646 (CH 680, Stats. 2011) that provides for a mandatory impasse procedure if requested when the parties have not reached a settlement of their dispute following mediation. These regulations establish the impasse procedure and the timelines for the procedure.

OAL approves this emergency regulatory action pursuant to sections 11346.1 and 11349.6 of the Government Code.

This emergency regulatory action is effective on 1/1/2012 and will expire on 6/30/2012. The Certificate of Compliance for this action is due no later than 6/29/2012.

Date: 12/29/2011

Peggy J. Gibson
Staff Counsel

For: DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director

Original: Anita Martinez
Copy: Les Chisholm

State of California
Office of Administrative Law

In re: Public Employment Relations Board Regulatory Action: Title 8, California Code of Regulations Adopt sections: 32802, 32804 Amend sections: 32380, 32603, 32604 Repeal sections:	NOTICE OF APPROVAL OF EMERGENCY REGULATORY ACTION Government Code Sections 11346.1 and 11349.6 OAL File No. 2011-1219-01 E

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Peggy J. Gibson
Staff Counsel

For: DEBRA M. CORNEZ
Assistant Chief Counsel/Acting Director

Original: Anita Martinez
Copy: Les Chisholm

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATION SUBMISSION EMERGENCY

(See Instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2011-1219-01E

For use by Office of Administrative Law (OAL) only

2011 DEC 19 AM 10:45

OFFICE OF ADMINISTRATIVE LAW

2011 DEC 29 PM 2:07

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY: Public Employment Relations Board

AGENCY FILE NUMBER (If any):

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Factfinding under the Meyers-Millas-Brown Act

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S):

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	
	ADOPT: 32802, 32804
	AMEND: 32380, 32603, 32604
TITLE(S): 8	REPEAL:

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
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Les Chisholm	(916) 327-8383	(916) 327-6377	lchisholm@perb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE: [signature] DATE: 12.19.11

TYPED NAME AND TITLE OF SIGNATORY: Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

DEC 29 2011

Office of Administrative Law

PROPOSED TEXT -- REGULATION CHANGES RELATED TO
IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
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PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
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December 28, 2011

Peggy J. Gibson, Staff Counsel
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Subject: Response to Comments Received about Proposed Emergency Regulations 2011-1219-01E

Dear Ms. Gibson:

By letter dated December 22, 2011, the City Attorney for the City of San Diego states that the Office of Administrative Law (OAL) should disapprove the emergency regulations submitted by the Public Employment Relations Board (PERB), "to the extent they mandate factfinding in the absence of mediation, or, in the alternative, requests that the proposed regulations be clarified for jurisdictions that do not engage in mediation by mutual agreement or by the terms of their negotiated impasse procedures." In essence, the City Attorney for the City of San Diego asserts that PERB's emergency regulations are not consistent with Assembly Bill 646 (AB 646) and that they do not provide clarity to the public agencies subject thereto.

PERB previously considered the concerns expressed by the City Attorney for the City of San Diego, but rejected the objections raised based on the language of the Meyers-Milias-Brown Act (MMBA), as amended by AB 646, as well as evidence of legislative intent, and the comments submitted by most other interested parties. OAL should consider all of the issues involved and the arguments in support of PERB's emergency regulations from both representatives of local government agencies (employers) and representatives of employee organizations (labor or exclusive representatives)—and approve the emergency regulations.

First, PERB agrees that nothing in AB 646 changes the voluntary nature of mediation under the MMBA. (See Gov. Code, § 3505.2.) Nor do the proposed emergency regulations mandate that parties engage in mediation. However, any attempt to read and harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those *specifically* exempted by Government Code section 3505.5, subdivision (e).

It is correct that Government Code section 3505.4, subdivision (a), as amended by AB 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, it also is important to consider that AB 646 *repealed* the prior language of section 3505.4, which set forth the conditions under which an employer could implement its last, best and final offer (LBFO). In

new section 3505.7, added by AB 646, the MMBA now provides that implementation of the employer's LBFO may occur only "[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5." (Emphasis added.)

In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also consistent with the available evidence of legislative intent. The author of AB 646 is quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful.

(Emphasis added.)

In the attached e-mail message to the undersigned on December 2, 2011, commenting on the proposed emergency regulations which were then pending approval by PERB, a representative of the author's office urged "recognition of the legislative intent of AB 646 to provide an exclusive representative with the absolute right to request factfinding irrespective of whether any mediation was held."

The majority of interested parties, both employer and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not. The following comments are excerpted from those submitted to PERB during the voluntary public discussions held by PERB preceding the submission of its emergency regulations to OAL, copies of which are available on the PERB website at www.perb.ca.gov/news/default.aspx:

Carroll, Burdick & McDonough LLP (letter dated November 28, 2011; representing labor)

We agree with our colleagues at Leonard Carder [in their letters dated November 14 and 17, 2011] that notwithstanding the final version of AB 646 being silent on the issue, the legislative history and the purpose behind the Meyers-Milias-Brown Act compel PERB to assume that a covered employer's obligation to participate in factfinding is mandatory, and PERB should draft its emergency regulation accordingly.

The purpose and intent of the Act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Govt. Code, [§] 3500.) Factfinding, as required by AB 646, is an extension of this policy of bilateral resolution of labor disputes to include a uniform, nonbinding, process for resolving bargaining impasse.

The idea, floated by some commentators and the City of San Diego [in its letter dated November 18, 2011], that an employer could simply opt out, or not be bound by, factfinding seems antithetical to the Legislature's whole approach on the subject. It sets up the scenario that an employer would choose not to voluntarily mediate at impasse because the mere agreement to mediate would bind the employer to factfinding *if* the mediation was unsuccessful and *if* the employee organization elected to pursue factfinding. As our colleagues at Roth[n]er, Segall and Greenstone point out [in their letter dated November 18, 2011], such a reading, which would make voluntary mediation less likely, would weaken impasse resolution processes, not strengthen them.

Mandatory factfinding would not conflict with section 3505.2 since AB 646 does not itself compel mediation, only factfinding. We conclude that notwithstanding whether parties mediate, factfinding is a mandatory impasse resolution procedure if invoked by the employee association.

Burke, Williams & Sorensen, LLP (representing employers)

In a submission dated November 8, 2011, this management-side law firm proposed its own, independently drafted regulations to implement AB 646, which included language expressly providing for requests for factfinding where "no mediator has been appointed."

Renne Sloan Holtzman Sakai LLP (letter dated December 2, 2011; representing employers)

> A.B. 646, by its terms, does not provide for a fact-finding request from an employer. Thus, there is no similar counter-balance under the MMBA as exists under EERA and HEERA. Under the MMBA, without a deadline by which the employee organization must request fact-finding, it will be extremely difficult for an employer to protect itself against unreasonable delays. This significant difference in statutory language justifies PERB adopting fact-finding regulations under the MMBA that are different than those under EERA and HEERA.

A number of interested parties also suggested, and PERB amended its proposed emergency regulations to reflect, that these regulations should include a time limit within which the exclusive representative must request factfinding. (CALPELRA letter dated November 26, 2011, representing employers; Burke, Williams & Sorensen, LLP proposal dated November 8, 2011 representing employers.) PERB added language to its proposed emergency regulations to address these pleas for clarity and consistency.

In its letter dated November 26, 2011, CALPELRA elaborated:

> PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty. During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.

In sum, the proposed emergency regulations presently before OAL are a product of the participation of more than 130 representatives of employers and employee organizations, extensive written comments, and numerous discussions at voluntary public meetings held by

PERB. These proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of the newly enacted factfinding process under the Meyers-Milias-Brown Act would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Without the approval of these proposed emergency regulations, the procedural and substantive rights of employers, employees and employee organizations will be unclear. With numerous threatened strikes on the horizon, public entities may be unable to provide essential public services, public employees will be without redress and/or pay, and the general public will be incontrovertibly harmed by the foregoing.

Both management-side and labor-side representatives have shown support for PERB's emergency regulations and participated in the process of developing the emergency regulations filed with OAL. Based on the foregoing, PERB's proposed emergency regulations should be approved.

Sincerely,

Les Chisholm
Division Chief

Attachment

Les Chisholm

From: Naylor, Cody <Cody.Naylor@asm.ca.gov>
Sent: Friday, December 02, 2011 10:33 AM
To: Les Chisholm
Subject: AB 646 Rulemaking / Dec 8 Mtg

Hi Les –

I was wondering if there are further revisions to the November 14 draft emergency regulations expected before the December PERB meeting. I'd be happy to discuss our office's position with you about the proposed regulations. But in short, we appreciate Staff's recognition of the legislative intent of AB 646 to provide an exclusive representative with the absolute right to request factfinding irrespective of whether any mediation was held and for incorporating that provision into its proposed regulations.

Thank you!

Cody Naylor
Legislative Aide
Office of Assembly Member Toni Atkins
76th Assembly District
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December 27, 2011

Via U.S. Mail and Email (staff@oal.ca.gov)
Kathleen Eddy, Reference Attorney
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Via U.S. Mail and Email (smurphy@perb.ca.gov; lchisholm@perb.ca.gov)
Suzanne Murphy, General Counsel, and Les Chisholm, Division Chief
Public Employment Relations Board
1031 – 18th Street
Sacramento, CA 95811-4124

Re: Proposed Emergency Regulations Related to AB 646 Implementation

Dear Ms. Eddy, Ms. Murphy, and Mr. Chisholm:

Leonard Carder, LLP represents scores of labor unions in the California public sector, including many which fall under the jurisdiction of the California Public Employment Relations Board ("PERB"). Accordingly, Leonard Carder, LLP is an "interested person" within the meaning of California Government Code section 11349.6 and submits this comment to the emergency regulations proposed by PERB related to the implementation of Assembly Bill 646, which amends the Meyers-Milias-Brown Act ("MMBA").

As a preliminary matter, we appreciate the opportunity to submit a comment supporting the proposed emergency regulations. To date, we have found PERB's process for soliciting comments on proposed emergency regulations to be proactive, thoughtful and transparent, including holding well-attended meetings across the state to engender discussion on these issues.

Particularly, we support the proposed regulations as consistent with the statute, and importantly, believe that the proposed regulations will provide clarity to the many public entities and labor organizations affected by the new law. (Cal. Gov't Code section 11349(c) & (d).) As noted in the statute, Government Code section 11349(d) defines "consistency" as meaning the

regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decision, or other provisions of law." "Clarity" is defined as "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Cal. Gov't Code section 11349(c).

It is our view that the proposed regulations, particularly proposed regulation 32802, are consistent with the statute. Earlier drafts of AB 646 – prior to the final draft that was enacted – included provisions providing an absolute right to request mediation. When those mediation provisions were struck from the bill, the drafters simply neglected to make the necessary corresponding alteration to the opening sentence of MMBA, Government Code Section 3505.4(a). In other words, the drafters intended to eliminate any absolute right to mediation, but intended to leave intact the employee organization's absolute right to request factfinding, irrespective of whether any mediation is held. The drafters' oversight is evident not only from comparing successive versions of the bill, but also from the abrupt way in which "the mediator" and his or her appointment appear, devoid of any context, at the outset of the enacted bill.

This conclusion is widely shared by many PERB constituents, in both labor and management; it is rare to find such unanimity in the labor relations bar. While one could argue for a different construction of the statute (i.e., that factfinding may be triggered only by voluntary mediation), we view that construction as contrary to the statute's express language, the legislative history, and the drafters' intent. Indeed, we view the alternate position as not only contrary to the legislative intent, but as inviting protracted litigation to seek clarification; clarification is, of course, one sanctioned purpose of the emergency regulations.

In sum, PERB's proposed regulations are consistent with AB 646, and accordingly we urge approval of the emergency regulations; in our view, the proposed emergency regulations are consistent with the statute and will provide much needed clarity for the public sector.

We appreciate your continued consideration of these comments and your close attention to these important matters.

Very truly yours,

LEONARD CARDER, LLP

By: Margot Rosenberg

PROPOSED TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k), ~~3541.3~~ and (n), 3563(j), ~~3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j), and (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

OAL Review. OAL has a maximum of 10 calendar days in which to complete its review of emergency regulations. OAL must disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency, if it determines that the regulations fail to meet the Authority, Reference, Consistency, Clarity, Nonduplication, and Necessity standards of Government Code section 11349.1, or if it determines that the rulemaking agency failed to comply with applicable provisions of the APA, particularly those described above under Required Documents.

EFFECTIVE PERIOD OF EMERGENCY REGULATIONS

- Emergency regulations become effective upon filing or upon any later date specified.
- Emergency regulations (adoptions, amendments, or repeals) may only remain in effect for 180 days with no further action by the rulemaking agency.
- To make emergency regulations permanent, a rulemaking agency must complete a regular, noticed rulemaking action and submit it, along with a certification that it has complied with the procedures for a regular, noticed rulemaking (a Certificate of Compliance) to OAL within the 180-day period.
- If the rulemaking agency fails to submit the regular, noticed rulemaking accompanied by a Certificate of Compliance within the 180-day period, on the 181st day the emergency regulations are repealed by operation of law and the pre-emergency regulation text, if any, again becomes effective.
- Alternatively, OAL may approve up to, but not more than two readoptions of the emergency regulations, each for a period not to exceed 90 days. OAL may only approve readoption if the agency has made substantial progress and proceeded with diligence to complete a regular, noticed rulemaking action to make the regulations permanent.
- To submit a request for readoption the rulemaking agency must resubmit the same documents required for the submission of emergency regulations (see Required Documents, above) and demonstrate that the agency has made substantial progress and proceeded with diligence to complete a regular, noticed rulemaking action to make the regulations permanent. (See title 1, CCR, section 52.) Upon approval of a request for readoption, OAL will re-file the emergency regulations with the Secretary of State.

  Note: The timing of the filing of a request for readoption with OAL is important. OAL has 10 working days to determine whether to approve or disapprove the request for readoption. Consequently, to ensure that there is no gap in the effective period of the emergency regulations the request for readoption materials need to be submitted to OAL @ least 10 calendar days prior to the expiration date of the emergency regulations.

TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD

NOTICE OF PROPOSED RULEMAKING

The Public Employment Relations Board (Board) proposes to adopt and amend the regulations described below after considering all comments, objections or recommendations regarding the proposed action.

REGULATORY ACTION

The Board proposes to amend sections 32380, 32603, and 32604, and to add sections 32802 and 32804. Section 32380 identifies types of administrative decisions by Board agents that are not appealable to the Board itself. Section 32603 describes unfair practices by a public agency under the Meyers-Milias-Brown Act (MMBA). Section 32604 describes unfair practices by an employee organization under the MMBA. Proposed section 32802 provides for the filing of requests for factfinding with PERB under the MMBA, describes when a request may be filed and the requirements for filing, and provides that determinations as to sufficiency of a request are not appealable. Proposed section 32804 describes the timelines and procedures for the selection of a neutral chairperson of a factfinding panel pursuant to a sufficient request filed under proposed section 32802.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on June 14, 2012, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period closes at

5:00 p.m. on June 12, 2012. Written comments will also be accepted at the public hearing. Submit written comments to:

Les Chisholm, Division Chief
Office of the General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
FAX: (916) 327-6377
E-mail: lchisholm@perb.ca.gov

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32380 of the Board's regulations: Government Code sections 3505.4, 3509, 3513(h), 3541.3(k) and (n), 3563(j) and (m), 71639.1 and 71825; and Public Utilities Code section 99561(j) and (m). General reference for section 32603 of the Board's regulations: Government Code sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for section 32604 of the Board's regulations: Government Code sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for proposed section 32802 of the Board's regulations: Government Code sections 3505.4, 3505.5,

and 3505.7. General reference for proposed section 32804 of the Board's regulations: Government Code sections 3505.4, 3505.5, and 3505.7.

POLICY STATEMENT OVERVIEW

PERB is a quasi-judicial agency which oversees public sector collective bargaining in California. PERB presently administers seven collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB are: the Meyers-Milias-Brown Act (MMBA) of 1968, which established collective bargaining for California's city, county, and local special district employers and employees; the Educational Employment Relations Act (EERA) of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act), establishing collective bargaining for state government employees; the Higher Education Employer-Employee Relations Act (HEERA) of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law; the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) of 2003, which covers supervisory employees of the Los Angeles County Metropolitan Transportation Authority; and the Trial Court Employment Protection and Governance Act (Trial Court Act) of 2000 and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) of 2002, which together provide for collective bargaining rights for most trial court employees.

Prior to January 1, 2012, the MMBA did not provide for any mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Pursuant to Assembly Bill 646 (Chapter 680, Statutes of 2011), the MMBA was amended to provide for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. Assembly Bill 646, while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7.

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to PERB. This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

INFORMATIVE DIGEST

Section 32380 identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 describes unfair practices by an employee organization under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed section 32802 would describe when and in which office a request for factfinding may be filed with the Board. The new section would further describe the timeline for PERB's determination as to the sufficiency of the request, and would specify that such determinations are not appealable to the Board itself.

Proposed section 32804 would describe the process, in cases where the Board finds a factfinding request to be valid, for the selection or appointment of the neutral chairperson of a factfinding panel. The new section would further specify, consistent with the provisions of MMBA section 3505.5, that PERB will not be responsible in any case for the costs of the panel chairperson.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Initial determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 et seq: Initial determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Initial determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's initial determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

ECONOMIC IMPACT ASSESSMENT

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

CONSIDERATION OF ALTERNATIVES

A rulemaking agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

PRELIMINARY ACTIVITIES

PERB staff began meeting with interested parties about the statutory changes made by Assembly Bill 646 in October 2011; circulated discussion drafts of possible regulations; held open meetings to take comments and suggestions on November 8, 2011 (Oakland) and November 10, 2011 (Glendale); and posted copies of the discussion drafts, written comments from parties, and the staff recommendations on the Board's web site. Additional public comments were received at the December 8, 2011 public Board meeting, at which time the Board authorized submission of an emergency rulemaking package to implement the provisions of Assembly Bill 646. The Board has also relied upon the Economic Impact Assessment identified in this Notice in proposing regulatory action.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is

published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons, when available, may be obtained by contacting Jonathan Levy or Katherine Nyman at the address or phone number listed below, and are also available on the Board's web site (see address below).

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of reasons should be sent to the attention of Jonathan Levy or Katherine Nyman at the address indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

INTERNET ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. Written comments received during the written comment period will also be posted on the web site. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

Jonathan Levy, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8387

or

Katherine Nyman, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8386

INITIAL STATEMENT OF REASONS

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.)

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to the Public Employment Relations Board (PERB or Board). This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

The proposed regulation changes that have been identified as necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646 are described below.

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. During the workshop process that preceded the adoption of emergency regulations, some parties advocated limiting the application of this regulation and MMBA factfinding to situations where the parties had first engaged in mediation. Based on the language of the MMBA, as amended by Assembly Bill 646, as well as evidence of legislative intent and the comments submitted by most other interested parties, this alternative approach has been rejected for purposes of the proposed regulations. Instead, it appears that harmonizing of the statutory changes made by Assembly Bill 646 requires the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

It is correct that Government Code section 3505.4(a), as re-added by Assembly Bill 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, Assembly Bill 646 also repealed the prior language of section 3505.4, which set forth under what conditions an employer could implement its last, best and final offer. In new section 3505.7, the MMBA provides that such an implementation may only occur, "After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5." (Emphasis added.) In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also highly consistent with the available evidence of legislative intent. For example, the author of Assembly Bill 646 was quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order

to assist them in resolving differences that remain after negotiations have been unsuccessful.

Under proposed Section 32802, where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself, consistent with how impasse determinations under other statutes are treated.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

INITIAL STATEMENT OF REASONS

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.)

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to the Public Employment Relations Board (PERB or Board). This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

The proposed regulation changes that have been identified as necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646 are described below.

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. Where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself, consistent with how impasse determinations under other statutes are treated.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD

NOTICE OF PROPOSED RULEMAKING

The Public Employment Relations Board (Board) proposes to adopt and amend the regulations described below after considering all comments, objections or recommendations regarding the proposed action.

REGULATORY ACTION

The Board proposes to amend sections 32380, 32603, and 32604, and to add sections 32802 and 32804. Section 32380 identifies types of administrative decisions by Board agents that are not appealable to the Board itself. Section 32603 describes unfair practices by a public agency under MMBA. Section 32604 describes unfair practices by an employee organization under MMBA. Proposed section 32802 provides for the filing of requests for factfinding with PERB under the MMBA, describes when a request may be filed and the requirements for filing, and provides that determinations as to sufficiency of a request are not appealable. Proposed section 32804 describes the timelines and procedures for the selection of a neutral chairperson of a factfinding panel pursuant to a sufficient request filed under proposed section 32802.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on June 14, 2012, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period closes at 5:00 p.m. on June 12, 2012. Written comments will also be accepted at the public hearing. Submit written comments to:

M. Suzanne Murphy
General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
FAX: (916) 327-6377
E-mail: SMurphy@perb.ca.gov

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32380 of the Board's regulations: Government Code sections 3505.4, 3509, 3513(h), 3541.3(k) and (n), 3563(j) and (m), 71639.1 and 71825; and Public Utilities Code section 99561(j) and (m). General reference for section 32603 of the Board's regulations: Government Code sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for section 32604 of the Board's regulations: Government Code sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for proposed section 32802 of the Board's regulations: Government Code sections 3505.4, 3505.5, and 3505.7. General reference for proposed section 32804 of the Board's regulations: Government Code sections 3505.4, 3505.5, and 3505.7.

POLICY STATEMENT OVERVIEW

PERB is a quasi-judicial agency which oversees public sector collective bargaining in California. PERB presently administers seven collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB are: the Meyers-Milias-Brown Act (MMBA) of 1968, which established collective bargaining for California's city, county, and local special district employers and employees; the Educational Employment Relations Act (EERA) of 1976 establishing collective bargaining in California's public schools (K-12) and community

colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act), establishing collective bargaining for state government employees; the Higher Education Employer-Employee Relations Act (HEERA) of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law; the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) of 2003, which covers supervisory employees of the Los Angeles County Metropolitan Transportation Authority; and the Trial Court Employment Protection and Governance Act (Trial Court Act) of 2000 and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) of 2002, which together provide for collective bargaining rights for most trial court employees.

Prior to January 1, 2012, the MMBA did not provide for any mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Pursuant to Assembly Bill 646 (Chapter 680, Statutes of 2011), the MMBA was amended to provide for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. Assembly Bill 646, while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7.

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to PERB. This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

INFORMATIVE DIGEST

Section 32380 identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

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public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed section 32802 would describe when and in which office a request for factfinding may be filed with the Board. The new section would further describe the timeline for PERB's determination as to the sufficiency of the request, and would specify that such determinations are not appealable to the Board itself.

Proposed section 32804 would describe the process, in cases where the Board finds a factfinding request to be valid, for the selection or appointment of the neutral chairperson of a factfinding panel. The new section would further specify, consistent with the provisions of MMBA section 3505.5, that PERB will not be responsible in any case for the costs of the panel chairperson.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Initial determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17561: Initial determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts, other than minimal copying costs, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Initial determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's initial determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

ASSESSMENT

The adoption of the proposed amendments to this regulation will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative considered by it, or otherwise identified and brought to the attention of the Board, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

PRELIMINARY ACTIVITIES

PERB staff began meeting with interested parties about the statutory changes made by Assembly Bill 646 in October 2011; circulated discussion drafts of possible regulations; held open meetings to take comments and suggestions on November 8, 2011 (Oakland) and November 10, 2011 (Glendale); and posted copies of the discussion drafts, written comments from parties, and the staff recommendations on the Board's web site. Additional public comments were received at the December 8, 2011 public Board meeting, at which time the Board authorized submission of an emergency rulemaking package to implement the provisions of Assembly Bill 646.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons, when available, may be obtained by contacting Jonathan Levy or Katherine Nyman at the address or phone number listed below, and are also available on the Board's web site (see address below).

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of reasons should be sent to the attention of Jonathan Levy or Katherine Nyman at the address indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

INTERNET ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. Written comments received during the written comment period will also be posted on the web site. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

Jonathan Levy, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8387

or

Katherine Nyman, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8386

PROPOSED TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k), ~~3541.3~~ and (n), 3563(j), ~~3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j), and (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

OFFICE OF ADMINISTRATIVE LAW
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

DEBRA M. CORNEZ
Director

MEMORANDUM

TO: Les Chisholm
FROM: OAL Front Desk
DATE: 8/7/2012
RE: Return of Approved Rulemaking Materials
OAL File No. 2012-0622-02C

OAL hereby returns this file your agency submitted for our review (OAL File No. 2012-0622-02C regarding Factfinding under the Meyers-Milias-Brown Act).

If this is an approved file, it contains a copy of the regulation(s) stamped "ENDORSED APPROVED" by the Office of Administrative Law and "ENDORSED FILED" by the Secretary of State. The effective date of an approved file is specified on the Form 400 (see item B.5). (Please Note: The 30th Day after filing with the Secretary of State is calculated from the date the Form 400 was stamped "ENDORSED FILED" by the Secretary of State.)

DO NOT DISCARD OR DESTROY THIS FILE

Due to its legal significance, you are required by law to preserve this rulemaking record. Government Code section 11347.3(d) requires that this record be available to the public and to the courts for possible later review. Government Code section 11347.3(e) further provides that "....no item contained in the file shall be removed, altered, or destroyed or otherwise disposed of." See also the Records Management Act (Government Code section 14740 et seq.) and the State Administrative Manual (SAM) section 1600 et seq.) regarding retention of your records.

If you decide not to keep the rulemaking records at your agency/office or at the State Records Center, you may transmit it to the State Archives with instructions that the Secretary of State shall not remove, alter, or destroy or otherwise dispose of any item contained in the file. See Government Code section 11347.3(f).

Enclosures

CERT

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

ENDORSED FILED
IN THE OFFICE OF

2012 JUL 30 PM 3:02

DEBRA BOWEN
SECRETARY OF STATE

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-2012-0416-02	2012-0622-02C	

For use by Office of Administrative Law (OAL) only

2012 JUN 22 P 2:10

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Public Employment Relations Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
Factfinding under the Meyers-Milias-Brown Act	2011-1219-01E

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	32802, 32804
	AMEND
	32380, 32603, 32604
TITLE(S) 8	REPEAL

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☒ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☒ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Les Chisholm	(916) 327-8383	(916) 327-6377	lchisholm@perb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE 6.18.12

TYPED NAME AND TITLE OF SIGNATORY
Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JUL 30 2012

Office of Administrative Law

INSTRUCTIONS FOR PUBLICATION OF NOTICE AND SUBMISSION OF REGULATIONS

Use the form STD. 400 for submitting notices for publication and regulations for Office of Administrative Law (OAL) review.

ALL FILINGS
Enter the name of the agency with the rulemaking authority and agency's file number, if any.

NOTICES
Complete Part A when submitting a notice to OAL for publication in the California Regulatory Notice Register. Submit two (2) copies of the STD. 400 with four (4) copies of the notice and, if a notice of proposed regulatory action, one copy each of the complete text of the regulations and the statement of reasons. Upon receipt of the notice, OAL will place a number in the box marked "Notice File Number." If the notice is approved, OAL will return the STD. 400 with a copy of the notice and will check "Approved as Submitted" or "Approved as Modified." If the notice is disapproved or withdrawn, that will also be indicated in the space marked "Action on Proposed Notice." Please submit a new form STD. 400 when resubmitting the notice.

REGULATIONS
When submitting regulations to OAL for review, fill out STD. 400, Part B. Use the form that was previously submitted with the notice of proposed regulatory action which contains the "Notice File Number" assigned, or, if a new STD. 400 is used, please include the previously assigned number in the box marked "Notice File Number." In filling out Part B, be sure to complete the certification including the date signed, the title and typed name of the signatory. The following must be submitted when filing regulations: seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification) and the complete rulemaking file with index and sworn statement. (See Gov. Code § 11347.3 for rulemaking file contents.)

RESUBMITTAL OF DISAPPROVED OR WITHDRAWN REGULATIONS
When resubmitting previously disapproved or withdrawn regulations to OAL for review, use a new STD. 400 and fill out Part B, including the signed certification. Enter the OAL file number(s) of all previously disapproved or withdrawn filings in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). Submit seven (7) copies of the regulation to OAL with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). Be sure to include an index, sworn statement, and (if returned to the agency) the complete rulemaking file. (See Gov. Code §§ 11349.4 and 11347.3 for more specific requirements.)

EMERGENCY REGULATIONS
Fill out only Part B, including the signed certification, and submit seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). (See Gov. Code §11346.1 for other requirements.)

NOTICE FOLLOWING EMERGENCY ACTION
When submitting a notice of proposed regulatory action after an emergency filing, use a new STD. 400 and complete Part A and insert the OAL file number(s) for the original emergency filing(s) in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). OAL will return the STD. 400 with the notice upon approval or disapproval. If the notice is disapproved, please fill out a new form when resubmitting for publication.

CERTIFICATE OF COMPLIANCE
When filing the certificate of compliance for emergency regulations, fill out Part B, including the signed certification, on the form that was previously submitted with the notice. If a new STD. 400 is used, fill in Part B including the signed certification, and enter the previously assigned notice file number in the box marked "Notice File Number" at the top of the form. The materials indicated in these instructions for "REGULATIONS" must also be submitted.

EMERGENCY REGULATIONS - READOPTION
When submitting previously approved emergency regulations for readoption, use a new STD. 400 and fill out Part B, including the signed certification, and insert the OAL file number(s) related to the original emergency filing in the box marked "All Previous Related OAL Regulatory Action Number (s)" (box 1b. of Part B).

CHANGES WITHOUT REGULATORY EFFECT
When submitting changes without regulatory effect pursuant to California Code of Regulations, Title 1, section 100, complete Part B, including marking the appropriate box in both B.3. and B.5.

ABBREVIATIONS
Cal. Code Regs. - California Code of Regulations
Gov. Code - Government Code
SAM - State Administrative Manual

For questions regarding this form or the procedure for filing notices or submitting regulations to OAL for review, please contact the Office of Administrative Law Reference Attorney at (916) 323-6815.

FINAL REGULATION TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k)~~, 3541.3~~ and (n), 3563(j)~~, 3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j)~~,~~ and (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and ~~3541.3~~(g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and ~~3541.3~~(g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

TABLE OF CONTENTS

TAB

CERTIFICATION

The foregoing table of contents constitutes the Public Employment Relations Board's rulemaking file for the subject regulations. The rulemaking file as submitted is complete. The rulemaking record for the subject regulations was closed on 6/22/12.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at 1031 18th Street, Sacramento, California, 95811, on 6/22/12.

Date: 6/22/12

LES CHISHOLM
Division Chief, Office of the General Counsel
PUBLIC EMPLOYMENT RELATIONS BOARD

Exhibit 1

TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD

NOTICE OF PROPOSED RULEMAKING

The Public Employment Relations Board (Board) proposes to adopt and amend the regulations described below after considering all comments, objections or recommendations regarding the proposed action.

REGULATORY ACTION

The Board proposes to amend sections 32380, 32603, and 32604, and to add sections 32802 and 32804. Section 32380 identifies types of administrative decisions by Board agents that are not appealable to the Board itself. Section 32603 describes unfair practices by a public agency under the Meyers-Milias-Brown Act (MMBA). Section 32604 describes unfair practices by an employee organization under the MMBA. Proposed section 32802 provides for the filing of requests for factfinding with PERB under the MMBA, describes when a request may be filed and the requirements for filing, and provides that determinations as to sufficiency of a request are not appealable. Proposed section 32804 describes the timelines and procedures for the selection of a neutral chairperson of a factfinding panel pursuant to a sufficient request filed under proposed section 32802.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on June 14, 2012, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period closes at

5:00 p.m. on June 12, 2012. Written comments will also be accepted at the public hearing. Submit written comments to:

Les Chisholm, Division Chief
Office of the General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
FAX: (916) 327-6377
E-mail: lchisholm@perb.ca.gov

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32380 of the Board's regulations: Government Code sections 3505.4, 3509, 3513(h), 3541.3(k) and (n), 3563(j) and (m), 71639.1 and 71825; and Public Utilities Code section 99561(j) and (m). General reference for section 32603 of the Board's regulations: Government Code sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for section 32604 of the Board's regulations: Government Code sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for proposed section 32802 of the Board's regulations: Government Code sections 3505.4, 3505.5,

and 3505.7. General reference for proposed section 32804 of the Board's regulations: Government Code sections 3505.4, 3505.5, and 3505.7.

POLICY STATEMENT OVERVIEW

PERB is a quasi-judicial agency which oversees public sector collective bargaining in California. PERB presently administers seven collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB are: the Meyers-Milias-Brown Act (MMBA) of 1968, which established collective bargaining for California's city, county, and local special district employers and employees; the Educational Employment Relations Act (EERA) of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act), establishing collective bargaining for state government employees; the Higher Education Employer-Employee Relations Act (HEERA) of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law; the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) of 2003, which covers supervisory employees of the Los Angeles County Metropolitan Transportation Authority; and the Trial Court Employment Protection and Governance Act (Trial Court Act) of 2000 and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) of 2002, which together provide for collective bargaining rights for most trial court employees.

Prior to January 1, 2012, the MMBA did not provide for any mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Pursuant to Assembly Bill 646 (Chapter 680, Statutes of 2011), the MMBA was amended to provide for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. Assembly Bill 646, while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7.

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to PERB. This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

INFORMATIVE DIGEST

Section 32380 identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 describes unfair practices by an employee organization under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed section 32802 would describe when and in which office a request for factfinding may be filed with the Board. The new section would further describe the timeline for PERB's determination as to the sufficiency of the request, and would specify that such determinations are not appealable to the Board itself.

Proposed section 32804 would describe the process, in cases where the Board finds a factfinding request to be valid, for the selection or appointment of the neutral chairperson of a factfinding panel. The new section would further specify, consistent with the provisions of MMBA section 3505.5, that PERB will not be responsible in any case for the costs of the panel chairperson.

CONSISTENT AND COMPATIBLE WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, PERB has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the

community at-large benefits from those cost-savings. Finally, the proposed amendments clarify the definition of "unfair practices" under the MMBA.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Initial determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 et seq: Initial determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Initial determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's initial determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California. The adoption of the proposed amendment will benefit public employers, employees, employees' representatives and the community at-large by further facilitating the resolution of public sector labor disputes by providing additional dispute resolution procedures and promoting full and bilateral communication between PERB's constituents. In so doing, California residents' welfare will receive the benefit of stable collective bargaining and dispute resolution, which translates to continuous delivery of the essential services that these employers and employees provide to California communities.

CONSIDERATION OF ALTERNATIVES

A rulemaking agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

PRELIMINARY ACTIVITIES

PERB staff began meeting with interested parties about the statutory changes made by Assembly Bill 646 in October 2011; circulated discussion drafts of possible regulations; held open meetings to take comments and suggestions on November 8, 2011 (Oakland) and November 10, 2011 (Glendale); and posted copies of the discussion drafts, written comments from parties, and the staff recommendations on the Board's web site. Additional public comments were received at the December 8, 2011 public Board meeting, at which time the Board authorized submission of an emergency rulemaking package to implement the provisions of Assembly Bill 646. The Board has also relied upon the Economic Impact Assessment identified in this Notice in proposing regulatory action.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons, when available, may be obtained by contacting Jonathan Levy or Katherine Nyman at the address or phone number listed below, and are also available on the Board's web site (see address below).

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of reasons should be sent to the attention of Jonathan Levy or Katherine Nyman at the address

indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

INTERNET ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. Written comments received during the written comment period will also be posted on the web site. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

Jonathan Levy, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8387

or

Katherine Nyman, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8386

Exhibit 2

PROPOSED TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k), ~~3541.3~~ and (n), 3563(j), ~~3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j), ~~and~~ (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

Exhibit 3

STATEMENT OF MAILING NOTICE
(Section 86 of Title 1 of the
California Code of Regulations)

The Public Employment Relations Board has complied with the provisions of Government Code section 11346.4, subdivision (a) (1) through (4), regarding the mailing of the notice of proposed regulatory action. The notice was mailed on April 27, 2012, over 45 days prior to the close of the public comment period and the public hearing, which was held on June 14, 2012.

4/27/12
Dated

Regulations Coordinator

Exhibit 4

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-2012-0416-02		2011-1219-01E

For use by Office of Administrative Law (OAL) only

RECEIVED FOR FILING PUBLICATION DATE

APR 16 '12 APR 27 '12

Office of Administrative Law

NOTICE REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Public Employment Relations Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
Factfinding under the Meyers-Milias-Brown Act	8	32380	April 27, 2012

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
[X] Notice re Proposed Regulatory Action [ ] Other	Les Chisholm	(916) 322-3198	(916) 327-6377

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	[ ] Approved as Submitted [ ] Approved as Modified [ ] Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT
	AMEND
TITLE(S)	REPEAL

3. TYPE OF FILING

- [ ] Regular Rulemaking (Gov. Code §11346)
- [ ] Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- [ ] Emergency (Gov. Code, §11346.1(b))
- [ ] Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- [ ] Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- [ ] Emergency Readopt (Gov. Code, §11346.1(h))
- [ ] File & Print
- [ ] Other (Specify) _____
- [ ] Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- [ ] Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- [ ] Effective 30th day after filing with Secretary of State
- [ ] Effective on filing with Secretary of State
- [ ] §100 Changes Without Regulatory Effect
- [ ] Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- [ ] Department of Finance (Form STD. 399) (SAM §6660)
- [ ] Fair Political Practices Commission
- [ ] State Fire Marshal
- [ ] Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE	DATE
	4.16.12

TYPED NAME AND TITLE OF SIGNATORY
Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

INSTRUCTIONS FOR PUBLICATION OF NOTICE AND SUBMISSION OF REGULATIONS

Use the form STD. 400 for submitting notices for publication and regulations for Office of Administrative Law (OAL) review.

ALL FILINGS
Enter the name of the agency with the rulemaking authority and agency's file number, if any.

NOTICES
Complete Part A when submitting a notice to OAL for publication in the California Regulatory Notice Register. Submit two (2) copies of the STD. 400 with four (4) copies of the notice and, if a notice of proposed regulatory action, one copy each of the complete text of the regulations and the statement of reasons. Upon receipt of the notice, OAL will place a number in the box marked "Notice File Number." If the notice is approved, OAL will return the STD. 400 with a copy of the notice and will check "Approved as Submitted" or "Approved as Modified." If the notice is disapproved or withdrawn, that will also be indicated in the space marked "Action on Proposed Notice." Please submit a new form STD. 400 when resubmitting the notice.

REGULATIONS
When submitting regulations to OAL for review, fill out STD. 400, Part B. Use the form that was previously submitted with the notice of proposed regulatory action which contains the "Notice File Number" assigned, or, if a new STD. 400 is used, please include the previously assigned number in the box marked "Notice File Number." In filling out Part B, be sure to complete the certification including the date signed, the title and typed name of the signatory. The following must be submitted when filing regulations: seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification) and the complete rulemaking file with index and sworn statement. (See Gov. Code § 11347.3 for rulemaking file contents.)

RESUBMITTAL OF DISAPPROVED OR WITHDRAWN REGULATIONS
When resubmitting previously disapproved or withdrawn regulations to OAL for review, use a new STD. 400 and fill out Part B, including the signed certification. Enter the OAL file number(s) of all previously disapproved or withdrawn filings in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). Submit seven (7) copies of the regulation to OAL with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). Be sure to include an index, sworn statement, and (if returned to the agency) the complete rulemaking file. (See Gov. Code §§ 11349.4 and 11347.3 for more specific requirements.)

EMERGENCY REGULATIONS
Fill out only Part B, including the signed certification, and submit seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). (See Gov. Code §11346.1 for other requirements.)

NOTICE FOLLOWING EMERGENCY ACTION
When submitting a notice of proposed regulatory action after an emergency filing, use a new STD. 400 and complete Part A and insert the OAL file number(s) for the original emergency filing(s) in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). OAL will return the STD. 400 with the notice upon approval or disapproval. If the notice is disapproved, please fill out a new form when resubmitting for publication.

CERTIFICATE OF COMPLIANCE
When filing the certificate of compliance for emergency regulations, fill out Part B, including the signed certification, on the form that was previously submitted with the notice. If a new STD. 400 is used, fill in Part B including the signed certification, and enter the previously assigned notice file number in the box marked "Notice File Number" at the top of the form. The materials indicated in these instructions for "REGULATIONS" must also be submitted.

EMERGENCY REGULATIONS - READOPTION
When submitting previously approved emergency regulations for readoption, use a new STD. 400 and fill out Part B, including the signed certification, and insert the OAL file number(s) related to the original emergency filing in the box marked "All Previous Related OAL Regulatory Action Number (s)" (box 1b. of Part B).

CHANGES WITHOUT REGULATORY EFFECT
When submitting changes without regulatory effect pursuant to California Code of Regulations, Title 1, section 100, complete Part B, including marking the appropriate box in both B.3. and B.5.

ABBREVIATIONS
Cal. Code Regs. - California Code of Regulations
Gov. Code - Government Code
SAM - State Administrative Manual

For questions regarding this form or the procedure for filing notices or submitting regulations to OAL for review, please contact the Office of Administrative Law Reference Attorney at (916) 323-6815.

Exhibit 5

INITIAL STATEMENT OF REASONS

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.)

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to the Public Employment Relations Board (PERB or Board). This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

The proposed regulation changes that have been identified as necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646 are described below.

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. During the workshop process that preceded the adoption of emergency regulations, some parties advocated limiting the application of this regulation and MMBA factfinding to situations where the parties had first engaged in mediation. Based on the language of the MMBA, as amended by Assembly Bill 646, as well as evidence of legislative intent and the comments submitted by most other interested parties, this alternative approach has been rejected for purposes of the proposed regulations. Instead, it appears that harmonizing of the statutory changes made by Assembly Bill 646 requires the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

It is correct that Government Code section 3505.4(a), as re-added by Assembly Bill 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, Assembly Bill 646 also repealed the prior language of section 3505.4, which set forth under what conditions an employer could implement its last, best and final offer. In new section 3505.7, the MMBA provides that such an implementation may only occur, "After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5." (Emphasis added.) In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also highly consistent with the available evidence of legislative intent. For example, the author of Assembly Bill 646 was quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order

to assist them in resolving differences that remain after negotiations have been unsuccessful.

Under proposed Section 32802, where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself, consistent with how impasse determinations under other statutes are treated.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

As discussed above, during the workshop process that preceded the adoption of the related emergency regulations, some parties advocated limiting MMBA factfinding to situations where the parties had first engaged in mediation. This alternative interpretation of Assembly Bill 646 was considered by PERB. However, based on the language of the MMBA, as amended by Assembly Bill 646, as well as the above-referenced evidence of legislative intent and the comments submitted by most other interested parties, this alternative interpretation was rejected for purposes of both the emergency and proposed regulations. PERB concluded, when adopting the emergency regulations, that harmonizing the statutory changes made by Assembly

Bill 646 required PERB to conclude that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

PERB fully intends to solicit further public comments and conduct a public hearing on these issues and interpretations in order to evaluate the possibility and strength of other alternatives through the regular rule making process.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the community at-large benefits from those cost-savings.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

PERB has not identified any alternatives that would lessen any adverse impact on small business and has not identified any adverse impacts on small businesses as a result of these proposed regulations.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

PERB relied upon the Economic Impact Assessment prepared regarding the proposed regulations. PERB did not rely upon any other technical, theoretical, or empirical studies, report or documents in proposing the adoption of these regulations.

MANDATED USE OF SPECIFIC TECHNOLOGIES OR EQUIPMENT

PERB's proposed regulations do not mandate the use of any specific technologies or equipment.

Exhibit 6

WRITTEN COMMENTS RECEIVED DURING COMMENT PERIOD

The Public Employment Relations Board did not receive any written comments during the 45-day comment period.

Exhibit 7

PUBLIC MEETING MINUTES

June 14, 2012

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:00 a.m.

Members Present

Anita I. Martinez, Chair
Alice Dowdin Calvillo, Member
A. Eugene Huguenin, Member

Staff Present

Wendi L. Ross, Deputy General Counsel
Les Chisholm, Division Chief, Office of General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer (Excused)

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the April 12, 2012 Public Meeting. She reported that the Board met in continuous closed session to deliberate the pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in April. Those were PERB Decision Nos. 2231a-M, 2236a-M, 2249-M, 2250-S, 2251-M, 2252-M, 2253-H, 2254-H, 2255-H, 2256, 2257-H, 2258-M, 2259, 2260, 2261-M, 2262, 2263-M, 2264, 2265, 2266, 2267-M, 2268, 2269, 2270, 2271-M, and 2272-M, and PERB Order No. Ad-394. In Request for Injunctive Relief (IR Request) No. 618 (*Melvin Jones Jr. v. County of Santa Clara*), the request was denied, IR Request No. 619 (*Public Employees Union Local 1 v. City of Yuba City*), the request was withdrawn, IR Request No. 620 (*Melvin Jones Jr. v. County of Santa Clara*), the request was denied, and in IR Request No. 621 (*Wenjiu Liu v. Trustees of the California State University (East Bay)*, the request was denied. A document containing a listing of the aforementioned decisions was made available at the meeting. A list containing the decisions is available on PERB's website.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo, to close the April 12, 2012 Public Meeting.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Without objection, Chair Martinez adjourned the April 12, 2012 Public Meeting. She then opened and called to order the June 14, 2012 Public Meeting. Member Dowdin Calvillo led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin, that the Board adopt the minutes for the April 12, 2012 Public Meeting.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Comments From Public Participants

Wenjiu Liu, a former Assistant Professor of Finance at the California State University, East Bay, appeared before the Board. Mr. Liu stated that prior to his recent filings with the Board, he was unfamiliar with PERB and its processes. He expressed respect and appreciation for the handling of his cases by PERB staff, including an unfair practice charge and a request for injunctive relief. Mr. Liu provided background regarding both his employment experiences at the university and the resultant filings at PERB. He expressed extensive suffering and grief from retaliation by the university which culminated in his denial of tenure and promotion, among other things, and ultimately in his termination. Mr. Liu stated that he filed the request for injunctive relief with PERB in hopes of an expedient resolution to this matter. He stated his belief that a possible 2-3 year decision by PERB of his unfair practice charge would cause irreparable harm to his career and ability to research.

As a Board agent who might possibly preside over the unfair practice charge filed by Mr. Liu, Chief Administrative Law Judge Shawn Cloughesy departed the Public Meeting during Mr. Liu's appearance before the Board.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

a. Administrative Report

In Chief Administrative Officer Eileen Potter's absence, Chair Martinez reported that the Administrative Services Division is in the process of completing Fiscal Year 2011-2012 expenditures and projects by staff, Stephanie Gustin and Ben Damian.

Chair Martinez reported on the progress of the lease renewals in PERB's Oakland and Sacramento offices. Tenant improvements and designs for floor plans have been approved by PERB for both offices. She stated that PERB's overall expense for rent in the Oakland office will not increase with the acquisition of additional space for a witness and hearing room. The anticipated completion of the improvements in that office is September 2012. With contract bids received, the lease renewal of PERB's Sacramento office is at the

Department of General Services for review and finalization. Tenant improvements in that office have not yet been scheduled, but it is anticipated that such work will be performed after hours to avoid interruption to PERB business.

Chair Martinez concluded by reporting on the budget. She stated that PERB's 2012-2013 budget remains as submitted which includes the transfer of State Mediation and Conciliation Service from the Department of Industrial Relations to PERB.

b. Legal Reports

Wendi Ross, Deputy General Counsel, reported that the monthly activity and litigation reports had been distributed to the Board for its review. From those reports Ms. Ross recapped the following information since the Board's last Public Meeting in April. With respect to unfair practice charges during the months of April and May, 200 new cases were filed with the General Counsel's Office (an increase of 8 over the prior two-month period and by 45 over the two-month period prior to that); 203 case investigations were completed, and during the same period a total of 61 informal settlement conferences were conducted by staff (down by 4 over the prior, but up by 6 over the two month period prior to that). Ms. Ross stated that fiscal year end data would be reported at the PERB's Public Meeting in August. However, as compared to Fiscal Year 2011-2012, it is significantly clear that the General Counsel's office was experiencing a significant increase in the number of charge filings (an increase of 9 percent), requests for injunctive relief (an increase of 37 percent), mediation requests (38 percent increase), and factfinding requests (16 percent increase). Ms. Ross reported that the amount of time General Counsel staff has spent on litigation matters has also taken a leap from last year. She continued, as mentioned by the Chair, since the last Public Meeting in April, the Board issued determinations in four requests for injunctive relief:

1. *Jones v. County of Santa Clara*, IR Request No. 618. The Board denied the request on April 30, 2012.

2. *Public Employees Union #1 v. City of Yuba City*, IR Request No. 619. This request was withdrawn on May 2, 2012. The matter was settled during a voluntary pre-complaint conference convened by PERB's Office of General Counsel staff on May 4, 2012, and the unfair practice charge was withdrawn on June 6, 2012.

3. *Jones v. County of Santa Clara,* IR Request No. 620. The Board denied the request on May 14, 2012.

4. *Liu v. Trustees of California State University (East Bay)*, IR Request No. 621. The Board denied the request on June 5, 2012.

In terms of litigation relating to PERB, since the April Public Meeting, three new litigation matters were filed:

1. *Moore v. PERB; Housing Authority of the County of Los Angeles & AFSCME, Council 36,* California Court of Appeal, Second Appellate District. This case has since been dismissed by the Court.

2. *Grace v. PERB; Beaumont Teachers Association & Beaumont Unified School District,* California Court of Appeal, Fourth Appellate District, Division Two. Contact has been made with counsel as PERB believes that this matter should have been filed in Superior Court under the rule of the California Supreme Court's decision in the *Richmond Firefighters* case, and is subject to dismissal.

3. *City of San Diego v. PERB; San Diego Municipal Employees Association*, California Court of Appeal, Fourth Appellate District. In its new writ petition, the city essentially seeks a permanent injunction against any further administrative action on the association's charge.

Chief Administrative Law Judge Shawn Cloughesy reported on the activities of the Division of Administrative Law and stated that the ALJ report had been distributed to the Board for its review. He reported that hearings are continuing to be set within three months from the date of informal conference in all three offices, a trend that he anticipated keeping. Within the division, as compared to one year ago, proposed decisions written are up 81 percent and total cases closed are up 74 percent. With regard to total cases closed, Chief ALJ Cloughesy reported that the division had already passed the highest number for cases closed by 50 percent (at the end of May the division had 172 cases closed compared to 114 two years ago; that is since the MMBA came into PERB jurisdiction). Additionally, the division is approaching the highest number of proposed decisions issued since PERB acquired the MMBA. In conclusion, Chief ALJ Cloughesy reported that the number of proposed decisions appealed to the Board itself is under 30 percent, and below historic averages.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, reported that the Legislative Report was circulated to the Board for its review. He stated that written reports are currently being provided regularly to the Board regarding the status of pending legislation. With regard to legislation, Mr. Chisholm reported the following:

Assembly Bill 1466 (Committee on Budget) – Although not yet included in the written report circulated to the Board, Mr. Chisholm stated that this bill was amended to be a budget trailer bill and includes the various statutory changes that are associated with transferring the State Mediation and Conciliation Service from the Department of Industrial Relations to PERB. The bill was to be heard today.

Assembly Bill 1244 (Chesbro) – With respect to self-determination support workers, this bill creates collective bargaining rights and an additional jurisdiction for PERB. After a period of long inactivity, the bill is currently scheduled for hearing in the Senate Human Services Committee on June 26.

Assembly Bill 1606 (Perea) – There has been no change in status regarding this legislation. This bill is a proposal to amend further the language of section 3505.4(a) and relates to Assembly Bill 646, factfinding under the MMBA. The bill is pending action in the Senate Appropriations Committee.

Assembly Bill 1659 (Butler) – Amends the language that presently excludes both the City of Los Angeles and the County of Los Angeles from the jurisdiction of PERB with respect to unfair practice charges and provides that they are excluded from PERB jurisdiction only if they meet the standards for independence that are described in this legislation. The bill was approved in the Senate Public Employment & Retirement Committee on Monday on a 3-2 vote. The bill was previously approved in the Assembly and is not going to Appropriations, and currently awaits a final vote on the floor of the Senate.

In answer to a question by Member Dowdin Cavillo, Mr. Chisholm stated that Assembly Bill 1659 was sponsored by the American Federation of State, County and Municipal Employees, Council 36. The Board continued and had further discussion regarding this legislation.

Governor's Reorganization Plan 2 (Achadjian) – Subject of hearings and a special committee of the Assembly on June 6-7 and 13.

Senate Bill 252 (Vargas) – Provides for a separation of bargaining unit 7, upon a petition, into two units. This bill is scheduled for hearing on June 20 in the Assembly Committee on Public Employees, Retirement and Social Security.

Senate Bill 259 (Hancock) – Amends the definition of employee under the Higher Education Employer-Employee Relations Act to remove the balancing test for student employees. This bill is scheduled for hearing next week in the Assembly Committee on Higher Education.

Mr. Chisholm reported that this year's maintenance of the codes bill which includes changes to one or more PERB statutes is in the Assembly Judiciary Committee and will be heard on June 19.

AB 2381 (Hernández, Roger) – Brings employees of the Judicial Council, including employees of the Administrative Office of the Courts, under the Ralph C. Dills Act and requires that PERB not include Judicial Council employees in a bargaining unit that includes other employees. The bill is currently in Senate Rules awaiting committee assignment.

Mr. Chisholm concluded his report on legislation which had not yet been introduced regarding in-home support service workers. He reported that this legislation could come in the form of budget trailer language and would provide that the state, rather than individual counties or public authorities, would bargain on behalf of in-home support service workers. As such workers are currently under PERB, this legislation would not be an increase to the agency's jurisdiction.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo that the Legal (including General Counsel and Chief Administrative Law Judge), Administrative, and Legislative Reports be accepted and filed.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Public Hearing on Proposed Rulemaking

Chair Martinez opened the hearing on proposed rulemaking for consideration of changes and additions to regulations (California Code of Regulations, Title 8, amending sections 32380, 32603, and 32604, and adding sections 32802 and 32804), implementing factfinding procedures under the Meyers-Milias-Brown Act pursuant to the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011). She directed PERB's Division Chief, Les Chisholm, to comment on the staff proposal.

Mr. Chisholm reported that the current staff proposal is the same as the emergency regulations adopted by PERB at the end of last year. He stated that prior to January 1, 2012, the MMBA did not provide for mandatory impasse procedures. Assembly Bill 646, enacted last year and effective January 1, 2012, provides for factfinding before an employer can impose its last, best and final offer.

Mr. Chisholm provided detail regarding the proposed regulatory package. New Regulation Section 32802 would define the process and the timelines for filing a request for factfinding under the MMBA. Section 32804 would state the process and timeline with respect to factfinding requests that are deemed to be sufficient under Section 32802. Specifically, Section 32802 provides that a request for factfinding can be filed either (1) within 30 days of the date impasse is declared, or (2) where there is mediation, which is voluntary under the MMBA, requests must be filed between the time period of 30 days after the appointment or selection of the mediator, but not later than 45 days. Mr. Chisholm stated that there are occasions where the parties to a case have mutually agreed to waive or extend those timelines.

Mr. Chisholm stated that to date, PERB has had 17 requests for factfinding under the emergency regulations. In most cases, the requests have been un-opposed and have proceeded forward, although PERB had dismissed a few requests as untimely. The agency recently received its first factfinding report issued under the MMBA.

Mr. Chisholm continued reporting on the regulatory package stating that staff are proposing to amend three existing regulation sections. Consistent with other statutes that PERB administers, in Section 32380, PERB staff propose to add language that would specify that determinations made under Section 32802 would not be appealable to the Board itself. Further, under the MMBA, Section 32603 describes unfair practices by a public agency, and Section 32604 defines employee organization unfair practices, and staff proposes that both be amended to include reference to the new requirement for factfinding.

Mr. Chisholm then commented on an issue that was a point of controversy when the Board considered the emergency regulatory package. Specifically, the proposed emergency regulations contained provisions stating that a request for factfinding could be filed after a declaration of impasse and where there had not been mediation. As mentioned in the legislative report there is pending legislation which addresses this issue, Assembly Bill 1606. Assembly Bill 1606 would amend Section 3505.4 to incorporate language that is found in the existing emergency regulations to provide that a request for factfinding may be filed between 30 and 45 days after the appointment of a mediator. The author and sponsors of this legislation contend that the amendment proposed by Assembly Bill 1606 is technical and clarifies existing

law. PERB staff, stated Mr. Chisholm, advocated for the emergency regulations, with the provisions for factfinding even where there has not been mediation, as consistent with the reading of Assembly Bill 646 in its entirety and all of the provisions enacted by that legislation. He stated that PERB staff found support in Assembly Bill 1606 for its position even though it is not yet law.

Mr. Chisholm concluded by stating that no written comments to the proposed regulatory package had been received in response to the Notice of Proposed Rulemaking that is before the Board today for consideration. For the reasons offered for the emergency regulatory package, including information provided to the Office of Administrative Law in its review of those regulations, PERB staff urged the Board to adopt the proposed regulations in their current form, which are identical to emergency regulations that are currently in effect.

Chair Martinez invited members of the public to appear before the Board for comment regarding the regulatory package proposed by PERB staff.

Michael Seville, Representative, International Federation of Professional Technical Engineers, Local 21 (IFPTE), appeared before the Board. Mr. Seville stated that IFPTE is a union located in the Bay Area which represents approximately 10,000 civil servants in the city and county, utility and transit districts. Mr. Seville first expressed appreciation for the Board's consideration of this matter, but had questions and concerns regarding the timelines. Specifically, in conferring with colleagues in the Bay Area, Mr. Seville stated the belief that while it was felt the 30-day requirement was "a good move", the 45-day requirement, the back-end date to file, was restrictive. The time limits as currently proposed, said Mr. Seville "may not be enough time and it puts a mediator in a bad place and kind of hamstrings the mediator in dealing with two parties who are engaging in good faith mediation if one party moves for factfinding. It erodes the confidence of both parties of good faith mediation, or could." On behalf of the union, Mr. Seville urged the Board that either (1) Assembly Bill 1606 would go into effect to clarify the time limits and would set a legal precedent, or in Assembly Bill 1606's absence (2) requests that PERB extend the 45-day time limit for filing a request for factfinding.

Mr. Seville brought a second point to the Board's attention regarding the timelines for the public release of information and the amount of time the employer must wait prior to imposition.

Extensive discussion was held regarding Mr. Seville's questions and concerns, where scenarios were introduced under which the time limit to file a request for factfinding might or might not affect parties engaged in good faith mediation, including the parties' mutual agreement to put the request for factfinding in abeyance. Also, Mr. Chisholm noted that regarding Mr. Seville's second point, the statute already addresses this issue, and that neither the current proposed regulations nor the emergency regulations adopted by the Board addressed this topic.

Eraina Ortega, Representative, California State Association of Counties (CSAC), appeared before the Board. Ms. Ortega commented on the above-mentioned issue on behalf of CSAC and employers who attended the regional meetings held by PERB last year regarding the emergency regulations which were adopted. At the regional meetings, she stated as a key issue the employers' interest in setting an outside date to request factfinding because of their desire to be able to resolve the issue. Ms. Ortega encouraged the Board to maintain the time limits in

the regulations. As another point, she then commented that CSAC had worked with the sponsors of Assembly Bill 1606, currently all of the major statewide union representatives, to amend the bill to reflect the language of the PERB regulations, which would ensure there would be no concerns about the regulation versus the statute, and provide clarity regarding the timeframe for filing a request for factfinding. Ms. Ortega asked that if any further discussions were to be considered regarding these timeframes, that PERB work with those involved with the legislation so that it continues to reflect a common goal.

Jeffrey Edwards, Attorney, Mastagni, Holstedt, Amick, Miller & Johnsen, appeared before the Board. Following the discussion held today, Mr. Edwards asked about PERB's practice with regard to factfinding requests that have been put into abeyance. He wanted to know whether either party could take the request out of abeyance or whether such request had to be made by mutual consent.

Mr. Chisholm stated that generally, and with a limited sample with regard to factfinding under the MMBA, parties in an unfair practice proceeding that has been put into abeyance are invited individually to request that a case be taken out of abeyance. Typically, cases are taken out of abeyance when the parties have reached resolution of the matter and the request is being withdrawn. There are no specific regulations which address the matter regarding placing cases into or out of abeyance.

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin to close the public hearing on proposed rulemaking concerning factfinding procedures under the Meyers-Milias-Brown Act.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Old Business

Chair Martinez closed the public hearing and no further public comments regarding the proposed regulatory package would hereafter be taken. The Board considered the adoption and amendment of regulations (California Code of Regulations, title 8, amending Sections 32380, 32603 and 32604 and adding Sections 32802 and 32804) as included in the Notice of Proposed Rulemaking published in the April 27, 2012, California Regulatory Notice Register.

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin to forward the rulemaking package to the Office of Administrative Law for review and approval.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

New Business

Chair Martinez announced that PERB has scheduled an Advisory Committee Meeting for Thursday, June 28, at 10 am in Sacramento. The following were noted as items that would be on the agenda for topics of discussion at that meeting:

1. The transfer to State Mediation and Conciliation Service into PERB.

2. An additional regulatory package which would soon be available on PERB's website.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through August 9, 2012 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo to recess the meeting to continuous closed session.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Respectfully submitted,

_____
Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

_____

_____
Anita I. Martinez, Chair

PUBLIC EMPLOYMENT RELATIONS BOARD
PUBLIC MEETING

Thursday,
10:00 a.m.
June 14, 2012
1031 - 18th Street
Sacramento, CA 95811

PLEASE SIGN IN - PLEASE PRINT

NAME	REPRESENTING	ADDRESS AND PHONE NUMBER
James MacDonald	CSDA	(916) 769-3514 1112 I St. #200
Kevin Colburn	CTA	2785 Hanford Ave. Yucca Valley 92284
Greg Eddy	CFT	1127 11 St #806, Sacramento CA 95814
WENJIU LIU	SBLP	3521 W LIDO BLVD. G. WBWAK, CA
D NIELSEN	CNA/NNU	5477 N. Fresno St. #104 Fresno, CA
Erana Ortega	CSAC	on file
Chris Howard	Vacaville	707 449 5101
Michael Sevilla	IFPTE Local 21	1182 Market St. #425

APPEARANCE CARD PERB PUBLIC BOARD MEETING

NAME: Erica Ortega DATE: 6/14

REPRESENTING: CSAC - Ca State Assoc of Counties

AGENDA ITEM(S) Regulations

ADDRESS: On file

PHONE:

PERB #81 (3/83)

APPEARANCE CARD PERB PUBLIC BOARD MEETING

NAME: Jeffrey Edwards DATE: 6/14

REPRESENTING: Mastagni, Holstedt etal.

AGENDA ITEM(S)

ADDRESS: 1912 I St 95811

PHONE: 491-4217

PERB #81 (3/83)

APPEARANCE CARD PERB PUBLIC BOARD MEETING

NAME: WENJIU LIU DATE: JUNE 11

REPRESENTING: SELF

AGENDA ITEM(S)

ADDRESS: 35214 LIDO BLVD, UNIT, NEWARK, CA 94560

PHONE: 510-688-0626

PERB #81 (3/83)

APPEARANCE CARD PERB PUBLIC BOARD MEETING

NAME: Michael Seville DATE: 6/14

REPRESENTING: IFPTE Local 21

AGENDA ITEM(S) Public Hearing on AB 646

ADDRESS: 1182 Market St. Suite 485 SF CA 94102

PHONE: (415) 864-2100

PERB #81 (3/83)

Exhibit 8

UPDATED INFORMATIVE DIGEST

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Regulatory Action.

Exhibit 9

FINAL STATEMENT OF REASONS

No written comments were received in response to the Notice of Proposed Rulemaking and the Public Employment Relations Board (PERB or Board) did not rely on any material that was not available for public review prior to close of the public comment period. Additionally, no modification has been made to the text of the proposed regulations originally noticed to the public.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE PUBLIC HEARING

COMMENT NO. 1: Michael Seville, Representative, International Federation of Professional Technical Engineers, Local 21 (IFPTE), appeared before the Board. Mr. Seville stated that IFPTE is a union located in the Bay Area that represents approximately 10,000 civil servants in the city and county, utility and transit districts. Mr. Seville first expressed appreciation for the Board's consideration of this matter, but had questions and concerns regarding the timelines set forth in the proposed regulations. Specifically, in conferring with colleagues in the Bay Area, Mr. Seville stated the belief that while it was felt the 30-day requirement was "a good move", the 45-day back-end filing deadline for factfinding requests is restrictive. The time limits as currently proposed, said Mr. Seville, "may not be enough time and it puts a mediator in a bad place and kind of hamstrings the mediator in dealing with two parties who are engaging in good faith mediation if one party moves for factfinding. It erodes the confidence of both parties of good faith mediation, or could." On behalf of the union, Mr. Seville urged the Board to either (1) wait for Assembly Bill 1606 to go into effect to clarify the time limits and set a legal precedent, or (2) in Assembly Bill 1606's absence, extend the 45-day time limit for filing a request for factfinding.

Response: PERB disagrees with the comment to the extent that Mr. Seville suggested that PERB, through this rulemaking package, extend the 45-day back-end filing deadline for factfinding requests. The reasons being two-fold. First, as discussed at the public hearing and affirmed by Comment Number 3, *infra*, Assembly Bill 1606, last amended on May 17, 2012, and currently before the Senate Appropriations Committee for consideration, seeks to clarify Assembly Bill 646 by explicitly establishing the 45-day back-end filing deadline. Additionally, the 45-day back-end filing deadline was proposed here and previously adopted in PERB's emergency rulemaking package in order to address interested parties' concerns and desire for certainty. During the discussion at the public hearing relating to this rulemaking package, PERB staff noted that if parties are actively engaged in mediation, the exclusive representative can file the factfinding request within the 45-day time limit to preserve its right to factfinding, then request the factfinding request be placed in abeyance pending the outcome of mediation between the parties.

COMMENT NO. 2: Mr. Seville brought a second point to the Board's attention regarding the timelines for the public release of a factfinding report and the amount of time the employer must wait prior to imposition.

Response: This comment does not relate to the proposed regulations. PERB Division Chief Les Chisholm noted that MMBA section 3505.7 already addresses this issue, and that neither the current proposed regulations nor the emergency regulations adopted by the Board address this topic.

COMMENT NO. 3: Eraina Ortega, Representative, California State Association of Counties (CSAC), appeared before the Board. Ms. Ortega addressed Comment Number 1 on behalf of CSAC and employers who attended the regional meetings held by PERB last year during the emergency rulemaking process. The key issue at the regional meetings was the employers' interest in setting an outside date to request factfinding because of their desire to be able to resolve bargaining disputes. Ms. Ortega encouraged the Board to maintain the time limits in the proposed regulations. She also stated that CSAC had worked with the sponsors of Assembly Bill 1606 to amend the bill to reflect the language of the PERB regulations, which would ensure there would be no concerns about the regulation versus the statute, and provide clarity regarding the timeframe for filing a request for factfinding. Ms. Ortega asked that if any further discussions were to be considered regarding these timeframes, that PERB work with those involved with the legislation so that it continues to reflect a common goal.

Response: This is a general comment in support of PERB's currently proposed regulation language and sought to clarify information relating to the back-end date and Assembly Bill 1606 as commented on by Mr. Seville. (See, Comment No. 1 and PERB's response thereto.)

COMMENT NO. 4: Jeffrey Edwards, Attorney, Mastagni, Holstedt, Amick, Miller & Johnsen, appeared before the Board. Following the discussion held today, Mr. Edwards asked about PERB's practice with regard to factfinding requests that have been put into abeyance. He wanted to know whether either party could take the request out of abeyance or whether such request had to be made by mutual consent.

Response: This comment is not directed at and does not relate to the proposed regulations. Typically, cases are taken out of abeyance when the parties have reached resolution of the matter and the request is being withdrawn. There are no specific regulations which address the matter regarding placing cases into or out of abeyance; instead, these issues are resolved on a case-by-case basis.

CONSISTENT AND COMPATIBLE WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, PERB has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and

promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the community at-large benefits from those cost-savings. Finally, the proposed amendments clarify the definition of "unfair practices" under the MMBA.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Final determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 et seq: Final determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Final determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's final determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California. The adoption of the proposed amendment will benefit public employers, employees, employees' representatives and the community at-large by further facilitating the resolution of public sector labor disputes by providing additional dispute resolution procedures and promoting full and bilateral communication between PERB's constituents. In so doing, California residents' welfare will receive the benefit of stable collective bargaining and dispute resolution, which translates to continuous delivery of the essential services that these employers and employees provide to California communities.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

During the workshop process that preceded the adoption of the related emergency regulations, some parties advocated limiting MMBA factfinding to situations where the parties had first engaged in mediation. This alternative interpretation of Assembly Bill 646 was considered by PERB. However, based on the language of the MMBA, as amended by Assembly Bill 646, as well as the above-referenced evidence of legislative intent and the comments submitted by most other interested parties, this alternative interpretation was rejected for purposes of both the emergency and proposed regulations. PERB concluded, when adopting the emergency regulations, that harmonizing the statutory changes made by Assembly Bill 646 required PERB to conclude that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

PERB has not identified any alternatives that would lessen any adverse impact on small business and has not identified any adverse impacts on small businesses as a result of these proposed regulations.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

PERB relied upon the Economic Impact Assessment prepared regarding the proposed regulations. PERB did not rely upon any other technical, theoretical, or empirical studies, report or documents in proposing the adoption of these regulations.

MANDATED USE OF SPECIFIC TECHNOLOGIES OR EQUIPMENT

PERB's proposed regulations do not mandate the use of any specific technologies or equipment.

Exhibit 10

RECEIVED FOR FILING PUBLICATION DATE

APR 16 '12 APR 27 '12

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT

(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

Office of Administrative Law

DEPARTMENT NAME	CONTACT PERSON	TELEPHONE NUMBER
Public Employment Relations Board	Les Chisholm	(916) 322-3198
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		**NOTICE FILE NUMBER**
Factfinding under the Meyers-Milias-Brown Act		Z

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts businesses and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☐ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (List areas.): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes ☐ No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): $ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☐ No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☐ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of : ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: $_____	Cost: $_____
Alternative 1:	Benefit: $_____	Cost: $_____
Alternative 2:	Benefit: $_____	Cost: $_____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million ? ☐ Yes ☐ No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

   Alternative 1: _____

   Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

   Regulation: $ _____ Cost-effectiveness ratio: $ _____

   Alternative 1: $ _____ Cost-effectiveness ratio: $ _____

   Alternative 2: $ _____ Cost-effectiveness ratio: $ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

   ☐ a. is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____

   ☐ b. will be requested in the _____ Governor's Budget for appropriation in Budget Act of _____
   (FISCAL YEAR)

☐ 2. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

   ☐ a. implements the Federal mandate contained in _____

   ☐ b. implements the court mandate set forth by the _____

   court in the case of _____ vs. _____

   ☐ c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ election;
   (DATE)

   ☐ d. is issued only in response to a specific request from the _____

   _____, which is/are the only local entity(s) affected;

   ☐ e. will be fully financed from the _____ authorized by Section
   (FEES, REVENUE, ETC.)

   _____ of the _____ Code;

   ☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

   ☐ g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Savings of approximately $ _____ annually.

☐ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.

☑ 6. Other. Unaware of any local costs. No reimbursement required per Gov. Code section 17561.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year. It is anticipated that State agencies will:

☐ a. be able to absorb these additional costs within their existing budgets and resources.

☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.

☐ 2. Savings of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any State agency or program.

☐ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year.

☐ 2. Savings of of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.

☐ 4. Other.

FISCAL OFFICER SIGNATURE ☒		DATE
AGENCY SECRETARY[1] APPROVAL/CONCURRENCE	☒ Chris S. Manning	DATE 4.16.12
DEPARTMENT OF FINANCE[2] APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER ☒	DATE

1. *The signature attests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.*

2. *Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.*

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT

(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME	CONTACT PERSON	TELEPHONE NUMBER
Public Employment Relations Board	Les Chisholm	(916) 322-3198
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		**NOTICE FILE NUMBER**
Factfinding under the Meyers-Milias-Brown Act		Z 2012-0416-02

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts businesses and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☐ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (List areas.): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes ☐ No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): $ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☐ No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☐ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of : ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: $_____	Cost: $_____
Alternative 1:	Benefit: $_____	Cost: $_____
Alternative 2:	Benefit: $_____	Cost: $_____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million ? ☐ Yes ☐ No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: $ _____ Cost-effectiveness ratio: $ _____

Alternative 1: $ _____ Cost-effectiveness ratio: $ _____

Alternative 2: $ _____ Cost-effectiveness ratio: $ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

☐ a. Is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. will be requested in the _____ Governor's Budget for appropriation in Budget Act of _____
(FISCAL YEAR)

☐ 2. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

☐ a. Implements the Federal mandate contained in _____

☐ b. Implements the court mandate set forth by the _____

court in the case of _____ vs. _____

☐ c. Implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ election;
(DATE)

☐ d. is issued only in response to a specific request from the _____

_____, which is/are the only local entity(s) affected;

☐ e. will be fully financed from the _____ authorized by Section
(FEES, REVENUE, ETC.)

_____ of the _____ Code;

☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

☐ g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Savings of approximately $ _____ annually.

☐ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.

☑ 6. Other. Unaware of any local costs. The initial determination of the agency is that the proposed action would not impose any new mandate.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year. It is anticipated that State agencies will:

- ☐ a. be able to absorb these additional costs within their existing budgets and resources.
- ☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.

☐ 2. Savings of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any State agency or program.

☐ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year.

☐ 2. Savings of of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.

☐ 4. Other.

FISCAL OFFICER SIGNATURE		DATE
AGENCY SECRETARY [1] APPROVAL/CONCURRENCE		DATE 6.18.12
DEPARTMENT OF FINANCE [2] APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER	DATE 6/20/12

1. *The signature attests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.*

2. *Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.*

Exhibit 11

ECONOMIC IMPACT ASSESSMENT

(Government Code section 11346.3(b))

As a result of the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012, the Meyers-Milias-Brown Act (MMBA), the collective bargaining statute applicable to local governments (cities, counties, and special districts) in California, provides for a mandatory impasse procedure—factfinding before a tripartite panel—upon the request of an exclusive representative where the parties have not reached a settlement of their dispute. The Public Employment Relations Board (PERB) is responsible for the appointment of the neutral chairperson of the factfinding panel unless the parties mutually agree upon the selection of the chairperson. This new legislation and the duties imposed on PERB under it require amendments to existing regulations as well as the adoption of new regulations in order to fully implement the legislation and PERB's role.

The proposed regulations clarify and interpret California Government Code sections 3505.4, 3505.5 and 3505.7, and provide guidelines for the filing and processing of requests for factfinding under the MMBA.

In accordance with Government Code Section 11346.3(b), the Public Employment Relations Board has made the following assessments regarding the proposed regulations:

Creation or Elimination of Jobs Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no jobs in California will be created or eliminated.

Creation of New or Elimination of Existing Businesses Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no new businesses in California will be created or existing businesses eliminated.

Expansion of Businesses or Elimination of Existing Businesses Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no existing businesses in California will be expanded or eliminated.

Benefits of the Regulations

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. Through the guidelines, the Public Employment Relations Board will ensure improvement of the public sector labor environment by providing additional dispute resolution procedures and promoting full communication between public employers and their employees in resolving disputes over wages, hours and other terms and conditions of employment. The proposed regulations will further the policy of bilateral resolution of public sector labor disputes and help PERB constituents avoid unnecessary and costly unfair practice charges and related litigation. The proposed regulatory action will not adversely affect the health and welfare of California residents, worker safety, or the State's environment. The proposed regulatory action will not benefit the health of California residents, worker safety, or the State's environment. The proposed regulatory action will, as described, benefit the general welfare of California residents by ensuring that public labor disputes are resolved in less costly ways.

OFFICE OF ADMINISTRATIVE LAW
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
(916) 323-6225 FAX (916) 323-6826

DEBRA M. CORNEZ
Director

MEMORANDUM

TO: Les Chisholm
FROM: OAL Front Desk
DATE: 8/7/2012
RE: Return of Approved Rulemaking Materials
OAL File No. 2011-1219-01E

OAL hereby returns this file your agency submitted for our review (OAL File No. 2011-1219-01E regarding Factfinding under the Meyers-Milias-Brown Act).

If this is an approved file, it contains a copy of the regulation(s) stamped "ENDORSED APPROVED" by the Office of Administrative Law and "ENDORSED FILED" by the Secretary of State. The effective date of an approved file is specified on the Form 400 (see item B.5). (Please Note: The 30th Day after filing with the Secretary of State is calculated from the date the Form 400 was stamped "ENDORSED FILED" by the Secretary of State.)

DO NOT DISCARD OR DESTROY THIS FILE

Due to its legal significance, you are required by law to preserve this rulemaking record. Government Code section 11347.3(d) requires that this record be available to the public and to the courts for possible later review. Government Code section 11347.3(e) further provides that "....no item contained in the file shall be removed, altered, or destroyed or otherwise disposed of." See also the Records Management Act (Government Code section 14740 et seq.) and the State Administrative Manual (SAM) section 1600 et seq.) regarding retention of your records.

If you decide not to keep the rulemaking records at your agency/office or at the State Records Center, you may transmit it to the State Archives with instructions that the Secretary of State shall not remove, alter, or destroy or otherwise dispose of any item contained in the file. See Government Code section 11347.3(f).

Enclosures

STATE OF CALIFORNIA--OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATION SUBMISSION

EMERGENCY

(See instruction on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2011-1219-01E

For use by Office of Administrative Law (OAL) only

2011 DEC 19 AM 10:45

OFFICE OF ADMINISTRATIVE LAW

2011 DEC 29 PM 2:07

OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Public Employment Relations Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)
Factfinding under the Meyers-Milias-Brown Act

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT: 32802, 32804

AMEND: 32380, 32603, 32604

REPEAL:

TITLE(S): 8

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☒ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify) _____
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☐ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☒ Effective other (Specify) January 1, 2012

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Les Chisholm	(916) 327-8383	(916) 327-6377	lchisholm@perb.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE: 12.19.11

TYPED NAME AND TITLE OF SIGNATORY
Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

DEC 29 2011

Office of Administrative Law

PROPOSED TEXT -- REGULATION CHANGES RELATED TO
IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
(New language shown in *italics*.)

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections *3505.4,* 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code; and Section 99561(j), (m), Public Utilities Code.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, *3505.4, 3505.5, 3505.7,* 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, *3505.4, 3505.5, 3505.7,* 3506, 3507 and 3509, Government Code; and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

State of California **PUBLIC EMPLOYMENT RELATIONS BOARD**

M E M O R A N D U M

1031 18th Street
Sacramento, CA 95811-4124

DATE: December 29, 2011

TO : Office of Administrative Law

FROM : Anita I. Martinez, Chair

SUBJECT : Factfinding under the Meyers-Milias-Brown Act
2011-1219-01E

This serves to confirm that, by unanimous vote of its Members at the December 8. 2011 public meeting, the Public Employment Relations Board approved the above-referenced emergency regulations and their submission to the Office of Administrative Law.

Respectfully submitted,

Anita I. Martinez,
Chair

LEONARD CARDER, LLP

SHAWN GROFF
KATE R. HALLWARD
ESTELLE PAE HUERTA
CHRISTINE S. HWANG
JENNIFER KEATING
ARTHUR A. KRANTZ
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December 27, 2011

Via U.S. Mail and Email (staff@oal.ca.gov)
Kathleen Eddy, Reference Attorney
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Via U.S. Mail and Email (smurphy@perb.ca.gov; lchisholm@perb.ca.gov)
Suzanne Murphy, General Counsel, and Les Chisholm, Division Chief
Public Employment Relations Board
1031 – 18th Street
Sacramento, CA 95811-4124

2011 DEC 29 PM 3:35
OFFICE OF ADMINISTRATIVE LAW

Re: Proposed Emergency Regulations Related to AB 646 Implementation

Dear Ms. Eddy, Ms. Murphy, and Mr. Chisholm:

Leonard Carder, LLP represents scores of labor unions in the California public sector, including many which fall under the jurisdiction of the California Public Employment Relations Board ("PERB"). Accordingly, Leonard Carder, LLP is an "interested person" within the meaning of California Government Code section 11349.6 and submits this comment to the emergency regulations proposed by PERB related to the implementation of Assembly Bill 646, which amends the Meyers-Milias-Brown Act ("MMBA").

As a preliminary matter, we appreciate the opportunity to submit a comment supporting the proposed emergency regulations. To date, we have found PERB's process for soliciting comments on proposed emergency regulations to be proactive, thoughtful and transparent, including holding well-attended meetings across the state to engender discussion on these issues.

Particularly, we support the proposed regulations as consistent with the statute, and importantly, believe that the proposed regulations will provide clarity to the many public entities and labor organizations affected by the new law. (Cal. Gov't Code section 11349(c) & (d).) As noted in the statute, Government Code section 11349(d) defines "consistency" as meaning the

regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decision, or other provisions of law." "Clarity" is defined as "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (Cal. Gov't Code section 11349(c).

It is our view that the proposed regulations, particularly proposed regulation 32802, are consistent with the statute. Earlier drafts of AB 646 – prior to the final draft that was enacted – included provisions providing an absolute right to request mediation. When those mediation provisions were struck from the bill, the drafters simply neglected to make the necessary corresponding alteration to the opening sentence of MMBA, Government Code Section 3505.4(a). In other words, the drafters intended to eliminate any absolute right to mediation, but intended to leave intact the employee organization's absolute right to request factfinding, irrespective of whether any mediation is held. The drafters' oversight is evident not only from comparing successive versions of the bill, but also from the abrupt way in which "the mediator" and his or her appointment appear, devoid of any context, at the outset of the enacted bill.

This conclusion is widely shared by many PERB constituents, in both labor and management; it is rare to find such unanimity in the labor relations bar. While one could argue for a different construction of the statute (i.e., that factfinding may be triggered only by voluntary mediation), we view that construction as contrary to the statute's express language, the legislative history, and the drafters' intent. Indeed, we view the alternate position as not only contrary to the legislative intent, but as inviting protracted litigation to seek clarification; clarification is, of course, one sanctioned purpose of the emergency regulations.

In sum, PERB's proposed regulations are consistent with AB 646, and accordingly we urge approval of the emergency regulations; in our view, the proposed emergency regulations are consistent with the statute and will provide much needed clarity for the public sector.

We appreciate your continued consideration of these comments and your close attention to these important matters.

Very truly yours,

LEONARD CARDER, LLP

By: Margot A. Rosenberg
Margot Rosenberg

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

JOAN F. DAWSON
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
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December 22, 2011

By U.S. Mail and Email (staff@oal.ca.gov)

Kathleen Eddy, Reference Attorney
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By U.S. Mail and Email (lchisholm@perb.ca.gov)

Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811-4124

Proposed Emergency Regulations Related to Assembly Bill 646

Dear Ms. Eddy and Mr. Chisholm:

The City of San Diego (City) is an interested person within the meaning of California Government Code (Government Code) section 11349.6 and submits this comment to the emergency regulations proposed by the Public Employment Relations Board (PERB) related to implementation of Assembly Bill 646 (A.B. 646).

Under Government Code sections 11349.1 and 11349.6(b), a regulation must meet the standard of "consistency," meaning the regulation is "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." Cal. Gov't Code § 11349(d). A regulation must also meet the standard of "clarity," meaning it is "written or displayed so that the meaning of [the] regulation[] will be easily understood by those persons directly affected by them." Cal. Gov't Code § 11349(c). PERB's proposed regulation 32802(a) is not consistent with A.B. 646, nor does it provide clarity to the public agencies subject to it. Therefore, it should be disapproved for the following reasons.

First, PERB's proposed regulation broadens the scope of A.B. 646 by providing that an exclusive representative may request factfinding even when a dispute is not submitted to mediation. The proposed regulation states that "[a]n exclusive representative may request that the parties' differences be submitted to a factfinding panel," without any limitation of circumstances. It also provides, in proposed regulation 32802(a)(2), that a request for factfinding may be submitted "[i]f the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse." This proposed regulation would require a public agency that does not engage in mediation to wait thirty days following the date of a written declaration of impasse to ensure there is no request for factfinding by an employee organization before the public agency proceeds with its own impasse process, or risk an unfair labor practice charge. It is our view that there is nothing in A.B. 646 that requires this waiting period or that requires factfinding when the parties do not engage in mediation.

Second, PERB's conclusion, set forth in its Finding of Emergency, that A.B. 646 provides for "a mandatory impasse procedure – factfinding before a tripartite panel – upon the request of an exclusive representative where the parties have not reached a settlement of their dispute" is not supported by the plain language of the legislation. In its Informative Digest, submitted with its proposed regulations, PERB writes that proposed section 32802 is consistent

> with the express requirements and clear intent of the recent amendments to the MMBA. . . . Where parties have not reached an agreement, an exclusive representative may file its request with PERB. . . . If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse.

That an employee organization may request factfinding following impasse in all circumstances is inconsistent with and expands the scope of A.B. 646. As you are aware, administrative regulations that alter or amend a statute or enlarge or impair its scope are void, and courts not only may, but must strike down the regulations. *Morris v. Williams*, 67 Cal. 2d 733, 748 (1967).

Third, A.B. 646 does not authorize or mandate factfinding when the parties do not engage in mediation of a dispute, nor does A.B. 646 mandate mediation. In fact, the legislative history supports this conclusion. The legislative analysis for A.B. 646 states that the legislation *allows* a local public employee organization to request factfinding *when* mediation has been unsuccessful at effectuating a resolution to a labor dispute within 30 days of appointment of the mediator. *Bill Analysis*, A.B. 646, S. Rules Comm. (June 22, 2011) (emphasis added).

In furtherance of this intent, the Legislature left unchanged those provisions of the Meyers-Milias-Brown Act (MMBA) that allow local public agencies to utilize their own negotiated impasse procedures and implement a last, best, and final offer, without resorting to mediation and factfinding, as long as the public agency holds a public hearing before imposition.

The MMBA, at Government Code section 3505, mandates:

> The governing body of a public agency . . . shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations . . . prior to arriving at a determination of policy or course of action.

Engaging in "meet and confer in good faith" includes the obligation "to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." Government Code section 3505 further provides, with italics added, "The process should include adequate time for the resolution of impasses *where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.*"

In accordance with Government Code section 3505, this City has a long-standing impasse procedure negotiated with the City's recognized employee organizations and adopted by the San Diego City Council (City Council), as Council Policy 300-06, that does not mandate or even contemplate that the parties engage in mediation upon an impasse in bargaining. Council Policy 300-06 provides that if the meet and confer process has reached an impasse, either party may initiate the impasse procedure by filing with the City Council a written request for an impasse meeting. An impasse meeting is then scheduled by the City's Mayor (previously, the City Manager) to review the position of the parties in a final effort to resolve a dispute. If the dispute is not resolved at the impasse meeting, then the impasse is resolved by a determination by the Civil Service Commission or the City Council after a hearing on the merits of the dispute.

Fourth, the Legislature left unchanged Government Code section 3505.2 which does not mandate mediation. It provides, with italics added:

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together *may agree* upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organizations.

Government Code section 14 defines "may" as permissive, not mandatory. There is no language in Government Code section 3505.2, which mandates this City or other public agencies under the MMBA engage in mediation to resolve a dispute. Because this City does not engage in mediation, there is no language in A.B. 646, which mandates this City engage in factfinding. A regulation implementing A.B. 646 that mandates factfinding when there is no mediation is inconsistent with the legislation.

Fifth, Government Code section 3505.4(a), added by A.B. 646, effective January 1, 2012, sets forth the circumstances in which an employee organization may request factfinding. Specifically, factfinding is to follow mediation: "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel." In other words, an employee organization may request factfinding *if* the mediation does not result in settlement in a defined period.

Sixth, Government Code section 3505.5, also added by A.B. 646, relates to the timing and conduct of the factfinding panel and the costs. There is no language in section 3505.5 which can be read to mandate factfinding when the parties do not first mediate a dispute.

Seventh, Government Code section 3505.7, added by A.B. 646, also does not mandate factfinding. It states:

> After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

If the parties do not engage in mediation, then factfinding is not applicable and the timing of the factfinders' report is not relevant. A public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, after holding a public hearing.

This City is required to conduct a public hearing under its established and negotiated impasse procedure. Therefore, it is our view that our process is presently consistent with the MMBA, as amended by A.B. 646. This City is not required to proceed to mediation or factfinding upon an impasse, but the City Council must conduct a public hearing, which it presently does to resolve an impasse. Any regulation that mandates factfinding when there is no mediation is inconsistent with A.B. 646.

PERB's proposed regulations enlarge the scope of A.B. 646. Therefore, this Office urges disapproval of the regulations to the extent they mandate factfinding in the absence of mediation, or, in the alternative, requests that the proposed regulations be clarified for jurisdictions that do not engage in mediation by mutual agreement or by the terms of their negotiated impasse procedures.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By Joan F. Dawson
Joan F. Dawson
Deputy City Attorney

JFD:ccm

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
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December 28, 2011

Peggy J. Gibson, Staff Counsel
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Subject: Response to Comments Received about Proposed Emergency Regulations 2011-1219-01E

Dear Ms. Gibson:

By letter dated December 22, 2011, the City Attorney for the City of San Diego states that the Office of Administrative Law (OAL) should disapprove the emergency regulations submitted by the Public Employment Relations Board (PERB), "to the extent they mandate factfinding in the absence of mediation, or, in the alternative, requests that the proposed regulations be clarified for jurisdictions that do not engage in mediation by mutual agreement or by the terms of their negotiated impasse procedures." In essence, the City Attorney for the City of San Diego asserts that PERB's emergency regulations are not consistent with Assembly Bill 646 (AB 646) and that they do not provide clarity to the public agencies subject thereto.

PERB previously considered the concerns expressed by the City Attorney for the City of San Diego, but rejected the objections raised based on the language of the Meyers-Milias-Brown Act (MMBA), as amended by AB 646, as well as evidence of legislative intent, and the comments submitted by most other interested parties. OAL should consider all of the issues involved and the arguments in support of PERB's emergency regulations from both representatives of local government agencies (employers) and representatives of employee organizations (labor or exclusive representatives)—and approve the emergency regulations.

First, PERB agrees that nothing in AB 646 changes the voluntary nature of mediation under the MMBA. (See Gov. Code, § 3505.2.) Nor do the proposed emergency regulations mandate that parties engage in mediation. However, any attempt to read and harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those *specifically* exempted by Government Code section 3505.5, subdivision (e).

It is correct that Government Code section 3505.4, subdivision (a), as amended by AB 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, it also is important to consider that AB 646 *repealed* the prior language of section 3505.4, which set forth the conditions under which an employer could implement its last, best and final offer (LBFO). In

new section 3505.7, added by AB 646, the MMBA now provides that implementation of the employer's LBFO may occur only "[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5." (Emphasis added.)

In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also consistent with the available evidence of legislative intent. The author of AB 646 is quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful.

(Emphasis added.)

In the attached e-mail message to the undersigned on December 2, 2011, commenting on the proposed emergency regulations which were then pending approval by PERB, a representative of the author's office urged "recognition of the legislative intent of AB 646 to provide an exclusive representative with the absolute right to request factfinding irrespective of whether any mediation was held."

The majority of interested parties, both employer and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not. The following comments are excerpted from those submitted to PERB during the voluntary public discussions held by PERB preceding the submission of its emergency regulations to OAL, copies of which are available on the PERB website at www.perb.ca.gov/news/default.aspx:

Carroll, Burdick & McDonough LLP (letter dated November 28, 2011; representing labor)

> We agree with our colleagues at Leonard Carder [in their letters dated November 14 and 17, 2011] that notwithstanding the final version of AB 646 being silent on the issue, the legislative history and the purpose behind the Meyers-Milias-Brown Act compel PERB to assume that a covered employer's obligation to participate in factfinding is mandatory, and PERB should draft its emergency regulation accordingly.
>
> The purpose and intent of the Act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Govt. Code, [§] 3500.) Factfinding, as required by AB 646, is an extension of this policy of bilateral resolution of labor disputes to include a uniform, nonbinding, process for resolving bargaining impasse.
>
> The idea, floated by some commentators and the City of San Diego [in its letter dated November 18, 2011], that an employer could simply opt out, or not be bound by, factfinding seems antithetical to the Legislature's whole approach on the subject. It sets up the scenario that an employer would choose not to voluntarily mediate at impasse because the mere agreement to mediate would bind the employer to factfinding *if* the mediation was unsuccessful and *if* the employee organization elected to pursue factfinding. As our colleagues at Roth[n]er, Segall and Greenstone point out [in their letter dated November 18, 2011], such a reading, which would make voluntary mediation less likely, would weaken impasse resolution processes, not strengthen them.
>
> Mandatory factfinding would not conflict with section 3505.2 since AB 646 does not itself compel mediation, only factfinding. We conclude that notwithstanding whether parties mediate, factfinding is a mandatory impasse resolution procedure if invoked by the employee association.

Burke, Williams & Sorensen, LLP (representing employers)

In a submission dated November 8, 2011, this management-side law firm proposed its own, independently drafted regulations to implement AB 646, which included language expressly providing for requests for factfinding where "no mediator has been appointed."

Renne Sloan Holtzman Sakai LLP (letter dated December 2, 2011; representing employers)

> A.B. 646, by its terms, does not provide for a fact-finding request from an employer. Thus, there is no similar counter-balance under the MMBA as exists under EERA and HEERA. Under the MMBA, without a deadline by which the employee organization must request fact-finding, it will be extremely difficult for an employer to protect itself against unreasonable delays. This significant difference in statutory language justifies PERB adopting fact-finding regulations under the MMBA that are different than those under EERA and HEERA.

A number of interested parties also suggested, and PERB amended its proposed emergency regulations to reflect, that these regulations should include a time limit within which the exclusive representative must request factfinding. (CALPELRA letter dated November 26, 2011, representing employers; Burke, Williams & Sorensen, LLP proposal dated November 8, 2011 representing employers.) PERB added language to its proposed emergency regulations to address these pleas for clarity and consistency.

In its letter dated November 26, 2011, CALPELRA elaborated:

> PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty. During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.

In sum, the proposed emergency regulations presently before OAL are a product of the participation of more than 130 representatives of employers and employee organizations, extensive written comments, and numerous discussions at voluntary public meetings held by

PERB. These proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of the newly enacted factfinding process under the Meyers-Milias-Brown Act would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Without the approval of these proposed emergency regulations, the procedural and substantive rights of employers, employees and employee organizations will be unclear. With numerous threatened strikes on the horizon, public entities may be unable to provide essential public services, public employees will be without redress and/or pay, and the general public will be incontrovertibly harmed by the foregoing.

Both management-side and labor-side representatives have shown support for PERB's emergency regulations and participated in the process of developing the emergency regulations filed with OAL. Based on the foregoing, PERB's proposed emergency regulations should be approved.

Sincerely,

Les Chisholm
Division Chief

Attachment

Les Chisholm

From: Naylor, Cody <Cody.Naylor@asm.ca.gov>
Sent: Friday, December 02, 2011 10:33 AM
To: Les Chisholm
Subject: AB 646 Rulemaking / Dec 8 Mtg

Hi Les –

I was wondering if there are further revisions to the November 14 draft emergency regulations expected before the December PERB meeting. I'd be happy to discuss our office's position with you about the proposed regulations. But in short, we appreciate Staff's recognition of the legislative intent of AB 646 to provide an exclusive representative with the absolute right to request factfinding irrespective of whether any mediation was held and for incorporating that provision into its proposed regulations.

Thank you!

Cody Naylor
Legislative Aide
Office of Assembly Member Toni Atkins
76th Assembly District
T (916) 319-2076
F (916) 319-2176

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

December 28, 2011

Peggy J. Gibson, Staff Counsel
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339

Subject: Supplemental Information Regarding Proposed Emergency Regulations 2011-1219-01E

Dear Ms. Gibson:

Prior to the enactment of Assembly Bill 646 (AB 646), the Meyers-Milias-Brown Act (MMBA) did not provide for any mandatory impasse procedures. AB 646 adds a factfinding process, with legislative intent to establish a uniform and mandatory procedure. AB 646 also repealed the prior language establishing when, if the parties did not reach an agreement, the employer could implement its last, best and final offer (LBFO), and enacted a new provision in this regard that references the new factfinding process as a *prerequisite* to implementation of the LBFO.

PERB's role is to administer and enforce the provisions of the MMBA, as well as six other public sector collective bargaining statutes. PERB's role is expanded by AB 646 to include the appointment of the chair of factfinding panels in disputes where the parties, who have been unable to resolve their bargaining dispute, are also unable to agree on the selection of a chairperson. At the present time, PERB does not have regulations in place to govern the procedures by which such an appointment would be made.

PERB currently administers factfinding provisions of the Educational Employment Relations Act (EERA, covering public school employers and employees) and the Higher Education Employer-Employee Relations Act (HEERA, covering higher education employers and employees). EERA and HEERA together cover roughly 1100 employers and some 750,000 employees organized into over 2400 bargaining units. The MMBA and the provisions of AB 646 apply to at least 3000 public employers, upwards of two million employees, and far more bargaining units than under EERA and HEERA. Currently, under EERA and HEERA, there are approximately 40 requests for factfinding each year. When factfinding was a new process under EERA and HEERA, requests occurred on a more frequent basis. Thus, PERB projects that, in the first year under the MMBA as amended by AB 646, there could be more than 100 requests to submit bargaining disputes to factfinding.

From the time that AB 646 was chaptered, PERB began receiving inquiries from both employer and employee organization representatives, wanting to know when and under what

circumstances factfinding could be requested, and how the process would work. While some differences emerged as to how the regulations should read, no party disputed that regulations were necessary, or that regulations should be adopted to go into effect on January 1, 2012. In fact, the disagreements over interpretation of AB 646 helped explain, in part, why interested parties wanted PERB to take action immediately.

For example, in a November 2, 2011 letter to PERB Chair Anita Martinez, the California Public Employers Labor Relations Association (CALPELRA) stated that:

> [CALPELRA] and its Board of Directors support the Public Employment Relations Board's interest in identifying issues that require regulatory action prior to the January 1, 2012, effective date of AB 646. The lack of clarity in some aspects of AB 646's amendments to the MMBA has created substantial uncertainty among MMBA jurisdictions. CALPELRA and its Board of Directors *would like to avoid unnecessary and costly unfair practices and related litigation caused by the imprecision of the statute*. We are confident that well designed PERB regulations could provide the necessary clarity and help MMBA jurisdictions and their employee representatives avoid disputes.

(Emphasis added.)

CALPELRA later stated, in a November 26, 2011 letter:

> PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. *Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty.* During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because *many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.*

(Emphasis added.)

In its November 14, 2011 letter, the labor-side law firm of Leonard Carder, while disagreeing with certain aspects of the initial staff discussion draft, commended PERB for "its proactive, thoughtful and transparent efforts" to adopt emergency regulations. Similar sentiments were expressed at the public meeting of PERB on December 8, 2011, by interested parties who

commented on the proposed emergency regulations. Throughout the process, no interested party urged PERB to take no action as to emergency regulations. On the other hand, PERB declined to take action on emergency regulations with respect to many proposals advanced by interested parties, believing that the emergency standard applied only to those regulations necessary to have procedures in place for the appointment of a factfinding panel chairperson.

The number of unfair practice charges filed under the MMBA has been increasing, as the fiscal constraints faced by local governments make for increasingly contentious bargaining. Likewise, PERB is seeing more requests for injunctive relief under the MMBA, filed by unions asking PERB to seek a court order halting the implementation of the employers' last, best and final offers, or by employers attempting to halt strikes or other work stoppages threatened by employee organizations. It was in this context that the Legislature saw fit to enact a mandatory impasse procedure (factfinding), with the express hope that impasse procedures could help parties to reach agreement, and thus avoid litigation and work actions that can disrupt public services. PERB and the overwhelming majority of interested parties who have weighed in to date believe that it is imperative to have regulations in place as of January 1, 2012, when the provisions of AB 646 take effect, so that the factfinding process may be implemented where requested, and so that this new impasse procedure can help to reduce the instance of the interruption of public services, lessen the amount of costly litigation over the lawfulness of employer implementations of terms and conditions of employment, and make less likely the finding of unfair practices with costly remedial orders.

By definition, whether PERB receives a handful of MMBA factfinding requests within the next six months, or whether 50 or 100 are filed, each such request will occur in the context where a public employer and a public employee union have been unable to reach agreement on a new contract—often after many months of contentious negotiations. Absent an agreement, which factfinding will hopefully facilitate, the employer may decide to implement its last, best and final offer and the members of the public employee union may decide to go on strike. In each case, the employer's action and the union's action will likely form the basis for another unfair practice charge and perhaps a request for injunctive relief. The consequences in any event will be costly, and will further strain labor-management relations.

Without OAL approval of the proposed emergency regulations, PERB will be left with only two options when presented with requests for factfinding: PERB can choose to take no action, until such time as the regular rulemaking process can be completed, including OAL's approval of the regulations adopted; or PERB can seek to assist the parties by appointing a factfinding chairperson and risk being charged with enforcing underground regulations.

PERB would prefer to act on the basis of approved emergency regulations, and believes that the factors described above justify approval of the proposed emergency regulations.

Sincerely,

Les Chisholm
Division Chief

Attachment

FINDING OF EMERGENCY

The Public Employment Relations Board finds that an emergency exists and that proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of a newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA) would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Specific Facts Showing the Need for Immediate Action

As a result of the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012, the MMBA, the collective bargaining statute applicable to local governments (cities, counties, and special districts) in California, will provide for a mandatory impasse procedure—factfinding before a tripartite panel—upon the request of an exclusive representative where the parties have not reached a settlement of their dispute. PERB will be responsible for the appointment of the neutral chairperson of the factfinding panel unless the parties mutually agree upon the selection of the chairperson. This new legislation and the duties imposed on PERB under it require amendments to existing regulations as well as the adoption of new regulations in order to fully implement the legislation and PERB's role.

The MMBA has not previously mandated the use of any impasse procedures with respect to negotiations between local agencies and unions representing their employees. The current regulations of the Board do not provide for the filing and processing of requests for factfinding under the MMBA. These legislative changes potentially affect hundreds of thousands of public employees in California, their employers, and the employee organizations that represent employees under the MMBA. PERB began receiving inquiries from public employers, employees and employee organizations, who are potentially affected by this new legislation, as soon as the legislation was chaptered. Public meetings were promptly convened by PERB in Northern and Southern California to discuss the legislation and the possible adoption of regulations, both of which were very well attended. The attendees included more than 130 representatives of employers and employee organizations, including numerous law firms that represent hundreds of local agencies and employee organizations that themselves represent multiple bargaining units within local government agencies. Extensive written comments and suggestions were received by PERB in response to the discussions at those meetings and the "discussion drafts" circulated by PERB staff.

In order that the procedural and substantive rights of employers, employees and employee organizations are protected, the Board finds that there exists an emergency need to adopt new regulations providing for the filing and processing of requests for factfinding under the MMBA, and to amend other existing regulations where necessary to conform to newly adopted regulations. In so doing, the Board has attempted to distinguish between those changes that are necessary to the immediate implementation of the statute as amended, and those areas that may be identified as requiring further regulations as the Board and the parties acquire experience with the provisions of the amended statute.

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act. Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act. Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act. Government Code section 3563(f) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act. Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act. Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Employment Protection and Governance Act. Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act.

General reference for section 32380 of the Board's regulations: Sections 3505.4, 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code, and Section 99561(j), (m), Public Utilities Code.

General reference for section 32603 of the Board's regulations: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

General reference for section 32604 of the Board's regulations: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

General reference for proposed section 32802 of the Board's regulations: Sections 3505.4, 3505.5, and 3505.7, Government Code.

General reference for proposed section 32804 of the Board's regulations: Sections 3505.4, 3505.5, and 3505.7, Government Code.

INFORMATIVE DIGEST

Section 32380 of the Board's regulations provides for administrative decisions that are not appealable. The proposed changes update reference citations to reflect the newly enacted provisions of the MMBA. (Chapter 680, Statutes of 2011.) The proposed changes also

conform this section to the text of proposed Section 32802 with regard to the appealability of Board agent determinations as to the sufficiency of a request for factfinding under the MMBA. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA.

Section 32603 defines employer unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Section 32604 defines employee organization unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. Where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well

as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17561: None.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings on federal funding to the state: None

Cost impact on private persons or directly affected businesses: None

Significant adverse economic impact on business including the ability of California businesses to compete with businesses in other states: None

Significant effect on housing costs: None

The proposed regulations will not affect small business because they only affect public employers and public employees.

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT

(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME	CONTACT PERSON	TELEPHONE NUMBER
Public Employment Relations Board	Les Chisholm	(916) 327-8383
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		**NOTICE FILE NUMBER**
Factfinding under the Meyers-Milias-Brown Act		Z

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts businesses and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☐ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (List areas.): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes ☐ No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

_____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): $ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☐ No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☐ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

_____

_____

2. Are the benefits the result of : ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

_____

_____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: $_____	Cost: $_____
Alternative 1:	Benefit: $_____	Cost: $_____
Alternative 2:	Benefit: $_____	Cost: $_____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

_____

_____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million ? ☐ Yes ☐ No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation:	$ _____	Cost-effectiveness ratio: $ _____
Alternative 1:	$ _____	Cost-effectiveness ratio: $ _____
Alternative 2:	$ _____	Cost-effectiveness ratio: $ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

☐ a. is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. will be requested in the _____ (FISCAL YEAR) Governor's Budget for appropriation in Budget Act of _____

☐ 2. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

☐ a. implements the Federal mandate contained in _____

☐ b. implements the court mandate set forth by the _____

court in the case of _____ vs. _____

☐ c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ (DATE) election;

☐ d. is issued only in response to a specific request from the _____

_____, which is/are the only local entity(s) affected;

☐ e. will be fully financed from the _____ (FEES, REVENUE, ETC.) authorized by Section

_____ of the _____ Code;

☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

☐ g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Savings of approximately $ _____ annually.

☐ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.

☑ 6. Other. Unaware of any local costs. No reimbursement required per Gov. Code section 17561.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year. It is anticipated that State agencies will:

- ☐ a. be able to absorb these additional costs within their existing budgets and resources.
- ☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.

☐ 2. Savings of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any State agency or program.

☐ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year.

☐ 2. Savings of of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.

☐ 4. Other.

FISCAL OFFICER SIGNATURE		DATE 12-19-11
AGENCY SECRETARY [1] APPROVAL/CONCURRENCE		DATE
DEPARTMENT OF FINANCE [2] APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER	DATE

1. *The signature attests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.*

2. *Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.*

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-3198
Fax: (916) 327-6377

December 9, 2011

NOTIFICATION OF PROPOSED EMERGENCY REGULATORY ACTION

Subject: Implementation of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012—Factfinding

The Public Employment Relations Board (PERB) is proposing to adopt emergency regulations implementing the newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA).

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency action to OAL, OAL shall allow interested persons five (5) calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. Upon filing, OAL will have ten (10) calendar days within which to review and make a decision on the proposed emergency rules. If approved, OAL will file the regulations with the Secretary of State, and the emergency regulations will become effective for one hundred and eighty (180) days. Within the 180-day effective period, PERB will proceed with a regular rulemaking action, including a public comment period. The emergency regulations will remain in effect during this rulemaking action.

Attached to this notice is the specific regulatory language of PERB's proposed emergency action and Finding of Emergency.

You may also review the proposed regulatory language and Finding of Emergency on PERB's website at the following address: http://www.perb.ca.gov.

If you have any questions regarding this proposed emergency action, please contact Les Chisholm at (916) 327-8383.

STATEMENT OF CONFIRMATION OF MAILING OF FIVE-DAY EMERGENCY NOTICE
(Cal. Code Regs., tit. 1, § 50(a)(5)(A))

The Public Employment Relations Board sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulation to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).

32802. Appointment of a Factfinder Under MMBA.

[OPTION 1]

Not sooner than 30 days after the appointment of a mediator, an exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required. The request shall be accompanied by documentation of the date on which a mediator was appointed.

Comments/Notes:

[OPTION 2]

Not sooner than 30 days after the appointment of a mediator, the Board shall appoint a person to chair a factfinding panel if the exclusive representative requests that the parties' differences be submitted to a factfinding panel. The request shall include or be accompanied by documentation of the date on which a mediator was appointed. The request must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

Comments/Notes: what happens if the person appointed says they can do it w/in 30 days and then we find out on day 20 they cannot do it, then when does the 30 days end. Does it restart? Only 10 days — how many days to get new?

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

****

32804. Appointment of Person to Chair Factfinding Panel Under MMBA.

(a) The Board shall, within five working days from the date filed, notify the parties whether the request satisfies the requirements of Section 32802. If the request does not satisfy the requirements of Section 32802, no further action shall be taken by the Board.

Comments/Notes:

(b)

[OPTION 1]

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Revised November 4, 2011

Comments/Notes:

[OPTION 2]

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In each case where Board appoints the chairperson, the Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties select one by alternate strike or other methodology of their choice. In no case will the Board be responsible for the costs of the chairperson.

Comments/Notes:

[OPTION 3]

Unless notified by the parties that they have mutually agreed upon a person to chair the panel, the Board shall refer each sufficient request to the State Mediation and Conciliation Service, for the appointment of a chairperson in accordance with the provisions of California Code of Regulations, title 8, Section 17300, within five working days. In no case will the Board be responsible for the costs of the chairperson or for any fees provided for by Section 17300.

Comments/Notes:

(c) "Working days," for purposes of this Section only, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

Comments/Notes:

(d) The determination as to whether a request satisfies the requirements of Section 32802 shall not be appealable to the Board itself.

Comments/Notes:

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

32802. Appointment of a Factfinder Under MMBA.

[OPTION 1]

Not sooner than 30 days after the appointment of a mediator, an exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required. The request shall be accompanied by documentation of the date on which a mediator was appointed.

Comments/Notes: See comment on option 2.

[OPTION 2]

Not sooner than 30 days after the appointment of a mediator, the Board shall appoint a person to chair a factfinding panel if the exclusive representative requests that the parties' differences be submitted to a factfinding panel. The request shall include or be accompanied by documentation of the date on which a mediator was appointed. The request must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

Comments/Notes: This draft assumes that mediation is a necessary pre-requisite to factfinding; not true.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

****

32804. Appointment of Person to Chair Factfinding Panel Under MMBA.

(a) The Board shall, within five working days from the date filed, notify the parties whether the request satisfies the requirements of Section 32802. If the request does not satisfy the requirements of Section 32802, no further action shall be taken by the Board.

Comments/Notes:

(b)

[OPTION 1]

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Revised November 4, 2011

Comments/Notes:

[OPTION 2]

The Board shall select and appoint the chairperson unless notified by the parties that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In each case where Board appoints the chairperson, the Board will submit seven names to the parties, drawn from the list of factfinders established pursuant to Government Code section 3541.3(d). The Board will, by random selection, designate one of the seven persons to serve as the chairperson unless the parties select one by alternate strike or other methodology of their choice. In no case will the Board be responsible for the costs of the chairperson.

Comments/Notes: Like option 2 best, provided the 7 names provided board all agreed to complete fact finding in 30 days, and the panel members are limited to interest arbitrators residing in Region (NoCal/SoCal) where dispute arises.

[OPTION 3]

Unless notified by the parties that they have mutually agreed upon a person to chair the panel, the Board shall refer each sufficient request to the State Mediation and Conciliation Service, for the appointment of a chairperson in accordance with the provisions of California Code of Regulations, title 8, Section 17300, within five working days. In no case will the Board be responsible for the costs of the chairperson or for any fees provided for by Section 17300.

Comments/Notes:

(c) "Working days," for purposes of this Section only, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

Comments/Notes:

(d) The determination as to whether a request satisfies the requirements of Section 32802 shall not be appealable to the Board itself.

Comments/Notes:

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Section 3505.4, Government Code.

ANDREW BAKER
BERSON, TAYER + BUDINE
483 9th St
Oakland 94607

Revised November 4, 2011

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-3198
Fax: (916) 327-6377

October 25, 2011

Re: Assembly Bill 646 (MMBA factfinding (see attached))

Dear Interested Party:

The Public Employment Relations Board (PERB) invites you to attend a meeting to discuss the implementation of Assembly Bill 646 (AB 646). Meetings will be held as follows:

Tuesday, November 8, 2011
10:00 a.m. – 1:00 p.m.
Elihu Harris State Office Building
1515 Clay Street, 2nd Floor, Room 1
Oakland, California

and

Thursday, November 10, 2011
10:00 a.m. – 1:00 p.m.
PERB Los Angeles Regional Office
700 N. Central Avenue, Suite 230
Glendale, California

The meetings will be conducted by PERB General Counsel Suzanne Murphy and Division Chief Les Chisholm. Representatives of the California State Mediation and Conciliation Service will also attend and participate. The discussion will focus on the issues raised by the enactment of AB 646, and in particular the issues that might require regulatory action by PERB in advance of January 1, 2012, when the legislation takes effect. Among the issues to be discussed are what information PERB should require when a party seeks to initiate factfinding pursuant to the Meyers-Milias-Brown Act, and how PERB will carry out its responsibilities vis-à-vis the appointment process.

We look forward to your insights and thoughts on these issues and any others that you may believe are raised by AB 646. Persons planning to attend either meeting are requested to reply by telephone (916.322.3198) or by e-mail (lchisholm@perb.ca.gov).

Sincerely,

Anita I. Martinez Chair	Sally M. Mc. Keag Member	Alice Dowdin Calvillo Member	A. Eugene Huguenin Member

Assembly Bill 646 (Chapter 680, Statutes of 2011)

Effective January 1, 2012, the following changes to the Meyers-Milias-Brown Act take effect, pursuant to Assembly Bill 646. Newly enacted provisions are shown in **bold** type. Strikeout (~~strikeout~~) of text is used to shown language deleted from the Act.

3505.4.

~~If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.~~

(a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

3505.5.

(a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

3505.7.

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

State of California

MEMORANDUM

PUBLIC EMPLOYMENT RELATIONS BOARD
Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124

DATE: August 13, 2012

TO : Board Members

FROM : Les Chisholm
Katharine Nyman
Jonathan Levy

SUBJECT : **Status of Regulation Projects**

This memo is intended to confirm in writing the information presented last Thursday, at the August 9, 2012 public Board meeting, regarding the status of various regulation projects.

1. **Implementation of AB 646 (MMBA factfinding)**

- The Office of Administrative Law (OAL) approved the rulemaking package and filed the Certificate of Compliance with Secretary of the State on July 30, 2012.

2. **Recommendations resulting from comprehensive review to improve/update current regulations**

- June 28, 2012—discussed possible areas of change with Advisory Committee
- July 27, 2012—circulated revised draft to Board members and managers
- Week of August 13, 2012—will post version 2.0 on website and invite comment by end of August
- October 11, 2012—hope to have package of recommendations and ask Board at that time to authorize submitting notice to OAL, with projected hearing date on December 14

3. **State Mediation and Conciliation Service**

- Some changes to existing PERB regulations that relate to transfer of SMCS from DIR to PERB are included in package discussed above
- Reviewing existing DIR regulations, that are now deemed to be PERB regulations, to make both technical corrections (statutory references, removing DIR Director) but also looking at where substantive changes may be desired, and will discuss with interested parties
- Two primary areas: reimbursement for services, and public transit representation processes
- May have package of changes to recommend to Board in October 2012

4. **In-Home Supportive Services Employer-Employee Relations Act (IHSSA)**

- Does not appear that emergency regulations are required, even though authorized by Senate Bill 1036
- Reviewing what new regulations are required, and which existing regulations are implicated
- Hope to have draft rulemaking package by end of calendar year, with action by Board in early 2013

5. **Public Notice/Financial Statement Complaints**

- In 2006, Board repealed regulations that established separate complaint procedures for these issues, and amended unfair practice charge regulations to allow disputes to be raised as unfair practice charges.
- May recommend that those changes be un-done.
- Recommendations to the Board will not be made any earlier than late 2012 or early 2013.

The attached chart shows, in brief form, the description of each project, the current status, and the projected target date(s) for further action.

Attachment

PERB REGULATION REVIEW
2012—2013

Description	Status	Action/Target Date(s)
MMBA Factfinding (AB 646)	Finalized as of July 30, 2012	N/A
General Review/Update	Informal "workshop" comment period	Post revised draft: August 15, 2012 Finalize staff draft: September 30, 2012 Submit to Board: October 14, 2012 meeting Issue notice: October 2012 Public hearing: December 2012 meeting
SMCS Merger	Staff review and drafting; and soliciting interested party comment	Initial staff draft: September 1, 2012 Finalize staff draft: September 30, 2012 Submit to Board: October 14, 2012 meeting Issue notice: October 2012 Public hearing: December 2012 meeting
Public notice/financial statement complaints	Staff review and drafting	Finalize draft: December 2012 Submit to Board: February 2013 meeting Issue notice: February 2013 Public hearing: April 2013 meeting
In-Home Supportive Services Employer-Employee Relations Act	Staff review and drafting	Finalize draft: December 2012 Submit to Board: February 2013 meeting Issue notice: February 2013 Public hearing: April 2013 meeting

STATE OF CALIFORNIA–OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z- 2012-0416-02		2011-1219-01E

For use by Office of Administrative Law (OAL) only

RECEIVED FOR FILING PUBLICATION DATE

APR 16 '12 APR 27 '12

Office of Administrative Law

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
Public Employment Relations Board

AGENCY FILE NUMBER (If any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
Factfinding under the Meyers-Milias-Brown Act	8	32380	April 27, 2012

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
[X] Notice re Proposed Regulatory Action [ ] Other	Les Chisholm	(916) 322-3198	(916) 327-6377

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	[ ] Approved as Submitted [ ] Approved as Modified [ ] Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S)

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

TITLE(S)

ADOPT

AMEND

REPEAL

3. TYPE OF FILING

- [ ] Regular Rulemaking (Gov. Code §11346)
- [ ] Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- [ ] Emergency (Gov. Code, §11346.1(b))
- [ ] Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- [ ] Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- [ ] Emergency Readopt (Gov. Code, §11346.1(h))
- [ ] File & Print
- [ ] Other (Specify) _____
- [ ] Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- [ ] Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- [ ] Effective 30th day after filing with Secretary of State
- [ ] Effective on filing with Secretary of State
- [ ] §100 Changes Without Regulatory Effect
- [ ] Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- [ ] Department of Finance (Form STD. 399) (SAM §6660)
- [ ] Fair Political Practices Commission
- [ ] State Fire Marshal
- [ ] Other (Specify) _____

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE 4.16.12

TYPED NAME AND TITLE OF SIGNATORY
Anita Martinez, Board Chair

For use by Office of Administrative Law (OAL) only

INSTRUCTIONS FOR PUBLICATION OF NOTICE AND SUBMISSION OF REGULATIONS

Use the form STD. 400 for submitting notices for publication and regulations for Office of Administrative Law (OAL) review.

ALL FILINGS
Enter the name of the agency with the rulemaking authority and agency's file number, if any.

NOTICES
Complete Part A when submitting a notice to OAL for publication in the California Regulatory Notice Register. Submit two (2) copies of the STD. 400 with four (4) copies of the notice and, if a notice of proposed regulatory action, one copy each of the complete text of the regulations and the statement of reasons. Upon receipt of the notice, OAL will place a number in the box marked "Notice File Number." If the notice is approved, OAL will return the STD. 400 with a copy of the notice and will check "Approved as Submitted" or "Approved as Modified." If the notice is disapproved or withdrawn, that will also be indicated in the space marked "Action on Proposed Notice." Please submit a new form STD. 400 when resubmitting the notice.

REGULATIONS
When submitting regulations to OAL for review, fill out STD. 400, Part B. Use the form that was previously submitted with the notice of proposed regulatory action which contains the "Notice File Number" assigned, or, if a new STD. 400 is used, please include the previously assigned number in the box marked "Notice File Number." In filling out Part B, be sure to complete the certification including the date signed, the title and typed name of the signatory. The following must be submitted when filing regulations: seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification) and the complete rulemaking file with index and sworn statement. (See Gov. Code § 11347.3 for rulemaking file contents.)

RESUBMITTAL OF DISAPPROVED OR WITHDRAWN REGULATIONS
When resubmitting previously disapproved or withdrawn regulations to OAL for review, use a new STD. 400 and fill out Part B, including the signed certification. Enter the OAL file number(s) of all previously disapproved or withdrawn filings in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). Submit seven (7) copies of the regulation to OAL with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). Be sure to include an index, sworn statement, and (if returned to the agency) the complete rulemaking file. (See Gov. Code §§ 11349.4 and 11347.3 for more specific requirements.)

EMERGENCY REGULATIONS
Fill out only Part B, including the signed certification, and submit seven (7) copies of the regulations with a copy of the STD. 400 attached to the front of each (one copy must bear an original signature on the certification). (See Gov. Code §11346.1 for other requirements.)

NOTICE FOLLOWING EMERGENCY ACTION
When submitting a notice of proposed regulatory action after an emergency filing, use a new STD. 400 and complete Part A and insert the OAL file number(s) for the original emergency filing(s) in the box marked "All Previous Related OAL Regulatory Action Number(s)" (box 1b. of Part B). OAL will return the STD. 400 with the notice upon approval or disapproval. If the notice is disapproved, please fill out a new form when resubmitting for publication.

CERTIFICATE OF COMPLIANCE
When filing the certificate of compliance for emergency regulations, fill out Part B, including the signed certification, on the form that was previously submitted with the notice. If a new STD. 400 is used, fill in Part B including the signed certification, and enter the previously assigned notice file number in the box marked "Notice File Number" at the top of the form. The materials indicated in these instructions for "REGULATIONS" must also be submitted.

EMERGENCY REGULATIONS - READOPTION
When submitting previously approved emergency regulations for readoption, use a new STD. 400 and fill out Part B, including the signed certification, and insert the OAL file number(s) related to the original emergency filing in the box marked "All Previous Related OAL Regulatory Action Number (s)" (box 1b. of Part B).

CHANGES WITHOUT REGULATORY EFFECT
When submitting changes without regulatory effect pursuant to California Code of Regulations, Title 1, section 100, complete Part B, including marking the appropriate box in both B.3. and B.5.

ABBREVIATIONS
Cal. Code Regs. - California Code of Regulations
Gov. Code - Government Code
SAM - State Administrative Manual

For questions regarding this form or the procedure for filing notices or submitting regulations to OAL for review, please contact the Office of Administrative Law Reference Attorney at (916) 323-6815.

PROPOSED TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k), ~~3541.3~~ and (n), 3563(j), ~~3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j), and (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

INITIAL STATEMENT OF REASONS

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.)

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to the Public Employment Relations Board (PERB or Board). This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

The proposed regulation changes that have been identified as necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646 are described below.

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. During the workshop process that preceded the adoption of emergency regulations, some parties advocated limiting the application of this regulation and MMBA factfinding to situations where the parties had first engaged in mediation. Based on the language of the MMBA, as amended by Assembly Bill 646, as well as evidence of legislative intent and the comments submitted by most other interested parties, this alternative approach has been rejected for purposes of the proposed regulations. Instead, it appears that harmonizing of the statutory changes made by Assembly Bill 646 requires the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

It is correct that Government Code section 3505.4(a), as re-added by Assembly Bill 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, Assembly Bill 646 also repealed the prior language of section 3505.4, which set forth under what conditions an employer could implement its last, best and final offer. In new section 3505.7, the MMBA provides that such an implementation may only occur, "After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5." (Emphasis added.) In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also highly consistent with the available evidence of legislative intent. For example, the author of Assembly Bill 646 was quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order

to assist them in resolving differences that remain after negotiations have been unsuccessful.

Under proposed Section 32802, where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself, consistent with how impasse determinations under other statutes are treated.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD

NOTICE OF PROPOSED RULEMAKING

The Public Employment Relations Board (Board) proposes to adopt and amend the regulations described below after considering all comments, objections or recommendations regarding the proposed action.

REGULATORY ACTION

The Board proposes to amend sections 32380, 32603, and 32604, and to add sections 32802 and 32804. Section 32380 identifies types of administrative decisions by Board agents that are not appealable to the Board itself. Section 32603 describes unfair practices by a public agency under the Meyers-Milias-Brown Act (MMBA). Section 32604 describes unfair practices by an employee organization under the MMBA. Proposed section 32802 provides for the filing of requests for factfinding with PERB under the MMBA, describes when a request may be filed and the requirements for filing, and provides that determinations as to sufficiency of a request are not appealable. Proposed section 32804 describes the timelines and procedures for the selection of a neutral chairperson of a factfinding panel pursuant to a sufficient request filed under proposed section 32802.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on June 14, 2012, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period closes at

5:00 p.m. on June 12, 2012. Written comments will also be accepted at the public hearing. Submit written comments to:

Les Chisholm, Division Chief
Office of the General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
FAX: (916) 327-6377
E-mail: lchisholm@perb.ca.gov

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32380 of the Board's regulations: Government Code sections 3505.4, 3509, 3513(h), 3541.3(k) and (n), 3563(j) and (m), 71639.1 and 71825; and Public Utilities Code section 99561(j) and (m). General reference for section 32603 of the Board's regulations: Government Code sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for section 32604 of the Board's regulations: Government Code sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for proposed section 32802 of the Board's regulations: Government Code sections 3505.4, 3505.5,

and 3505.7. General reference for proposed section 32804 of the Board's regulations: Government Code sections 3505.4, 3505.5, and 3505.7.

POLICY STATEMENT OVERVIEW

PERB is a quasi-judicial agency which oversees public sector collective bargaining in California. PERB presently administers seven collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB are: the Meyers-Milias-Brown Act (MMBA) of 1968, which established collective bargaining for California's city, county, and local special district employers and employees; the Educational Employment Relations Act (EERA) of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act), establishing collective bargaining for state government employees; the Higher Education Employer-Employee Relations Act (HEERA) of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law; the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) of 2003, which covers supervisory employees of the Los Angeles County Metropolitan Transportation Authority; and the Trial Court Employment Protection and Governance Act (Trial Court Act) of 2000 and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) of 2002, which together provide for collective bargaining rights for most trial court employees.

Prior to January 1, 2012, the MMBA did not provide for any mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Pursuant to Assembly Bill 646 (Chapter 680, Statutes of 2011), the MMBA was amended to provide for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. Assembly Bill 646, while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7.

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to PERB. This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

INFORMATIVE DIGEST

Section 32380 identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 describes unfair practices by an employee organization under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed section 32802 would describe when and in which office a request for factfinding may be filed with the Board. The new section would further describe the timeline for PERB's determination as to the sufficiency of the request, and would specify that such determinations are not appealable to the Board itself.

Proposed section 32804 would describe the process, in cases where the Board finds a factfinding request to be valid, for the selection or appointment of the neutral chairperson of a factfinding panel. The new section would further specify, consistent with the provisions of MMBA section 3505.5, that PERB will not be responsible in any case for the costs of the panel chairperson.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Initial determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 et seq: Initial determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Initial determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's initial determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

ECONOMIC IMPACT ASSESSMENT

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

CONSIDERATION OF ALTERNATIVES

A rulemaking agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

PRELIMINARY ACTIVITIES

PERB staff began meeting with interested parties about the statutory changes made by Assembly Bill 646 in October 2011; circulated discussion drafts of possible regulations; held open meetings to take comments and suggestions on November 8, 2011 (Oakland) and November 10, 2011 (Glendale); and posted copies of the discussion drafts, written comments from parties, and the staff recommendations on the Board's web site. Additional public comments were received at the December 8, 2011 public Board meeting, at which time the Board authorized submission of an emergency rulemaking package to implement the provisions of Assembly Bill 646. The Board has also relied upon the Economic Impact Assessment identified in this Notice in proposing regulatory action.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is

published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons, when available, may be obtained by contacting Jonathan Levy or Katherine Nyman at the address or phone number listed below, and are also available on the Board's web site (see address below).

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of reasons should be sent to the attention of Jonathan Levy or Katherine Nyman at the address indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

INTERNET ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. Written comments received during the written comment period will also be posted on the web site. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

Jonathan Levy, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8387

or

Katherine Nyman, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8386

STATE OF CALIFORNIA — DEPARTMENT OF FINANCE

ECONOMIC AND FISCAL IMPACT STATEMENT

(REGULATIONS AND ORDERS)

STD. 399 (REV. 12/2008)

See SAM Section 6601 - 6616 for Instructions and Code Citations

DEPARTMENT NAME	CONTACT PERSON	TELEPHONE NUMBER
Public Employment Relations Board	Les Chisholm	(916) 322-3198
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400		**NOTICE FILE NUMBER**
Factfinding under the Meyers-Milias-Brown Act		Z

ECONOMIC IMPACT STATEMENT

A. ESTIMATED PRIVATE SECTOR COST IMPACTS (Include calculations and assumptions in the rulemaking record.)

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts businesses and/or employees
- ☐ b. Impacts small businesses
- ☐ c. Impacts jobs or occupations
- ☐ d. Impacts California competitiveness
- ☐ e. Imposes reporting requirements
- ☐ f. Imposes prescriptive instead of performance
- ☐ g. Impacts individuals
- ☐ h. None of the above (Explain below. Complete the Fiscal Impact Statement as appropriate.)

h. (cont.) _____

(If any box in Items 1 a through g is checked, complete this Economic Impact Statement.)

2. Enter the total number of businesses impacted: _____ Describe the types of businesses (Include nonprofits.): _____

Enter the number or percentage of total businesses impacted that are small businesses: _____

3. Enter the number of businesses that will be created: _____ eliminated: _____

Explain: _____

4. Indicate the geographic extent of impacts: ☐ Statewide ☐ Local or regional (List areas.): _____

5. Enter the number of jobs created: _____ or eliminated: _____ Describe the types of jobs or occupations impacted: _____

6. Will the regulation affect the ability of California businesses to compete with other states by making it more costly to produce goods or services here?

☐ Yes ☐ No If yes, explain briefly: _____

B. ESTIMATED COSTS (Include calculations and assumptions in the rulemaking record.)

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? $ _____

a. Initial costs for a small business: $ _____ Annual ongoing costs: $ _____ Years: _____

b. Initial costs for a typical business: $ _____ Annual ongoing costs: $ _____ Years: _____

c. Initial costs for an individual: $ _____ Annual ongoing costs: $ _____ Years: _____

d. Describe other economic costs that may occur: _____

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

2. If multiple industries are impacted, enter the share of total costs for each industry: _____

3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. (Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.): $ _____

4. Will this regulation directly impact housing costs? ☐ Yes ☐ No If yes, enter the annual dollar cost per housing unit: _____ and the number of units: _____

5. Are there comparable Federal regulations? ☐ Yes ☐ No Explain the need for State regulation given the existence or absence of Federal regulations: _____

Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: $ _____

C. ESTIMATED BENEFITS (Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. Briefly summarize the benefits that may result from this regulation and who will benefit: _____

2. Are the benefits the result of : ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?

Explain: _____

3. What are the total statewide benefits from this regulation over its lifetime? $ _____

D. ALTERNATIVES TO THE REGULATION (Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.)

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: _____

2. Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation:	Benefit: $_____	Cost: $_____
Alternative 1:	Benefit: $_____	Cost: $_____
Alternative 2:	Benefit: $_____	Cost: $_____

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: _____

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ Yes ☐ No

Explain: _____

E. MAJOR REGULATIONS (Include calculations and assumptions in the rulemaking record.) Cal/EPA boards, offices, and departments are subject to the following additional requirements per Health and Safety Code section 57005.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

1. Will the estimated costs of this regulation to California business enterprises exceed $10 million ? ☐ Yes ☐ No (If No, skip the rest of this section.)

2. Briefly describe each equally as an effective alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: _____

Alternative 2: _____

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: $ _____ Cost-effectiveness ratio: $ _____

Alternative 1: $ _____ Cost-effectiveness ratio: $ _____

Alternative 2: $ _____ Cost-effectiveness ratio: $ _____

FISCAL IMPACT STATEMENT

A. FISCAL EFFECT ON LOCAL GOVERNMENT (Indicate appropriate boxes1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code. Funding for this reimbursement:

☐ a. is provided in _____, Budget Act of _____ or Chapter _____, Statutes of _____

☐ b. will be requested in the _____ (FISCAL YEAR) Governor's Budget for appropriation in Budget Act of _____

☐ 2. Additional expenditures of approximately $ _____ in the current State Fiscal Year which are not reimbursable by the State pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code because this regulation:

☐ a. implements the Federal mandate contained in _____

☐ b. implements the court mandate set forth by the _____

court in the case of _____ vs. _____

☐ c. implements a mandate of the people of this State expressed in their approval of Proposition No. _____ at the _____ (DATE) election;

☐ d. is issued only in response to a specific request from the _____

_____, which is/are the only local entity(s) affected;

☐ e. will be fully financed from the _____ (FEES, REVENUE, ETC.) authorized by Section

_____ of the _____ Code;

☐ f. provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each such unit;

☐ g. creates, eliminates, or changes the penalty for a new crime or infraction contained in _____

☐ 3. Savings of approximately $ _____ annually.

☐ 4. No additional costs or savings because this regulation makes only technical, non-substantive or clarifying changes to current law regulations.

ECONOMIC AND FISCAL IMPACT STATEMENT cont. (STD. 399, Rev. 12/2008)

☐ 5. No fiscal impact exists because this regulation does not affect any local entity or program.

☑ 6. Other. Unaware of any local costs. No reimbursement required per Gov. Code section 17561.

B. FISCAL EFFECT ON STATE GOVERNMENT (Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year. It is anticipated that State agencies will:

☐ a. be able to absorb these additional costs within their existing budgets and resources.

☐ b. request an increase in the currently authorized budget level for the _____ fiscal year.

☐ 2. Savings of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any State agency or program.

☐ 4. Other.

C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS (Indicate appropriate boxes1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.)

☐ 1 . Additional expenditures of approximately $ _____ in the current State Fiscal Year.

☐ 2. Savings of of approximately $ _____ in the current State Fiscal Year.

☑ 3. No fiscal impact exists because this regulation does not affect any federally funded State agency or program.

☐ 4. Other.

FISCAL OFFICER SIGNATURE		DATE
AGENCY SECRETARY [1] APPROVAL/CONCURRENCE		DATE 4.16.12
DEPARTMENT OF FINANCE [2] APPROVAL/CONCURRENCE	PROGRAM BUDGET MANAGER	DATE

1. *The signature attests that the agency has completed the STD.399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or department not under an Agency Secretary must have the form signed by the highest ranking official in the organization.*

2. *Finance approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD.399.*

TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD

NOTICE OF PROPOSED RULEMAKING

The Public Employment Relations Board (Board) proposes to adopt and amend the regulations described below after considering all comments, objections or recommendations regarding the proposed action.

REGULATORY ACTION

The Board proposes to amend sections 32380, 32603, and 32604, and to add sections 32802 and 32804. Section 32380 identifies types of administrative decisions by Board agents that are not appealable to the Board itself. Section 32603 describes unfair practices by a public agency under the Meyers-Milias-Brown Act (MMBA). Section 32604 describes unfair practices by an employee organization under the MMBA. Proposed section 32802 provides for the filing of requests for factfinding with PERB under the MMBA, describes when a request may be filed and the requirements for filing, and provides that determinations as to sufficiency of a request are not appealable. Proposed section 32804 describes the timelines and procedures for the selection of a neutral chairperson of a factfinding panel pursuant to a sufficient request filed under proposed section 32802.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on June 14, 2012, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period closes at

5:00 p.m. on June 12, 2012. Written comments will also be accepted at the public hearing. Submit written comments to:

Les Chisholm, Division Chief
Office of the General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
FAX: (916) 327-6377
E-mail: lchisholm@perb.ca.gov

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32380 of the Board's regulations: Government Code sections 3505.4, 3509, 3513(h), 3541.3(k) and (n), 3563(j) and (m), 71639.1 and 71825; and Public Utilities Code section 99561(j) and (m). General reference for section 32603 of the Board's regulations: Government Code sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for section 32604 of the Board's regulations: Government Code sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for proposed section 32802 of the Board's regulations: Government Code sections 3505.4, 3505.5,

and 3505.7. General reference for proposed section 32804 of the Board's regulations: Government Code sections 3505.4, 3505.5, and 3505.7.

POLICY STATEMENT OVERVIEW

PERB is a quasi-judicial agency which oversees public sector collective bargaining in California. PERB presently administers seven collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB are: the Meyers-Milias-Brown Act (MMBA) of 1968, which established collective bargaining for California's city, county, and local special district employers and employees; the Educational Employment Relations Act (EERA) of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act), establishing collective bargaining for state government employees; the Higher Education Employer-Employee Relations Act (HEERA) of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law; the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) of 2003, which covers supervisory employees of the Los Angeles County Metropolitan Transportation Authority; and the Trial Court Employment Protection and Governance Act (Trial Court Act) of 2000 and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) of 2002, which together provide for collective bargaining rights for most trial court employees.

Prior to January 1, 2012, the MMBA did not provide for any mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Pursuant to Assembly Bill 646 (Chapter 680, Statutes of 2011), the MMBA was amended to provide for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. Assembly Bill 646, while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7.

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to PERB. This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

INFORMATIVE DIGEST

Section 32380 identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 describes unfair practices by an employee organization under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed section 32802 would describe when and in which office a request for factfinding may be filed with the Board. The new section would further describe the timeline for PERB's determination as to the sufficiency of the request, and would specify that such determinations are not appealable to the Board itself.

Proposed section 32804 would describe the process, in cases where the Board finds a factfinding request to be valid, for the selection or appointment of the neutral chairperson of a factfinding panel. The new section would further specify, consistent with the provisions of MMBA section 3505.5, that PERB will not be responsible in any case for the costs of the panel chairperson.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Initial determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 et seq: Initial determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Initial determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's initial determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

ECONOMIC IMPACT ASSESSMENT

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

CONSIDERATION OF ALTERNATIVES

A rulemaking agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

PRELIMINARY ACTIVITIES

PERB staff began meeting with interested parties about the statutory changes made by Assembly Bill 646 in October 2011; circulated discussion drafts of possible regulations; held open meetings to take comments and suggestions on November 8, 2011 (Oakland) and November 10, 2011 (Glendale); and posted copies of the discussion drafts, written comments from parties, and the staff recommendations on the Board's web site. Additional public comments were received at the December 8, 2011 public Board meeting, at which time the Board authorized submission of an emergency rulemaking package to implement the provisions of Assembly Bill 646. The Board has also relied upon the Economic Impact Assessment identified in this Notice in proposing regulatory action.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is

published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons, when available, may be obtained by contacting Jonathan Levy or Katherine Nyman at the address or phone number listed below, and are also available on the Board's web site (see address below).

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of reasons should be sent to the attention of Jonathan Levy or Katherine Nyman at the address indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

INTERNET ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. Written comments received during the written comment period will also be posted on the web site. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

Jonathan Levy, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8387

or

Katherine Nyman, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8386

PRESENTATION OF EMERGENCY RULEMAKING PROPOSAL RELATED TO ASSEMBLY BILL 646

AB 646

- Amends MMBA; repeals and re-adds 3505.4, adds 3505.5 and 3505.7
- 1st instance of mandating an impasse procedure under MMBA; intent to provide for a uniform and mandatory procedure
- Factfinding may be requested by exclusive representative (3505.4)
- PERB to appoint chair of tripartite panel unless parties mutually select
- Specifies criteria for FF panel to consider
- Findings of fact and recommendations issued if no settlement (3505.5)
- FF report public after 10 days
- Parties (not PERB) to bear costs for chairperson
- Employer may impose LBFO after "any applicable" mediation and factfinding procedures, but "no earlier than 10 days after" FF report issued
- Charter cities and counties with process for binding arbitration exempted

WHY EMERGENCY REGULATIONS (WHY NOW?)

- New process introduced into local government labor relations that are already subject to many stressor factors, and labor strife
- PERB has not just authority but a responsibility to act with respect to appointment of FF chairperson, and has no existing regulations in this area
- Considerable interest in how PERB will handle has been expressed by constituent parties and organizations, including two

very well-attended meetings in Oakland and Glendale, and a number of written comments, and through numerous informal discussions

WHAT WE PROPOSE

- Two "discussion drafts" posted and circulated earlier to solicit feedback and comments. The drafts evolved, and the proposed text before the Board evolved, based the discussions with and written comments by interested parties. Many suggested changes incorporated. The text before you today was circulated earlier, and posted on our website for the benefit of interested parties.
- In proposing emergency regulations, we have attempted to focus on those areas most important to allow PERB to fulfill its role and responsibility and to assist the parties to move forward. Other areas where parties encouraged the adoption of regulations will be considered further as part of the regular rulemaking process, but did not appear to fit the "emergency" standard.
- In all cases, we have been mindful of recommending only changes or new regulations that meet the authority, consistency, clarity, nonduplication, and necessity standards enforced by the Office of Administrative Law.
- Changes to Sections 32380, 32603 and 32604 are recommended to conform them to new sections being recommended. This was an area recommended by several parties.
- Proposed new section 32802 identifies when and where a request for factfinding may be filed, and what information is required. In order to provide predictability and certainty regarding the process, an outer time limit is proposed. Thus, if the parties do not engage in mediation, the request must be filed within 30 days from the date either party declares impasse. If mediation does occur, the request may not be filed until 30 days have elapsed, but not more than 45 days following the mediator's appointment.

- We recognize that there is some disagreement concerning whether factfinding may be requested where mediation did not occur; this is an area where we think it is important to consider all the statutory changes together—not just the new language of 3505.4 but also 3505.7—as well as other evidence of legislative intent to enact a uniform and mandatory impasse procedure. Again, a paramount interest of many constituents was expressed as the need for certainty and predictability, including the ability of an employer to implement its LBFO where the parties are unable to reach agreement.
- 32802 would also identify the time in which PERB would determine whether a request meets the requirements of that section. Consistent with existing regulations regarding impasse-related determinations, the time frame is expressed in terms of "working days" (as defined) and that the determination is not appealable to the Board itself.
- Proposed section 32804 specifies that PERB will provide a list of seven names to the parties to facilitate their selection of a chairperson. If the parties are unable to select from this list, by alternately striking names or otherwise, or to selection someone else by mutual agreement, PERB will appoint one of the seven. The number seven is a convention commonly found with lists of neutrals provided by labor relations agencies like PERB, and was PERB's practice for many years with respect to EERA and HEERA factfinding cases. This section also specifies the time frame in which these actions must take place.

NEXT STEPS

- If so authorized by the Board, the Text, the Finding of Emergency, and the Statement of Mailing will be posted on the PERB website and mailed to interested parties. That should happen tomorrow (December 9), depending on the number of changes made today.

- We are required to provide the above-described notice five working days before submitting the Emergency Rulemaking package to OAL. There is no comment period during that five-day period. OAL then has 10 calendar days to review the proposal, and will receive public comments during the first five calendar days. PERB may, but is not required to, respond to any comments.
- If approved by OAL, the regulations could be in effect by January 1, 2012, when the legislative changes take effect.

RELATED ACTIVITIES

- We are amending/updating our Panel of Neutrals application forms and related materials to reference factfinding under the MMBA.
- We will soon mail a letter to all current Panel of Neutrals members to ask if they wish to be included on the Panel for purposes of MMBA factfinding.
- We will also be pursuing other outreach avenues, including a notice on the PERB website, to solicit additional applications for the Panel.

State of California **PUBLIC EMPLOYMENT RELATIONS BOARD**
Office of the General Counsel
M E M O R A N D U M **1031 18th Street**
Sacramento, CA 95811-4124

ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL

DATE: December 2, 2011

TO **:** Board Members

FROM **:** Suzanne Murphy
Wendi Ross
Les Chisholm

SUBJECT **:** **Proposed Emergency Regulation Changes**
Assembly Bill 646 (Factfinding under the MMBA)

Recommendations for amendments to existing PERB regulations, and the addition of new PERB regulations, intended to address the effects of the enactment of Assembly Bill 646 (AB 646),[1] have been drafted for your review and consideration, and are submitted with this memo.

Background

As you are aware, PERB has received extensive inquiries and written comment concerning the implications of and the implementation of the provisions of AB 646. Two public meetings for interested parties, held in Oakland on November 8, 2011, and in Glendale on November 10, 2011, were very well attended. Staff circulated "discussion drafts" of possible regulations during this process as a means of eliciting feedback, suggestions and comments. In drafting the enclosed recommendations, all of the comments received, oral or written, have been considered, and many of the constituents' suggestions have been incorporated into our proposal.

The emergency regulation process permits the Board to adopt regulations when it is necessary "to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code, § 11342.545.) This process is used infrequently. However, PERB has used the process on several occasions in the past when new legislation required it. For example, it was used in December 1999 to implement agency fee changes in HEERA when the legislated changes were effective January 1, 2000. Here, while some disagreement emerged from the public comments as to the substance of the regulations, no party has disputed the need for regulations and many have encouraged the Board to act promptly to adopt regulations.

The factors establishing the need for emergency rule changes are as follows. Effective January 1, 2012, the Meyers-Milias-Brown Act (MMBA) is amended expressly to authorize exclusive representatives, but not public employers, to request the submission of their bargaining disputes to a tri-partite factfinding panel, for the panel to make findings of fact and recommendations based on specified criteria, and for the publication of the panel's report 10

[1] Chapter 680, Statutes of 2011.

days after the parties' receipt of the findings and recommendations. AB 646 also requires PERB to appoint the chairperson of the panel, unless the parties mutually agree upon a chairperson in lieu of one appointed by PERB. At present, the MMBA does not require exhaustion of a factfinding process in order to complete bargaining under any circumstances. Further, PERB does not have regulations providing for the filing of a request for factfinding under the MMBA or for the appointment of a factfinding chairperson pursuant to the MMBA. If PERB does not fulfill its statutory duty under the MMBA, as amended, the lack of factfinding where requested will lead to increased uncertainty regarding when parties have exhausted applicable impasse procedures, whether a public employer may lawfully adopt and impose its last, best, and final offer, and whether a union may call for a work stoppage.

Next Steps

Action on this item at the December 8, 2011 public Board meeting will allow sufficient time to make a timely filing with the Office of Administrative Law (OAL).

The emergency rulemaking process requires that we provide notice of proposed emergency regulations by sending the finding of emergency,[2] the proposed text of emergency regulations, and the statement required by California Code of Regulations, title 1, section 48[3] to interested parties, at least five working days prior to submitting the emergency filing to the OAL. The same documents must also be posted on the PERB website. Staff intends, if the Board authorizes it, to send the "interested parties" mailing on December 9, 2011. This would allow for submission of the proposed emergency action to OAL on or about December 16, 2011. OAL then has 10 calendar days to review the emergency regulations. Assuming approval by OAL, the emergency regulations would be in effect as of January 1, 2012, and would remain in effect for 180 days. In order for the regulations to continue in effect, PERB must either file a completed Certificate of Compliance with regard to the regular rulemaking process within 180 days thereafter, or obtain OAL approval of a readopted emergency within that time.

[2] The "finding of emergency" will include a more extensive explanation of the need to adopt emergency regulations, as well as the authority and justification for each of the changes proposed. Drafting of this document is not complete at this time, but the Finding of Emergency language will be provided to Board Members prior to the December 8 meeting.

[3] The referenced statement would be, or be similar to, the following: "Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6."

Recommendation

That the Board review the proposed regulations and authorize filing under emergency provisions so that these changes can take effect on January 1, 2012.

cc: Legal Advisers

FINDING OF EMERGENCY

The Public Employment Relations Board finds that an emergency exists and that proposed emergency regulations are necessary to address a situation that calls for immediate action to avoid serious harm to the public peace, health, safety or general welfare. Failure to provide for implementation of a newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA) would leave uncertain the rights and responsibilities of parties subject to the MMBA, and would contribute to increased instability and strife in local government labor relations.

Specific Facts Showing the Need for Immediate Action

As a result of the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012, the MMBA, the collective bargaining statute applicable to local governments (cities, counties, and special districts) in California, will provide for a mandatory impasse procedure—factfinding before a tri-partite panel—upon the request of an exclusive representative where the parties have not reached a settlement of their dispute. PERB will be responsible for the appointment of the neutral chairperson of the factfinding panel unless the parties mutually agree upon the selection of the chairperson. This new legislation and the duties imposed on PERB under it require amendments to existing regulations as well as the adoption of new regulations in order to fully implement the legislation and PERB's role.

The MMBA has not previously mandated the use of any impasse procedures with respect to negotiations between local agencies and unions representing their employees. The current regulations of the Board do not provide for the filing and processing of requests for factfinding under the MMBA. These legislative changes potentially affect hundreds of thousands of public employees in California, their employers, and the employee organizations that represent employees under the MMBA. PERB began receiving inquiries from public employers, employees and employee organizations, who are potentially affected by this new legislation, as soon as the legislation was chaptered. Public meetings were promptly convened by PERB in Northern and Southern California to discuss the legislation and the possible adoption of regulations, both of which were very well attended. The attendees included more than 130 representatives of employers and employee organizations, including numerous law firms that represent hundreds of local agencies and employee organizations that themselves represent multiple bargaining units within local government agencies. Extensive written comments and suggestions were received by PERB in response to the discussions at those meetings and the "discussion drafts" circulated by PERB staff.

In order that the procedural and substantive rights of employers, employees and employee organizations are protected, the Board finds that there exists an emergency need to adopt new regulations providing for the filing and processing of requests for factfinding under the MMBA, and to amend other existing regulations where necessary to conform to newly adopted regulations. In so doing, the Board has attempted to distinguish between those changes that are necessary to the immediate implementation of the statute as amended, and those areas that may be identified as requiring further regulations as the Board and the parties acquire experience with the provisions of the amended statute.

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act. Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act. Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act. Government Code section 3563(f) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act. Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act. Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Employment Protection and Governance Act. Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act.

General reference for section 32380 of the Board's regulations: Sections 3505.4, 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code, and Section 99561(j), (m), Public Utilities Code.

General reference for section 32603 of the Board's regulations: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

General reference for section 32604 of the Board's regulations: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

General reference for proposed section 32802 of the Board's regulations: Sections 3505.4, 3505.5, and 3505.7, Government Code.

General reference for proposed section 32804 of the Board's regulations: Sections 3505.4, 3505.5, and 3505.7, Government Code.

INFORMATIVE DIGEST

Section 32380 of the Board's regulations provides for administrative decisions that are not appealable. The proposed changes update reference citations to reflect the newly enacted provisions of the MMBA. (Chapter 680, Statutes of 2011.) The proposed changes also

conform this section to the text of proposed Section 32802 with regard to the appealability of Board agent determinations as to the sufficiency of a request for factfinding under the MMBA. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA.

Section 32603 defines employer unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Section 32604 defines employee organization unfair practices under the MMBA. The proposed changes to this section are necessary to conform the language and reference citations to the recent amendments to the MMBA (Chapter 680, Statutes of 2011) that, for the first time, provide for a mandatory factfinding procedure.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. Where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well

as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: None.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17561: None.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings on federal funding to the state: None

Cost impact on private persons or directly affected businesses: None

Significant adverse economic impact on business including the ability of California businesses to compete with businesses in other states: None

Significant effect on housing costs: None

The proposed regulations will not affect small business because they only affect public employers and public employees.

2011-12-11

PERB Adopts Emergency Regulations on Mandatory Factfinding

The Public Employment Relations Board (PERB) adopted emergency regulations at its Dec. 8 hearing to implement AB 646 (Chapter 680, Statutes of 2011), which will take effect Jan. 1, 2012. The emergency rulemaking package will now move to the Office of Administrative Law (OAL) for review and approval.

AB 646 authored by Assembly Member Toni Atkins (D-San Diego) imposes mandatory factfinding only at the request of an employee organization when an impasse is reached and requires that the parties split the costs of the factfinding panel. The League, as well as several other public agency associations, opposed this bill because it intrudes on a local agency's ability to determine its own impasse rules, a long standing provision of the MMBA, and will significantly increase costs for local agencies.

Prior to the Dec. 8 hearing, PERB staff drafted proposed regulations and asked that comment letters be submitted in response to the proposed emergency regulations. The League, along with the California State Association of Counties and the California Special Districts Association, submitted a comment letter on Nov. 29, 2011.

Les Chisholm, division chief for PERB, presented comments to PERB and expressed that the emergency regulations were necessary because the legislation imposes new duties on PERB that PERB is incapable of fulfilling without new regulations.

PERB staff took into consideration all the comments they received and presented the final draft to PERB at the hearing. The final staff draft was revised several times, and the final version took into account the request by many management stakeholders that an outer time limit be established by when an employee organization must request factfinding. The League argued that a timeframe like this would ensure that the factfinding process would not be unduly delayed and therefore risk an untimely resolution of negotiations.

The proposed regulations provide that if the parties opt to mediate that a factfinding request can be filed not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator. In cases where a dispute is not submitted to a mediator, the request for fact-finding must occur within 30 days following the date that either party provided the other with written notice of declaration of impasse.

One outstanding question that PERB rightfully did not attempt to resolve with the emergency regulations was whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request factfinding. Further, if an agency does not provide, as part of its local rules, the option to mediate once impasse is reached the question remains about whether the agency must agree to factfinding if requested by an employee organization. Assembly Member Atkins submitted a letter to PERB prior to the hearing indicating that the intent of the bill was to grant an employee organization the ability to request factfinding regardless of whether an agency provides the option to mediate. This question may likely to be resolved through litigation.

Next Steps

Once the emergency rulemaking package is filed with OAL there will be a five day comment period. If OAL accepts the emergency rulemaking package it will be filed with the Secretary of State at which time the regulations become effective unless another date is requested by PERB. The emergency regulations will remain in place for 180 days once effective. PERB has the option for two 90-day extensions.

Visit the PERB website for more information.

For questions please email Natasha Karl .

last updated : 12/9/2011

PUBLIC EMPLOYMENT RELATIONS BOARD

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1031 18th Street
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December 9, 2011

NOTIFICATION OF PROPOSED EMERGENCY REGULATORY ACTION

Subject: Implementation of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012—Factfinding

The Public Employment Relations Board (PERB) is proposing to adopt emergency regulations implementing the newly enacted factfinding process under the Meyers-Milias-Brown Act (MMBA).

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency action to OAL, OAL shall allow interested persons five (5) calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. Upon filing, OAL will have ten (10) calendar days within which to review and make a decision on the proposed emergency rules. If approved, OAL will file the regulations with the Secretary of State, and the emergency regulations will become effective for one hundred and eighty (180) days. Within the 180-day effective period, PERB will proceed with a regular rulemaking action, including a public comment period. The emergency regulations will remain in effect during this rulemaking action.

Attached to this notice is the specific regulatory language of PERB's proposed emergency action and Finding of Emergency.

You may also review the proposed regulatory language and Finding of Emergency on PERB's website at the following address: http://www.perb.ca.gov.

If you have any questions regarding this proposed emergency action, please contact Les Chisholm at (916) 327-8383.

PROPOSED TEXT -- REGULATION CHANGES RELATED TO
IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
(New language shown in *italics*.)

32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code, and Section 99561(f), Public Utilities Code. Reference: Sections *3505.4*, 3509, 3513(h), 3541.3(k), (n), 3563(j), (m), 71639.1 and 71825, Government Code, and Section 99561(j), (m), Public Utilities Code.

32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, *3505.4, 3505.5, 3505.7,* 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, *3505.4, 3505.5, 3505.7,* 3506, 3507 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. <u>Appointment of Person to Chair Factfinding Panel Under the MMBA</u>.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

STATEMENT OF CONFIRMATION OF
MAILING OF FIVE-DAY EMERGENCY NOTICE
(Cal. Code Regs., tit. 1, § 50(a)(5)(A))

The Public Employment Relations Board sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulation to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1(a)(2).

PROPOSED TEXT -- REGULATION CHANGES RELATED TO
IMPLEMENTATION OF PROVISIONS OF ASSEMBLY BILL 646
(New language shown in *italics*.)

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(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(c) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, *3505.4, 3505.5, 3505.7,* 3506, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

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(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by *the MMBA or* any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, *3505.4, 3505.5, 3505.7,* 3506, 3507 and 3509, Government Code, and Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608.

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(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

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Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

ECONOMIC IMPACT ASSESSMENT

(Government Code section 11346.3(b))

As a result of the enactment of Assembly Bill 646 (Chapter 680, Statutes of 2011), effective January 1, 2012, the Meyers-Milias-Brown Act (MMBA), the collective bargaining statute applicable to local governments (cities, counties, and special districts) in California, provides for a mandatory impasse procedure—factfinding before a tripartite panel—upon the request of an exclusive representative where the parties have not reached a settlement of their dispute. The Public Employment Relations Board (PERB) is responsible for the appointment of the neutral chairperson of the factfinding panel unless the parties mutually agree upon the selection of the chairperson. This new legislation and the duties imposed on PERB under it require amendments to existing regulations as well as the adoption of new regulations in order to fully implement the legislation and PERB's role.

The proposed regulations clarify and interpret California Government Code sections 3505.4, 3505.5 and 3505.7, and provide guidelines for the filing and processing of requests for factfinding under the MMBA.

In accordance with Government Code Section 11346.3(b), the Public Employment Relations Board has made the following assessments regarding the proposed regulations:

Creation or Elimination of Jobs Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no jobs in California will be created or eliminated.

Creation of New or Elimination of Existing Businesses Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no new businesses in California will be created or existing businesses eliminated.

Expansion of Businesses or Elimination of Existing Businesses Within the State of California

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. In clarifying and interpreting California Government Code sections 3505.4, 3505.5 and 3505.7 with the proposed factfinding guidelines, no existing businesses in California will be expanded or eliminated.

Benefits of the Regulations

The proposed regulations are designed to provide guidelines for the filing and processing of requests for factfinding under the MMBA. Through the guidelines, the Public Employment Relations Board will ensure improvement of the public sector labor environment by providing additional dispute resolution procedures and promoting full communication between public employers and their employees in resolving disputes over wages, hours and other terms and conditions of employment. The proposed regulations will further the policy of bilateral resolution of public sector labor disputes and help PERB constituents avoid unnecessary and costly unfair practice charges and related litigation. The proposed regulatory action will not adversely affect the health and welfare of California residents, worker safety, or the State's environment. The proposed regulatory action will not benefit the health of California residents, worker safety, or the State's environment. The proposed regulatory action will, as described, benefit the general welfare of California residents by ensuring that public labor disputes are resolved in less costly ways.

INITIAL STATEMENT OF REASONS

Prior to January 1, 2012, the Meyers-Milias-Brown Act (MMBA) (Gov. Code, § 3500 et seq.) did not provide for mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Assembly Bill 646 (Chapter 680, Statutes of 2011), while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7. Pursuant to Assembly Bill 646, the MMBA provides for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. (Gov. Code, § 3505.7.)

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to the Public Employment Relations Board (PERB or Board). This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

The proposed regulation changes that have been identified as necessary for the implementation of PERB's responsibilities pursuant to Assembly Bill 646 are described below.

Section 32380 of the Board's regulations identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Consistent with existing Sections 32380 and 32793, which do not allow for appeals to the Board itself concerning impasse determinations under other statutes administered by PERB, such determinations would not be appealable to the Board itself under the MMBA. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 defines employee organization unfair practices under the MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed Section 32802 defines the process and timelines for filing a request for factfinding under the MMBA. The process and timelines are consistent with the express requirements and clear intent of the recent amendments to the MMBA (Chapter 680, Statutes of 2011), by which the Legislature identified the need to provide for a mandatory and uniform impasse procedure in order to make negotiations more effective. During the workshop process that preceded the adoption of emergency regulations, some parties advocated limiting the application of this regulation and MMBA factfinding to situations where the parties had first engaged in mediation. Based on the language of the MMBA, as amended by Assembly Bill 646, as well as evidence of legislative intent and the comments submitted by most other interested parties, this alternative approach has been rejected for purposes of the proposed regulations. Instead, it appears that harmonizing of the statutory changes made by Assembly Bill 646 requires the conclusion that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

It is correct that Government Code section 3505.4(a), as re-added by Assembly Bill 646, references a request for factfinding where "the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment." However, Assembly Bill 646 also repealed the prior language of section 3505.4, which set forth under what conditions an employer could implement its last, best and final offer. In new section 3505.7, the MMBA provides that such an implementation may only occur, "After any applicable mediation and factfinding procedures have been exhausted, <u>but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties</u> pursuant to Section 3505.5." (Emphasis added.) In order to harmonize the language of Section 3505.7 with that of 3505.4, and in order to provide clarity, PERB adopted proposed emergency regulations that provide for factfinding both where mediation has occurred, and where it has not.

This conclusion is also highly consistent with the available evidence of legislative intent. For example, the author of Assembly Bill 646 was quoted in the June 22, 2011 Bill Analysis, in relevant part, as follows:

> Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.
>
> The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order

to assist them in resolving differences that remain after negotiations have been unsuccessful.

Under proposed Section 32802, where parties have not reached an agreement, an exclusive representative may file its request with PERB, and must serve its request on the employer. If the parties have not agreed to mediate the bargaining dispute, and are not subject to a required mediation process adopted pursuant to MMBA section 3507, the request must be filed within 30 days of the date that either party has provided the other with written notice of a declaration of impasse. Where a mediator has been appointed or selected to help the parties to effectuate a settlement, the request may not be filed until at least 30 days after the date the mediator was appointed, but also not more than 45 days following that date. In either circumstance, the intent of the timelines in the proposed section is to allow the parties sufficient time to resolve their dispute on their own, without utilization of the statutory impasse procedure, but also to provide certainty for all parties as to the time within which a request for factfinding may be filed. This proposed section also describes the Board's process concerning such requests and specifies the timeframe within which the Board must act. Finally, the section provides that determinations regarding whether a request filed under this section is sufficient shall not be appealable to the Board itself, consistent with how impasse determinations under other statutes are treated.

Proposed Section 32804 defines the timeline and process for the appointment of a neutral chairperson of a factfinding panel, in cases where the Board finds a factfinding request to be valid. Consistent with the statute, PERB would not appoint a chairperson if the parties are able mutually to agree upon a chairperson. In order to assist the parties, PERB would provide for each sufficient request a list of seven names of neutrals from which the parties could select the chairperson, either by the alternate striking of names or other method upon which the parties agree. The parties would also be able to select any other person as the chairperson by mutual agreement. If the parties are unable to agree on a chairperson, PERB would appoint one of the persons on the list of seven as the chairperson. The number seven was specified in order to provide an odd number for purposes of the alternate striking of names, and based on PERB's normal practice in similar situations under other statutes, as well as the customary practice of many agencies that provide lists of neutrals to parties upon request. Consistent with the express provisions of the statute, the regulation also specifies that PERB shall not bear the costs for the chairperson under any circumstance.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

As discussed above, during the workshop process that preceded the adoption of the related emergency regulations, some parties advocated limiting MMBA factfinding to situations where the parties had first engaged in mediation. This alternative interpretation of Assembly Bill 646 was considered by PERB. However, based on the language of the MMBA, as amended by Assembly Bill 646, as well as the above-referenced evidence of legislative intent and the comments submitted by most other interested parties, this alternative interpretation was rejected for purposes of both the emergency and proposed regulations. PERB concluded, when adopting the emergency regulations, that harmonizing the statutory changes made by Assembly

Bill 646 required PERB to conclude that factfinding is mandatory, if requested by an exclusive representative, for all local government agencies except those specifically exempted by Government Code section 3505.5(e).

PERB fully intends to solicit further public comments and conduct a public hearing on these issues and interpretations in order to evaluate the possibility and strength of other alternatives through the regular rule making process.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the community at-large benefits from those cost-savings.

REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESS

PERB has not identified any alternatives that would lessen any adverse impact on small business and has not identified any adverse impacts on small businesses as a result of these proposed regulations.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS RELIED UPON

PERB relied upon the Economic Impact Assessment prepared regarding the proposed regulations. PERB did not rely upon any other technical, theoretical, or empirical studies, report or documents in proposing the adoption of these regulations.

MANDATED USE OF SPECIFIC TECHNOLOGIES OR EQUIPMENT

PERB's proposed regulations do not mandate the use of any specific technologies or equipment.

TITLE 8. PUBLIC EMPLOYMENT RELATIONS BOARD

NOTICE OF PROPOSED RULEMAKING

The Public Employment Relations Board (Board) proposes to adopt and amend the regulations described below after considering all comments, objections or recommendations regarding the proposed action.

REGULATORY ACTION

The Board proposes to amend sections 32380, 32603, and 32604, and to add sections 32802 and 32804. Section 32380 identifies types of administrative decisions by Board agents that are not appealable to the Board itself. Section 32603 describes unfair practices by a public agency under the Meyers-Milias-Brown Act (MMBA). Section 32604 describes unfair practices by an employee organization under the MMBA. Proposed section 32802 provides for the filing of requests for factfinding with PERB under the MMBA, describes when a request may be filed and the requirements for filing, and provides that determinations as to sufficiency of a request are not appealable. Proposed section 32804 describes the timelines and procedures for the selection of a neutral chairperson of a factfinding panel pursuant to a sufficient request filed under proposed section 32802.

PUBLIC HEARING

The Board will hold a public hearing at 10:00 a.m., on June 14, 2012, in Room 103 of its headquarters building, located at 1031 18th Street, Sacramento, California. Room 103 is wheelchair accessible. At the hearing, any person may orally present statements or arguments relevant to the proposed action described in the Informative Digest. It is requested, but not required, that persons making oral comments at the hearing submit a written copy of their testimony at the hearing. Any person wishing to testify at the hearing is requested to notify the Office of the General Counsel as early as possible by calling (916) 322-3198 to permit the orderly scheduling of witnesses and to permit arrangements for an interpreter to be made if necessary.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Board. The written comment period closes at

5:00 p.m. on June 12, 2012. Written comments will also be accepted at the public hearing. Submit written comments to:

Les Chisholm, Division Chief
Office of the General Counsel
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
FAX: (916) 327-6377
E-mail: lchisholm@perb.ca.gov

AUTHORITY AND REFERENCE

Pursuant to Government Code section 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Educational Employment Relations Act (EERA). Pursuant to Government Code sections 3509(a) and 3541.3(g), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Meyers-Milias-Brown Act (MMBA). Government Code section 3513(h) authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Ralph C. Dills Act (Dills Act). Government Code section 3563 authorizes the Board to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Higher Education Employer-Employee Relations Act (HEERA). Pursuant to Public Utilities Code section 99561(f), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA). Pursuant to Government Code sections 3541.3(g) and 71639.1(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Governance and Employment Protection Act (Trial Court Act). Pursuant to Government Code sections 3541.3(g) and 71825(b), the Board is authorized to adopt, amend and repeal rules and regulations to carry out the provisions and effectuate the purposes and policies of the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act).

General reference for section 32380 of the Board's regulations: Government Code sections 3505.4, 3509, 3513(h), 3541.3(k) and (n), 3563(j) and (m), 71639.1 and 71825; and Public Utilities Code section 99561(j) and (m). General reference for section 32603 of the Board's regulations: Government Code sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for section 32604 of the Board's regulations: Government Code sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608. General reference for proposed section 32802 of the Board's regulations: Government Code sections 3505.4, 3505.5,

and 3505.7. General reference for proposed section 32804 of the Board's regulations: Government Code sections 3505.4, 3505.5, and 3505.7.

POLICY STATEMENT OVERVIEW

PERB is a quasi-judicial agency which oversees public sector collective bargaining in California. PERB presently administers seven collective bargaining statutes, ensures their consistent implementation and application, and adjudicates disputes between the parties subject to them. The statutes administered by PERB are: the Meyers-Milias-Brown Act (MMBA) of 1968, which established collective bargaining for California's city, county, and local special district employers and employees; the Educational Employment Relations Act (EERA) of 1976 establishing collective bargaining in California's public schools (K-12) and community colleges; the State Employer-Employee Relations Act of 1978, known as the Ralph C. Dills Act (Dills Act), establishing collective bargaining for state government employees; the Higher Education Employer-Employee Relations Act (HEERA) of 1979 extending the same coverage to the California State University System, the University of California System and Hastings College of Law; the Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) of 2003, which covers supervisory employees of the Los Angeles County Metropolitan Transportation Authority; and the Trial Court Employment Protection and Governance Act (Trial Court Act) of 2000 and the Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) of 2002, which together provide for collective bargaining rights for most trial court employees.

Prior to January 1, 2012, the MMBA did not provide for any mandatory impasse procedures, although allowing for voluntary mediation in section 3505.2 and authorizing local agencies to adopt additional dispute resolution procedures in section 3507. Pursuant to Assembly Bill 646 (Chapter 680, Statutes of 2011), the MMBA was amended to provide for a factfinding process that must be exhausted prior to a public agency's unilateral implementation of its last, best and final offer. Assembly Bill 646, while not changing the voluntary mediation provisions of section 3505.2, repealed the prior section 3505.4 and enacted new sections 3505.4, 3505.5, and 3505.7.

Under section 3505.4, in the absence of an agreement between a public agency and an exclusive representative, the employee organization may submit a request for factfinding to PERB. This section further describes PERB's responsibilities with respect to the selection or appointment of the neutral chairperson of the factfinding panel, and the timelines that are applicable to the process.

INFORMATIVE DIGEST

Section 32380 identifies administrative decisions that are not appealable. The proposed changes would, consistent with proposed section 32802, add a new paragraph identifying as non-appealable all determinations made with respect to the sufficiency of a factfinding request filed under section 32802. Section 32380 would also be revised to add MMBA section 3505.4 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32603 describes unfair practices by a public agency under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32603 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Section 32604 describes unfair practices by an employee organization under MMBA. The current language includes a provision making it an unfair practice to fail to participate in good faith in any impasse procedures mutually agreed upon or required under the local rules of the public agency. The proposed changes would amend the language to also make it an unfair practice to fail to participate in impasse procedures required by the MMBA. Section 32604 would also be revised to add MMBA sections 3505.4, 3505.5, and 3505.7 to the reference citations, and to make various non-substantive changes to other reference citations.

Proposed section 32802 would describe when and in which office a request for factfinding may be filed with the Board. The new section would further describe the timeline for PERB's determination as to the sufficiency of the request, and would specify that such determinations are not appealable to the Board itself.

Proposed section 32804 would describe the process, in cases where the Board finds a factfinding request to be valid, for the selection or appointment of the neutral chairperson of a factfinding panel. The new section would further specify, consistent with the provisions of MMBA section 3505.5, that PERB will not be responsible in any case for the costs of the panel chairperson.

CONSISTENT AND COMPATIBLE WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, PERB has conducted a search of any similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

ANTICIPATED BENEFITS OF THE PROPOSED REGULATIONS

These regulations and changes will improve the public sector labor environment and the collective bargaining process by providing additional dispute resolution procedures and promoting full communication between public employers, their employees and representatives in resolving disputes over wages, hours and other terms and conditions of employment. These regulations further the policy of bilateral resolution of public sector labor disputes. During a time in which many public employers, employees, and employees' representatives must address severe financial shortfalls, these regulations benefit all parties by providing procedural certainty to reduce further financial hardships and promote bilateral resolution of conflicts without disrupting essential public services. As an additional benefit, these changes will help PERB's constituents to avoid unnecessary and costly unfair practices and related litigation. Additionally, when public sector labor disputes are resolved in less costly ways, the

community at-large benefits from those cost-savings. Finally, the proposed amendments clarify the definition of "unfair practices" under the MMBA.

DISCLOSURES REGARDING THE PROPOSED ACTION

Mandate on local agencies and school districts: Initial determination of the agency is that the proposed action would not impose any new mandate.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code section 17500 et seq: Initial determination of the agency is that the proposed action would not impose any new costs, and therefore requires no reimbursement.

Other non-discretionary cost or savings imposed upon local agencies: None

Costs or savings to state agencies: None

Cost or savings in federal funding to the state: None

Cost impact on representative private persons or businesses: The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
Significant statewide adverse economic impact directly affecting business including the ability of California businesses to compete with businesses in other states: Initial determination of the agency is that the proposed action will have no impact.

Significant effect on housing costs: The agency's initial determination is that there is no effect on housing costs.

The proposed regulations will not affect small business because they only affect public employers and public employees.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT

The adoption of the proposed amendments will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California. The adoption of the proposed amendment will benefit public employers, employees, employees' representatives and the community at-large by further facilitating the resolution of public sector labor disputes by providing additional dispute resolution procedures and promoting full and bilateral communication between PERB's constituents. In so doing, California residents' welfare will receive the benefit of stable collective bargaining and dispute resolution, which translates to continuous delivery of the essential services that these employers and employees provide to California communities.

CONSIDERATION OF ALTERNATIVES

A rulemaking agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Board invites interested persons to present statements or arguments with respect to alternatives to the proposed regulations at the above-mentioned hearing or during the written comment period.

PRELIMINARY ACTIVITIES

PERB staff began meeting with interested parties about the statutory changes made by Assembly Bill 646 in October 2011; circulated discussion drafts of possible regulations; held open meetings to take comments and suggestions on November 8, 2011 (Oakland) and November 10, 2011 (Glendale); and posted copies of the discussion drafts, written comments from parties, and the staff recommendations on the Board's web site. Additional public comments were received at the December 8, 2011 public Board meeting, at which time the Board authorized submission of an emergency rulemaking package to implement the provisions of Assembly Bill 646. The Board has also relied upon the Economic Impact Assessment identified in this Notice in proposing regulatory action.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

The Board will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office, at the address below. As of the date this notice is published in the California Regulatory Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations and the Initial Statement of Reasons. Copies of these documents and the Final Statement of Reasons, when available, may be obtained by contacting Jonathan Levy or Katherine Nyman at the address or phone number listed below, and are also available on the Board's web site (see address below).

ADOPTION OF PROPOSED REGULATIONS, AVAILABILITY OF CHANGED OR MODIFIED TEXT AND FINAL STATEMENT OF REASONS

Following the hearing, the Board may adopt the proposed regulations substantially as described in this notice. If modifications are made which are sufficiently related to the originally proposed text, the modified text -- with changes clearly indicated -- shall be made available to the public for at least 15 days prior to the date on which the Board adopts the regulations. Requests for copies of any modified regulations and/or the final statement of reasons should be sent to the attention of Jonathan Levy or Katherine Nyman at the address

indicated below. The Board will accept written comments on the modified regulations for 15 days after the date on which they are made available.

INTERNET ACCESS

The Board will maintain copies of this Notice, the Initial Statement of Reasons and the text of the proposed regulations on its web site, found at www.perb.ca.gov, throughout the rulemaking process. Written comments received during the written comment period will also be posted on the web site. The Final Statement of Reasons or, if applicable, notice of a decision not to proceed will be posted on the web site following the Board's action.

CONTACT PERSONS

Any questions or suggestions regarding the proposed action or the substance of the proposed regulations should be directed to:

Jonathan Levy, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8387

or

Katherine Nyman, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811
(916) 327-8386

PROPOSED TEXT

Section 32380. Limitation of Appeals.

The following administrative decisions shall not be appealable:

(a) A decision by a Board agent regarding the mechanics of an election provided the decision does not affect standing of a party to appear on a ballot;

(b) Except as provided in Section 32200, any interlocutory order or ruling on a motion.

(c) A decision by a Board agent pursuant to Section 32793 regarding the existence of an impasse.

(d) A decision by a Board agent pursuant to Section 32802 regarding the sufficiency of a request for factfinding under the MMBA.

Authority cited: Sections 3509(a), 3513(h), 3541.3(g), 3563(f), 71639.1(b) and 71825(b), Government Code; and Section 99561(f), Public Utilities Code. Reference: Sections 3505.4, 3509, 3513(h), 3541.3(k), ~~3541.3~~ and (n), 3563(j), ~~3563~~ and (m), 71639.1 and 71825, Government Code; and Section 99561(j), ~~,~~ and (m), Public Utilities Code.

Section 32603. Employer Unfair Practices under MMBA.

It shall be an unfair practice for a public agency to do any of the following:

(a) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(b) Deny to employee organizations rights guaranteed to them by Government Code section 3503, 3504.5, 3505.1, 3505.3, 3507.1, 3508(d) or 3508.5 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith with an exclusive representative as required by Government Code section 3505 or any local rule adopted pursuant to Government Code section 3507.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another in violation of rights guaranteed by Government Code section 3502 or 3508(d) or any local rule adopted pursuant to Government Code section 3507.

(e) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(f) Adopt or enforce a local rule that is not in conformance with MMBA.

(g) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3505, 3505.2, 3505.3, 3505.4, 3505.5, 3505.7, 3506, 3506.5, 3507, 3507(d), 3507.1, 3507.5, 3508, 3508.1, 3508.5 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32604. Employee Organization Unfair Practices under MMBA.

It shall be an unfair practice for an employee organization to do any of the following:

(a) Cause or attempt to cause a public agency to engage in conduct prohibited by the MMBA or by any local rule adopted pursuant to Government Code section 3507.

(b) Interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights guaranteed by Government Code section 3502 or by any local rule adopted pursuant to Government Code section 3507.

(c) Refuse or fail to meet and confer in good faith as required by Government Code section 3505 or by any local rule adopted pursuant to Government Code section 3507.

(d) Fail to exercise good faith while participating in any impasse procedure mutually agreed to pursuant to Government Code section 3505 or 3505.2, or required by the MMBA or any local rule adopted pursuant to Government Code section 3507.

(e) In any other way violate MMBA or any local rule adopted pursuant to Government Code section 3507.

Authority cited: Sections 3509(a) and 3541.3(g), Government Code. Reference: Sections 3502, 3502.1, 3502.5, 3505, 3505.2, 3505.4, 3505.5, 3505.7, 3506, 3507 and 3509, Government Code; and ~~Firefighters Union, Local 1186 v. City of Vallejo~~ *Firefighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608.

Section 32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

(b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.

(c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

(d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

32804. Appointment of Person to Chair Factfinding Panel Under the MMBA.

If a request is determined to be sufficient under Section 32802, the Board shall, within five working days following this determination, submit to the parties the names of seven persons, drawn from the list of neutral factfinders established pursuant to Government Code section 3541.3(d). The Board will thereafter designate one of the seven persons to serve as the chairperson unless notified by the parties within five working days that they have mutually agreed upon a person to chair the panel in lieu of a chairperson selected by the Board. In no case will the Board be responsible for the costs of the chairperson.

Authority cited: Sections 3509(a) and 3541.3(e) and (g), Government Code. Reference: Sections 3505.4, 3505.5, and 3505.7, Government Code.

On April 27, 2012, a Notice of Proposed Rulemaking was published in the California Regulatory Notice Register concerning proposed regulations that will be considered by the Public Employment Relations Board (PERB or Board) with respect to the implementation of factfinding procedures under the Meyers-Milias-Brown Act (MMBA). A copy of the Notice of Proposed Rulemaking has also been provided by PERB to interested parties.

Written comments on the proposed regulatory changes may be submitted on or before June 12, 2012, as described in the Notice. The Board will hold a public hearing on the proposed changes on June 14, 2012, and written comments may also be submitted at that time.

Copies of the Notice, the Initial Statement of Reasons, the Economic Impact Assessment, and the Proposed Text are provided below. Written comments will be posted on this website as they are received.

RSVP List – Oakland meeting re AB 646 (November 8)		
1.	Gene Huguenin	PERB
2.	James Coffey	PERB
3.	Larry Edginton	Public Employees Union Local 1
4.	Maria Robinson	East Bay MUD
5.	Angela Nicholson	Marin County
6.	Jennifer Vuillermet	Marin County
7.	Dawn DelBiaggio	City of Vacaville
8.	Chas Howard	City of Vacaville
9.	Art Hartinger	Meyers Nave
10.	Kelly M. Tuffo	Liebert Cassidy Whitmore
11.	Holly Brock Cohn	City of Livermore
12.	Kevin Young	City of Livermore
13.	Linda Spady	City of San Mateo
14.	Casey Echarte	City of San Mateo
15.	Delores Turner	City of Emeryville
16.	Margot Rosenberg	Leonard Carder
17.	Kate Hallward	Leonard Carder
18.	Ari Krantz	Leonard Carder
19.	Steve Janice	City of Fairfield
20.	Henry Soria	SEIU Local 521
21.	Frank Garden	SEIU Local 521
22.	William E. Riker	Arbitrator
23.	Kathy Mount	City of San Francisco
24.	Suzanne Mason	Napa County HR
25.	Jorge Salinas	Napa County HR
26.	Karen Brady	Napa County HR
27.	Bruce Heid	IEDA
28.	Carol Koenig	Wylie McBride
29.	Lorenzo Zialcita	Solano County
30.	Ron Grassi	Solano County
31.	Lee Axelrad	Solano County
32.	Charmie Junn	Solano County
33.	Desi Murray	CNA
34.	*Gregory McClune	+ 3 others !! Foley, Lardner
35.	*?	
36.	*?	
37.	*?	
38.	Rocky Lucia	Rains, Lucia, Stern
39.	John Noble	Ditto
40.	Peter Hoffmann	Ditto
41.	Nancy Watson	Western Conf. of Engineers
42.	Peter Finn	IBT Local 856
43.	Neville Vania	City of Pittsburg
44.	Jenny Yelin	Santa Clara County
45.	Rich Digre	City of Union City
46.	Brian Ring	Butte County
47.	Brian Hopper	Santa Clara Valley Water District

RSVP List – Oakland meeting re AB 646 (November 8)		
48.	Donald Nielsen	CNA
49.	Reanette Fillmer	Tehama County
50.	Jeffrey Edwards	Mastagni Law Firm
51.	Kathleen Mastagni Storm	Mastagni Law Firm
52.	Deborah Glasser Kolly	LR consultant
53.	Jackie Langenberg	City of Elk Grove
54.	Ruth Baxley	East Bay MUD
55.	Michael Rich	East Bay MUD
56.	Maria Robinson	East Bay MUD
57.	Jill Gaskins	East Bay MUD
58.	Loretta van der Pool	SMCS
59.	Eraina Ortega	CSAC
60.	Faith Conley	CSAC
61.	Natasha Karl	League of California Cities
62.	Iris Herrera-Whitney	California Special Districts Association
63.	Stuart K. Tubis	Mastagni Law Firm
64.	Esteban Codas	County of Marin
65.	Linda Gregory	AFSCME
66.	Carol Stevens	Burke, Williams & Sorensen
67.	Bill Kay	Burke, Williams & Sorensen
68.	Janet Sommer	Burke, Williams & Sorensen
69.	Delores Turner	CALPELRA
70.	Kerianne Steele	Weinberg, Roger & Rosenfeld
71.	Corrie Erickson	Kronick, et al.
72.	Emily Prescott	Renne, Sloan
73.		
74.		

Plus several CALPELRA people?

RSVP List – Glendale meeting re AB 646 (November 10)

1.	Shelline Bennett	Liebert Cassidy Whitmore
2.	Peter Brown	Liebert Cassidy Whitmore
3.	Shannon Leslie	County of Ventura Labor Relations
4.	Catherine Rodriguez	County of Ventura Labor Relations
5.	Tabin Cosio	County of Ventura Labor Relations
6.	Jim Bembowski	County of Ventura Labor Relations
7.	Jerry Fecher	SMCS
8.	Kenneth A. Walker	City of Long Beach
9.	Don Becker	Arbitrator
10.	Draza Mrvichin	Management consultant
11.	Mike Gaskins	City Employees Associates
12.	Michael E. Koskie	City Employees Associates
13.	Jeff Natke	City Employees Associates
14.	Mary Neeper	City Employees Associates
15.	Brian Niehaus	City Employees Associates
16.	Derick Yasuda	City of Tustin
17.	Kristi Recchia	City of Tustin
18.	Scott Chadwick	City of San Diego
19.	Jennifer Carbuccia	City of San Diego
20.	Sandy Lindoerfer	Arbitrator/factfinder
21.	Cathy Thompson	City of Cypress
22.	Kevin Chun	City of La Cañada Flintridge
23.	Dori Duke	San Luis Obispo County
24.	Lisa Winter	San Luis Obispo County
25.	Scott Burkle	COPS Legal
26.	Kathy Saling	Wife of Daniel R. Saling/Arbitrator
27.	Robin Matt	Arbitrator
28.	Joan F. Dawson	City of San Diego
29.	?	City of San Diego
30.	?	City of San Diego
31.	?	City of San Diego
32.	William Sheh	Reich, Adell & Cvitan
33.	James Adams	Los Angeles County
34.	Paul Croney	Los Angeles County
35.	Maurice Cooper	Los Angeles County
36.	Bob Bergeson	City of Los Angeles
37.		

PUBLIC EMPLOYMENT RELATIONS BOARD

1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 322-3198
Fax: (916) 327-6377

October 25, 2011

Re: Assembly Bill 646 (MMBA factfinding (see attached))

Dear Interested Party:

The Public Employment Relations Board (PERB) invites you to attend a meeting to discuss the implementation of Assembly Bill 646 (AB 646). Meetings will be held as follows:

Tuesday, November 8, 2011
10:00 a.m. – 1:00 p.m.
Elihu Harris State Office Building
1515 Clay Street, 2nd Floor, Room 1
Oakland, California

and

Thursday, November 10, 2011
10:00 a.m. – 1:00 p.m.
PERB Los Angeles Regional Office
700 N. Central Avenue, Suite 230
Glendale, California

The meetings will be conducted by PERB General Counsel Suzanne Murphy and Division Chief Les Chisholm. Representatives of the California State Mediation and Conciliation Service will also attend and participate. The discussion will focus on the issues raised by the enactment of AB 646, and in particular the issues that might require regulatory action by PERB in advance of January 1, 2012, when the legislation takes effect. Among the issues to be discussed are what information PERB should require when a party seeks to initiate factfinding pursuant to the Meyers-Milias-Brown Act, and how PERB will carry out its responsibilities vis-à-vis the appointment process.

We look forward to your insights and thoughts on these issues and any others that you may believe are raised by AB 646. Persons planning to attend either meeting are requested to reply by telephone (916.322.3198) or by e-mail (lchisholm@perb.ca.gov).

Sincerely,

Anita I. Martinez Chair	Sally M. Mc. Keag Member	Alice Dowdin Calvillo Member	A. Eugene Huguenin Member

Assembly Bill 646 (Chapter 680, Statutes of 2011)

Effective January 1, 2012, the following changes to the Meyers-Milias-Brown Act take effect, pursuant to Assembly Bill 646. Newly enacted provisions are shown in **bold** type. Strikeout (~~strikeout~~) of text is used to shown language deleted from the Act.

3505.4.

~~If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.~~

(a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

3505.5.

(a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

3505.7.

After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

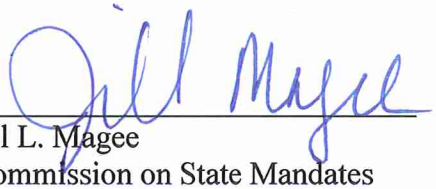
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On August 26, 2016, I served the:

Response to Request for Rulemaking Files
Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Section 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on August 26, 2016 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 8/16/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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STATE of CALIFORNIA
COMMISSION ON STATE MANDATES

Exhibit F

November 16, 2016

Ms. Melanie Chaney
Liebert Cassidy Whitmore
6033 West Century Blvd, Suite 500
Los Angeles, CA 90045

Justyn Howard
Department of Finance
915 L Street
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**
Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Sections 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

Dear Ms. Chaney and Mr. Howard:

The Draft Proposed Decision for the above-captioned matter is enclosed for your review and comment.

Written Comments

Written comments may be filed on the Draft Proposed Decision by **December 7, 2016**. Please note that all representations of fact submitted to the Commission must be signed under penalty of perjury by persons who are authorized and competent to do so and must be based upon the declarant's personal knowledge, information, or belief. (Cal. Code Regs., tit. 2, § 1187.5.)

You are advised that comments filed with the Commission on State Mandates (Commission) are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. However, this requirement may also be satisfied by electronically filing your documents. Refer to http://www.csm.ca.gov/dropbox_procedures.php on the Commission's website for electronic filing instructions. (Cal. Code Regs., tit. 2, § 1181.3.)

If you would like to request an extension of time to file comments, please refer to section 1187.9(a) of the Commission's regulations.

Hearing

This matter is set for hearing on **Friday, January 27, 2017** at 10:00 a.m., State Capitol, Room 447, Sacramento, California. The proposed decision will be issued on or about January 13, 2017. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Sincerely,

Heather Halsey
Executive Director

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Hearing Date: January 27, 2017
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ITEM ___

TEST CLAIM

DRAFT PROPOSED DECISION

Government Code Sections 3505.4, 3505.5, and 3505.7

Statutes 2011, Chapter 680 (AB 646)

Local Agency Employee Organizations: Impasse Procedures

15-TC-01

City of Glendora, Claimant

EXECUTIVE SUMMARY

Overview

This Test Claim alleges reimbursable state-mandated activities arising from the amendment of the Meyers-Milias-Brown Act by Statutes 2011, chapter 680 (AB 646). Staff recommends that the Commission on State Mandates (Commission) find that the test claim statute (which is the only law pled by the City of Glendora (claimant)), did not legally compel the claimant to engage in a collective bargaining procedure known as factfinding. In addition, staff recommends that the Commission find no evidence in the record that the claimant was, as a practical matter, compelled to engage in factfinding. Therefore, staff recommends that the Commission find that the test claim statute does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution. On these grounds, staff recommends that the Commission deny the Test Claim.

Procedural History

On October 9, 2011, the Governor signed AB 646, which the Secretary of State chaptered as Statutes 2011, chapter 680. The effective date of the test claim statute was January 1, 2012.

The claimant alleged that it first incurred costs under the test claim statute on June 16, 2015.[1] On June 2, 2016, the claimant filed the Test Claim with the Commission. On July 25, 2016, the Department of Finance filed comments on the Test Claim.[2] On August 24, 2016, Nichols Consulting filed comments on the Test Claim.[3] On September 16, 2016, the claimant filed

[1] Exhibit A, Test Claim, page 8.

[2] Exhibit B, Department of Finance's Comments on the Test Claim.

[3] Exhibit C, Nichols Consulting's Comments on the Test Claim. Nichols Consulting is an "interested person" under the Commission's regulations, defined as "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (California Code of Regulations, title 2, section 1181.2(j).)

rebuttal comments.[4] On November 16, 2016, Commission staff issued the Draft Proposed Decision.[5]

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission must strictly construe XIII B, section 6 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[6]

Claims

The following chart provides a brief summary of the claims and issues raised and staff's recommendation:

Subject	Description	Staff Recommendation
Was the claimant legally compelled by the test claim statute to engage in mediation or factfinding?	The test claim statute provides that, if a mediator is unable to resolve the controversy within 30 days after appointment, the employee organization may request submission to factfinding. However, mediation is voluntary under the statutory scheme.	*Deny* — Under the Meyers-Milias-Brown Act, mediation is voluntary. If factfinding is required at all, it is a downstream requirement of a local agency's discretionary decision to engage in mediation and therefore not a state-mandated activity.
Was the claimant legally compelled by the test claim statute to hold a public hearing?	The test claim statute provides that, upon an impasse, a local agency may implement its last,	The test claim statute's requirement of a public hearing before the implementation of a last, best, and final offer does not legally compel local agencies to

[4] Exhibit D, Claimant's Rebuttal Comments.

[5] Exhibit F, Draft Proposed Decision.

[6] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

	best, and final offer after holding a public hearing.	hold a public hearing, since the implementation of the last, best and final offer is a discretionary decision of the local agency and the hearing is therefore a downstream requirement of that discretionary decision.
Was the claimant practically compelled to engage in mediation or factfinding or to hold a public hearing?	There is no argument in the test claim narrative, and no evidence in the record, that claimant was practically compelled to engage in mediation or factfinding or to hold a public hearing.	*Deny* — There is no evidence in the record that the claimant was practically compelled to engage in mediation or factfinding or to hold a public hearing.

Staff Analysis

The Meyers-Milias-Brown Act governs the collective bargaining rights and procedures of employees of local agencies.[7] The primary issue in this case is whether the test claim statute imposes a state-mandated program of mandatory factfinding upon local agencies governed by the Meyers-Milias-Brown Act. "Factfinding"[8] under California labor law is a process in which a panel of three members reviews evidence relevant to a dispute (e.g., the salaries of similar employees in other jurisdictions) and submits a non-binding recommendation of what the employer and the union should agree to.

1. <u>The Test Claim Statute, by its Plain Language, Does Not Legally Compel Local Agencies to Engage in Mediation or Factfinding.</u>

In this case, the test claim statute does not legally compel local agencies to act. The plain language of the test claim statute provides that, if a mediator is unable to resolve the controversy within 30-days after appointment, the employee organization may request submission to factfinding. However, mediation is voluntary under the plain language of the statutory scheme. Government Code section 3505.4 as replaced by the test claim statute reads in relevant part:

> If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.

This is the only sentence in the test claim statute which addresses how factfinding would commence. The remainder of the code sections amended by the test claim statute address the procedures for factfinding. Under the plain language of the Meyers-Milias-Brown Act as it existed prior to the enactment of the test claim statute, mediation was voluntary. Government

[7] Government Code sections 3500 to 3511, inclusive.

[8] This term is variously spelled factfinding, fact-finding and fact finding. This Decision will utilize the term "factfinding", following the test claim statute, except for in direct quotations.

Code section 3505.2, which was not amended by the test claim statute, has read as follows since 1968:

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

The plain language of Section 3505.2 — the parties "may agree" to appoint a "mutually agreeable" mediator — means that mediation under the Meyers-Milias-Brown Act is voluntary.[9]

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[10] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[11] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[12]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to the enactment of the test claim statute) did not contain or require an impasse procedure other than voluntary mediation, nor did the test claim statute add any language making such procedures mandatory. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure."[13] Moreover, the California Supreme Court has found that "… the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to *fact-finding* or binding arbitration."[14]

Consequently, the test claim statute allows for factfinding only "[i]f the mediator is unable to effect settlement." Since mediation remained voluntary upon the effective date of the test claim

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[9] "'Shall' is mandatory and 'may' is permissive." Government Code section 14.

[10] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[11] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[12] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[13] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[14] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25, emphasis added.

statute, factfinding — which is commenced only after unsuccessful mediation — is also voluntary under the test claim statute.

Since entering into mediation is a discretionary decision of the local agency, any factfinding that is later required as a result of unsuccessful mediation is at most a downstream requirement of that discretionary decision to mediate. Since the State of California is not obligated to reimburse a local agency for activities which are conducted voluntarily,[15] the test claim statute does not impose a reimbursable state mandate.

2. The Test Claim Statute's Requirement of a Public Hearing Before the Implementation of a Last, Best, and Final Offer Does Not Legally Compel Local Agencies to Hold a Public Hearing.

The test claim statute can be read to argue that, if a local government employer seeks to implement its last, best, and final offer, the local government employer is mandated to first hold a public hearing — even if the local government employer opted out of mediation and factfinding. Compare former Government Code section 3505.4 ("a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer") with the test claim statute's Government Code section 3505.7 ("a public agency that is not required to proceed to interest arbitration may, *after holding a public hearing regarding the impasse*, implement its last, best, and final offer") (new language emphasized).

While the test claim statute appears to create the new requirement of a public hearing regarding an impasse, the local government employer would only be obligated to hold the public hearing if the local government employer decided to impose its last, best, and final offer — and the imposition of the last, best, and final offer is a discretionary activity. The Public Employment Relations Board (PERB) has found, in *Operating Engineers Local 3 v. City of Clovis,* that "[p]ursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency 'may implement its last, best, and final offer.' This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer." [16] Under state mandates law, the voluntary actions of a local agency do not create a reimbursable state mandate. "[I]f a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[17]

The discretionary nature of the imposition of the last, best, and final offer renders the pre-requisite of a public hearing to be discretionary as well; the public hearing, therefore, is not a reimbursable state-mandate.

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[15] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727.

[16] Exhibit X, *Operating Engineers Local 3 v. City of Clovis*, PERB Case No. SA-CE-513-M, page 5, footnote 5.

[17] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

3. There Is No Evidence in the Record that Local Agencies Are Practically Compelled to Engage in Mediation or Factfinding or to Hold a Public Hearing.

The court in *Kern High School District*[18] — which involved the issue of which level of government was responsible for paying for mandatory activities which were part of voluntary educational programs — left open the possibility that a state mandate might be found in circumstances of practical compulsion, where a local entity faced certain and severe penalties as a result of noncompliance with a program that is not legally compelled.

The claimant has not submitted any evidence that it was practically compelled to engage in factfinding. There is no evidence in the record that, for example, the claimant would have automatically suffered a reduction in state or federal funding if it refused to engage in factfinding. Rather, the record reveals that the claimant engaged in voluntary factfinding in or around August 2015, apparently under the mistaken belief that the test claim statute mandated factfinding.[19]

If a local agency employer and one of its unions reach an impasse, all that the test claim statute requires is that the local agency employer engage in factfinding if, as a pre-requisite, it previously agreed to voluntary mediation. Under the Section 3505.2, which was not amended by the test claim statute, a local agency employer who has reached impasse is free to decline mediation (which effectively declines factfinding). And, under the test claim statute, a local agency is then free to implement its last, best, and final offer.[20] Though it may be true that later enacted regulations and amendments to the Meyers-Milias-Brown Act have changed the voluntary nature of fact-finding, those later changes in law have not been pled and are not before the Commission.

Conclusion

Based on the foregoing discussion and analysis, staff finds that the test claim statute does not legally compel the local agencies to engage in mediation or factfinding or to hold a public hearing and there is no evidence in the record that the claimant or any other local agency was, as a practical matter, compelled to engage in mediation or factfinding, or to hold a public hearing. Therefore, the test claim statute does not impose a reimbursable state-mandated program.

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision to deny this Test Claim and authorize staff to make any technical, non-substantive changes following the hearing.

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[18] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727.

[19] Exhibit D, Claimant's Rebuttal Comments, pages 103-108 (Fact-finding Report & Recommendations, City of Glendora and Glendora Municipal Employees Association, dated August 24, 2015).

[20] Government Code section 3505.7, as added by Statutes 2011, chapter 680, section 4.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Sections 3505.4, 3505.5, and 3505.7; Statutes 2011, Chapter 680 (AB 646) Filed on June 2, 2016 By City of Glendora, Claimant	Case No.: 15-TC-01 *Local Agency Employee Organizations: Impasse Procedures* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted January 27, 2017*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on January 27, 2017. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/deny] the Test Claim by a vote of [vote count will be included in the adopted Decision], as follows:

Member	**Vote**
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller	
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	
Sarah Olsen, Public Member	
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	
Carmen Ramirez, City Council Member	
Don Saylor, County Supervisor	

Summary of the Findings

This Test Claim alleges reimbursable state-mandated activities arising from the enactment of amendments to the Meyers-Milias-Brown Act by Statutes 2011, chapter 680 (AB 646). The Commission finds that the test claim statute does not legally compel the City of Glendora (claimant) to engage in a collective bargaining procedure known as factfinding. In addition, the Commission finds no evidence in the record that the claimant or any other local agency was, as a practical matter, compelled to engage in factfinding. Therefore, the test claim statute does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution. On these grounds, the Commission denies the Test Claim.

COMMISSION FINDINGS

I. Chronology

10/09/2011 The test claim statute, Statutes 2011, chapter 680, was enacted.

01/01/2012 Effective date of Statutes 2011, chapter 680.

06/16/2015 Claimant allegedly first incurred costs under Statutes 2011, chapter 680.[21]

06/02/2016 Claimant filed the Test Claim with Commission.[22]

07/25/2016 Department of Finance (Finance) filed comments on the Test Claim.[23]

08/24/2016 Interested person Nichols Consulting filed comments on the Test Claim.[24]

09/16/2016 Claimant filed rebuttal comments.[25]

11/16/2016 Commission staff issued the Draft Proposed Decision.[26]

II. Background

This Test Claim addresses Statutes 2011, chapter 680, which amended the Meyers-Milias-Brown Act to add a factfinding procedure after a local agency and a union reach an impasse in negotiations. The test claim statute went into effect on January 1, 2012.

[21] Exhibit A, Test Claim, page 8.

[22] Exhibit A, Test Claim.

[23] Exhibit B, Department of Finance's Comments on Test Claim.

[24] Exhibit C, Nichols Consulting's Comments on the Test Claim. Nichols Consulting is an "interested person" under the Commission's regulations, defined as "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (California Code of Regulations, title 2, section 1181.2(j).)

[25] Exhibit D, Claimant's Rebuttal Comments.

[26] Exhibit F, Draft Proposed Decision.

A. Prior Law

1. The General Provisions of the Meyers-Milias-Brown Act

The collective bargaining rights of many local agency employees are governed by the Meyers-Milias-Brown Act, which is codified at Government Code sections 3500 to 3511. Specifically, the Meyers-Milias-Brown Act (also referred to herein as the "MMBA" or the "Act") applies to employees of California cities, counties, and certain types of special districts.[27]

The Meyers-Milias-Brown Act obligates each local agency to meet with the relevant "recognized employee organization" — the Act's term for a labor union — and to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment.[28] The relevant provision of the Act, which was added in 1971 and has not been amended since, reads:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
>
> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.[29]

Meeting and conferring is intended to result in a tentative agreement which, if adopted, is formalized into a Memorandum of Understanding (MOU).[30] From 1969 to 2013, the relevant

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[27] The Meyers-Milias-Brown Act applies to each "public employee," which is defined as any person employed by a "public agency." Government Code section 3501(d). A "public agency" is then defined as "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." Government Code section 3501(c).

[28] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

[29] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

[30] Government Code section 3505.1.

provision of the Act, which was not amended by the test claim statute, read:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.[31]

2. The Impasse Provisions of the Meyers-Milias-Brown Act Were Limited to Voluntary Mediation.

An "impasse" occurs when "despite the parties best efforts to achieve an agreement, neither party is willing to move from its respective position."[32]

The Meyers-Milias-Brown Act contains several provisions regarding what happens when an impasse in negotiations is reached.

As quoted above, the provision of the Act which requires a local agency and a union to meet and confer in good faith also counsels the negotiating parties to allocate time for a potential impasse. Government Code section 3505 reads in relevant part, "The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

In addition, the Meyers-Milias-Brown Act recognizes the right of the negotiating parties to engage in voluntary mediation. Government Code section 3505.2 — which has not been amended since it was enacted in 1968 — reads:

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In

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[31] Government Code section 3505.1. The quoted language was in effect from 1969 to 2013. After the test claim statute was enacted, Statutes 2013, Chapter 785, which was not pled and is not before the Commission, amended Government Code section 3505.1 to read:

> If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding.

[32] *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 827.

the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[33] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[34] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[35]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to enactment of the test claim statute) did not contain an impasse procedure other than voluntary mediation. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure."[36] "Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration."[37]

B. The Test Claim Statute: Statutes 2011, Chapter 680

1. The Plain Language of the Test Claim Statute

The test claim statute, Statutes 2011, chapter 680, effective January 1, 2012, contains four provisions.

In Section One, the test claim statute repeals the pre-existing version of Government Code section 3505.4.[38] The pre-existing version of Government Code section 3505.4 read:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public

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[33] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[34] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[35] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[36] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[37] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

[38] Statutes 2011, chapter 680, section 1.

agency of its annual budget, or as otherwise required by law.[39]

In Section Two, the test claim statute replaces Government Code Section 3505.4 to read:

> 3505.4. (a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.
>
> (b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.
>
> (c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.
>
> (d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
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> (1) State and federal laws that are applicable to the employer.
>
> (2) Local rules, regulations, or ordinances.
>
> (3) Stipulations of the parties.
>
> (4) The interests and welfare of the public and the financial ability of the public agency.
>
> (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
>
> (6) The consumer price index for goods and services, commonly known as the cost of living.
>
> (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of

[39] Statutes 2000, chapter 316, section 1.

employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

In Section 3, the test claim statute adds to the Government Code a new Section 3505.5 which reads:

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

In Section 4, the test claim statute adds to the Government Code a new Section 3505.7 which reads:

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of

understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

2. The Legislative History of the Test Claim Statute

The legislative history of AB 646 — the bill which became the test claim statute— includes evidence that the author intended to insert a new factfinding procedure into the Meyers-Milias-Brown Act which would have been made mandatory by the inclusion of mandatory mediation provisions.[40] However, the author removed the mandatory mediation provisions from the bill when it was heard by the Assembly Committee on Public Employees, Retirement and Social Security.

The Assembly Committee on Public Employees, Retirement and Social Security bill analysis on the test claim quotes the bill's author, Assemblywoman Toni G. Atkins, D-San Diego who recognized that the Meyers-Milias-Brown Act, in its then-current form, did not mandate factfinding or any other form of impasse procedure: "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed," the Assemblywoman stated.[41]

However, although Assemblywoman Atkins argued in favor of the perceived benefits of *mandatory* impasse procedures stating: "[t]he creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful,"[42] and "[f]act-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions,"[43] opponents of AB 646 argued that "requiring mediation and factfinding prior to imposing a last, best and final offer would simply add costs and be unhelpful to both the employer and the employees."[44]

The author agreed to a series of amendments, which the Committee memorialized as follows:

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[40] See Exhibit X, AB 646 as amended March 23, 2011, amendments indicated in strike out and italics.

[41] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[42] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[43] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[44] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3.

1) *Remove all of the provisions related to mediation*, making no changes to existing law.

2) *Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel* and instead provides employees organizations with the *option* to participate in the fact-finding process established in Government Section 3505.4 which is added by this measure.

3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer. [45]

After the amendments were made, the Senate Floor Analysis stated that AB 646:

1. Allows an employee organization to request fact-finding when a mediator has been unsuccessful at effectuating a resolution to a labor dispute within 30 days of appointment. . . . .
3. Requires the fact-finding panel to meet with the parties within 10 days after appointment, and take other steps it deems appropriate. . . . .
5. Requires state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel. . . . .
7. Requires the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. . . . .
8. Requires the costs of the chairperson of the fact-finding panel to be paid for by both parties whether or not PERB selected the chairperson."[46]

3. Questions About the Language of the Test Claim Statute

Almost immediately after passage, the test claim statute was criticized on the grounds that, while the author's intent had been to make factfinding mandatory under the Meyers-Milias-Brown Act, the test claim statute as drafted merely made factfinding voluntary, not mandatory.

AB 646, as passed, was drafted to state that mediation was a pre-requisite to factfinding. Since mediation under the Meyers-Milias-Brown Act is voluntary, and AB 646 as enacted did not include provisions to make it mandatory, this drafting rendered factfinding voluntary as well.

Specifically, the first sentence of newly added Section 3505.4 was drafted to read, "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel."

Commentators and practitioners promptly criticized the language. Twelve days after the Governor signed AB 646, the employment law firm of Littler Mendelson P.C. posted the following analysis to its web site:

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[45] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3, emphasis added.

[46] Exhibit X, Senate Rules Committee, Floor Analysis of AB 646, pages 2-3.

> It is questionable whether this new law actually fulfills the bill sponsor's apparent intent of requiring an employer to submit to factfinding before implementing its last, best and final offer in *all* cases where the union has requested factfinding. The bill sponsor's comments regarding AB 646 reference "the creation of *mandatory* impasse procedures," giving the impression of an intent to require these impasse procedures (e.g., factfinding and a public hearing) in all cases where a union requests them.
>
> However, the law, as written, arguably does not achieve this goal. AB 646 specifically states that "*[i]f the mediator is unable to effect settlement* of the controversy within 30 days after his or her appointment, the employee organization may request . . . factfinding . . . ." Because mediation is not required under the current version of the MMBA and, importantly, AB 646 did not change the voluntariness of mediation under the statute, it appears the union may not be able to insist on factfinding in the absence of a failed attempt at settling the dispute before a mediator. If true, it is possible that an employer can avoid the costs and delays associated with factfinding by declining to participate in mediation and, thereafter, implementing its last, best and final offer. Indeed, new Government Code section 3505.7, which was added by AB 646 and permits implementation of the last, best and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted," lends some support to this interpretation of the new law because it opens the door to the possibility that such procedures are permissive, but not necessarily required.[47]

Other commentators shared the concern. "[T]he statute's vague and inconsistent language leaves many questions unanswered as to how this new process will really work. . . . . We believe the legislative history clearly shows that AB 646 does not require mediation. However, without mediation, there is no clear trigger for fact-finding."[48] "Without mediation — voluntary or mandatory — there is no explicit trigger for fact-finding, and opinions as to whether fact-finding is truly mandatory are already split."[49] "Can factfinding be avoided by not agreeing to

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[47] Exhibit X, Jennifer Mora and Maggy Athanasious, "California Governor Signs New Collective Bargaining Law Requiring Factfinding Procedures for Impasse Resolution for Public Sector Employers Covered by the MMBA" dated October 21, 2011 [emphases in original], pages 2-3, http://www.littler.com/california-governor-signs-new-collective-bargaining-law-requiring-factfinding-procedures-impasse, accessed November 9, 2016.

[48] Exhibit X, Renne Sloan Holtzman Sakai LP, Navigating the Mandatory Fact-Finding Process Under AB 646 [November 2011], pages 1, 8, http://www.pccfacultyassociation.org/wp-content/uploads/2012/09/fact_finding.pdf, accessed November 9, 2016.

[49] Exhibit X, Emily Prescott, "Mandatory Fact-Finding Under the Meyers-Milias-Brown Act," California Labor & Employment Law Review, Vol. 26 No. 1 [January 2012], page 11, http://www.publiclawgroup.com/wp-content/uploads/2012/01/Mandatory-Fact-Finding-Under-Meyers-Milias-Brown-Act-by-Emily-Prescott-Cal-Labor-and-Employment-Law-Review.pdf, accessed November 9, 2016.

mediation?"[50] "The question 'Is mediation required before the union can request factfinding?' may be the most obvious point of confusion created by the statute, but others exist."[51]

C. The Subsequent Adoption of Regulations and a 2012 Statute Which Have Not Been Pled in This Test Claim

After the enactment of the test claim statute, Public Employee Relations Board (PERB) adopted emergency regulations and the Legislature enacted a subsequent statute in 2012 to address whether the factfinding process was required if the parties had not gone through mediation. The claimant did not plead the PERB regulations or the subsequent statute in its Test Claim, and, consequently, the Commission is not herein rendering a ruling upon these laws.[52] However, they are included in the Background for history and context.

1. PERB Regulation 32802

Within two months of the Governor's signing of AB 646, PERB, which has administered the Meyers-Milias-Brown Act since July 2001,[53] adopted emergency regulations.[54] PERB filed the emergency rulemaking package with the Office of Administrative Law (OAL) on December 19, 2011.[55] The emergency regulations became operative on January 1, 2012[56] — the same date that the test claim statute became effective. The emergency regulations became

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[50] Exhibit X, Best Best & Krieger LLP, AB 646's Impact On Impasse Procedures Under the MMBA (Mandated Factfinding) dated December 2011, page 6, http://www.bbklaw.com/88E17A/assets/files/News/MMBA-Impasse%20Procedures%20After%20AB%20646.pdf, accessed November 9, 2016.

[51] Exhibit X, Stefanie Kalmin, "A.B. 646 Raises Many Questions," U.C. Berkeley Institute for Research on Labor and Employment, page 1, http://cper.berkeley.edu/journal/online/?p=952, accessed November 9, 2016.

[52] In a test claim, a claimant must allege that a specific statute or executive order forced the claimant to incur reimbursable costs; the Commission has jurisdiction to rule only upon the specific statutes or executive orders which the claimant has timely pled. See Government Code sections 17551(a), 17553(b)(1), 17553(b)(2)(C) and 17553(b)(3)(A)(i); California Code of Regulations, title 2, section 1183.1(d).

[53] Government Code section 3509; see also Statutes 2000, chapter 901.

[54] The emergency regulations amended or added PERB Regulations 32380, 32603, 32604, 32802 and 32804. See Exhibit X, Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5 to 8). In response to a Commission request, PERB provided 503 pages of underlying rulemaking documents. See Exhibit X, Public Employment Relations Board's Response to the Request for the Rulemaking Files, filed August 26, 2016.

[55] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606, as introduced February 7, 2012, page 2. This analysis erroneously bears a "2011" date.

[56] See History at bottom of Code of California Regulations, title 8, section 32802. See also Register 2011, No. 52.

permanent after PERB transmitted a Certificate of Compliance to the OAL on or about June 22, 2012.[57]

One section of these emergency regulations — codified at California Code of Regulations, title 8, section 32802 (section 32802) — sought to implement, interpret, or make specific the provisions of the test claim statute.[58] Section 32802 of the emergency regulations read:

> 32802. Request for Factfinding Under the MMBA.
>
> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> > (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
> >
> > (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.
>
> (b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.
>
> (c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.
>
> (d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.
>
> (e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.[59]

PERB Regulation 32802(a) begins by stating that "[a]n exclusive representative may request that

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[57] See History at bottom of Code of California Regulations, title 8, section 32802. See also Register 2012, No. 31.

[58] Section 32804 was also amended by the emergency regulations and pertained to the test claim statute, specifically, the manner in which PERB would select the chairperson of the factfinding panel. Since Section 32804 is not relevant to the material issue of whether factfinding is mandatory under the test claim legislation, this Decision will not focus on Section 32804.

[59] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

the parties' differences be submitted to a factfinding panel" — a statement which is not qualified in terms of whether or not mediation has occurred.

Regulation 32802(a)(1) specifies a timeline for the initiation of factfinding after mediation, and Regulation 32802(a)(2) specifies a timeline for the initiation of factfinding when mediation has not occurred. Regulation 32802(a)(2) reads:

> If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

During the promulgation of this regulation, the question arose as to whether the test claim statute authorized PERB to oversee factfinding when no mediation had occurred since the test claim statute was silent on this point.

On November 8 and 10, 2011 — about one month after the Governor signed AB 646 — PERB staff members met in Oakland and Glendale with members of the public, including officials of unions representing city and county employees, regarding the draft regulations.[60] PERB also held formal meetings in its Sacramento headquarters about the regulations on December 8, 2011, and April 12, 2012.[61]

At these meetings, whether the test claim statute mandated factfinding in the absence of mediation was questioned.

During at least one of the non-Sacramento meetings, a union official "stated that at the PERB meeting he attended, the unions agreed that factfinding should be required even when mediation was not required by law."[62]

PERB member Dowdin Calvillo "commented on concerns expressed by some constituents with regard to staff's recommendation that factfinding would be required in situations where mediation was not required by law."[63] Member Calvillo "said she was not sure if the Board had authority to require factfinding in those situations given that AB 646 was silent in that regard but that she was willing to allow the language to move forward as staff proposed and allow OAL to make that determination."[64]

According to PERB Minutes, Mr. Chisholm, the Division Chief of PERB's Office of General Counsel, "stated that AB 646 provides, for the first time, a mandatory impasse procedure under

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[60] Exhibit E, Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 177-181.

[61] Exhibit E, Minutes, Public Employment Relations Board Meeting, December 8, 2011; Exhibit X, Minutes, Public Employment Relations Board Meeting, April 12, 2012.

[62] Exhibit E, Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 180.

[63] Exhibit E, Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 180.

[64] Exhibit E, Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 180.

the MMBA."[65] Mr. Chisholm stated that AB 646 "established a mandatory factfinding procedure under the MMBA that did not exist previously."[66] "Mr. Chisholm acknowledged the comments and discussions held regarding whether factfinding may be requested where mediation has not occurred. PERB, having considered all aspects, including comments and discussions held, related statutes, and legislative history and intent, drafted a regulatory package that would provide certainty and predictability."[67]

During the period of time when the emergency regulations were being reviewed by OAL, the City of San Diego, as an interested person, submitted comments arguing that Regulation 32802(a) was inconsistent with the test claim statute and also lacked clarity. "PERB's proposed regulation 32802(a) is not consistent with A.B. 646, nor does it provide clarity to the public agencies subject to it," the City of San Diego wrote, through its City Attorney.[68] "A.B. 646 does not authorize or mandate factfinding when the parties do not engage in mediation of a dispute, nor does A.B. 646 mandate mediation."[69]

In response to the City of San Diego's letter, PERB agreed "that nothing in AB 646 changes the voluntary nature of mediation under the MMBA," but stated that "any attempt to read and harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory . . . ."[70] PERB argued that its proposed emergency regulations were consistent with legislative intent and that the "majority of interested parties, both employer and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not."[71] PERB also argued that, since the test claim statute repealed the prior language regarding when an employer could implement its last, best, and final offer, the replacement language — which references factfinding — implies that factfinding must be a

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[65] Exhibit E, Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 178.

[66] Exhibit X, Minutes, Public Employment Relations Board Meeting, April 12, 2012, page 6.

[67] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 179 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 6).

[68] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 120 (Letter from Joan F. Dawson, Deputy City Attorney, to Kathleen Eddy, Office of Administrative Law, and Les Chisholm, PERB, dated December 22, 2011, page 1).

[69] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 121 (Letter from Joan F. Dawson, Deputy City Attorney, to Kathleen Eddy, Office of Administrative Law, and Les Chisholm, PERB, dated December 22, 2011, page 2).

[70] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 124 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 1).

[71] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

mandatory step in the process which leads to the ability of the employer to implement its last, best, and final offer.[72]

2. Statutes 2012, Chapter 314 (AB 1606) Amends Government Code Section 3505.4, Effective January 1, 2013.

AB 1606, Statutes 2012, chapter 314, went into effect on January 1, 2013. According to the author of the bill, "Ambiguity in the drafting of AB 646 has called into question whether an employer can forgo all impasse procedures, including mediation and fact-finding. In fact, several government employers argue that AB 646 does not require fact-finding if the parties do not engage in mediation."[73]

Although PERB adopted Regulation 32802, "the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains unresolved," the author continued.[74] "AB 1606 would clarify that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have engaged in mediation."[75]

Unidentified supporters of AB 1606 were quoted as stating,

> During the PERB rulemaking process, it became apparent that AB 646 was drafted in a manner that called into question whether mediation was a precondition to an employee organization's ability to request factfinding. . . . . AB 1606 seeks to provide a final, statutory clarification of this question, by revising the Government Code to allow factfinding in all circumstances in which a local public employer and its employees have reached an impasse in their negotiations.[76]

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[72] "[I]t also is important to consider that AB 646 *repealed* the prior language of section 3505.4, which set forth the conditions under which an employer could implement its last, best and final offer (LBFO). In new section 3505.7, added by AB 646, the MMBA now provides that implementation of the employer's LBFO may occur only '[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5.' (Emphasis added.)" Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2).

[73] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 for hearing of March 28, 2011, page 1.

[74] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 for hearing of March 28, 2011, page 2.

[75] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 for hearing of March 28, 2011, page 2.

[76] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 for hearing of March 28, 2011, page 2.

According to the Senate Public Employment & Retirement Committee AB 1606, ". . . . clarifies that if the dispute leading to impasse was not submitted to mediation, the employee organization may request factfinding within 30 days after the date that either party provided the other with written notice of the declaration of impasse."[77]

Statutes 2012, chapter 314 (AB 1606), contains two sections. Section One codifies the timelines and language contained in PERB Regulation 32802(a) and states that a union may demand factfinding whether or not mediation has occurred. Section One amends Government Code section 3505.4(a) to read (in underline and italic):

> 3505.4. (a) ~~If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the~~ *The* employee organization may request that the parties' differences be submitted to a factfinding panel~~.~~ *not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.* Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

Section One also adds to Government Code section 3505.4 a new subdivision (e) which reads:

> (e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

Section Two makes a finding the legislation is technical and clarifying, by stating:

> SEC. 2. The Legislature finds and declares that the amendments to Section 3505.4 of the Government Code made by this act are intended to be technical and clarifying of existing law.

III. Positions of the Parties and Interested Person

A. City of Glendora

The claimant argues that the following activities are mandated by the test claim statute and are reimbursable state mandates:

> If mediation did not result in settlement after 30 days and if the employee organization requests factfinding:
>
> 1) The agency must notice impasse hearing if delay in factfinding request.
> 2) Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of its member.

[77] Exhibit X, Senate Public Employment & Retirement Committee, Analysis of AB 1606 as introduced February, 7, 2012 [emphases omitted], page 2.

3) If chairperson is not approved by other party, agency must select a different chairperson.

4) PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.

5) The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)

6) The agency shall participate in all factfinding hearings.

7) The agency shall review and make the panel findings publicly available within 10 days of receipt.

8) The agency shall pay for half of the costs of the factfinding.

9) The agency must hold a public impasse hearing, if it chooses to impose its last, best offer.

10) The agency shall meet and confer with union and submit/resubmit last, best offer.

One time costs would include:

1) Train staff on new requirements.

2) Revise local agency manuals, policies, and guidelines related to new factfinding requirements.[78]

In response to Finance's comments on the Test Claim, the claimant filed written rebuttal comments.[79]

In these rebuttal comments, the claimant took the position, without analysis, that the test claim statute established a mandatory factfinding procedure: "AB 646 changed the MMBA significantly by establishing new ***mandatory*** factfinding procedures, effective January 1, 2012."[80] The claimant also challenged the specific stances taken by Finance regarding what activities were newly imposed, or were discretionary.[81]

B. Department of Finance

Finance asserts that the following activities identified in the Test Claim were required by prior law and, therefore, are not new programs or higher levels of service under state mandate law:

2) Agency must select a person to serve as its member of the factfinding panel, and

[78] Exhibit A, Test Claim, page 7.

[79] Exhibit D, Claimant's Rebuttal Comments.

[80] Exhibit D, Claimant's Rebuttal Comments, page 94, emphasis in original.

[81] Exhibit D, Claimant's Rebuttal Comments, pages 94-99.

pay for the costs of its member.

3) If chairperson is not approved by other party, agency must select a different chairperson.

5) The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)

6) The agency shall participate in all factfinding hearings.[82]

Finance further alleges that the following activities 1, 9, and 10, identified in the Test Claim are discretionary and are not mandated at all. These activities are:

1) The agency must notice impasse hearing if delay in factfinding request.

9) The agency must hold a public impasse hearing, if it chooses to impose its last, best offer.

10) The agency shall meet and confer with union and submit/resubmit last, best offer.[83]

Finally, Finance asserts alleged activities 4 and 8 (below) identified in the Test Claim are not a "program" as defined and are instead "straight costs," which are not subject to reimbursement:

4) PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.

8) The agency shall pay for half of the costs of the factfinding.[84]

Finance's comments do not address one activity identified in the Test Claim: "7) The agency shall review and make the panel findings publicly available within 10 days of receipt."

C. Nichols Consulting

Interested person Nichols Consulting submitted written comments noting that: (1) the "prior laws" implicated by Finance's comments with regard to alleged activities 1, 9, and 10, are EERA (the Educational Employment Relations Act) and HEERA (Higher Education Employer-Employee Relations Act), both of which contain factfinding provisions that do not apply to cities, counties and other local agencies which are governed by the Meyers-Milias-Brown Act; and (2) the claimant does not appear to have requested the reimbursement of mediation costs, a subject on which the test claim statute is silent.[85]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

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[82] See Exhibit B, Department of Finance's Comments on the Test Claim, page 1.

[83] See Exhibit B, Department of Finance's Comments on the Test Claim, page 1.

[84] See Exhibit B, Department of Finance's Comments on the Test Claim, page 2.

[85] Exhibit C, Nichols Consulting's Comments on the Test Claim, pages 1-2.

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[86] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[87]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[88]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or
   a. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[89]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[90]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[91]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[92] The determination

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[86] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[87] *County of Los Angeles v. State of California* (*County of Los Angeles I*) (1987) 43 Cal.3d 46, 56.

[88] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[89] *Id*., pages 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[90] *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[91] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[92] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[93] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[94]

Statutes 2011, Chapter 680 (AB 646), Does Not Impose a State-Mandated Program on Local Agencies.

In 2003, the California Supreme Court decided the *Kern High School District* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[95] In *Kern High School District*, school districts participated in various optional education-related programs that were funded by the state and federal government. Each of the underlying funded programs required school districts to establish and utilize school site councils and advisory committees. State open meeting laws later enacted in the mid-1990s required the school site councils and advisory bodies to post a notice and an agenda of their meetings. The school districts requested reimbursement for the notice and agenda costs pursuant to article XIII B, section 6.[96]

There, the *Kern* court reviewed and affirmed the holding of *City of Merced v. State of California*,[97] determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled. The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain — but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[98]

Thus, the California Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are

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[93] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[94] *County of Sonoma v. Commission on State Mandates* 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

[95] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727.

[96] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 730.

[97] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[98] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743 (emphasis in original).

> mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*[99]

More recently, the court in *POBRA* held that school districts that choose to employ peace officers and have a school police department are not mandated by the state to comply with the requirements of the Peace Officer Procedural Bill of Rights Act (POBRA).[100] Consistent with the prior decisions of the court, the court stated that "[t]he result of the cases discussed above is that, if a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[101]

1. The Test Claim Statute, by its Plain Language, Does Not Legally Compel Local Agencies to Engage in Mediation or Factfinding.

In this case, the test claim statute does not legally compel local agencies to act. The plain language of the test claim statute links factfinding to mediation. Government Code section 3505.4 as replaced by the test claim statute reads in relevant part:

> If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.[102]

This is the only sentence in the test claim statute which addresses how factfinding would commence. The remainder of the test claim statute addresses the procedures for factfinding. Under the Meyers-Milias-Brown Act as it existed prior to the enactment of the test claim statute, mediation was voluntary and this is supported by numerous cases.[103] The plain language of the statute indicated that mediation was voluntary. Government Code section 3505.2 read at that time (and still reads to this day):

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and

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[99] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 731 (emphasis added).

[100] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1357.

[101] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366.

[102] Statutes 2011, chapter 680.

[103] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034; *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21; *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

one-half to the recognized employee organization or recognized employee organizations.

The plain language of Section 3505.2 — the parties "may agree" to appoint a "mutually agreeable" mediator — means that mediation under the Meyers-Milias-Brown Act is voluntary.[104]

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[105] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[106] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[107]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to the test claim statute did not contain or require an impasse procedure other than voluntary mediation. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure."[108] "Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration."[109]

Consequently, the test claim statute allows for factfinding only "[i]f the mediator is unable to effect settlement." Since mediation remained voluntary after the effective date of the test claim statute, factfinding — which is triggered by unsuccessful mediation — is a non-reimbursable downstream requirement of a discretionary decision to engage in mediation.[110]

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[104] "'Shall' is mandatory and 'may' is permissive." Government Code section 14. "Under 'well-settled principle[s] of statutory construction,' we 'ordinarily' construe the word 'may' as permissive and the word 'shall' as mandatory, 'particularly' when a single statute uses both terms." *Tarrant Bell Property, LLC v. Superior Court (Abaya)* (2011) 51 Cal.4th 538, 542.

[105] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[106] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[107] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[108] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[109] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

[110] See *Department of Finance v. Commission on State Mandates (Kern High School District),* 30 Cal.4th 727, 743 and *San Diego Unified School Dist. v. Commission On State Mandates* (2004) 33 Cal.4th 859, 887.

Under state mandates law, the voluntary actions of a local agency do not create a reimbursable state mandate. "[T]he core point . . . is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds — even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice."[111] "[I]f a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[112]

Mediation is voluntary under the plain meaning of the test claim statute, and under the test claim statute, fact finding is only triggered by the mediation. Since the State is not obligated to reimburse a local agency for activities which are conducted voluntarily, the test claim statute does not impose a reimbursable state mandate.

Though, as discussed in the Background above, PERB came to a different legal conclusion regarding the test claim statute during the promulgation of PERB Regulation 32802 (which does in fact require fact finding) than the Commission does here, the plain language of the statute, the case law, and the legislative history of AB 646 strongly support the Commission's conclusion.

As discussed above, the plain language of the test claim statute conditions factfinding upon mediation, which is voluntary. The test claim statute does not contain any language which makes mediation or factfinding mandatory or which requires factfinding in the absence of mediation.

The Commission finds the plain language of the test claim statute to be unambiguous and that the plain meaning therefore controls. "If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs."[113]

Moreover, the Legislature specifically chose to omit mandatory mediation from the test claim statute, as is reflected in the Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3 and in the March 23, 2011 amendments themselves.[114] With regard to courts or quasi-judicial tribunals, such as the Commission, their rulings may not create or add text which was omitted by the Legislature. In the words of the California Supreme Court:

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[111] *Department of Finance v. Commission on State Mandates (Kern High School District),* 30 Cal.4th 727, 742.

[112] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

[113] *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.

[114] See Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3 and AB 646 as amended March 23, 2011 wherein the author agrees to and takes amendments to "remove all of the provisions related to mediation."

> [I]n construing this, or any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. "Our office ... 'is simply to ascertain and declare' what is in the relevant statutes, 'not to insert what has been omitted, or to omit what has been inserted.' " (Citation.) "'[A] court . . . may not rewrite the statute to conform to an assumed intention which does not appear from its language.'" (Citation.)[115]

Therefore, since the Legislature excluded language making factfinding or mediation mandatory, it is not within the authority of this Commission to re-write the test claim statute and insert new provisions.

PERB supported its reading of the test claim statute by stating that it was harmonizing the test claim statute with the rest of the Meyers-Milias-Brown Act.[116] However, even when the test claim statute is read in conjunction with the rest of the Act, nothing in the text passed by the Legislature (in 2011 or before) makes factfinding or mediation mandatory. The process of harmonization cannot be used to add terms which the Legislature has not enacted; phrased differently, a person construing an amended statute may seek to harmonize all of the provisions which have been enacted but cannot add new provisions which have not been enacted.

Nor is the Commission persuaded that, since factfinding is referenced in the statutory section as amended by the test claim statute which authorizes an employer to implement its last, best, and final offer, factfinding is mandatory.[117] As amended by the test claim statute, Government Code section 3505.7 authorizes the employer to implement its last, best, and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted." The use of the term "applicable" means only that; if a procedure is applicable, it must be exhausted, and, if a procedure is not applicable, it need not be exhausted. Government Code section 3505.7 is not the statutory provision which determines whether or not a procedure is applicable; other provisions of the Act do that. Since Government Code section 3505.7 as amended by the test claim statute linked factfinding to mediation, and since mediation under the Act is indisputably voluntary, then factfinding under the test claim statute is voluntary, and not legally compelled by the State. Nothing in Section 3505.7 changes the voluntary nature of mediation under the Act. Government Code section 3505.7 refers to "any applicable mediation and factfinding procedures." Under PERB's reasoning, mediation would also be required (or one of either mediation or factfinding would be required) before an employer could implement its last, best, and final offer. Yet, the legal authorities (cited and quoted above) are unanimous in holding that mediation under the Act is voluntary. Nothing in PERB's analysis explains how the phrase "any applicable mediation and factfinding procedures" can be construed to mean that mediation is

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[115] *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.

[116] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 124 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 1).

[117] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2).

voluntary while factfinding is mandatory. The determination of whether or not mediation or factfinding is voluntary must be determined by reference to other provisions of the Act, not to Section 3505.7.

PERB based its reading in part on the fact that a staffer from the author's legislative office stated in December 2011 (after the test claim statute had been enacted) that mandatory factfinding in all situations was consistent with the legislative intent.[118] Post-enactment statements of intent by legislators and their staff are of little or no legal weight. "The views of an individual legislator or staffer concerning the interpretation of legislation may not properly be considered part of a statute's legislative history, particularly when the views are offered after the statute has already been enacted."[119]

To the extent that PERB relied upon committee reports and other legislative history, the unambiguous plain language of the test claim statute governs instead. "Committee reports, often drafted by unelected staffers, cannot alter a statute's plain language."[120] "When a statute is unambiguous, its language cannot be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."[121] And, as discussed above, the Committee Reports in fact reveal that the Legislature was well aware of the omission of the mandatory mediation provisions, although that was not the author's original intent in introducing the bill. As the Assembly Committee on Public Employees, Retirement and Social Security memorialized, the amendments taken by the author:

> 1) *Remove all of the provisions related to mediation*, making no changes to existing law.
>
> 2) *Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel* and instead provides employees organizations with the *option* to participate in the fact-finding process established in Government Section 3505.4 which is added by this measure.
>
> 3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.[122]

PERB based its reading in part on the fact that the "majority of interested parties, both employers and labor representatives, also urged a reading of AB 646 that provides for a factfinding request

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[118] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

[119] *California Highway Patrol v. Superior Court (Allende)* (2006) 135 Cal.App.4th 488, 501.

[120] *People v. Johnson* (2015) 60 Cal. 4th 966, 992.

[121] *Sabi v. Sterling* (2010) 183 Cal.App. 4th 916, 934.

[122] Exhibit X, Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3, emphasis added.

whether mediation occurs or not."[123] The opinions of third parties on what the law ought to be cannot alter the plain language of the test claim statute or express the intent of the Legislature as a whole.

Therefore, the Commission finds that Statutes 2011, chapter 680 does not legally compel local agencies to comply with the factfinding provisions of the test claim statute.

2. The Test Claim Statute's Requirement of a Public Hearing Before the Implementation of a Last, Best, and Final Offer Does Not Legally Compel Local Agencies to Hold a Public Hearing.

The test claim statute can be read to argue that, if a local government employer seeks to implement its last, best, and final offer, the local government employer is mandated to first hold a public hearing — even if the local government employer opted out of mediation and factfinding. Compare former Government Code section 3505.4 ("a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer") with the test claim statute's Government Code section 3505.7 ("a public agency that is not required to proceed to interest arbitration may, *after holding a public hearing regarding the impasse*, implement its last, best, and final offer") (new language emphasized).

While the test claim statute appears to create the new requirement of a public hearing regarding an impasse, the local government employer would only be obligated to hold the public hearing if the local government employer decided to impose its last, best, and final offer — and the imposition of the last, best, and final offer is a discretionary activity. However, PERB has found, in *Operating Engineers Local 3 v. City of Clovis*, that "[p]ursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency 'may implement its last, best, and final offer.' This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer." [124] Under state mandates law, the voluntary actions of a local agency do not create a reimbursable state mandate. "[I]f a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[125]

The discretionary nature of the imposition of the last, best, and final offer renders the pre-requisite of a public hearing to be discretionary as well; the public hearing, therefore, is not a reimbursable state mandate.

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[123] Exhibit X, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

[124] Exhibit X, *Operating Engineers Local 3 v. City of Clovis*, PERB Case No. SA-CE-513-M, page 5, footnote 5.

[125] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

3. There Is No Evidence in the Record That Local Agencies Are Practically Compelled to Engage in Mediation or Factfinding or to Hold a Public Hearing.

The court in *Kern High School District* left open the possibility that a state mandate might be found in circumstances of practical compulsion, where a local entity faced certain and severe penalties as a result of noncompliance with a program that is not legally compelled. The court in *POBRA* explained further that a finding of "practical compulsion" requires a concrete showing in the record that a failure to engage in the activity in question will result in certain and severe penalties and that as a practical matter, local agencies do not have a genuine choice of alternative measures.[126]

The claimant has not submitted any evidence that the claimant was under a practical compulsion to engage in factfinding. There is no evidence in the record that, for example, the claimant would have automatically suffered draconian consequences, if it refused to engage in factfinding. Rather, the record reveals that the claimant engaged in voluntary factfinding in or around August 2015 or perhaps mandatory factfinding under a later enacted statute or regulation that his not before the Commission, apparently under the mistaken belief that the test claim statute mandated factfinding.[127]

If a local agency government employer like the claimant and one of its unions reached an impasse, all that the test claim statute required was that the local agency employer engage in factfinding if, as a pre-requisite, the local agency employer previously agreed to voluntary mediation — which the local agency employer was under no obligation to do. Under the test claim statute, a local agency employer who has reached impasse was free to decline mediation (and thus factfinding) and to implement its last, best, and final offer.[128]

In addition, the claimant has not submitted evidence that it is practically compelled to implement a last, best, and final offer which would then trigger the requirement under the test claim statute to hold a public hearing.

V. Conclusion

Based on the foregoing analysis, the Commission finds that Statutes 2011, chapter 680, does not impose a reimbursable state-mandated program.

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[126] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367.

[127] Exhibit D, Claimant's Rebuttal Comments on the Test Claim, pages 103-108 (Fact-finding Report & Recommendations, City of Glendora and Glendora Municipal Employees Association, dated August 24, 2015).

[128] Government Code section 3505.7, as added by Statutes 2011, chapter 680, section 4.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On November 16, 2016, I served the:

> **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing**
> *Local Agency Employee Organizations: Impasse Procedures*, 15-TC-01
> Government Code Sections 3505.4, 3505.5, and 3505.7;
> Statutes 2011, Chapter 680 (AB 646)
> City of Glendora, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 16, 2016 at Sacramento, California.

Jill Magee

Jill L. Magee
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 11/15/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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December 7, 2016

RECEIVED
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State Mandates

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Re: ***City of Glendora's Comments to November 16, 2016 Draft Proposed Decision Local Agency Employee Organizations: Impasse Procedures, Claim No. 5-TC-01***
Client-Matter: GL050/051

Dear Ms. Halsey:

The City of Glendora (City), claimant in the above-referenced matter, submits the following written comments in response to the Commission on State Mandate's November 16, 2016 Draft Proposed Decision concerning the test claim. The City further and hereby notifies the Commission that Melanie L. Chaney, Attorney for Liebert Cassidy Whitmore, will appear on the City's behalf during the January 27, 2017 hearing for this matter. As explained below, the results-oriented Proposed Decision fails to address critical facts establishing that the California Legislature intended to and did, in fact, establish mandatory factfinding procedures via Government Code section 3505.4. AB 1606 did not establish any new factfinding procedures. Rather, AB 1606 merely clarified the mandatory factfinding procedures already established by AB 646.

I. FACTUAL BACKGROUND

A. THE LEGISLATIVE HISTORY OF ASSEMBLY BILL 646

In 2011, Assembly Member Toni G. Atkins introduced AB 646 intending to establish mandatory mediation and factfinding procedures as a means to resolve impasse during labor negotiations between local agencies and recognized employee organizations subject to the Meyers-Milias-Brown Act (MMBA). (*See generally,* May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011.) Assembly Member Atkins argued in favor of establishing mandatory impasse procedures, stating: "[t]he *creation of mandatory impasse procedures* is likely to increase the effectiveness of the collective bargaining process," and "[f]act-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions." (May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011, p. 2.)

Opponents argued that the bill "undermined a local agency's authority to establish local rules for resolving impasse and the requirement that a local agency engage in factfinding may delay rather than speed the conclusion of contract negotiations." (May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011, p. 2 [prior to 2012, employee organizations and public agencies could, but were not required, to engage in mediation or interest arbitration and the parties were permitted to consult regarding local impasse rules].) As a result of these and other constituent concerns, Assembly Member Atkins agreed to a series of amendments. The Committee memorialized the relevant changes as follows:

> 1) *Remove all of the provisions related to mediation*, making no changes to existing law.
>
> 2) Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel and instead *provides employees organizations with the option to participate in the fact-finding process* established in Government Section 3505.4 which is added by this measure. (May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011, p. 3.)

As described below, these factfinding procedures are not implemented unless impasse is reached and an exclusive employee representative first requests fact-finding. *Upon request by the exclusive employee representative, the public agency is* ***required****, not permitted, to participate in the factfinding procedures, regardless of its objections to factfinding, if any*. Therefore, public agencies have no choice but to participate in factfinding following an exclusive employee representative's demand to PERB for factfinding.

Following the amendments, the Senate Floor Analysis stated that AB 646 "allows local public employee organizations to request fact-finding if a mediator is unable to effect a settlement of a labor dispute within 30 days of appointment," as well as defined other responsibilities of the fact-finding panel and interested parties.[1] (August 29, 2011 Senate Floor Analysis of AB 646, as amended June 22, 2011, p. 1.) Assembly Member Atkins continued to argue that the bill was necessary to prevent "some municipalities and agencies [from] attempting to expedite the impasse [procedures] to unilaterally impose their last, best, and final offer... rush[ing] through the motions" of good faith bargaining. She explicitly argued that a uniform process was essential, stating that "[f]act-finding is an effective tool... [to] facilitate agreement." (August 29, 2011 Senate Floor Analysis of AB 646, as amended June 22, 2011, p. 5.)

In August 2011, following the major amendments to proposed mediation procedures on which the Proposed Decision turns, the Department of Finance provided its analysis of AB 646

[1] Previous proposals allowed *either* party to request factfinding. The amendments reserved this right solely for employee organizations.

to Governor Brown. As the Governor's chief fiscal policy advisor, the Department analyzes proposed legislation for its fiscal impact, among other policy considerations.[2] The Department's analysis of AB 646, in its final form prior to enactment, described employee organizations' right to compel fact-finding and that "*local employer[s] would be **required** to participate in the fact-finding panel*." (August 1, 2011 Department of Finance Bill Analysis of AB 646, as amended June 22, 2011, p. 1 [emphasis added].) The Department opposed the bill because, in its opinion, the bill "could create a reimbursable state mandate." (*Id.*)

AB 646 returned to the State Assembly in September 2011 following passage by the State Senate. The final Assembly Floor Analysis explicitly acknowledged that AB 646 could require "substantial state mandated reimbursement of local costs." (September 1, 2011 Assembly Floor Analysis of AB 646, as amended June 22, 2011, p. 2.) In support, Assembly Member Atkins continued to argue in favor of the perceived benefits of mandatory impasse procedures, stating that uniform impasse procedures were necessary to ensure "fully effective" negotiations. As part of those procedures, she again argued: "*[t]he creation of mandatory impasse procedures* is likely to increase the effectiveness of the collective bargaining process" and "[f]act-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decision." (September 1, 2011 Assembly Floor Analysis of AB 646, as amended June 22, 2011, pp. 2-3.)

Opponents of the bill similarly continued to argue that the bill created "a disincentive for employee organizations to negotiate in good faith when there exists the option of *further processes* under the PERB that will prolong negotiations." Specifically, they reasoned that "*requiring mediation and fact finding* prior to imposing a last, best and final offer would simply add costs and be unhelpful to both the employer and the employees." (September 1, 2011 Assembly Floor Analysis of AB 646, as amended June 22, 2011, p. 3.)

Notwithstanding such opposition, the Assembly voted in favor of the final bill. In October 2011, Governor Brown signed AB 646 into law. AB 646 changed the MMBA significantly by establishing new impasse procedures, effective January 1, 2012. (Gov. Code §§ 3505.4, 3505.5, 3505.7.)

B. THE LEGISLATIVE HISTORY OF ASSEMBLY BILL 1606

On February 7, 2012, only one month after AB 646 took effect, Assembly Member Henry Perea and the Legislature introduced clean-up legislation to constituent questions over factfinding and its original intent regarding AB 646. (*See,* March 27, 2012 Assembly Committee Analysis of AB 1606, as introduced February 7, 2012.)

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[2] The Department reports its findings and support positions through Bill Analyses, available at <http://www.dof.ca.gov/Legislative_Analyses/index.php>; *see also,* Department of Finance Home Page, <http://www.dof.ca.gov/>.

The Assembly Committee on Public Employees, Retirement and Social Security bill analysis on AB 1606 stated that the bill was necessary to "clarif[y] impasse procedures governing local public agencies and employee organizations." (*Ibid.*, p. 1.) Assembly Member Perea acknowledged that:

> *Ambiguity in the **drafting** of AB 646* has called into question whether an employer can forgo all impasse procedures, including mediation and factfinding... the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains unresolved. AB 1606 would clarify that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have engaged in mediation. (*Ibid.*, pp. 1-2 [emphasis added].)

Supporters, which included AB 1606 co-sponsor American Federation of State, County and Municipal Employees (i.e., previous sponsor of AB 646), stated that in December 2011, prior to AB 646's effective date, it "became apparent that *AB 646 was **drafted in a manner** that called into question whether mediation was a precondition to an employee organization's ability to request factfinding*." (*Ibid.*, p. 2.) As a result, PERB adopted emergency regulations allowing "factfinding to be requested in all circumstances, because they found it to be the most efficient way to implement the entirety of AB 646 and accurately reflect the intent of the Legislature." (*Ibid.*)

In summary, the bill's proponents argued that final, statutory clarification of this question was necessary to effectuate the purposes of AB 646. Accordingly, they stated, "AB 1606 properly reflects the intent of the Legislature to strengthen collective bargaining by ensuring employers and employees operate in good faith and work collaboratively to deliver government services in a fair, cost-efficient manner." (*Ibid.*)

As AB 1606 worked its way through the Legislature, the Department of Finance issued its analysis of bill. In review of the final draft for AB 1606, the Department acknowledged the Assembly Member Perea's efforts to enact "a technical clean-up," writing:

> [T]his bill would *clarify* a substantive dispute between labor and some local governments that arose during the rule-making process in late 2011 for implementing AB 646.
>
> Specifically, the bill makes clear that mediation is not required before parties can pursue resolution through a PERB factfinding panel. AB 646 may have suggested that factfinding can occur only after mediation efforts have been exhausted. Because some local government entities do not utilize mediation services as a matter of

> practice or policy during negotiations, *the drafting of AB 646 left it unclear* if public employees in non-mediation cities, counties, and districts could still seek redress from a factfinding panel. (June 25, 2012 Department of Finance Bill Analysis of AB 1606, as amended May 17, 2012, p. 1 [emphasis added].)

In September 2012, Governor Brown signed AB 1606 into law, clarifying this discrepancy and employee organizations' right to request (e.g., demand) factfinding even in cases where the parties do not submit their dispute to mediation. Thus, AB 1606 makes clear that "fact-finding is available to employee organizations *in all situations*, regardless of whether the employer and employee engaged in mediation." (November 13, 2012 Senate Floor Analysis of Assembly Bill 1606, as amended May 17, 2012, p. 2 [emphasis added].) Accordingly, AB 1606 enacted the following changes to Government Code section 3505.4, effective January 1, 2013:

> (a) ~~If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, t~~***[T]***he employee organization may request that the parties' differences be submitted to a factfinding panel ***not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse***. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the fact-finding panel. (*Compare* City Exhibit H *with* City Exhibit I.)

C. THE CITY FILES A TEST CLAIM FOR REIMBURSEMENT FOR COMPLIANCE WITH MANDATORY FACTFINDING PROCUEDURES UNDER GOVERNMENT CODE SECTION 3505.4

The City first incurred increased costs under Government Code section 3505.4 on June 16, 2015, more than two years after AB 1606 first took effect. Under Section 3505.4(a), as it existed when the City first incurred costs, the City was required to participate in factfinding where an impasse had been reached and the exclusive employee representative requested fact-finding within 30 – 45 days following the appointment of a mediator or if mediation was not used, within 30 days of the written declaration of impasse by either party.

On June 2, 2016, the City filed the instant Test Claim for reimbursement of costs incurred in compliance with mandatory factfinding procedures under Section 3505.4, as that statute existed in June 2015. The City identified Section 3505.4 as the statute under which it acted, acknowledging that the State first implemented the statutory mandate and other impasse alterations in 2011 under AB 646. (*See generally,* June 2, 2016 Test Claim; *see also,* Stat. 2011, Chapter 680.) But the City also submitted the current statutory language of Section 3505.4 enacted in 2012 by AB 1606. The current provisions, under which the City had acted, clarified the mandatory nature of AB 646's factfinding requirements and were critical to the City's Test Claim. (*See,* June 2, 2016 Test Claim, pp. 19-21.)

II. LEGAL ANALYSIS

A. THE CITY IS REQUIRED TO PARTICIPATE IN FACTFINDING PROCEDURES UNDER GOVERNMENT CODE SECTION 3505.4 AND IS ENTITLED TO SUBVENTION FOR REIMBURSABLE STATE MANDATE

Under the California Constitution, "Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of such program or increased level of service...." (Cal. Const., art. XIII B, § 6.) The Constitution, therefore, imposes on the State an obligation to reimburse local agencies for the cost of most programs and services they are required to provide pursuant to State mandate provided that those local agencies were not under a preexisting duty to fund the activity. (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 328.) The purpose of this Constitutional provision is to prohibit "the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81; *see also, Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727, 735 [local agency protection critical following limitation on state and local governments' taxing and spending powers].)

In 1984, the State enacted legislation establishing comprehensive administrative procedures for resolving claims through the Commission on State Mandates. (Gov. Code, §§ 17500 *et seq.*) The legislation also established a "test claim" procedure to resolve whether a cost is or is not a reimbursable state mandate. (*See,* Gov. Code, §§ 17552-54, 17562, 17600, 17612.) A "test claim" is "the first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state...." (Gov. Code, § 17521.) Because Commission decisions apply statewide, *the test claim* "functions similarly to a class action and *has been established to expeditiously resolve disputes affecting multiple agencies*." (Cal. Code Regs., tit. 2, § 1181.2, subd. (s) [emphasis added].)

A test claim must identify *the statutory sections*... that purportedly impose a mandate, explain in detail how they create new costs, *and include evidentiary support*. (Gov. Code, § 17553(b); Cal. Code Regs., tit. 2, §§ 1181.2(s) [test claims allege "that a particular statue" imposes State-mandated costs] and 1183.1.) It is apparent from the comprehensive nature of this legislative scheme, and the Legislature's expressed intent, that *the... statutes... establish procedures which exist for the express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created*. (*Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333.)

The question whether a statute imposes a mandate is a question of law. Thus, it is critical that "the *entire* record before the Commission" be considered, including references to state statutes and regulations. (*Dep't of Fin. v. Comm'n on State Mandates* (2016) 1 Cal.5th 749, 762, as modified on denial of reh'g (Nov. 16, 2016).)

The Proposed Decision is based solely on the Commission staff's conclusion that the test claim statute encompasses only those activities arising from Statute 2011, chapter 680 (AB 646). The Proposed Decision urges the Commission to find that AB 646, allegedly the only law pled by the City, did not compel the City to engage in factfinding. (Proposed Decision, pp. 1 and 17 [alleging City did not plead AB 1606 in its Test Claim].)

The administrative record, however, is clear: the City alleged that it first incurred mandatory factfinding costs in 2015 under Government Code section 3505.4. The Test Claim acknowledged that the Legislature first altered applicable impasse procedures through the passage of AB 646 in 2011. (*See generally,* June 2, 2016 Test Claim; *see also,* Stat. 2011, Chapter 680.) In accordance with Commission regulations, the City provided additional evidentiary support demonstrating the mandatory nature of the MMBA's factfinding procedures – it submitted the current, modified language of Section 3505.4, enacted 2012 by AB 1606, under which it acted. (*See,* June 2, 2016 Test Claim, pp. 19-21; *see also,* AB 1606, Stat. 2012, Chapter 314.)

Therefore, the City properly identified the statutory sections and evidentiary support demonstrating the State mandate in its test claim. If the Commission narrows its decision to address the City's claim based solely on obsolete statutory provisions, the language under which the City did not act, the Commission will defeat the legislative purpose and intent of the California Constitution and Government Code sections 17500 *et seq.* (*County of San Diego, supra,* 15 Cal.4th at 81 [state barred from shifting financial responsibilities to local agencies] and Cal. Code Regs., tit. 2, § 1181.2(s) [test claim procedures intended to *expeditiously* resolve disputes affecting multiple agencies]; *see also,* Gov. Code 17572(a) and (b) [establishing legislative preference for early settlement of mandate claims].) The Commission cannot put off until tomorrow what it should rule on today; the Commission must consider the entire record as presented by the City, including the clarifying statutory provisions enacted by AB 1606. The clarifying provisions clearly required the City to participate in factfinding at an employee organization's request, whether or not the parties engaged in mediation.

B. THE CANONS OF STATUTORY INTERPRETATION DEMONSTRATE THAT THE STATE ESTABLISHED MANDATORY FACTFINDING PROCEDURES IMPOSING UNIQUE REQUIREMENTS UPON LOCAL GOVERNMENT AGENCIES

The rules of statutory interpretation require that the Commission: (1) ascertain and give effect to the legislative intent; (2) provide a reasonable and common sense interpretation consistent with its apparent purpose; (3) give significance to every possible word and harmonize the parts by considering a particular clause or section in the context of the whole; (4) take into account matters such as context, object in view, evils to be remedied, Legislation on the same subject, public policy, and contemporaneous construction; and (5) give great weight to consistent administrative construction. (*DeYoung v. San Diego* (1983) 147 Cal.App.3d 11, 17 (disapproved on different grounds by *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10, 15.)

When interpreting a statute, a court or administrative body starts with the statutory language to determine if the words used unequivocally express the legislature's intent. (*People v. Hall* (2002) 101 Cal.App. 4th 1009, 1020 [when statutory language is "ambiguous or *susceptible of more than one reasonable interpretation*, [courts must consider] a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, and the statutory scheme of which the statute is a part."]; *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market* (2011) 52 Cal. 4th 1100, 1107.)

But in construing or interpreting a statute, the Commission's primary objective is to determine and effectuate the legislative intent of the enactment. All other rules of statutory construction yield to this rule. (*See,* Code Civ. Proc. § 1859; *see also, Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235; *In re C.H.* (2011) 53 Cal.4th 94, 100.) Thus, when the legislative intent is not expressed in the statute or the language is not clear, as is the case here, the Commission should examine the statutory history to determine the Legislature's intent. (*Delaney v. Baker* (1999) 20 Cal.4th 23, 29.)

Lastly, even if the language of a statute is unambiguous, the Commission must consider the consequences that will flow from a particular interpretation. The legislative history of such statutes should be considered if the literal meaning of the language in the statute would result in absurd consequences that the Legislature did not intend. (*In re Michele D.* (2002) 29 Cal.4th 600, 606; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

1. The Proposed Decision Ignores Rules of Statutory Construction to Suggest There Is No Basis to Consider the Applicable Legislative History

The Proposed Decision suggests there is no need to review the legislative history of AB 646, or evidence of PERB's subsequent emergency regulations nor the Legislature's AB 1606, because "the plain language of the test claim statute [is] unambiguous." (Proposed Decision, p. 29.) This argument, however, ignores other pertinent rules of statutory construction.

The Proposed Decision, which highlights PERB's (i.e., the expert agency responsible for interpreting and enforcing public employer-employee bargaining obligations), public agencies', and employee organizations' conflicting understanding of Section 3505.4 (Stat. 2011, Chapter 680), contradicts this notion. AB 646's factfinding provisions were anything but clear. The Commission cannot lightly dismiss its responsibility to construe the words of the statute in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other. (*Dyna-Med, supra,* 43 Cal.3d at 1387.) Accordingly, the Commission is obligated to determine and effectuate the legislative intent of Section 3505.4. And, as demonstrated below, the Legislature intended to create mandatory impasse and factfinding procedures.

a. Comments from the Sponsor of AB 646 Demonstrate Legislative Intent to Create Mandatory Factfinding Procedures

Assembly Member Atkins sponsored AB 646. The analysis prepared by the Assembly Committee on Public Employees, Retirement and Social Security includes the following comments by Assembly Member Atkins:

> The *creation of mandatory impasse procedures* is likely to increase the effectiveness of the collective bargaining process," and "[f]act-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions." (May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011, p. 2.)

The final analysis of AB 646, as amended on June 22, 2011, includes identical statements from the bill's sponsor. (September 1, 2011 Assembly Floor Analysis of AB 646, as amended June 22, 2011, pp. 2-3.) The records unequivocally demonstrate that, before and after the amendments on which the Proposed Decision turns, the Legislature intended that AB 646 would create mandatory impasse procedures, including the requirement that public agencies would be required to participate in factfinding if demanded by an employee organization.

Although the Proposed Decision argues that factfinding under AB 646 was premised on the occurrence of mediation, which was voluntary under Government Code section 3505.2, the record clearly demonstrates that the City acted in accordance with Section 3505.4 *as it existed in June 2015*. This decision cannot turn on the occurrence of mediation, a provision rendered obsolete in 2012 when AB 1606 clarified Section 3505.4's mandatory nature. Nor can the Commission escape Assembly Member Atkins comments. Statements by the sponsor of legislation are entitled to be considered in determining the import of legislation. (*Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 401.) Here, Assembly Member Atkin's express intent must be incorporated into the meaning of Government Code § 3505.4 because it leads to the only rational interpretation of the statute.

b. Legislative Amendments and Department of Finance Analysis Regarding Section 3505.4 Illustrates Legislative Intent to Create Mandatory Factfinding Procedures

The amendment history of AB 646 prior to its enactment further demonstrates the Legislature's intent to enact mandatory factfinding procedures. (*See, Dyna-Med, Inc., supra,* 43 Cal.3d at 1387 ["Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent."]

Assembly Member Atkins originally drafted AB 646 to permit *either* the agency or employee organization to request mediation without agreement by the other. The bill further authorized *either* party to request factfinding if the mediator was not able to settle the matter. (May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011, p. 1.) The Legislature revised AB 646 following concerns that its procedures would delay contract negotiations, removing new mediation provisions but preserving employee organizations' right to compel factfinding without the agency's agreement. Without considering other possibilities, the Proposed Decision summarily determines these revisions signaled the Legislature's intent to permit factfinding only if the parties agreed to mediation under Section 3505.2. (Proposed Decision, pp. 10-11, 27-28) But it is also reasonable that Assembly Member Atkins revised the bill to limit opposition without considering Section 3505.2's effect on employee organizations' mandatory factfinding rights.

This conclusion is all the more reasonable given her consistent statements on the Assembly floor, described above, regarding the creation of mandatory impasse procedures both before and after these revisions. Further, following the March 23, 2011 amendments, Assembly Member Atkins continued to argue that a uniform impasse process was essential and that "[f]act-finding is an effective tool… [to] facilitate agreement." (August 29, 2011 Senate Floor Analysis of AB 646, as amended June 22, 2011, p. 5.)

Additionally, in August 2011, the Department of Finance explicitly advised Governor Brown that the bill allowed employee organizations to request fact-finding and that "*local employer[s] would be required to participate in the fact-finding panel*." (August 1, 2011

Department of Finance Bill Analysis of AB 646, as amended June 22, 2011, p. 1 [emphasis added].) By contrast, now faced with a test claim that would affect the State Budget, the Department now argues that AB 646 did not create mandatory factfinding procedures and that local agencies bear the financial responsibility for these procedures which it previously conceded were required by the statute. This approach is disingenuous at best, and is unquestionably inconsistent with its unadulterated analysis in 2011. Courts have similarly found enrolled bill reports, prepared by a responsible agency contemporaneous with passage and before signing, instructive on matters of legislative intent. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn. 19 [other citations omitted].) The Commission must therefore consider the Department's analysis as indicative of the Legislature's and Governor's intent when enacting AB 646; the Department cannot exploit this body to advance contrary positions in order to avoid reimbursing the City's mandated costs.

It is undisputable that this additional evidence supports the City's contention that the Legislature intended to require public agencies, such as the City, to participate in factfinding procedures at the sole request of employee organizations. Further, the Department of Finance, as the Governor's chief fiscal policy advisor, counseled Governor Brown as much before he signed AB 646 into law in October 2011.

c. The Plain Language of Section 3505.4 Does Not Clearly Permit the City to Voluntarily Participate or Decline to Participate in Factfinding

The Proposed Decision states that the plain language of the test claim statute is unambiguous, arguing AB 646 fails to "make mediation or factfinding mandatory or... require factfinding in the absence of mediation." (Proposed Decision, p. 29.) But the Legislature cannot reasonably anticipate every factual scenario that will be applied to any particular statute in the future. While AB 646 required factfinding at an employee organization's request, it was not precise enough to cover a factual scenario in which an organization requested factfinding in the event that mediation had not occurred. The Commission should read Government Code section 3505.4, as it was amended in 2012 by AB 1606 and which was, in fact, the governing statute that existed when the City acted. The Commission should also read section 3505.4, as it was amended in 2012 in context with the remainder of the MMBA. In doing so, it has no other choice but to conclude that the City was required to engage in factfinding, in all circumstances, at the employee organization's timely request, as the Legislature intended it to mean.

Even statutory language that appears clear and unambiguous on its face, as the Proposed Decision argues 2011's Section 3505.4 is, may be shown to have a latent ambiguity when some extrinsic factor creates a need for interpretation or a choice between two or more possible meanings. (*Varshock v. California Dep't of Forestry & Fire Prot.* (2011) 194 Cal.App.4th 635, 644; *Sutter County v. Board of Administration* (1989) 215 Cal.App.3d 1288, 1295 [ambiguity arises if more than one construction "is semantically permissible... given the context and applicable rules of usage."].) A latent ambiguity *requires* examination of extrinsic matters to

make the judgment whether the claim is tenable. If a reasonable ambiguity is established, it requires harmonization of the comprehensive legislative scheme to avoid conflict. (*City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 795 [citations omitted].) A latent ambiguity exists where, for example, a literal interpretation of a statute would frustrate rather than promote the purpose of the statute or would produce absurd consequences the Legislature did not intend. (*Varshock, supra,* 194 Cal.App.4th at 644.)

The Proposed Decision acknowledges the difficulties in interpreting AB 646, describing both PERB's adoption of emergency regulations in order to implement AB 646 and the Legislature's subsequent clean-up bill in AB 1606. (Proposed Decision, pp. 17-22.) However, the Proposed Decision summarily concludes AB 646 cannot be harmonized with these examples because doing so would add terms "which the Legislature has not enacted." (Proposed Decision, p. 30.) It further rejects PERB's reading of AB 646, to the extent PERB relied upon committee reports and other legislative history, because the alleged unambiguous plain language governs instead. (Proposed Decision, p. 31.)

First, PERB is the expert public sector labor relations agency recognized by the California Legislature and the Courts as having exclusive initial jurisdiction to interpret and administer the provisions of the MMBA, including Section 3505.4, in order to effectuate the purposes of the Act. Thus, courts generally defer to PERB's construction of labor law provisions within its jurisdiction. (Gov. Code, § 3509; *Los Angeles County v. Los Angeles County Employee Relations Comm.* (2013) 56 Cal.4th 905, 922; *San Diego Municipal Employees Ass'n. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1456-1458 [PERB is the expert administrative agency in California established to administer collective bargaining for government employees].) Hence, courts and administrative bodies should follow PERB's interpretation unless it is clearly erroneous. (*Los Angeles County, supra,* 56 Cal.4th at 922.) As described below, PERB's interpretation is not erroneous. The Commission should adopt PERB's conclusion that mandatory factfinding in all situations is consistent with the legislative intent.

Second, the Proposed Decision incorrectly interprets PERB's harmonization of Government Code sections 3505.4 with 3505.7. Although AB 646's revisions omitted previous language describing when an employer could implement its last, best, and final offer (LBFO), PERB acutely recognized that the revised language in Section 3505.7 showed that factfinding was a mandatory step in the process preceding an employer's ability to implement its LBFO. (*See,* Proposed Decision, pp. 20-21.) More specifically, PERB held that the MMBA now "provided that implementation of an LBFO may occur only '[a]fter any *applicable* mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5.'" (Commission Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2.)

The Proposed Decision finds that the term "applicable" means only that, if a procedure is applicable, it must be exhausted, and, if it is not applicable, it need not be exhausted. The Proposed Decision further alleges that PERB's interpretation of Section 3505.7 would similarly require mandatory mediation contrary to Section 3505.2, which described mediation as voluntary. (Proposed Decision, pp. 30-31.) Such analysis misconstrues PERB's reasoning.

The Assembly described Assembly Member Atkins's intent to implement mandatory mediation procedures, allowing *either* the public employer or employee organization to request mediation. (May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011, p. 1.) It acknowledged, however, that existing law "[a]uthorize[d] a local public agency to adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under the MMBA." (*Id.*, p. 2.) Accordingly, this bill also:

> 10) Specifie[d] that the parties [were] still able to utilize their own negotiated and mutually agreed upon factfinding procedure, in which case, cost will be borne equally by the parties.
>
> 11) Allow[ed] an employer to implement their last, best and final offer once any applicable mediation and factfinding procedures have been exhausted. (*Id.*, pp. 1-2.)

AB 646, as drafted on March 23, 2011, thus proposed to amend Section 3505.2 as follows: "*Either* party may request that [PERB] appoint a mediator for the purpose of assisting them in reconciling their differences...." (*See,* Redline Comparison of AB 646, as amended March 23, 2011 [Section 3505.2(a)(2)], with AB 646, Stat. 2011, Ch. 680, as chaptered October 9, 2011 [emphasis added].) Importantly, this earlier version further added Section 3505.7, which, as proposed, read:

> *After any applicable mediation and factfinding procedures have been exhausted,* a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer.... (*Id.*)

But opponents of AB 646 argued that it "undermined a local agency's authority to establish local rules for resolving impasse." (May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011, p. 2.) As a result of these and other concerns, Assembly Member Atkins agreed to a series of amendments. The Committee memorialized the changes, including, in relevant part, that the revisions would "*[r]emove all of the provisions related to mediation*, making no changes to existing law." (*Id.*, p. 3.) AB 646 was then amended to dispense with the proposed mandatory mediation procedures that *either* party could implement.

The Legislature, however, failed to revise Section 3505.7, which the author originally drafted with the intent that the parties would be required to complete: (1) Section 3505.2's then-mandatory mediation and, consequently, factfinding procedures, or (2) other applicable impasse rules that had been negotiated locally. This drafting error, in harmony with Assembly Member Atkins' consistent argument that she intended to enact mandatory impasse procedures, embedded a latent defect that created confusion and required subsequent interpretation by both PERB and the Legislature.

Third, the Commission must account for AB 1606, which the Proposed Decision ignored. AB 1606 significantly impacts this test claim because the Legislature explicitly drafted the clean-up legislation to ***clarify AB 646's latent ambiguities***. The sponsors of AB 1606 clearly acknowledged the ambiguities "in the drafting" of AB 646. (March 27, 2012 Assembly Committee Analysis of AB 1606, as introduced February 7, 2012, pp. 1 [Perea], 2 [sponsor of both AB 646 and 1606, stating "AB 646 *was drafted* in a manner that" created ambiguity].) AB 1606 ***proclaimed and clarified the Legislature's intent for AB 646*** to create mandatory factfinding procedures "available to employee organizations *in all situations*, regardless of whether the employer and employee engaged in mediation." (November 13, 2012 Senate Floor Analysis of Assembly Bill 1606, as amended May 17, 2012, p. 2 [emphasis added].)

The Proposed Decision cannot ignore AB 1606's clarification of Section 3505.4, which was in effect when the City first incurred costs. The present forum is an appropriate place to address the amended provisions, the language of which was presented in the City's original Test Claim and upon which the City actually acted. (*Bjornestad v. Hulse* (1991) 229 Cal.App.3d 1568, 1578 [citation omitted]; *see also,* June 2, 2016 Test Claim, pp. 19-21.) It would not be in the interest of administrative economy to reject the City's Test Claim only to require another public agency to prepare and file a second test claim, which would inevitably be subject to this Commission's review in a subsequent matter. The City has submitted its Test Claim, attaching to it the relevant supporting evidence, including the statutory language enacted by AB 1606; the issues are of continuing public interest; and they are likely to affect the future rights of the parties. (*See generally, Bjornestad, supra,* 229 Cal.App.3d at 1578–79.)

The Proposed Decision's narrow reading of Section 3505.4 and AB 646 is in tension with the statutory scheme as a whole. Thus, in order to (1) give effect to the legislative intent clearly demonstrated within the record, (2) provide a reasonable and common sense interpretation of the statute, and (3) harmonize it with the legislative history and statutory scheme, the Commission should consider the extrinsic evidence presented above. Upon doing so, there can be no doubt that Section 3505.4, as it existed in 2015, creates a reimbursable state mandate.

2. Holding That Government Code Section 3505.4's Factfinding Procedures Are Discretionary Would Create an Absurd Result

Even assuming, *arguendo*, the Commission finds that the plain and unambiguous terms of Section 3505.4 demonstrate that mediation procedures and, consequently, factfinding are

discretionary, it must still interpret the statute to avoid absurd results. The language of a statute should not be given its literal meaning if doing so would yield absurd results or consequences that the Legislature did not intend. (*People v. Albillar* (2010) 51 Cal.4th 47, 55; *In re Michele D., supra,* 29 Cal.4th at 606.) The plain meaning of words in a statute may also be disregarded when that meaning is "repugnant to the general purview of the act," or for some other compelling reason. (*Spielman v. Ex'pression Center for New Media* (2010) 191 Cal.App.4th 420, 428–29.) The Proposed Decision suggests that Section 3505.4's factfinding procedures were discretionary based on obsolete statutory language as it existed in 2012 (*See,* AB 646, Stat. 2011, Ch. 680) and a narrow reading of the City's Test Claim, which the Proposed Decision suggests excludes any reference to the current statutory language enacted 2013. Such statutory construction produces an absurd result that contravenes the legislative intent supporting Section 3505.4

First, there is no judicial authority that supports such an interpretation of the statute. Neither does the Proposed Decision explain the logic of its analysis. In fact, the administrative and judicial authorities that address this issue support the conclusion that employee organizations may require public agencies to participate in factfinding before the agency may impose its LBFO. (*San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, 9 [interpreting mandatory impasse procedures wrought by AB 646]; *County of Contra Costa* (2014) PERB Order No. Ad-410-M, pp.48-49 [38 PERC ¶ 154] [upholding administrative determination regarding mandatory factfinding procedures].)

Second, the record clearly demonstrates that AB 1606 "clarified" AB 646 in 2013. The Legislature was clear: it did not overturn or rescind the provisions enacted by AB 646; it clarified that it had intended for AB 646 to establish mandatory factfinding procedures. Additionally, the City incurred factfinding costs beginning in *June 2015*. The City did not act in accordance with then-obsolete statutory language from 2012, as the Proposed Decision's literal interpretation suggests. The City instead acted in accordance with the mandatory factfinding procedures under Section 3505.4, *as it has existed since 2013*, with or without the occurrence of mediation. (*See,* AB 1606, Stat. 2012, Ch. 314; *see also,* June 2, 2016 Test Claim, pp. 19-21 [City submitted the clarifying statutory provisions for the Commission's consideration with its initial Test Claim].) The Commission must not endorse such absurdity; Section 3505.4 can only be interpreted as compulsory. This is the only approach which would promote the legislative intent to develop mandatory factfinding procedures.

III. CONCLUSION

This Proposed Decision takes the obsolete version of Section 3505.4 (Stat. 2011) at face value, without consideration of the current version (Stat. 2012). However, an absurdity would result if the Proposed Decision were confirmed. As explained above, the Legislature clearly intended that AB 646 created mandatory impasse procedures. Once the employee organization requests factfinding, the local agency has no choice but to engage in factfinding. Since there is no situation where the local agency has any discretion over whether to participate in factfinding, there is no other logical conclusion than factfinding is mandatory for the local agency. That the

Legislature did not anticipate the latent ambiguities that developed during the drafting process should not lead to a result that denies the City reimbursement for bargaining responsibilities mandated by the statute.

Therefore, the City respectfully requests that the Commission avoid this absurd result by amending the proposed decision to find a reimbursable state mandate with regard to factfinding procedures.

Very Truly Yours

LIEBERT CASSIDY WHITMORE

Erik M. Cuadros

EMC:brm

cc: Melanie L. Chaney

Enclosures:
Exhibit A – May 3, 2011 Assembly Committee Analysis of AB 646, as amended March 23, 2011
Exhibit B – August 29, 2011 Senate Floor Analysis of AB 646, as amended June 22, 2011
Exhibit C – August 1, 2011 Department of Finance Bill Analysis of AB 646, as amended June 22, 2011
Exhibit D – September 1, 2011 Assembly Floor Analysis of AB 646, as amended June 22, 2011
Exhibit E – March 27, 2012 Assembly Committee Analysis of AB 1606, as introduced February 7, 2012
Exhibit F – June 25, 2012 Department of Finance Bill Analysis of AB 1606, as amended May 17, 2012
Exhibit G – November 13, 2012 Senate Floor Analysis of Assembly Bill 1606, as amended May 17, 2012
Exhibit H – AB 1606, Stat. 2012, Ch. 314
Exhibit I – Redline Comparison of AB 646, as amended March 23, 2011, with AB 646, Stat. 2011, Ch. 680, as chaptered October 9, 2011

DECLARATION

I, Erik Cuadros, am an attorney with the law firm of Liebert Cassidy Whitmore, Claimant City of Glendora's designated representative in this matter. I declare under penalty of perjury that the statements made in these Comments in Response to the Commission on State Mandate's November 16, 2016 Draft Proposed Decision are true and complete to the best of my knowledge, information and belief and that this declaration was executed on December 7, 2016 at 400 Capitol Mall, Suite 1260, Sacramento, California.

Erik M. Cuadros

EXHIBIT A

Date of Hearing: May 4, 2011

ASSEMBLY COMMITTEE ON PUBLIC EMPLOYEES, RETIREMENT AND SOCIAL SECURITY
Warren T. Furutani, Chair
AB 646 (Atkins) – As Amended: March 23, 2011

SUBJECT: Local public employee organizations: impasse procedures.

SUMMARY: Establishes additional processes, including mediation and factfinding, that local public employers and employee organizations may engage in if they are unable to reach a collective bargaining agreement. Specifically, this bill:

1) Allows either party, if after a reasonable time they fail to reach agreement, to request that the Public Employment Relations Board (PERB) appoint a mediator to assist the parties in reconciling differences. If PERB determines that an impasse exists, it is required to appoint a mediator within five working days after receipt of the request at PERB's expense.

2) Specifies that the parties are still able to utilize their own negotiated and mutually agreed-upon mediation procedure, in which case, PERB would not appoint a mediator, as specified.

3) Authorizes either party to request a factfinding panel to investigate the issues if the mediator is unable to settle the matter and declares factfinding is appropriate.

4) Specifies that the factfinding panel consist of one member selected by each party and a chairperson selected by PERB or by agreement of the parties.

5) Authorizes the factfinding panel to make inquiries and investigations, hold hearings, and take any other steps it deems appropriate, and to issue subpoenas requiring the attendance and testimony of witnesses and the production of witnesses.

6) Requires any state agency, the California State University, or any political subdivision of the state to furnish requested information to the factfinding panel, as specified.

7) Specifies the criteria the factfinding panel should be guided by in arriving at their finding and recommendations.

8) Requires the factfinding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. This information must first be provided to the parties being made available to the public.

9) Requires the costs of the chairperson of the factfinding panel to be paid for by PERB if PERB selected the chairperson. If the chairperson was mutually selected by the parties, the costs will be divided equally between the parties. Any other costs incurred will be borne equally by the parties, as specified.

10) Specifies that the parties are still able to utilize their own negotiated and mutually agreed-upon factfinding procedure, in which case, cost will be borne equally by the parties.

11) Allows an employer to implement their last, best and final offer once any applicable mediation and factfinding procedures have been exhausted.

EXISTING LAW, as established by the Meyers-Milias-Brown Act (MMBA):

1) Contains various provisions intended to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.

2) Provides that if, after a reasonable amount of time, representatives of the public agency and the employee organization fail to reach agreement, the two parties may mutually agree on the appointment of a mediator and equally share the cost. If the parties reach impasse, the public agency is not required to proceed to interest arbitration and may implement its last, best and final offer.

3) Authorizes a local public agency to adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under the MMBA.

4) Delegates jurisdiction over the employer-employee relationship to the Public Employment Relations Board (PERB) and charges PERB with resolving disputes and enforcing the statutory duties and rights of local public agency employers and employee organizations.

FISCAL EFFECT: Unknown.

COMMENTS: According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.

"The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. Mediators are often useful in restarting stalled negotiations, by encouraging dialogue where talks have broken down; identifying potential areas where agreement may be reached; diffusing tension; and suggesting creative compromise proposals. Fact-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions."

Opponents state, "AB 646 undermines a local agency's authority to establish local rules for resolving impasse and the requirement that a local agency engage in factfinding may delay rather than speed the conclusion of contract negotiations." Opponents go on to say they are not aware of any abuses or short-comings of the current process and question the need for making such an important change in the process of reaching a collective bargaining agreement.

Opponents conclude, "Most importantly, the provisions in AB 646 could lead to significant delays in labor negotiations between public employers and employee organizations and result in additional costs to public employers at a time when public agencies are struggling to address budget shortfalls and maintain basic services for their residents. AB 646 would provide a disincentive for employee organizations to negotiate in good faith when there exists the option of further processes under the PERB that will prolong negotiations. Most collectively bargained contracts are stalled due to cost-saving measures being sought by the public agency in a downturned economy; requiring mediation and factfinding prior to imposing a last, best and final offer would simply add costs and be unhelpful to both the employer and the employees."

The Committee is informed the author will be offering amendments in Committee that do the following:

1) Remove all of the provisions related to mediation, making no changes to existing law.

2) Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel and instead provides employees organizations with the option to participate in the fact-finding process established in Government Section 3505.4, which is added by this measure.

3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.

REGISTERED SUPPORT / OPPOSITION:

Support

American Federation of State, County and Municipal Employees (Sponsor)
California Labor Federation

Opposition

Association of California Healthcare Districts
California Association of Sanitation Agencies
California State Association of Counties
Desert Water Agency
East Valley Water District
El Dorado Irrigation District
Placer County Board of Supervisors
Regional Council of Rural Counties
Sacramento Municipal Utility District

Analysis Prepared by: Karon Green / P.E., R. & S.S. / (916) 319-3957

EXHIBIT B

SENATE RULES COMMITTEE AB 646
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

THIRD READING

Bill No: AB 646
Author: Atkins (D)
Amended: 6/22/11 in Senate
Vote: 21

SENATE PUBLIC EMPLOYMENT & RETIRE. COMM.: 3-2, 6/27/11
AYES: Negrete McLeod, Padilla, Vargas
NOES: Walters, Gaines

SENATE APPROPRIATIONS COMMITTEE: 6-3, 8/25/11
AYES: Kehoe, Alquist, Lieu, Pavley, Price, Steinberg
NOES: Walters, Emmerson, Runner

ASSEMBLY FLOOR: 50-25, 6/1/11 - See last page for vote

SUBJECT: Local public employee organizations: impasse procedures

SOURCE: American Federation of State, County and Municipal Employees, AFL-CIO

DIGEST: This bill allows local public employee organizations to request fact-finding if a mediator is unable to effect a settlement of a labor dispute within 30 days of appointment, and defines certain responsibilities of the fact-finding panel and interested parties, and makes specified exemptions from its provisions.

ANALYSIS: Existing law, as established by the Meyers-Milias-Brown Act (MMBA):

1. Contains various provisions intended to promote full communication between public employers and their employees by providing a

CONTINUED

reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.

2. Provides that if, after a reasonable amount of time, representatives of the public agency and the employee organization fail to reach agreement, the two parties may mutually agree on the appointment of a mediator and equally share the cost. If the parties reach impasse, the public agency is not required to proceed to interest arbitration and may implement its last, best and final offer.

3. Authorizes a local public agency to adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under the MMBA.

4. Delegates jurisdiction over the employer-employee relationship to the Public Employment Relations Board (PERB) and charges the PERB with resolving disputes and enforcing the statutory duties and rights of local public agency employers and employee organizations.

This bill:

1. Allows an employee organization to request fact-finding when a mediator has been unsuccessful at effectuating a resolution to a labor dispute within 30 days of appointment.

2. Specifies that the fact-finding panel consist of one member selected by each party and a chairperson selected by the PERB or by agreement of the parties.

3. Requires the fact-finding panel to meet with the parties within 10 days after appointment, and take other steps it deems appropriate.

4. Authorizes the panel to make inquiries and investigations, hold hearings, and take any other steps it deems appropriate, and to issue subpoenas requiring the attendance and testimony of witnesses and the production of witnesses.

CONTINUED

5. Requires state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel.

6. Specifies the criteria the fact-finding panel should be guided in by arriving at their findings and recommendations.

7. Requires the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. This information must first be provided to the parties before being made available to the public.

8. Requires the costs of the chairperson of the fact-finding panel to be paid for by both parties whether or not PERB selected the chairperson. Any other costs incurred will be borne equally by the parties, as specified;.

9. Allows an employer to implement its last, best and final offer, excluding implementation of a Memorandum of Understanding, once any applicable mediation and fact-finding procedures have been exhausted.

10. Allows a recognized employee organization the right each year to meet and confer, despite the implementation of the best and final offer.

11. Exempts a charter city, charter county, or a charter city and county that has a procedure, as specified, that applies if an impasse has been reached between the public agency and a bargaining unit regarding negotiations to which the impasse procedure applies.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

According to the Senate Appropriations Committee:

Fiscal Impact (in thousands)

Major Provisions	2011-12	2012-13	2013-14	Fund
Admin. expenses	$75	$150	$150	General
Fact finding expenses	unknown, potentially significant not reimbursable			Local

CONTINUED

SUPPORT: (Verified 8/29/11)

American Federation of State, County and Municipal Employees, AFL-CIO, (source)
District Council 36
California State Employees Association
California Labor Federation
California Nurses Association
City of Los Angeles Councilmember Paul Koretz
Orange County Labor Federation
Peace Officers Research Association of California
San Diego and Imperial Counties Labor Council'

OPPOSITION: (Verified 8/29/11)

Association of California Healthcare Districts
Association of California Water Agencies
California Association of Sanitation Agencies
California Municipal Utilities Association
California Special Districts Association
California State Association of Counties
Cities of Brea, Cerritos, Cloverdale, Costa Mesa, Fountain Valley, Fresno, Healdsburg, Huntington Park, Kingsburg, Livingston, Long Beach, Merced, Murrieta, Red Bluff, Rocklin, San Diego, San Mateo, Santa Rosa, Torrance, Tulare, Vista, Wasco and Whittier
Counties of Los Angeles, Orange, Placer, Sacramento, San Diego and Solano
County Sanitation Districts of Los Angeles County
Cucamonga Valley Water District
Department of Finance
Desert Water Agency
Dublin San Ramon Services District
East Valley Water District
El Dorado Irrigation District
Helix Water District
Howard Jarvis Taxpayers Association
League of CA Cities
Office of Mayor Antonio R. Villaraigosa
Placer County Water Agency
Regional Council of Rural Counties
Sacramento Municipal Utilities District

CONTINUED

Stockton East Water District
Three Valleys Municipal Water District
Urban Counties Caucus
Valley Center Municipal Water District
Vista Irrigation District

ARGUMENTS IN SUPPORT: According to the author, "Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. This creates an incentive for surface bargaining in which local governments rush through the motions of [a] meet-and-confer process to unilaterally meet the goal of the agency's management. Although some municipalities have elected to include local impasse rules and procedures, no standard requirement exists for using impasse procedures. This lack of uniformity causes confusion and uncertainty for workers. Fact-finding is an effective tool in labor relations because it can facilitate agreement through objective determinations that help the parties engage in productive discussions and reach reasonable decisions."

According to the sponsor of the bill, the American Federation of State, County and Municipal Employees, AFL-CIO, "Impasse procedures are crucial parts of the collective bargaining process and without them, negotiations may not be fully effective, and bargaining may break down before all avenues of agreement have been explored. Fact-finding panels facilitate agreement through their objective determinations that can help the parties engage in productive discussions and reach reasonable decisions. If a public agency has already promulgated its own impasse procedures, [this bill] will not prevent that public agency from using those procedures, as long as the procedures are agreed upon by the employee organization."

ARGUMENTS IN OPPOSITION: Opponents contend that, "[This bill] removes local authority by giving full discretion to public employee unions to request fact-finding once an impasse is reached. The significant costs that will be imposed on agencies for a process that is at the sole discretion of a local bargaining unit and not the agency is financially impractical for cities. In addition, there is limited funding available to allow PERB to meet this measurable mandate. [This bill] undermines a local agency's authority to establish local rules for resolving impasse; delays the conclusion of contract negotiations – which inevitably will create more adversarial relations

CONTINUED

between the negotiating parties; could lead to significant delays in labor negotiations between public employers and employee organizations, and could provide a disincentive for employee organizations to negotiate in good faith when a subsequent option exists."

Opponents further contend that they provide impasse procedures in collective bargaining, bargain in good faith with their respective employee organizations, and that they are unaware of any problems with the current process such that a change is necessary.

ASSEMBLY FLOOR: 50-25, 6/1/11
AYES: Alejo, Allen, Ammiano, Atkins, Beall, Block, Blumenfield, Bonilla, Bradford, Brownley, Buchanan, Butler, Charles Calderon, Campos, Carter, Cedillo, Chesbro, Davis, Dickinson, Eng, Feuer, Fong, Fuentes, Furutani, Galgiani, Gatto, Gordon, Hall, Hayashi, Roger Hernández, Hill, Huber, Hueso, Huffman, Lara, Bonnie Lowenthal, Ma, Mendoza, Mitchell, Monning, Pan, Perea, Portantino, Skinner, Solorio, Swanson, Torres, Wieckowski, Williams, John A. Pérez
NOES: Achadjian, Bill Berryhill, Conway, Cook, Donnelly, Fletcher, Beth Gaines, Grove, Hagman, Halderman, Harkey, Jones, Knight, Logue, Mansoor, Miller, Morrell, Nestande, Nielsen, Norby, Olsen, Silva, Smyth, Valadao, Wagner
NO VOTE RECORDED: Garrick, Gorell, Jeffries, V. Manuel Pérez, Yamada

CPM:do 8/29/11 Senate Floor Analyses
SUPPORT/OPPOSITION: SEE ABOVE
**** **END** ****

EXHIBIT C

DEPARTMENT OF FINANCE BILL ANALYSIS

AMENDMENT DATE: June 22, 2011
POSITION: Oppose
SPONSOR: American Federation of State, County and Municipal Employees

BILL NUMBER: AB 646
AUTHOR: T. Atkins

BILL SUMMARY: Local Public Employee Organizations: Impasse Procedures

This bill would allow local public employee organizations to request a fact-finding panel to address a dispute with their local employer if a mediator is unable to reach a settlement within 30 days. The local employer would be required to participate in the fact-finding panel. This bill also defines the responsibilities of the fact-finding panel and makes specified exemptions from its provisions.

FISCAL SUMMARY

Based on a January 1, 2012 implementation of this bill, the Public Employment Relations Board (PERB) indicates they would require $75,000 General Fund (GF) in 2011-12 and $150,000 GF in 2012-13 for a staff counsel and part time office technician. PERB indicates this staffing may not be necessary on an ongoing basis if anticipated workload does not materialize. The legislative analysis by the Assembly Committee on Appropriations estimates costs of $100,000 GF in 2011-12 and $200,000 GF in 2012-13 and ongoing based on a higher estimate of the workload required to oversee the fact-finding process.

The bill specifies that costs to fund the fact-finding panel chairperson, including per diem, and any other mutually incurred costs shall be shared equally between the local public employee organization and the local employer. Any separately incurred costs for the panel member selected by each party shall be paid for by that party. While this bill does not indicate that it would result in a state-mandated local cost, if local public employee organizations request a fact-finding panel that would require participation and shared costs with a local government entity, these costs could be considered a reimbursable state-mandated local cost.

The California Constitution requires the state to reimburse local entities for increased costs associated with any new program or higher level of service imposed by the state on local entities if the Commission on State Mandates determines that the new program or higher level of service is reimbursable and a state mandate.

COMMENTS

The Department of Finance is opposed to this bill because it could generate additional General Fund workload and increase the number of state employees when the state is dealing with significant fiscal challenges and has been working towards decreasing the size of government. In addition, it could create a reimbursable state mandate that could result in costs that are not included in the Administration's current fiscal plan.

Existing law specifies that if a public agency and an employee organization fail to reach agreement, the two parties may agree on the appointment of a mediator at shared cost. If the parties reach impasse, the public agency may implement its last, best, and final offer. PERB currently oversees a fact-finding process for higher education and public education employers and employee organizations.

(Continued)

Analyst/Principal	Date	Program Budget Manager	Date
(0932) K. Martone		Diana Ducay	

Department Deputy Director — Date

Governor's Office: By: Date: Position Approved / Position Disapproved

COMMENTS (continued)

This bill would:

- Allow local public employee organizations to request a fact-finding panel to address a dispute if a mediator is unable to reach a settlement within 30 days.
- Specify that the fact-finding panel shall consist of one member selected by each party and a chairperson selected by PERB or by agreement of the parties.
- Specify the terms of the fact-finding panel's authority including conducting investigations, holding hearings, issuing subpoenas, and requiring the parties to furnish the panel with documentation.
- Specify the criteria the fact-finding panel should use to arrive at their finding and recommendations.
- Require the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days.
- Allow an employer to implement their last, best, and final offer once any applicable mediation and fact-finding procedures have been exhausted.
- Exempt specified local government charter cities or counties from the requirements of this bill if the charter entity has a procedure that applies to an impasse between the public charter entity and a bargaining unit and that procedure includes a process for binding arbitration.

Code/Department Agency or Revenue Type	SO LA CO RV	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) PROP 98	FC	2011-2012	FC	2012-2013	FC	2013-2014	Fund Code
8320/Employ Rel	SO	No	---------- See Fiscal Summary ----------						0001
8885/Comm St Mndt	LA	No	---------- See Fiscal Summary ----------						0001

EXHIBIT D

CONCURRENCE IN SENATE AMENDMENTS
AB 646 (Atkins)
As Amended June 22, 2011
Majority vote

ASSEMBLY: 50-25 (June 1, 2011) SENATE: 23-14 (August 31, 2011)

Original Committee Reference: P.E.,R.& S.S.

SUMMARY: Allows local public employee organizations to request fact-finding if a mediator is unable to reach a settlement within 30 days of appointment, defines certain responsibilities of the fact-finding panel and interested parties, and makes specified exemptions from these provisions. Specifically, this bill:

1) Requires the fact-finding panel shall meet with the parties within 10 days after appointment and take other steps it deems appropriate. Specifies that the fact-finding panel consist of one member selected by each party and a chairperson selected by the Public Employment Relations Board (PERB) or by agreement of the parties.

2) Authorizes the fact-finding panel to make inquiries and investigations, hold hearings, and take any other steps it deems appropriate, and to issue subpoenas requiring the attendance and testimony of witnesses and the production of witnesses.

3) Requires state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel.

4) Specifies the criteria the fact-finding panel should be guided by in arriving at their findings and recommendations.

5) Requires the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. This information must first be provided to the parties before being made available to the public.

6) Requires the costs of the chairperson of the fact-finding panel to be paid for by both parties whether or not PERB selected the chairperson. Any other costs incurred will be borne equally by the parties, as specified.

7) Allows an employer to implement their last, best and final offer once any applicable mediation and fact-finding procedures have been exhausted and despite the implementation of the best and final offer, allows a recognized employee organization the right each year to meet and confer.

8) Exempts a charter city, charter county, or a charter city and county that has a procedure, as specified, that applies if an impasse has been reached between the public agency and a bargaining unit regarding negotiations to which the impasse procedure applies.

The Senate amendments exempt a charter city, charter county, or a charter city and county that has a procedure, as specified, that applies if an impasse has been reached between the public

agency and a bargaining unit regarding negotiations to which the impasse procedure applies.

EXISTING LAW, as established by the Meyers-Milias-Brown Act (MMBA):

1) Contains various provisions intended to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.

2) Provides that if, after a reasonable amount of time, representatives of the public agency and the employee organization fail to reach agreement, the two parties may mutually agree on the appointment of a mediator and equally share the cost. If the parties reach impasse, the public agency is not required to proceed to interest arbitration and may implement its last, best and final offer.

3) Authorizes a local public agency to adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under the MMBA.

4) Delegates jurisdiction over the employer-employee relationship to PERB and charges PERB with resolving disputes and enforcing the statutory duties and rights of local public agency employers and employee organizations.

AS PASSED BY THE ASSEMBLY, this bill was substantially similar to the version approved by the Senate.

FISCAL EFFECT: According to the Assembly Appropriations Committee:

1) Based on the staffing that PERB estimated was necessary to administer the bill, the fiscal impact of administering the provisions of this bill is approximately $200,000.

2) There could be substantial state mandated reimbursement of local costs. The amount would depend on the number of requests for fact finding. PERB staff raised the possibility of exceeding 100 cases annually in the first years of the program. Assuming an individual case is likely to cost around $5,000, with the local agency footing half the bill, reimbursable costs could exceed $2.5 million. The Commission on State Mandates has approved a test claim for any local government subject to the jurisdiction of PERB that incurs increased costs as a result of a mandate, meaning their costs are eligible for reimbursement. Increasing the waiting time before fact finding can begin should reduce the costs slightly.

COMMENTS: According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed. Without impasse procedures, negotiations may not be fully effective, and bargaining may break down before all avenues for agreement are explored. Many municipalities and public agencies promulgate local rules which include impasse rules and procedures. However, this requirement is not uniform, and the lack of uniformity may serve to create confusion and uncertainty.

"The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. Mediators are often useful in restarting stalled negotiations, by encouraging dialogue where talks have broken down; identifying potential areas where agreement may be reached; diffusing tension; and, suggesting creative compromise proposals. Fact-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions."

Opponents state, "AB 646 undermines a local agency's authority to establish local rules for resolving impasse and the requirement that a local agency engage in factfinding may delay rather than speed the conclusion of contract negotiations." Opponents go on to say they are not aware of any abuses or short-comings of the current process and question the need for making such an important change in the process of reaching a collective bargaining agreement.

Opponents conclude, "Most importantly, the provisions in AB 646 could lead to significant delays in labor negotiations between public employers and employee organizations and result in additional costs to public employers at a time when public agencies are struggling to address budget shortfalls and maintain basic services for their residents. AB 646 would provide a disincentive for employee organizations to negotiate in good faith when there exists the option of further processes under the PERB that will prolong negotiations. Most collectively bargained contracts are stalled due to cost-saving measures being sought by the public agency in a downturned economy; requiring mediation and fact finding prior to imposing a last, best and final offer would simply add costs and be unhelpful to both the employer and the employees."

Analysis Prepared by: Karon Green / P.E., R. & S.S. / (916) 319-3957

FN: 0002141

EXHIBIT E

Date of Hearing: March 28, 2011

ASSEMBLY COMMITTEE ON PUBLIC EMPLOYEES, RETIREMENT AND SOCIAL SECURITY
Warren T. Furutani, Chair
AB 1606 (Perea) – As Introduced: February 7, 2012

SUBJECT: Local public employee organizations: impasse procedures.

SUMMARY: Clarifies impasse procedures governing local public agencies and employee organizations. Specifically, this bill:

1) Authorizes the employee organization to request that the parties differences be submitted to a fact-finding panel if the parties are unable to effect settlement of the controversy within 30 days after the appointment of a mediator, or if the dispute was not submitted to mediation within 30 days after the date that either party provided the other with written notice of a declaration of impasse.

EXISTING LAW, as established by the Meyers-Milias-Brown Act (MMBA):

1) Contains various provisions intended to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.

2) Allows, as established by AB 646 (Atkins), Chapter 680, Statutes of 2011, local public employee organizations to request fact-finding if a mediator is unable to reach a settlement within 30 days of appointment.

3) Allows an employer to implement their last, best and final offer once any applicable mediation and fact-finding procedures have been exhausted and, despite the implementation of the best and final offer, allows a recognized employee organization the right each year to meet and confer.

4) Delegates jurisdiction over the employer-employee relationship to the Public Employment Relations Board (PERB) and charges PERB with resolving disputes and enforcing the statutory duties and rights of local public agency employers and employee organizations.

FISCAL EFFECT: Unknown.

COMMENTS: According to the author, "Ambiguity in the drafting of AB 646 has called into question whether an employer can forgo all impasse procedures, including mediation and fact-finding. In fact, several local government employers argue that AB 646 does not require fact-finding if the parties do not engage in mediation.

"Last December, PERB adopted emergency regulations to implement the provisions of AB 646. The adopted regulations provide that, if the parties opt to mediate, a fact-finding request can be filed not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator. In cases where a dispute is not submitted to a mediator, the request for fact-finding

must occur within 30 days following the date that either party provided the other with written notice of declaration of impasse.

"However, the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains unresolved. AB 1606 would clarify that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have engaged in mediation."

Supporters state, "During the PERB rulemaking process, it became apparent that AB 646 was drafted in a manner that called into question whether mediation was a precondition to an employee organization's ability to request factfinding. Numerous employers and employee organizations provided public comments on the issue. The majority of interested parties, both employer and labor representatives, urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not. In December 2011, PERB adopted emergency regulations that implemented the majority opinion, allowing factfinding to be requested in all circumstances, because they found it to be the most efficient was to implement the entirety of AB 646 and accurately reflect the intent of the Legislature.

"AB 1606 seeks to provide a final, statutory clarification of this question, by revising the Government Code to allow factfinding in all circumstances in which a local public employer and its employees have reached an impasse in their negotiations. AB 1606 properly reflects the intent of the Legislature to strengthen collective bargaining by ensuring employers and employees operate in good faith and work collaboratively to deliver government services in a fair, cost-efficient manner."

Opponents state, "While it is indicated that this bill is intended to be technical and clarifying of existing law, the language states that the panel shall consider different items when reaching their decision. It is believed these factors take more and more discretion away from the Board (i.e., the financial ability of the public agency, consumer price index, etc.) and puts it into the hands of the fact finding panel. While it is not mentioned in the bill's text, the decision of the fact finding panel will be made public so it could also have political implications.

"This bill would be applicable to both formal contract negotiations and any Meet and Confer process involving changes to departmental operations that have an impact to the wages, hours or working conditions of employees. The fact finding panel would be required to consider, weigh, and be guided by the criteria outlines in arriving at their findings and recommendations. The broad criteria allows for the panel to consider factors normally not considered by the County as being relevant to operations. The costs of this process or revenue impacts are unknown at this time. However, many County agencies/departments implement operational changes to gain efficiencies and/or lower costs that require a Meet and Confer process to address impacts to employees. This bill could significantly impact the proposed changes which could be implemented."

On December 8, 2011, PERB approved amendments to three regulation sections and the adoption of two new regulation sections as emergency regulations necessary for the implementation of the provisions of AB 646. The emergency rulemaking package was submitted to the Office of Administrative Law (OAL) on December 19, 2011. On December 29, 2011, OAL approved the emergency regulatory action, effective on January 1, 2012. Below is the relevant excerpt from those new regulations:

32802. Request for Factfinding Under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

REGISTERED SUPPORT / OPPOSITION:

Support

American Federation of State, County and Municipal Employees (Co-Sponsor)
Peace Officers Research Association of California (Co-Sponsor)
California Professional Firefighters (Co-Sponsor)
Service Employees International Union (Co-Sponsor)
Laborers' Locals 777 & 792

Opposition

County of Orange Board of Supervisors

Analysis Prepared by: Karon Green / P.E., R. & S.S. / (916) 319-3957

EXHIBIT F

DEPARTMENT OF FINANCE BILL ANALYSIS

AMENDMENT DATE: 05/17/2012
POSITION: Neutral
SPONSOR: American Federation of State, County, and Municipal Employees (AFSCME)

BILL NUMBER: AB 1606
AUTHOR: Perea, Henry

BILL SUMMARY: Local public employee organizations: impasse procedures.

This bill would clarify that mediation is not required as a precondition for a factfinding panel to address collective bargaining disputes between local public employee organizations and their local government employers.

FISCAL SUMMARY

The Public Employment Relations Board (PERB) states that no additional costs are needed to implement this bill, and Finance concurs.

SUMMARY OF CHANGES

Amendments to this bill since our analysis of the original version include the following significant amendment, which does not change our position:

- Adds that an employee organization's right to request factfinding cannot be expressly or voluntarily waived.

COMMENTS

Finance is neutral on this bill because it does not generate additional costs for PERB. This bill is a policy matter concerning local government collective bargaining and does not affect or amend statutes or provisions relating to the Ralph C. Dills Act, which governs state employer-employee relations.

This bill makes changes to Chapter 680, Statutes of 2011 (AB 646), which allowed local government employees to request factfinding through PERB before a local government employer could impose a last, best, and final offer. Though the author's office and supporters contend this bill is a technical clean-up, this bill would clarify a substantive dispute between labor and some local governments that arose during the rule-making process in late 2011 for implementing AB 646.

Specifically, the bill makes clear that mediation is not required before parties can pursue resolution through a PERB factfinding panel. AB 646 may have suggested that factfinding can occur only after mediation efforts have been exhausted. Because some local government entities do not utilize mediation services as a matter of practice or policy during negotiations, the drafting of AB 646 left it unclear if public employees in non-mediation cities, counties, and districts could still seek redress from a factfinding panel.

In adopting emergency regulations through the Office of Administrative Law, PERB took the view that mediation should not be required as a precondition of factfinding. PERB is in the process of formalizing those rules. This bill conforms to the regulations and adds certainty to the impasse procedure.

In addition to AFSCME, several other labor organizations are co-sponsoring this legislation.

Analyst/Principal (0933) K.Martone	Date	Program Budget Manager Diana Ducay	Date
Department Deputy Director			Date
Governor's Office:	By:	Date:	Position Approved Position Disapproved
BILL ANALYSIS			Form DF-43 (Rev 03/95 Buff)

BILL ANALYSIS--(CONTINUED) **Form DF-43**

AUTHOR	**AMENDMENT DATE**	**BILL NUMBER**
Perea, Henry	05/17/2012	AB 1606

Code/Department Agency or Revenue Type	SO LA CO RV	(Fiscal Impact by Fiscal Year) (Dollars in Thousands) PROP 98	FC	2011-2012 FC	2012-2013 FC	2013-2014	Fund Code
8320/Employ Rel	SO	No		----- No/Minor Fiscal Impact -----			0001

EXHIBIT G

SENATE RULES COMMITTEE AB 1606
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 651-1520 Fax: (916) 327-4478

THIRD READING

Bill No: AB 1606
Author: Perea (D), et al.
Amended: 5/17/12 in Senate
Vote: 21

SENATE PUBLIC EMPLOYMENT & RETIRE. COMM.: 3-2, 5/7/12
AYES: Negrete McLeod, Padilla, Vargas
NOES: Walters, Gaines

SENATE APPROPRIATIONS COMMITTEE: Senate Rule 28.8

ASSEMBLY FLOOR: 46-24, 4/23/12 - See last page for vote

SUBJECT: Local public employee organizations: impasse procedures

SOURCE: American Federation of State, County and Municipal Employees
California Professional Firefighters
Peace Officers Research Association of California
Service Employees International Union

DIGEST: This bill authorizes the employee organization to request that the parties' differences be submitted to a factfinding panel not sooner than 30 days or more than 45 days following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. This bill also authorizes an employee organization, if the dispute was not submitted to mediation, to request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Lastly, it specifies that its provisions are intended to be technical and clarifying of existing law.

CONTINUED

ANALYSIS: According to the author, ambiguity in the drafting of AB 646 (Atkins), Chapter 680, Statutes of 2011, has called into question whether an employer can forgo all impasse procedures, including mediation and fact-finding. Several local governments argue that AB 646 does not require fact-finding if the parties do not engage in mediation. The author notes that the Public Employment Relations Board (PERB) adopted emergency regulations to implement AB 646 and the regulations provide if the parties opt to mediate, a fact-finding request can be filed not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator. The regulations also provide in cases where a dispute is not submitted to a mediator, the request for fact-finding must occur within 30 days.

However, the author argues that whether AB 646 requires that mediation is a necessary precondition to request fact-finding remains unresolved. The author states that AB 1606 clarifies that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have engaged in mediation.

Background

In December 2011, PERB adopted emergency regulations allowing fact-finding to be requested in all circumstances, because the board found it to be the most efficient way to implement the entirety of AB 646 and accurately reflect the intent of the Legislature. The Office of Administrative Law approved the emergency regulatory action, effective on January 1, 2012.

During the PERB rulemaking process, it became apparent that AB 646 was drafted in a manner that called into question whether mediation was a precondition to an employee organization's ability to request fact-finding. The emergency regulations allow employee organizations to request fact-finding, regardless if mediation has occurred. PERB adopted this interpretation for the regulations to eliminate any uncertainty for employees and employers about when fact-finding could be requested.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: No

SUPPORT: (Verified 5/21/12)

American Federation of State, County and Municipal Employees (co-source)
California Professional Firefighters (co-source)

CONTINUED

Peace Officers Research Association of California (co-source)
Service Employees International Union (co-source)
California Labor Federation
California Teachers Association
Laborers' Local 777 & 792

OPPOSITION: (Verified 5/21/12)

Orange County Board of Supervisors

ARGUMENTS IN SUPPORT: Supporters state that during the PERB rulemaking process, it became apparent that AB 646 was drafted in a manner that called into question whether mediation was a precondition to an employee organization's ability to request fact-finding. Supporters conclude that numerous employers and employee organizations provided public comments on the issue and the majority of interested parties, both employer and labor representatives, urged a reading of AB 646 that provides for a fact-finding request whether mediation occurs or not.

ARGUMENTS IN OPPOSITION: Orange County states, "While it is indicated that this bill is intended to be technical and clarifying of existing law, the language states that the panel shall consider different items when reaching their decision. It is believed these factors take more and more discretion away from the Board (i.e., the financial ability of the public agency, consumer price index, etc.) and puts it into the hands of the fact finding panel. While it is not mentioned in the bill's text, the decision of the fact finding panel will be made public so it could also have political implications."

ASSEMBLY FLOOR: 46-24, 4/23/12
AYES: Alejo, Allen, Ammiano, Atkins, Beall, Block, Blumenfield, Bonilla, Bradford, Buchanan, Butler, Campos, Carter, Chesbro, Dickinson, Eng, Feuer, Fong, Fuentes, Galgiani, Gatto, Gordon, Hall, Hayashi, Roger Hernández, Hill, Huber, Hueso, Huffman, Lara, Bonnie Lowenthal, Ma, Mendoza, Mitchell, Monning, Pan, Perea, V. Manuel Pérez, Portantino, Skinner, Solorio, Swanson, Torres, Wieckowski, Williams, John A. Pérez
NOES: Achadjian, Bill Berryhill, Conway, Donnelly, Beth Gaines, Garrick, Gorell, Grove, Hagman, Halderman, Harkey, Jeffries, Jones, Knight, Logue, Mansoor, Miller, Morrell, Nielsen, Norby, Olsen, Silva, Valadao, Wagner

CONTINUED

NO VOTE RECORDED: Brownley, Charles Calderon, Cedillo, Cook, Davis, Fletcher, Furutani, Nestande, Smyth, Yamada

DLW:m:n 11/13/12 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

****** END ******

EXHIBIT H

AB-1606 Local public employee organizations: impasse procedures. (2011-2012)

Date Published:

Assembly Bill No. 1606

CHAPTER 314

An act to amend Section 3505.4 of the Government Code, relating to public employment.

[Approved by Governor September 14, 2012. Filed with Secretary of State September 14, 2012.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1606, Perea. Local public employee organizations: impasse procedures.

The Meyers-Milias-Brown Act contains various provisions that govern collective bargaining of local represented employees, and delegates jurisdiction to the Public Employment Relations Board to resolve disputes and enforce the statutory duties and rights of local public agency employers and employees. The act requires the governing body of a public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations.

Under the act, if the representatives of the public agency and the employee organization fail to reach an agreement, they may mutually agree on the appointment of a mediator and equally share the cost. If the parties reach an impasse, the act provides that a public agency may unilaterally implement its last, best, and final offer. Existing law further authorizes the employee organization, if the mediator is unable to effect settlement of the controversy within 30 days of his or her appointment, to request that the parties' differences be submitted to a factfinding panel.

This bill would instead authorize the employee organization to request that the parties' differences be submitted to a factfinding panel not sooner than 30 days or more than 45 days following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. The bill would also authorize an employee organization, if the dispute was not submitted to mediation, to request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. The bill would specify that the procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived. The bill would also specify that its provisions are intended to be technical and clarifying of existing law.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 3505.4 of the Government Code is amended to read:

3505.4. (a) The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences

be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

(e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

SEC. 2. The Legislature finds and declares that the amendments to Section 3505.4 of the Government Code made by this act are intended to be technical and clarifying of existing law.

EXHIBIT I

California LEGISLATIVE INFORMATION

AB-646 Local public employee organizations: impasse procedures. (2011-2012)

Current Version: 10/09/11 - Chaptered **Compared to Version:** 03/23/11 - Amended Assembly ▼ Compare Versions ⓘ

~~SEC. 3.~~ ***SECTION 1.*** Section 3505.4 of the Government Code is repealed.

SEC. ~~4.~~ ***2.*** Section 3505.4 is added to the Government Code, to read:

3505.4. (a) If the mediator is unable to effect settlement of the controversy within ~~15~~ *30* days after his or her ~~appointment pursuant to Section 3505.2, and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other party, request that their~~ *appointment, the employee organization may request that the parties'* differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel. ~~The chairperson designated by the board shall not, without the consent of both parties, be the same person who served as mediator pursuant to Section 3505.2.~~

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the ~~fact finders~~ *factfinders* shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

SEC. ~~5.~~ ***3.*** Section 3505.5 is added to the Government Code, to read:

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be ~~borne by the board.~~ *equally divided between the parties.*

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's ~~resume~~ *résumé* on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

SEC. ~~7.~~ ***4.*** Section 3505.7 is added to the Government Code, to read:

3505.7. After any applicable mediation and factfinding procedures have been exhausted, *but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5,* a public agency that is not required to proceed to interest arbitration ~~may~~ *may, after holding a public hearing regarding the impasse,* implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

~~**SECTION 1.** Section 3505 of the Government Code is amended to read:~~

~~**3505.** The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.~~

~~"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.~~

~~**SEC. 2.** Section 3505.2 of the Government Code is amended to read:~~

~~**3505.2.** (a) If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations may do one of the following:~~

~~(1) The parties may agree upon the appointment of a mediator mutually agreeable to the parties, in which case, the costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.~~

(2) Either party may request that the Public Employment Relations Board appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms that are mutually acceptable. If the board determines that an impasse exists, it shall appoint a mediator within five working days after its receipt of the request. The mediator shall meet with the parties or their representatives, either jointly or separately, as soon as practicable, and shall take any other steps he or she deems appropriate in order to persuade the parties to resolve their differences and reach a mutually acceptable agreement. The services of the mediator, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be provided by the board without cost to the parties.

(b) Nothing in this section shall be construed to prevent the parties from utilizing their own negotiated and mutually agreed upon mediation procedure. If the parties agree to utilize their own mediation procedure, the board shall not appoint its own mediator unless failure to do so would be inconsistent with the policies of this chapter. If the parties have negotiated and agreed upon their own mediation procedure, the cost of the services of any appointed mediator, including per diem fees, and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.

SEC. 6. Section 3505.6 is added to the Government Code, to read:

3505.6. Nothing in Sections 3505.4 and 3505.5 shall be construed to prevent the parties from utilizing their own negotiated and mutually agreed upon factfinding procedure in lieu of the factfinding procedure set forth in those sections. If the parties have negotiated and agreed upon their own factfinding procedure, any associated costs shall be borne equally by the parties.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On December 7, 2016, I served the:

Claimant Comments on the Draft Proposed Decision
Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Sections 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on December 7, 2016 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
Sacramento, CA 95814
(916) 323-3562

COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 11/22/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

Each commission mailing list is continuously updated as requests are received to include or remove any party or person on the mailing list. A current mailing list is provided with commission correspondence, and a copy of the current mailing list is available upon request at any time. Except as provided otherwise by commission rule, when a party or interested party files any written material with the commission concerning a claim, it shall simultaneously serve a copy of the written material on the parties and interested parties to the claim identified on the mailing list provided by the commission. (Cal. Code Regs., tit. 2, § 1181.3.)

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October 2011

California Governor Signs New Collective Bargaining Law Requiring Factfinding Procedures for Impasse Resolution for Public Sector Employers Covered by the MMBA

By Edward Ellis and Jill Albrecht

On October 9, 2011, California Governor Jerry Brown signed AB 646, which amends the Meyers-Milias-Brown Act (MMBA) to require certain public sector employers to submit their differences with a labor organization representing their employees to a "factfinding panel" for impasse resolution. The new law allows an employer covered by the MMBA to implement its "last, best, and final offer" after the parties' respective positions over wages, benefits and other terms and conditions of employment have been presented to the panel, the panel's findings and recommendations have been made public and a public hearing has been held on the impasse.

This amendment to the MMBA, which is effective January 1, 2012, is significant because it now requires public sector employers covered by the MMBA to engage in the same type of factfinding, or "nonbinding interest arbitration," that has long been required under other public sector employment statutes, such as the Educational Employment Relations Act (EERA) and the Higher Education Employment Relations Act (HEERA). Employers will need to rethink their strategies when negotiating with unions over a labor agreement in light of the new requirements that must be satisfied prior to unilaterally implementing their last, best and final offer.

Current Impasse Resolution Procedures Under the MMBA

The Public Employment Relations Board (PERB) is a quasi-judicial agency that oversees public sector collective bargaining in California. Among other things, PERB administers seven collective bargaining statutes and adjudicates disputes between the parties subject to them. Those statutes include, among others: the Educational Employment Relations Act (EERA) (covering California's public schools (K-12) and community colleges); the State Employer-Employee Relations Act (Dills Act) (covering state government employees); and the Higher Education Employer-Employee Relations Act (HEERA) (which covers the California State University System, the University of California System and Hastings College of Law). The MMBA, which was enacted in 1968, establishes collective bargaining for California's municipal, county and local special district employers and employees. Although the MMBA covers peace officers, management employees and the City and County of Los Angeles, PERB's jurisdiction, which was extended to the MMBA in 2001, does not extend to these groups.

The MMBA requires local public agencies to meet and confer in good faith with representatives of recognized labor organizations regarding wages, hours and other terms and conditions of employment. Under existing law, if the parties are unable to reach an agreement, the MMBA allows them to mutually agree on the appointment of a mediator and to share the mediator's costs. If the employer and the union still cannot agree and have reached "impasse," the MMBA allows the public sector employer to implement its last, best and final offer. Unlike the EERA and the HEERA, both of which *require* parties to submit their bargaining dispute to a mediator and a factfinding panel before implementing the last, best and final offer, the decision to proceed to mediation under the MMBA has always been voluntary and factfinding has never been required. The MMBA further allows for local control of the process for resolving impasse disputes by providing that specific impasse procedures may be contained in local rules, regulations, or ordinances, or when such procedures are agreed upon by the parties.

The New Law Amends the MMBA to Require Factfinding and a Public Hearing

AB 646 is a significant change to what historically has been considered an informal and undefined process under the MMBA for breaking an impasse between the parties. Indeed, the new law amends the MMBA to impose additional requirements on counties, cities and special districts if voluntary mediation is unable to effectively settle the parties' dispute. If the mediator is unable to settle the dispute within 30 days of his or her appointment, the labor organization, *but not the employer*, may request that the dispute be submitted to a "factfinding panel." The panel must consist of one member selected by each party, as well as a chairperson selected by PERB or by agreement of the parties. The new law authorizes this factfinding panel to conduct an investigation, hold a hearing, issue subpoenas to require witnesses to appear and testify, and subpoena the production of evidence. All political subdivisions of the state will be required to comply with a factfinding panel's information request, even if the subdivision is not a party to the proceedings. Although AB 646 is silent as to how this requirement will be enforced, existing PERB regulations provide a process by which a superior court order compelling compliance can be obtained.

If the dispute still is not settled within 30 days after appointment of the panel, or longer if the parties agree to an extension, the new law authorizes the panel to make findings of fact and recommend terms of settlement, which shall be "advisory only." In making this determination, the panel is required to consider the following factors:

- State and federal laws applicable to the employer;
- Local rules, regulations or ordinances;
- Any stipulations between the parties;
- The interests and welfare of the public and the financial ability of the public agency;
- Comparison of wages, hours and conditions of employment of the employees at issue in the dispute with those of employees performing similar services in comparable public agencies;
- The consumer price index;
- The overall compensation and other benefits received by the employees along with the continuity and stability of employment; and
- Any other facts that are normally considered when making findings and recommendations.

Before the findings and recommendations are available to the public, the panel must first make them available to the parties for a period of 10 days. However, if a public sector employer intends to implement its last, best and final offer, it must wait until at least 10 days after the panel's written findings of fact and recommended terms of settlement have been submitted to the parties *and* the employer has held a public hearing regarding the impasse. Charter cities and counties with charters that provide for impasse procedures which include, at a minimum, "binding arbitration," are exempt from this factfinding process.

Open Questions Under the New Law

It is questionable whether this new law actually fulfills the bill sponsor's apparent intent of requiring an employer to submit to factfinding before implementing its last, best and final offer in *all* cases where the union has requested factfinding. The bill sponsor's comments regarding AB 646 reference "the creation of *mandatory* impasse procedures," giving the impression of an intent to require these impasse procedures (*e.g.*, factfinding and a public hearing) in all cases where a union requests them.

However, the law, as written, arguably does not achieve this goal. AB 646 specifically states that "*[i]f the mediator is unable to effect settlement* of the controversy within 30 days after his or her appointment, the employee organization may request . . . factfinding . . . ." Because mediation is not required under the current version of the MMBA and, importantly, AB 646 did not change the voluntariness of mediation under the statute, it appears the union may not be able to insist on factfinding in the absence of a failed attempt at settling the dispute before a mediator. If true, it is possible that an employer can avoid the costs and delays associated with factfinding by declining to participate in mediation and, thereafter, implementing its last, best and final offer. Indeed, new Government Code section 3505.7, which was added by AB 646 and permits implementation of the last, best and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted," lends some support to this interpretation of the new law because it opens the door to the possibility that such procedures are permissive, but not necessarily required.

Another ambiguity in AB 646 is the requirement of a "public hearing" regarding the impasse, which must occur before the employer implements its last, best and final offer even if the parties do not proceed to mediation or factfinding. The term "public hearing" is undefined in AB 646. However, it is used elsewhere in the MMBA, which allows a governing body of a public agency to act "by resolution or ordinance adopted after a *public hearing*." Such a "public hearing" presumably refers to posting, agendizing and permitting an opportunity for public comment at a duly organized meeting of the governing body under the Ralph M. Brown Act, which is the open meeting law for local public agencies. Although this is a reasonable and likely interpretation of the "public hearing" requirement under AB 646, it remains to be seen whether PERB will require something different.

Implications for MMBA Employers

The imposition of the factfinding process, if it is really required, changes the landscape of bargaining for MMBA agencies, leading up to and including impasse. Some local public agencies and municipalities will no doubt take the position that factfinding is not required unless the parties first mediate the dispute and, therefore, may decline mediation as part of their bargaining strategy. On the other hand, given the absence of any deadline for a union to request factfinding, it is possible that a union may attempt to completely thwart an employer's efforts to implement its last, best and final offer by adamantly refusing to submit, or causing an unreasonable delay in the submission of, the dispute to factfinding. Regardless, employers should consult with legal counsel and proceed with caution before either refusing to mediate altogether or implementing its last, best and final offer following an unsuccessful mediation, as labor organizations are likely to argue that factfinding is required if requested, even if the parties do not proceed to mediation, that there is no deadline by which it must request factfinding and that the employer's failure to proceed to factfinding or implementation of its final offer are unfair labor practices. As a result, AB 646 is likely destined for litigation and/or future amendment by the legislature.

For agencies that proceed to factfinding, it is helpful to know that factfinding, which is akin to nonbinding interest arbitration, is nothing new for public education institutions covered by the EERA and HEERA. Drawing from their experiences, local public entities covered by the MMBA should keep in mind the following implications of the new law:

- Factfinding will prolong the bargaining and impasse resolution process, and will delay implementation of the last, best and final offer. Because unions may attempt to use the many ambiguities in the statute to their advantage employers should, before negotiations commence, formulate strategies for avoiding and responding to possible union delay tactics.
- Employers may not request that a labor organization proceed to a factfinding panel; only the labor organization has this option.
- When convening the factfinding panel, the parties have the option of selecting a mutually agreeable chairperson, often called a "neutral," in lieu of the chairperson selected by PERB. The nature of the employer's relationship with the union and the complexity of the issues may bear on whether the parties should mutually agree to a neutral or proceed with a PERB-selected neutral. In practice, PERB often provides the parties with a panel of "neutral factfinders," from which they may select, rather than designating a chairperson.
- Because factfinding timelines move relatively quickly, the parties have the option, and often do, waive the timelines prescribed for submitting required documentation, holding the hearing and issuing findings and recommendations. Some neutrals that are sought by mutual agreement of the parties will only agree to be a part of the factfinding panel if timelines are waived. Moreover, the process rarely proceeds according to the required timelines due to scheduling issues and the time needed to prepare for the proceedings.

- Factfinding is expensive. Substantial preparation is the norm and parties often utilize experts and consultants to prepare the detailed financial data and comparables that will be presented as evidence. Like an arbitration, the hearing can span several days and requires the presence of staff, witnesses and, often, legal counsel. Additionally, the parties are required to split the costs associated with the neutral panel member, and each party bears the cost of its own panel member. When constructing an overall bargaining strategy, public employers should balance the time and labor-intensive nature of factfinding (which results in a recommendation that is not binding) against the costs and benefits of reaching a settlement, short of impasse.
- Although the factfinding process is nonbinding and results in "advisory" findings and recommendations, public employers covered by the MMBA should not underestimate the impact of adverse findings, which can hinder implementation of the last, best and final offer for political and/or public relations reasons.
- Even under the new law, the MMBA still allows for the provision of specific impasse procedures by local rule, regulation, or ordinance, or when such a procedure is agreed upon by the parties. To the extent permissible by the MMBA, employers may want to consider negotiating changes to their employee resolutions with the labor organizations or implementing changes to applicable local rules.

With these considerations in mind, public agency employers can rest assured that factfinding under AB 646 is not a bar to implementation of a last, best and final offer; rather, it is merely another hurdle.

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Public Law Group™

Navigating the Mandatory Fact-Finding Process Under AB 646

A Public Law Group™ White Paper

By: Emily Prescott and Charles Sakai

Issued November 2011

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I. INTRODUCTION

Signed by Governor Brown on October 9, 2011, AB 646 (Atkins) institutes a ***new mandatory impasse process*** for negotiations conducted under the Meyers-Milias-Brown Act (MMBA).

Beginning January 1, 2012, if a local public employer and its employee organization are unable to reach agreement in negotiations, the employee organization (but not the employer) "may request that the parties' differences be submitted to a factfinding panel." The panel consists of a union member, a management member, and a neutral chairperson appointed by the Public Relations Employment Board (PERB) – typically someone with interest arbitration or fact-finding[1] experience. The fact-finding panel can ultimately make recommendations but does not have final and binding authority.

The statute may have a significant impact on labor relations and some commentators have argued that it will "fundamentally change" bargaining under the MMBA. However, many public entities, including all of California's public schools, have managed collective bargaining under fact-finding for years. Careful planning and thoughtful execution will allow California's local public entities to integrate fact-finding into the existing meet and confer process with limited impact. Nonetheless, the statute's vague and inconsistent language leaves many questions unanswered as to how this new process will really work. Navigating through the process will impact the timing of negotiations because it can potentially add 50-80 days, or more, to the process of reaching either agreement or the point at which an employer could unilaterally implement its last best offer if no agreement is reached.

In this white paper, we provide a summary of the terms of AB 646 and the changes it makes to current law. We then address the likely resolution of some of the inconsistent provisions of the law and make specific recommendations on how to deal with the terms of this law, including one version of a model local rule to be adopted under Government Code section 3507 to address timing issues and the scope of impasse procedures. In the absence of local rules, PERB's planned emergency regulations on fact-finding will likely control your agency's impasse resolution procedures.

II. HOW DOES AB 646 CHANGE EXISTING LAW?

Before AB 646, the only impasse procedure outlined in the MMBA was an option for mediation by mutual agreement of the parties.[2] Local public agencies had the option to develop their own impasse resolution procedures through local rules adopted pursuant to Government Code section 3507, and local impasse procedures therefore vary widely. Many agencies' local rules provide for mediation – either mandatory or by mutual agreement, some provide for fact-finding

[1] Although the Legislature uses the term "factfinding," most commentators have used the term "fact-finding," in accord with Webster's Dictionary. We use the more accepted spelling in this white paper.

[2] Govt Code § 3505.2.

– again, either mandatory or optional,[3] and a handful of local charters provide for interest arbitration as a method for resolving disputes. These variations are examples of how local agencies over the years have exercised local control by deciding, after meeting and consulting with affected employee organizations, what impasse processes work best given local conditions and history.

AB 646 changes the landscape for public employers covered by the MMBA who do not already have binding interest arbitration.[4] It imposes on local government a state law requirement for fact-finding in any instance in which an employee organization requests it – regardless of the historic process that local agencies and employee organizations have agreed to and followed. It also appears to impose a new requirement that prior to implementation of a last, best, and final offer, the agency must "hold a public hearing regarding the impasse." [5]

AB 646 borrows heavily from the fact-finding provisions of the Educational Employment Relations Act (EERA)[6] and the Higher Education Employer-Employee Relations Act (HEERA)[7] for both the procedural and substantive elements of the new fact-finding procedure,[8] with three key differences:

- If the parties go to mediation, the timeline under the MMBA will be thirty days instead of EERA's fifteen-day timeline;[9]
- Under the MMBA *only* employee organizations may request fact-finding, whereas under EERA and HEERA, the employer also has the right to request; and
- Under EERA and HEERA, PERB pays costs and expenses of the PERB-appointed panel chairperson, whereas under the MMBA those costs and expenses are shared equally by the parties.

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[3] We know of no local agency rules that require fact-finding without prior resort to mediation. This is, however, exactly what AB 646 literally requires.

[4] Charter cities and counties who have binding interest arbitration are exempted from the new law. (Govt. Code § 3505.5)

[5] Because there is no requirement that the public hearing regarding the impasse occur at any time prior to the implementation, we believe that the impasse hearing and implementation of the last best and final offer should occur at the same public meeting.

[6] Govt. Code §3540, et seq.

[7] Govt. Code §3560, et seq. The HEERA does not include any factors for the fact-finding panel to consider. The MMBA factors are borrowed from the EERA factors.

[8] The Ralph C. Dills Act, which covers State employment, is now the only public sector labor relations act in California which does not mandate fact-finding.

[9] Govt. Code §3548 (EERA), and 3590 (HEERA).

III. LEGISLATIVE HISTORY

The early versions of AB 646 included mandatory mediation in addition to fact-finding, provided a 15-day timeline for mediation, and would have applied to all public employers covered by the MMBA. Early on in the amendment process, the bill's author indicated that all provisions related to mediation would be removed, "making no changes to existing law."[10] Although mandatory mediation was removed from the final bill, in the event the parties do mediate, the timeline for mediation was extended from 15 days to 30 days.[11] Finally, in the final bill, charter cities and counties who already provide interest arbitration were exempted from the fact-finding provision.

The author of AB 646, Assembly Member Toni Atkins (D-San Diego) provided the following statement of purpose in support of the legislation:

> Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. This creates an incentive for surface bargaining in which local governments rush through the motions of a meet-and-confer process to unilaterally meet the goal of the agency's management. Although some municipalities have elected to include local impasse rules and procedures, no standard requirement exists for using impasse procedures. This lack of uniformity causes confusion and uncertainty for workers. Fact-finding is an effective tool in labor relations because it can facilitate agreement through objective determinations that help the parties engage in productive discussions and reach reasonable decisions.[12]

AB 646 was opposed by numerous city, county, and special district representatives, who protested that it would impose significant increased costs on agencies for a process that will be triggered at the sole discretion of unions. Additionally, the opposition raised serious concerns that the bill would delay the conclusion of negotiations, inevitably create more adversarial relations rather than promote settlement, and undermine a local agency's authority to establish local rules for resolving impasse. Notwithstanding these concerns, Governor Brown signed AB 646 on October 9, 2011, without comment.

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[10] Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) May 3, 2011, p. 4.

[11] Assem. Amend. to Assem. Bill No. 646 (2011-2012 Reg. Sess.) May 27, 2011.

[12] Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) Aug. 29, 2011, p. 5.

IV. HOW FACT-FINDING WORKS

A. What is Fact-Finding?

The fact-finding process under AB 646 is very similar to that under the EERA and the HEERA. It is also similar to the interest arbitration procedures followed by a handful of California's charter cities and counties.[13] While none of those statutes provide explicit guidance on the conduct of the hearings, the parameters of fact-finding have been well-developed over the years.[14] In general, the fact-finding panel hears evidence on the negotiations issues in dispute and provides findings and recommended terms for settlement. Under AB 646, hearings must start within 10 days of the chairperson's appointment by PERB. Once convened, the panel is to conduct an investigation, hold hearings and issue subpoenas for those purposes.

Because of the short statutory timelines, fact-finding is normally very informal, with evidence presented by only a handful of witnesses, exhibits and testimony being introduced with limited foundation, and without the need for a court reporter. A fact-finding hearing is typically structured as follows:

- In advance of the hearing, the parties will identify the issues in dispute to be presented to the panel;
- Position statements on all issues are submitted at the beginning of the process;
- Evidence regarding the employer's fiscal condition and comparability often is presented at the beginning of the process because such evidence frames the other issues;
- The parties then present their respective cases on each issue in dispute through the introduction of foundational evidence in support of proposals;
- After the hearing, post-hearing briefs or position statements may be submitted to support and summarize the parties' positions;
- Within 30 days after its appointment, the fact-finding panel must make findings of fact and recommend terms of settlement;
- The agency and union share the costs and expenses of the PERB-appointed panel chairperson (and pay their own separately-incurred costs associated with their panel member).

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[13] An understanding of the interest arbitration process can be extremely helpful to the management of a fact-finding case. (See Holtzman & Sloan, *Let's Make a Deal* (June 1, 2005) 2005-6 Bender's Cal. Labor & Employment Law Bulletin 6; but see Tenant, *Interest Arbitration: A Poor Substitute for a Strike* (Nov. 1, 2005), 2005-11 Bender's California Labor & Employment Law Bulletin 4.)

[14] In 1987, PERB issued a "Fact-Finding Resource Manual." However, the manual is no longer available. Another valuable resource is the aptly titled "Interest Arbitration" by Will Aitchison. (Aitchison, Interest Arbitration (2d Ed, 2000).)

B. Fact-Finding Criteria

The bill specifies criteria to be considered by the panel, including comparability in wages, health care benefits, and retirement benefits.[15] AB 646 requires the fact-finding panel to evaluate the parties' positions using the following specific criteria:[16]

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the fact-finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, other excused time, insurance, pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Our experience has shown that comparability is generally afforded significant weight, meaning that local public agencies will now have to consider the expense and time required to manage a comparability study as part of the negotiations process.[17] In addition, employers should prepare, as a key component of any fact-finding presentation, a financial report analyzing the financial condition of the employer and the impact of union proposals on the agency's ability to deliver public services. The oft-neglected criteria of the agency's financial ability and the public interest have a substantial role to play in any fact-finding. The agency must have a strong handle on its fiscal condition, with a view towards anticipated revenues and expenditures during the next several years. Taken together, the financial condition of the employer and the overall

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[15] The criteria are virtually identical to those established under the EERA. (See Govt. Code § 3548.2.)

[16] Govt. Code § 3505.4(d).

[17] Comparability is the key factor relied on by many arbitrators, and will likely carry great weight in a fact-finding process. (See *City of San Jose* (Cossack 2007) [Awarding enhanced retirement benefit based on comparability]; *City of Modesto* (Brand 2002); *City of San Luis Obispo* (Goldberg 2008) [awarding 32.82% wage increases over 3 years].) Will Aitchison's treatise on interest arbitration dedicates four chapters, nearly a third of the book, to issues of comparability. (See Aitchison, *supra* note 13, at pp. 31-120.)

compensation of employees can be used together to provide significant leverage for an agency's proposals.

The second factor, "Local rules, regulations, or ordinances," also provides a significant opportunity for local public agencies to adopt specific criteria for fact-finding and to establish rules or procedures for the fact-finding panel. In addition, other local regulations or ordinances that address pay policies, maintenance of reserves, and fiscal crisis management must also be considered by the panel.

C. Findings and Recommendations – The Panel's Report

AB 646 does not specify the form of the report or how it is organized. For instance, it is not clear that the fact-finder must make findings on an issue-by-issue basis or that the fact-finder must choose between the proposals submitted by the parties. Indeed, because of its informal nature, testimony and evidence are normally presented without oath or transcription, making the recommendations less formal as compared to an interest arbitration decision. As a result, fact-finder reports, along with any dissents by the partisan panel members, are usually brief.

D. Post Fact-Finding: Agreement or Implementation

The public agency must make public the findings and recommendations within 10 days after their receipt. An employer may not unilaterally impose its last best offer until after holding a public hearing and no earlier than 10 days after receipt of the findings and recommendations (i.e., the same time the findings and recommendations must be made public).

V. ADJUSTING NEGOTIATIONS STRATEGY IN LIGHT OF AB 646

A. Negotiations Preparation

In the current environment, many agencies have focused their bargaining preparation on making a strong financial case to support the need for concessions and long-term structural changes. While the financial condition of the agency will continue to remain a centerpiece of bargaining, going forward, negotiations preparation will need to be expanded, because a fact-finding panel will be required to apply the specific criteria noted above when evaluating proposals. Therefore, comparability will move from an important consideration for ensuring the ability to attract and retain talented employees to a key component of bargaining. Moreover, it will be important that the agency prepare a negotiating strategy around every aspect of the fact-finding criteria, including specific reference to the interest and welfare of the public and the financial ability of the employer. The need to prepare competent testimony to support proposals will increase the time and expense required for bargaining preparation. To meet the timelines required by their budgets, public agencies will need to begin bargaining preparation earlier.

B. Negotiations Timelines

A majority of public agencies hope to have new contracts in place by July 1 of each year and plan their negotiations schedule accordingly, including the time necessary for the public adoption process. The potential for fact-finding will now add at least 50-80 days to the timeline, assuming that fact-finders will be available to conduct hearings in the timeframe set forth by the statute. In the first year of this new process, availability of fact-finders during the critical window of time before the end of the fiscal year could be a challenge.

Fact-finding timeline example

Mediation (if parties mediate)*	+30 days
Panel member selection after a union requests fact-finding*	+5 days
Panel chairperson appointed by PERB	+5 days
Time before hearing must begin	+10 days
Findings issued (if no settlement and no agreed-upon extension, 30 days from appointment of chairperson)	+20 days
Earliest possible implementation date (assumes public hearing could be held same day)	+10 days
Total minimum additional time for full process	**+80 days**

**This timeline assumes the parties mediate and the union requests fact-finding at the end of the 30-day period. See below for a discussion regarding mediation and the lack of deadline by which the union must request fact-finding.*

Assuming a governing body has the opportunity to meet in open and closed session on the first and third Wednesday of each month, and assuming that 80 days is an optimistic timeline, employers should conservatively plan on an additional 90-100 days, or about 14 weeks. Here's what the negotiations timeline might look like for a June 30, 2012 expiration:

2012 hypothetical timeline

November 2011	Begin negotiations preparation, including developing support for financial case and conducting comparability study
Early January 2012	Begin negotiations
March 7, 2012	Date by which parties should substantially complete good faith bargaining in order for the employer's team to request authority to declare impasse
March 14, 2012	Date by which parties should reach agreement or impasse (if including mediation)
March 14-April 14	Mediation

April 14-June 6	Fact-finding
June 20, 2012	Last day for governing body to adopt new MOU or implement LBFO for effective date of July 1

VI. PROBLEM AREAS: WHETHER TO MEDIATE, & TIMING OF FACT-FINDING REQUESTS

A. Mediation is Likely not Required

The first line of the new provision, section 3505.4(a) starts out as follows:

> If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.

Despite the opening phrase "if *the* mediator…," there is no provision in the bill requiring the parties to go to mediation. As first introduced, the bill mirrored the EERA's requirement for mandatory mediation as well as fact-finding. The mediation requirement was later removed from the bill, but the reference to mediation preceding fact-finding remained in the legislation, creating ambiguity and contradiction.

We believe the legislative history clearly shows that AB 646 does not require mediation. However, without mediation, there is no clear trigger for fact-finding. Therefore, we recommend that every local public agency identify such a trigger (either mediation or something else) in its local rules.

B. Lack of Explicit Time Limit Within Which the Union Must Request Fact-finding

When the earlier version of the bill required mediation, it also allowed an employee organization to request fact-finding only once a mediator had been unsuccessful at resolving the dispute within 30 days of appointment. When the Legislature removed mandatory mediation from the bill, it failed to clarify that a union can request fact-finding when the parties are at impasse and opt not to go to mediation. And in no versions of the bill did the Legislature define a time period within which a union had to request fact-finding.

Even absent mediation by mutual agreement or pursuant to local rule, fact-finding remains a mandatory impasse procedure, if requested by the employee organization. But whether or not mediation occurs, there is *no provision* to ensure that fact-finding is requested in a timely manner.

Under a technical reading of the statute, a union may argue that absent fact-finding, the employer cannot implement a last best offer. Given the lack of a time by which the union must request fact-finding, it is possible that some unions will attempt to avoid unilateral implementation by failing to request fact-finding and then alleging that the employer is in violation of the statute if it attempts to impose. However, we believe that such an approach

would ultimately fail, because it would violate California Constitution Article XI, Section 1(b), which forbids the Legislature from interfering with a local governing body's determination of the number, compensation, tenure and appointment of employees.[18]

Nonetheless, agencies hoping to avoid being a test case may consider the following options:

1. ***Local Rules.*** Amend local rules (ideally before AB 646 takes effect on January 1). Provide notice to unions and an opportunity for them to meet and consult over revised local rules governing the timing and process for mediation and fact-finding.

2. ***PERB Regulations.*** PERB will likely adopt emergency regulations prior to January 1 that may address many of the open issues. To the extent PERB regulations fill a gap in an agency's local rules, PERB's rules will apply.[19]

3. ***Address it in Ground Rules.*** In negotiating ground rules with employees at the beginning of bargaining, consider adopting timelines for achieving agreement or impasse, for determining whether to use mediation, and perhaps even timelines for going through the fact-finding process.

4. ***Include Reasonable Notice Prior to Implementation to Support a Waiver Argument.*** If after impasse an employer gives reasonable notice of the date for a public hearing on the impasse and subsequent date of imposition of the employer's last, best, and final offer, there is a strong argument that the employee organization will have waived its right to request fact-finding if it fails to do so prior to the date of the public hearing.

VII. DRAFT MODEL LOCAL RULE

AB 646 does not abrogate the right of local public agencies to adopt rules and regulations for the administration of employer-employee relations, including rules involving impasse resolution procedures.[20] Agencies have an opportunity to draft local rules to conform local agency impasse procedures to AB 646 and to establish specific timelines for negotiations, mediation, and fact-finding. The adoption of strict timelines would ensure sufficient time for the parties to negotiate in good faith and reach impasse prior to beginning mediation; set a specific deadline for ending mediation and beginning fact-finding; and require the fact-finding panel to issue a report in time for the agency to adopt changes before the expiration of the contract. For simplicity, the model rule uses a June 30 date to represent the expiration of the contract, end of the budget year, and deadline for completion of the impasse process.

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[18] See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285 (holding that mandatory interest arbitration was an unconstitutional interference with the County's exclusive authority to establish compensation for employees).

[19] See Govt. Code § 3509(a); *County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113.

[20] Govt. Code § 3507.

The draft model local rule presented here represents only one possible version. Other options could be sufficient for your agency's purposes, including something as simple as a rule providing an employer option to request fact-finding. In addition, the model rules provide for mandatory mediation to remove the potential ambiguity in the statute. However, since the statute does not specifically require mediation, your agency may choose not to include those provisions. Therefore, we recommend that you carefully consider your agency's needs and contact labor counsel before deciding on a course of action.

Although AB 646 does not specifically require the completion of fact-finding before an employer can adopt rules pursuant to section 3507, there remains some risk that PERB could require completion of fact-finding under section 3505.7. While we continue to believe, absent a specific timeline for fact-finding, that such a conclusion would be unconstitutional, it may be some time before the courts settle that issue. Because the introduction of fact-finding compressed the timeline for negotiations, we recommend that every agency revise its EERR before January 1, 2012. Please remember that section 3507 requires that you provide your unions notice and an opportunity to consult before adopting local impasse rules. In addition, these model rules may conflict with some of your existing rules. Now may be a good time for a complete review of your Employer-Employee Relations Resolution.

Model Local Rules

Model Language	***Commentary***
Update or create a definitions section:	*Most local rules already include a definitions section. However, local agencies adopting new rules covering fact-finding need to ensure that the definitions section includes definitions for Impasse, Mediation, and Fact-finding.*
Bargaining Timelines and Impasse Resolution Procedures 1. In consideration of the strong public interest in the equitable and efficient resolution of disputes over the wages, hours, and working conditions of public employees, these rules establish specific timelines for the completion of bargaining and any necessary impasse resolution procedures. All deadlines contained herein may be waived by mutual agreement.	
2. The provisions of this section shall apply only so long as state law requires the parties to proceed to fact-finding (as currently required by Section 3505.4 and 3505.5).	*This section is important to protect your agency in the event that AB 646 is found unconstitutional or a future*

Model Language	*Commentary*
	legislature strikes fact-finding from the books. In the absence of this language, a local agency could be bound to continue fact-finding based on its local rules even if fact-finding was no longer required by state law.
3. Initiation of Bargaining. The parties shall begin the meet and confer process no later than January 5 of the budget year in which the parties' memorandum of understanding (MOU) expires.	*The January timeframe may need to be adjusted for compliance with the actual expiration date of your MOU. Check current language in MOUs which may include a provision to start negotiations at a set time later than the proposed new rule.*
4. Declaration of Impasse. Either party may declare impasse and invoke impasse procedures by submitting to the other a written declaration of impasse, together with a statement in detail of its position on all disputed issues.	
5. Mediation When Fact-Finding Has Been Waived. If the parties have AGREED in writing to waive fact-finding, the following timelines for mediation shall apply. All date references are to the year in which the current MOU expires.	*Mandatory mediation removes the potential ambiguity in the new bill, enables statutory timelines to be met, and could provide an incentive for employee organizations to waive fact-finding.*
a. Once the parties have reached the point where further negotiations would be futile, either party may declare an impasse.	***Note** that a set time by which agreement or impasse must be reached will not excuse bad faith or surface bargaining.*
b. Once either party has declared impasse, the parties shall proceed to mediation. Prior to mediation the parties shall exchange statements of their positions on all disputed issues.	
c. As soon as either party declares impasse, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible.	
d. If neither party has declared impasse by May 1, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon	*This rule is intended to permit mediation without the need for a declaration of impasse. In this case, mediation becomes an*

Model Language	*Commentary*
as possible, but no later than the week of May 15.	*extension of bargaining.*
e. Mediation shall be concluded no later than June 15.	
6. Mediation Plus Fact-Finding. If the parties have NOT AGREED to waive fact-finding, the following timelines for mediation and fact-finding shall apply.	*By including mandatory fact-finding in the local rules, the local agency regains the ability to trigger fact-finding and maintains control over the timing of impasse procedures, rather than leaving this important decision solely in the hands of the employee organizations.*
a. Once the parties have reached the point where further negotiations would be futile, either party may declare an impasse.	
b. Once either party has declared impasse, the parties shall proceed to mediation. Prior to mediation the parties shall exchange statements of their positions on all disputed issues.	
c. As soon as either party declares impasse, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible.	
d. If neither party has declared impasse by March 15, the City shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible, but no later than April 1.	
e. If the mediator is unable to effect settlement by April 30, the parties shall proceed to fact-finding.	
7. Fact-finding	
a. Selection of fact-finding panel chairperson	*Pre-selection of a fact-finder can avoid the problem of getting stuck with a PERB-appointed chairperson who cannot meet the statutory timeline. Pre-selection can also encourage employee organizations to evaluate early in the negotiations process whether to waive fact-finding.*
i. On or before February 15, the parties shall mutually agree on and pre-designate a fact-finding chairperson who will certify that he or she will start the fact-finding proceedings within 10 days of notification by the parties. If the parties are unable to mutually agree, the parties shall mutually request that the California State Mediation & Conciliation Service provide a list of seven (7) qualified fact-finders, and the parties will select a fact-finder from this list who will certify that he or she will start the fact-finding hearing within 10 days of notification by the parties. The parties shall confirm the pre-designated chairperson no later	

Model Language	*Commentary*
than March 1.	
ii. If the mediator has been unable to effect agreement within thirty days after appointment and in any event, no later than May 1, the parties shall request that PERB appoint a chairperson for the fact-finding panel. If PERB cannot confirm that the appointed chairperson can begin the fact-finding proceedings within ten (10) days of appointment, the parties shall proceed to fact-finding with the pre-designated chairperson.	
b. Fact-finding Criteria	
i. No later than the first meeting of the fact-finding panel, the Finance Director shall prepare a report on the employer's financial condition, including projections of revenues and expenditures going forward at least three (3) fiscal years.	
ii. In assessing comparability, the fact-finding panel shall consider the wages and benefits paid by private employers as well as public employers.	
iii. The fact-finding report must include specific consideration of the impacts of any recommendation which will result in an increased cost to the employer, including the impact of that additional expense on the ability of the employer to continue to provide services.	
c. Fact-finding report	
i. To the extent the fact-finding panel makes findings and recommendations, those findings and recommendations shall be made on an issue-by-issue basis.	*Requiring the panel to address each issue in controversy may create a longer and more detailed report. However, it ensures that the report addresses each of the parties' proposals*
ii. The fact-finding panel shall limit its findings and recommendations to issues that fall within mandatory subjects of bargaining, unless the parties mutually agree, in writing, to submit issues that are non-mandatory subjects.	
iii. If the dispute is not settled within thirty (30) days of the chairperson's appointment, the panel shall make findings of fact and advisory recommendations for terms of settlement. The	

Model Language	*Commentary*
fact-finding panel shall submit a written report including findings of fact and recommended terms of settlement to the parties no later than June 10. iv. The parties shall maintain the confidentiality of the fact-finders' report for a period of ten (10) days. If the parties have not reached agreement within that time, the employer shall make the report public. d. Costs. Each party shall bear its own costs for mediation and fact-finding, including the costs of their advocates. Any costs for the mediator, neutral fact-finder, facilities, court reporters, or similar costs shall be shared by the parties. 8. Council Action. On or after the date the employer has released the fact-finders' report to the public, or upon conclusion of mediation if the parties waived fact-finding, the Council may hold a public hearing on the impasse and implement the terms of its last best and final offer.	

VIII. TEXT OF THE NEW STATUTE

[*Prior section 3505.4 was repealed; portions of 3505.4 are now in new 3505.7. There is no provision numbered 3505.6*]

3505.4.(a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization

benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last,

best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

Mandatory Fact-Finding Under the Meyers-Milias-Brown Act

By Emily Prescott

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INTRODUCTION

The Meyers-Milias-Brown Act (MMBA) requires the governing body of a public agency to meet with recognized employee organizations to meet and confer in good faith regarding "wages, hours, and other terms and conditions of employment."[1] Under current law, when the parties are unable to reach agreement, ultimately the public agency can implement its last, best and final offer after exhaustion of any applicable impasse procedures. Impasse procedures under the MMBA have largely been governed by local rules, and until now the MMBA had provided only for voluntary mediation[2] and did not contain any mandatory impasse procedures.

AB 646, signed by California Governor Jerry Brown on October 9, 2011, amends the MMBA to require a new mandatory fact-finding[3] impasse process. Effective January 1, 2012, if a local public employer and its employee organization are unable to reach agreement in negotiations, the employee organization (but not the employer) "may request that the parties' differences be submitted to a factfinding panel."[4] This new process will be overseen by the California Public Employment Relations Board (PERB), which administers the labor laws governing public sector labor-management relationships.[5]

While many public entities, including all of California's public schools, have managed collective bargaining under fact-finding for years, AB 646 likely will have a significant impact on labor relations in cities, counties, and special districts because it will impact the timing of negotiations by potentially adding two to four months to the process, and because the statute's vague and inconsistent language leaves many questions unanswered as to how this new process will really work.

HOW AB 646 CHANGES EXISTING LAW

Before AB 646, the only impasse procedure outlined in the MMBA was an option for mediation by mutual agreement of the parties.[6] Local public agencies had the option to develop their own impasse resolution procedures through local rules adopted pursuant to Cal. Gov't Code § 3507, and local impasse procedures therefore vary widely. Many agencies' local rules provide for mediation—either mandatory or by mutual agreement, some provide for fact-finding—again, either mandatory or optional, and a handful of local charters provide for interest arbitration as a method for resolving disputes. These variations are examples of how local agencies over the years have exercised local control by deciding, after meeting and consulting with affected employee organizations, what impasse processes work best given local conditions and history.

"AB 646 changes the landscape for public agencies covered by the MMBA who do not already have binding interest arbitration."

AB 646 changes the landscape for public agencies covered by the MMBA who do not already have binding interest arbitration.[7] It imposes a state law requirement for fact-finding in any instance in which an employee organization requests it. AB 646 borrows heavily from the fact-finding provisions of the Educational Employment Relations Act (EERA)[8] and the Higher Education Employer-Employee Relations Act (HEERA)[9] for both the procedural and substantive elements of the new fact-finding procedure,[10] with three key differences:

- If the parties go to mediation, the timeline under the MMBA will be thirty days instead of EERA's fifteen-day timeline;[11]
- Under the MMBA *only* employee organizations may request fact-finding, whereas under EERA and HEERA, the employer also has the right to request; and
- Under EERA and HEERA, PERB pays the costs and expenses of the PERB-appointed panel chairperson, whereas under the MMBA, those costs and expenses will be shared equally by the parties.

AB 646 also now mandates that prior to implementation of a last, best and final offer, the public agency must "hold a public hearing

regarding the impasse."[12] There is no requirement that this public hearing regarding the impasse occur at a separate public meeting prior to the date of implementation.

LEGISLATIVE HISTORY

The initial versions of AB 646 included mandatory mediation[13] in addition to fact-finding, provided a fifteen-day timeline for mediation, and would have applied to all public employers covered by the MMBA. Early on in the amendment process, the bill's author indicated that all provisions related to mediation would be removed, "making no changes to existing law."[14] Although mandatory mediation was removed from the final bill, in the event the parties do mediate, the timeline for mediation was extended from fifteen days to thirty days.[15] Finally, in the final bill, bargaining units in charter cities and counties who are covered by binding interest arbitration are exempted from the fact-finding provision.[16]

In the final version of the bill, the author of AB 646, Assembly Member Toni Atkins (D-San Diego) provided the following statement of purpose in support of the legislation:

> Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. This creates an incentive for surface bargaining in which local governments rush through the motions of a meet-and-confer process to unilaterally meet the goal of the agency's management. While some municipalities have elected to include local impasse rules and procedures, no standard requirement exists for using impasse procedures. This lack of uniformity causes confusion and uncertainty for workers. Fact-finding is an effective tool in labor relations because it can facilitate agreement through objective determinations that help the parties engage in productive discussions and reach reasonable decisions.[17]

AB 646 was opposed by numerous city, county, and special district representatives, who protested that it would impose significant increased costs on agencies for a process that will be triggered at the sole discretion of unions. Additionally, the opposition raised serious concerns that the bill would delay the conclusion of negotiations, inevitably create more adversarial relations rather than promote settlement, and undermine a local agency's authority to establish local rules for resolving impasse. Notwithstanding these concerns, Governor Brown signed AB 646 on October 9, 2011, without comment.

HOW FACT-FINDING CAN BE TRIGGERED

Because Mediation Likely Is Not Required, There Is No Clear Trigger

When first introduced, AB 646 mirrored the EERA's requirement for mandatory mediation as well as fact-finding. The mediation requirement was later removed from the bill, but the final version retained a reference to mediation preceding fact-finding. The first line of the new provision, § 3505.4(a) starts out as follows:

> If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.

Despite the opening phrase "if the mediator," there is no provision in the bill requiring the parties to go to mediation, and Cal. Gov't Code § 3505.2, providing for voluntary mediation, remains intact in the MMBA. The legislative history further indicates that mediation is not required.

Ambiguity as to Whether Fact-Finding Is Mandatory

Without mediation—voluntary or mandatory—there is no explicit trigger for fact-finding, and opinions as to whether fact-finding is truly mandatory are already split.[18] Those agencies that are considering a challenge to the law will likely contend that fact-finding is not mandatory, because nothing in the statute mandates fact-finding if the parties have not proceeded to mediation, mediation is still voluntary, and newly-enacted Cal. Gov't Code § 3505.7 lends support to the argument because it contains language arguably suggesting the procedures are permissive.[19] Conversely, under a technical reading of the statute, a union may argue that absent fact-finding, the employer cannot implement a last, best and final offer.[20]

In this author's opinion, based on legislative intent and in the absence of clean-up legislation or litigation, fact-finding likely will remain a mandatory impasse procedure *only if* requested by the employee organization—and regardless of whether the parties proceed to mediation first.

There Is No Explicit Time Limit Within Which an Employee Organization Must Request Fact-Finding

Whether or not mediation occurs, there is no provision to ensure that fact-finding is requested in a timely manner. When an earlier version of the bill required mediation, it also allowed an employee organization to request fact-finding only after a mediator had been unsuccessful at resolving the dispute within thirty days of appointment—effectively setting the earliest date a request could be made. But no provision exists setting the latest date a request could be made. Thus, instead of facilitating cooperative efforts during impasse, the lack of an explicit timeline could encourage additional delays and protracted battles, in contravention to the stated legislative intent.

To fill this void, PERB will likely have promulgated emergency regulations by the time this article is printed. Public agencies may also amend their local rules, pursuant to Cal. Gov't Code § 3507, to address the timing and process for fact-finding. To the extent PERB regulations fill a gap in an agency's local rules, PERB's rules will apply.[21]

THE FACT-FINDING PROCESS

Timelines and Conducting the Hearing

The fact-finding process under the MMBA will be very similar to that under the EERA and the HEERA. The timelines are compact in all three statutes.[22] Under EERA and HEERA, in practice the process has been known to extend far beyond the statutory timelines. Scheduling issues, time needed to prepare, and availability of the fact-finding chairperson all impact the parties' ability to meet the timelines, often resulting in mutual agreements to extend the time.

The hearing process, if mediation is included, likely will add at least eighty days to the negotiations process:[23]

Mediation (if parties mediate)	**+30 days**
Panel member selection after a union requests fact-finding	**+5 days**
Panel chairperson appointed by PERB	**+5 days**
Time before hearing must begin	**+10 days**
Findings issued (if no settlement and no agreed-upon extension, thirty days from appointment of chairperson)	**+20 days**
Findings made public by the employer	**+10 days**
Total minimum additional time (if parties mediate)	**+80 days**

In general, the fact-finding panel hears evidence on the negotiation issues in dispute and provides findings and recommended terms for settlement. Once convened, the panel is to conduct an investigation, hold hearings, and issue subpoenas for those purposes. A fact-finding hearing is typically structured as follows:

- In advance of the hearing, the parties identify the issues in dispute to be presented to the panel;
- Position statements on all issues are submitted at the beginning of the process;
- Evidence regarding the employer's fiscal condition and comparability often is presented at the beginning of the process because such evidence frames the other issues;
- The parties then present their respective cases on each issue in dispute through the introduction of foundational evidence in support of proposals;
- After the hearing, post-hearing briefs or position statements may be submitted to support and summarize the parties' positions;
- Within thirty days after its appointment, the fact-finding panel must make findings of fact and recommend terms of settlement;
- The agency and employee organization share the costs and expenses of the PERB-appointed panel chairperson (and pay their own separately-incurred costs associated with their panel member).

Fact-Finding Criteria

The statute specifies criteria to be considered by the fact-finding panel:[24]

1. State and federal laws that are applicable to the employer.
2. Local rules, regulations, or ordinances.
3. Stipulations of the parties.
4. The interests and welfare of the public and the financial ability of the public agency.
5. Comparison of the wages, hours, and conditions of employment of the employees involved in the fact-finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
6. The consumer price index for goods and services, commonly known as the cost of living.
7. The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, other excused time, insurance, pensions, medical and hospitalization benefits,

the continuity and stability of employment, and all other benefits received.

8. Any other facts that are normally or traditionally taken into consideration in making the findings and recommendations.

Under EERA and HEERA (and in binding interest arbitration), comparability is generally afforded significant weight, meaning that local public agencies may now have to consider the expense and time required to manage a comparability study as part of the negotiation process.[25] In addition, the financial condition of the employer and the impact of union proposals on the agency's ability to deliver public services are typically significant criteria.

Conclusion of Fact-Finding Process

At the conclusion of fact-finding, the panel issues a written report and "shall make findings of fact and recommend terms of settlement, which shall be advisory only."[26] AB 646 does not specify the form of the report or how it is organized. For instance, it is not clear that the fact-finder must make findings on an issue-by-issue basis or that the fact-finder must choose between the proposals submitted by the parties.

The public agency must make public the findings and recommendations within ten days after their receipt. Because the statute does not explicitly require an employee organization to maintain the confidentiality of the report during this ten-day period, public agencies may want to clarify through a local rule that both sides are expected to keep the report confidential.

An employer may not unilaterally impose a last, best and final offer until after holding a public hearing and no earlier than ten days after receipt of the findings and recommendations (i.e., at the same time the findings and recommendations must be made public).

INTERPLAY WITH LOCAL RULES

AB 646 does not abrogate the right of local public agencies to adopt rules and regulations for the administration of employer-employee relations, including rules involving impasse resolution procedures.[27] Absent clean-up legislation, or resolution of potential legal challenges, agencies who do not want to rely solely on PERB's regulations can tackle many of the ambiguities of this statute through revisions to their local rules. As with their current local rules, agencies can determine what impasse processes will work best given local conditions and history. Issues that could be addressed through local rules to provide for more structure, clearer timelines, and predictability include:

- Whether mediation should be voluntary or mandatory;
- Whether fact-finding should be mandatory (i.e., provide an employer option to trigger fact-finding after impasse);
- Whether to set specific timelines to trigger fact-finding in the absence of mediation;
- Whether to require pre-designation of a fact-finding panel chairperson in order to ensure statutory timelines can be met;
- Whether to specify additional criteria for the fact-finding panel to consider;
- Whether the fact-finding panel may be allowed to consider matters that fall outside of mandatory subjects of bargaining;
- Whether the fact-finding panel should provide findings and recommendations issue-by-issue;
- Whether to clarify other timelines of the process, such as requiring the fact-finding report to be issued in time for an agency to adopt changes before the expiration of a contract or before the start of a new budget year; and
- Whether to require both sides to maintain confidentiality of the fact-finder's report for the ten-day quiet period.

This list is not exhaustive, and serves to highlight the potential pitfalls of the new statute.

CONCLUSIONS—FOR NOW

In the current environment, many agencies have focused their bargaining preparation on making a strong financial case to support the need for concessions and long-term structural changes. No doubt, the financial condition of public agencies will continue to remain a centerpiece of bargaining regardless of the state of the economy. Going forward, negotiation preparation may need to be expanded, because if the parties go to fact-finding, a fact-finding panel will be required to apply the additional specific statutory criteria when evaluating proposals. Comparability thus may move from an important consideration for ensuring the ability to attract and retain talented employees to a key component of bargaining. To meet the timelines required by their budgets, public agencies will need to begin bargaining preparation earlier.

It remains to be seen whether the ambiguities of the new statute will be resolved through clean-up legislation or through legal challenges. In the meantime, fact-finding likely is coming soon to a public agency near you.

ENDNOTES

1. Cal. Gov't Code § 3505.
2. Cal. Gov't Code § 3505.2.
3. Although the Legislature uses the term "factfinding," most commentators have used the term "fact-finding," in accord with Webster's Dictionary. This

article uses the more accepted spelling.

4. Cal. Gov't Code § 3505.4(a).
5. PERB's jurisdiction was extended to all MMBA-covered employers in 2001, with the exception of peace officers, management employees, and the City and County of Los Angeles. While it is clear that AB 646 applies to all MMBA-covered bargaining units, those who do not fall within PERB's jurisdiction are questioning whether PERB can regulate the fact-finding process as to them. See commentary by the City and County of Los Angeles and by Carroll, Burdick & McDonough LLP at http://www.perb.ca.gov/news/default.aspx.
6. Cal. Gov't Code § 3505.2.
7. Charter cities and counties who have binding interest arbitration are exempted from the new law. Cal. Gov't Code § 3505.5(e).
8. Cal. Gov't Code §§ 3540, et seq.
9. Cal. Gov't Code §§ 3560, et seq. The HEERA does not include any factors for the fact-finding panel to consider. The MMBA factors are modeled on the EERA factors.
10. The Ralph C. Dills Act, which covers State employment, is now the only public sector labor relations act in California which does not mandate fact-finding.
11. Cal. Gov't Code §§ 3548 (EERA), and 3590 (HEERA).
12. Cal. Gov't Code § 3505.7.
13. In earlier versions, Assembly Member Atkins' statement of purpose included references to the benefits of both mediation and fact-finding:

    > The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ *mediation and fact-finding* in order to assist them in resolving differences that remain after negotiations have been unsuccessful. *Mediators are often useful in restarting stalled negotiations, by encouraging dialogue where talks have broken down; identifying potential areas where agreement may be reached; diffusing tension; and suggesting creative compromise proposals.* Fact-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions
    >
    > Assem. Comm. On Public Employees, Retirement and Soc. Sec., Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) May 4, 2011, at 3 (emphasis added). The references to mediation were dropped from the final statement of purpose.

14. Assem. Comm. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.), May 3, 2011, at 4.
15. Assem. Amend. to Assem. Bill No. 646 (2011-2012 Reg. Sess.), May 27, 2011.
16. Cal. Gov't Code § 3505.5(e).
17. Sen. Rules Comm., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.), Aug. 29, 2011, at 5.
18. See http://www.perb.ca.gov/news/default.aspx for extensive commentary on AB 646 provided by labor and management.
19. Government Code § 3505.7 permits implementation of the last, best and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted."
20. However, this interpretation likely would violate California Constitution art. XI, § 1(b), which forbids the Legislature from interfering with a local governing body's determination of the number, compensation, tenure and appointment of employees. *See County of Riverside v. Superior Court*, 30 Cal. 4th 278, 285 (2003) (holding that mandatory interest arbitration was an unconstitutional interference with the county's exclusive authority to establish compensation for employees).
21. *See* Cal. Gov't Code § 3509(a); *County of Siskiyou/Siskiyou County Superior Court*, PERB Decision No. 2113 (2010).
22. The short statutory timelines could be viewed as an indication that fact-finding is meant to be informal, with evidence presented by only a handful of witnesses, exhibits and testimony being introduced with limited foundation, and without the need for a court reporter.
23. *See* Cal. Gov't Code §§ 3505.4, 3505.5, 3505.7.
24. Cal. Gov't Code § 3505.4(d). The criteria are virtually identical to those established under the EERA. *See* Cal. Gov't Code § 3548.2.
25. Comparability is the key factor relied on by many arbitrators, and will likely carry great weight in a fact-finding process. (*See City of San Jose* (Cossack 2007) [awarding enhanced retirement benefit based on comparability]; *City of Modesto* (Brand 2002); *City of San Luis Obispo* (Goldberg 2008) [awarding 32.82% wage increases over 3 years].) Will Aitchison's treatise on interest arbitration dedicates four chapters, nearly a third of the book, to issues of comparability. See Aitchison, Will, Interest Arbitration (2nd ed. 2000), at 31-120.
26. Cal. Gov't Code § 3505.5(a).
27. Cal. Gov't Code § 3507.

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AB 646's Impact On Impasse Procedures Under the MMBA (Mandated Factfinding)

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December 2011

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Public Employer Labor Relations

- Meyers Milias Brown Act (MMBA)
  - Gov't. Code 3500, *et seq.*
- Educational Employment Relations Act (EERA) Gov't. Code 3540, *et seq.*
- Public Employment Relations Board (PERB)

Duty to Bargain

- MMBA requires public employers and recognized labor associations to meet and confer in good faith on matters within the "scope of representation."

- Mandatory subjects of bargaining:
  - Wages, hours, and other terms and conditions of employment.

MMBA-Impasse Procedures Prior to AB 646

- Impasse: when the parties, after meeting and conferring in good faith, reach the point at which further discussions would be fruitless.
- MMBA permits an agency to implement its “last, best, and final offer” after impasse procedures are concluded.
- Impasse procedures based on local rules/CBA
- Mediation (optional) (Govt . Code 3505.2)

MMBA-Impasse Procedures After AB 646

- "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel."
  - Is mediation still optional?
  - Can factfinding be avoided by not agreeing to mediation?
  - What happens to local impasse rules previously established?

MMBA-Impasse Procedures After AB 646

- Within 5 days of factfinding request each party must select a person to serve as its member of the factfinding panel.
- PERB will select chairperson (neutral) of panel within 5 days of selection of parties' panel members.
- Parties may agree on different chairperson within 5 days after PERB makes selection.

MMBA-Impasse Procedures After AB 646

- The Panel shall, within 10 days, after appointment, meet with the parties, either jointly or separately, and may make inquires and investigations, hold hearings, and take any other steps it deems appropriate.
  - Panel shall have power to issue subpoenas.
  - The agency shall furnish panel with all relevant documents upon request.

FACTFINDING CRITERIA

- State and federal laws that are applicable to the employer.
- Local rules, regulations, or ordinances.
- Stipulations of parties.
- The interests and welfare of the public and the financial ability of the public agency.

FACTFINDING CRITERIA

- Comparison of the wages, hours, and conditions of employment with other employees performing similar services in comparable public agencies.
- CPI.
- The overall compensation presently received by the employees. (Total Compensation)
- Any other facts which are normally or traditionally taken into consideration in making the findings or recommendations.

FF Panel Recommendations Only Advisory-Not Binding

- If dispute is not settled within 30 days after appointment of factfinding panel, the panel shall make findings of fact and recommended terms of settlement, which shall be advisory only.

- Panel shall submit findings to parties before they are made available to public.

- Agency shall make findings publically available within 10 days of receipt.

Unilateral Implementation Following Factfinding

- After applicable mediation and factfinding procedures have been exhausted the agency may implement its last, best, and final offer.
    - Must wait 10 days after factfinding report submitted to parties.
    - Must hold public impasse hearing.
    - Cannot implement an “MOU.”

Additional Provisions Under AB 646

- Factfinding provisions not applicable to charter cities or counties with impasse procedures in charter that provide for binding arbitration.
- Costs of panel chairperson equally divided between parties.
- Peace Officer Unions not exempt from the factfinding requirement.

Impact of AB 646

- Longer negotiation period if labor requests factfinding (approx. 100 days)
- Preparation for negotiations must start much earlier than before.
- Preparation for negotiations will be more data driven. Financial management staff may need to be more involved.

Avoiding Delay in Negotiations Process

- Revise local rules if possible regarding factfinding timelines.
- Set ground rules prior to negotiations regarding timelines.
- Possible PERB Regulations regarding timeline to request factfinding.
- Notice impasse hearing if delay in factfinding request.

Selection of Panel Chair

- Possible PERB Regulations.
- Research the proposed Panel Chair.
- Attempt to reach agreement with Union on Panel Chair
  - Strikeout method

Selection of Agency Panel Member

- Strong oral advocacy skills
- Solid understanding of labor relations and scope of bargaining issues
- Solid understanding of economic issues
- Usually member of negotiating team

What To Expect at Factfinding Hearing

- Panel Chair conducts proceedings
- Generally informal
- Relaxed rules of evidence
- Each side will have opportunity to present evidence on issues in dispute. Usually party who proposed issue will go first

Preparation for FF Hearing

- Select appropriate spokesperson (usually attorney)
- Prepare Factfinding Binder/Notebook (Exhibits)
- Determine who would be appropriate witnesses for agency

What to do now.

- Review employer-employee relations policy. Consider revisions to impasse resolution procedure.
- Review existing memoranda of understanding. Identify window periods for the meet and confer process.
- Keep a record of changes you want for next MOU.
- Gather evidence.

What to do prior to negotiations.

- Keep governing body informed of procedure, including realistic timelines.
- Strategize. Ask how likely that these negotiations will go to impasse.
- Develop proposals and gather supporting evidence.
- Involve Finance Director on economic issues and other managers on non-economic issues. (These are potential witnesses in the event of fact-finding.)

What to do during negotiations

- Steer clear of conduct that could be construed as an unfair practice. Respond properly to information requests.
- Gather supporting evidence for proposals as they change throughout the meet and confer process. Organize and prepare this evidence as if fact-finding were inevitable.
- Consult with proper management personnel about union objections and counter proposals.
- Make sure you are truly at impasse. This may take time.
- Begin preparation for potential public information campaign.

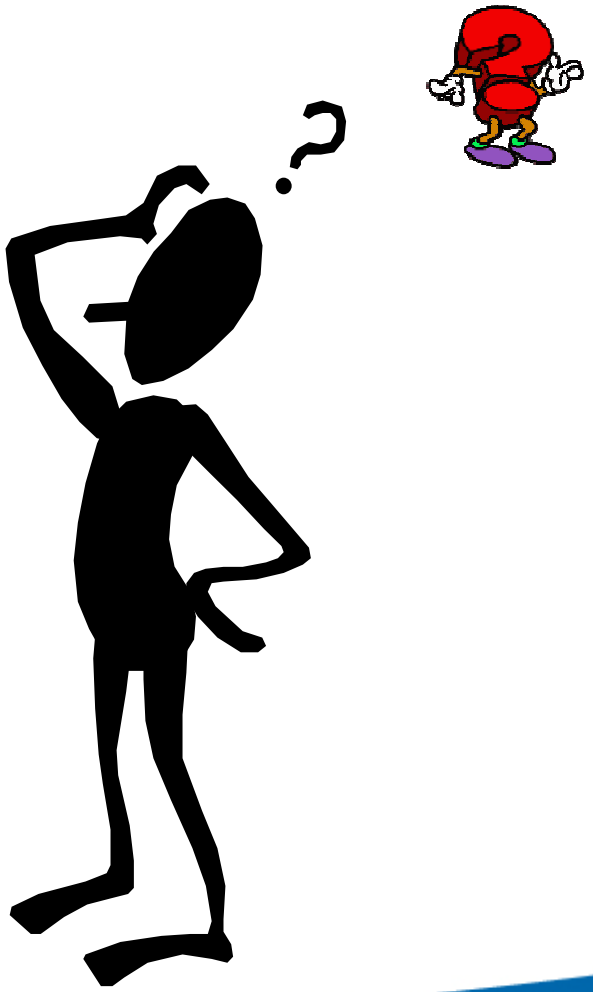
Preparation for fact-finding -- revisited.

- Identify issues to be presented to panel.
- Select qualified panel member.
- Organize and gather evidence.
- Prepare witnesses.
- Consider preparing a pre-hearing written brief.
- Continue preparation of public information campaign.

What to do after fact-finding.

- During 10-day period following fact-finding, finalize public information campaign and prepare for public impasse hearing.
- Meet and confer with union; submit (re-submit) last, best, and final offer.

Questions



A.B. 646 Raises Many Questions

The Public Employment Relations Board held meetings in November to discuss the implementation of A.B. 646, which provides factfinding for all employees covered by the Meyers-Milias-Brown Act. The question, “Is mediation required before the union can request factfinding?” may be the most obvious point of confusion created by the statute, but others exist. Some questions have been answered in PERB’s emergency regulations, adopted on December 8.

The statute is effective January 1, 2012. Under Labor Code Sec. 3505.5(e), the only bargaining units that are clearly exempt from the procedures are those that have an agreement with a charter city, county, or charter city and county to submit a bargaining impasse to binding interest arbitration. The only entity that can totally ignore the statute is the City and County of San Francisco, since it has interest arbitration agreements with all of its bargaining units.

Early drafts of the legislation called for both mandatory mediation and mandatory factfinding, but the mediation sections were dropped before the bill passed. Unfortunately, the mediation concept remained in the new Sec. 3505.4 (a), which reads, “If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties’ differences be submitted to a factfinding panel.” The law then requires each party to appoint a factfinder, and PERB to select a chairperson of the panel.

This discrepancy has encouraged some employer representatives to contend that factfinding is not mandatory if there is no mediation of the impasse. Even if factfinding is required, when must the employee organization request factfinding if there is no mediation?

PERB’s proposed emergency regulations assume that factfinding is mandatory if the employee organization requests it. The union must file a statement that the parties have been “unable to effectuate settlement” within 30 days of the date one party declared impasse if there is no mediation. If the parties have first used a mediator, the emergency rules would allow the union to request factfinding beginning 30 days, but not more than 45 days, after the mediator has been selected.

PERB must notify the parties within five working days of the request whether it finds the declaration of impasse sufficient. If so, the emergency regulations would require the parties to select party factfinders and require PERB to provide a list of neutral factfinders to the parties within five working days. The parties will have only five working days after the list is provided to select a neutral chair, or PERB will appoint one.

Once a panel has been selected, A.B. 646 requires that the panel meet with the parties within 10 days and make findings of fact and advisory recommendations within 30 days. These timelines are the same as exist under the Educational Employment Relations Act and the Higher Education Employer-Employee Relations Act, but the parties frequently waive them.

In making its recommendations, the factfinding panel must consider four factors in addition to state and federal laws, local rules, regulations and ordinances, and stipulations of the parties. The panel must weigh the public interest and the financial ability of the agency. It must examine and compare the wages, hours, and conditions of employment of “employees performing similar services in comparable public agencies.” It must consider the consumer price index and assess the total compensation of the employees involved in the factfinding. These factors are nearly identical to the factors prescribed for factfindings under EERA.

Another question that the proposed PERB regulations do not answer and that may end up in court is whether an agency should follow its own local employee relations ordinance if it requires factfinding. Some public sector labor law attorneys are advocating for an interpretation of the statute that would allow agencies to follow their own impasse procedures, so that only those agencies with no impasse procedures would be subject to the A.B. 646 factfinding mandate.

PERB currently has 40 neutral factfinders on its list. Although PERB paid factfinding chairs up to $600 a day in the past, the pay is now limited to $100 for HEERA and EERA factfindings. Under A.B. 646, the parties would be entirely responsible for the costs and fees of the panel chair. Undoubtedly, that will increase the number of neutrals applying to the factfinding panels for local agency impasses.

Once the panel's report is issued to the parties, the public employer may not disclose it for 10 days. If the parties do not settle the contract, the agency must hold a public hearing before implementing its last, best, and final offer. Employee organizations still are entitled to bargain matters within the scope of representation each year, even if there is no contract.

As factfinding delays the point at which an employer can impose its last, best, and final offer, many agencies are not in favor of factfinding. There have been reports of employers pushing to declare impasse before January 1 to avoid the facfinding mandate. With many questions unanswered, time is running out.

PUBLIC MEETING MINUTES

April 12, 2012

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:00 a.m.

Members Present

Anita I. Martinez, Chair
Alice Dowdin Calvillo, Member
A. Eugene Huguenin, Member

Staff Present

Wendi L. Ross, Deputy General Counsel
Les Chisholm, Division Chief, Office of General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the February 9, 2012 Public Meeting. She reported that the Board met in continuous closed session to deliberate the pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in February. Those were PERB Decision Nos. 2242-M, 2243, 2244, 2245-I, 2246-M, 2247-M, and 2248-M, and PERB Order No. Ad-393. In Request for Injunctive Relief (IR Request) No. 615 (*San Diego Municipal Employees Association v. City of San Diego*), the request was granted, IR Request No. 616 (*Calexico Unified School District v. Associated Calexico Teachers*), the request was denied, and in IR Request No. 617 (*Deputy City Attorneys Association of San Diego v. City of San Diego*), the request was granted. A document containing a listing of the aforementioned decisions was made available at the meeting. A list containing the decisions is available on PERB's website.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo, to close the February 9, 2012 Public Meeting.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Without objection, Chair Martinez adjourned the February 9, 2012 Public Meeting. She then opened and called to order the April 12, 2012 Public Meeting. Member Dowdin Calvillo led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin, that the Board adopt the minutes for the February 9, 2012 Public Meeting.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Comments From Public Participants

None.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

a. Administrative Report

Chief Administrative Officer Eileen Potter reported on the status of the lease renewals in PERB's Oakland and Sacramento offices. She stated that the State Fire Marshall has approved the renewal and acquisition of additional space for PERB's Oakland office. A site tour is to occur at the end of April followed by designs for the floor plan. The lease in that office expires July 31 and will be extended on a month-by-month basis until all tenant improvements have been completed and the new lease executed.

In PERB's Sacramento office, all necessary renewal reports have been submitted to the Department of General Services (DGS) real estate division for review, comment and approval. Contractors for tenant improvements have toured the site and were to submit their bids by Monday, April 9. PERB is awaiting an update from DGS and is on track to complete the processes for lease renewal in this office prior to expiration of the current lease.

Regarding PERB's budget, the agency is currently waiting for the matter to be set for hearing.

b. Legal Reports

Chief Administrative Law Judge Shawn Cloughesy reported on the activities of the Division of Administrative Law and stated that the ALJ report had been distributed to the Board for its review. He reported that hearings are being set within three months from the date of informal conference in all three offices. Compared to last year, statistics for the third quarter in the division are as follows: days of formal hearing conducted are up 44 percent; formal hearings completed are up 103 percent; proposed decisions issued are up 70 percent; and total cases closed is 48 percent. Chief ALJ Cloughesy stated the significance that, also just at the third quarter mark, case closures are at its highest in the division since the MMBA came within PERB's jurisdiction.

Wendi Ross, Deputy General Counsel, reported that the monthly activity and litigation reports had been distributed to the Board for its review. From those reports Ms. Ross recapped the following information since the Board's last Public Meeting in February. With respect to unfair practice charges during the months of February and March, 192 new cases were filed with the General Counsel's Office (an increase of 37 from the prior two-month period where the number of cases filed was 155); 176 case investigations were completed (down by 12 cases over the prior period of 188). Ms. Ross noted that in the month of February, the General Counsel's Office saw an end to a year-long run where more cases were disposed of each month than came in the door (100 cases filed, 80 investigations completed), and in March the office was back in the "net plus" column (92 filed, 96 completed). She continued reporting that in the two-month period since the last Public Meeting, a total of 65 informal settlement conferences were conducted by staff (up by 10 over the prior period of 55). As mentioned by the Chair, since the last Board meeting in February, the Board issued determinations in three requests for injunctive relief:

- *San Diego Municipal Employees Association v. City of San Diego*, IR Request No. 615; Charge No. LA-CE-746-M, filed January 31,2012. This request was granted on February 10, 2012.

- *Calexico Unified School District v. Association of Calexico Teachers*, IR Request No. 616, Charge No. LA-CO-1510-E, filed February 8, 2012. This request was denied on February 15, 2012.

- *Deputy City Attorneys of San Diego v. City of San Diego*, IR Request No. 617; Charge No. LA-CE-752-M, filed February 15, 2012. This request was granted on March 9, 2012, by a majority of the Board, with Member Dowdin Calvillo dissenting.

In terms of litigation relating to PERB, since the February Public Meeting, two new litigation matters were filed:

- *PERB v. City of San Diego (San Diego Municipal Employees Association)*, filed February 14, 2012, San Diego Superior Court Case No. 37-2012-00092205 [PERB Case No. LA-CE-746-M]. On February 15, 2012, PERB filed an Ex Parte Application for a temporary restraining order and an order to show cause (TRO/OSC) re preliminary injunction. After a hearing on February 21, 2012, Judge William S. Dato denied PERB's request for TRO/OSC, without prejudice to refiling a motion for preliminary injunction after the election.

- *Boling v. PERB & City of San Diego (San Diego Municipal Employees Association)*, filed March 5, 2012, San Diego Superior Court Case No. 37-2012-00093347 [PERB Case No. LA-CE-746-M. Plaintiffs filed a complaint on March 5. On March 14, the *Boling* plaintiffs and the City filed an ex parte application for an immediate stay of the PERB administrative proceedings in PERB Case No. LA-CE-746-M. At an ex parte hearing in Department 72 on March 15, Judge Taylor denied the City's and plaintiffs' applications for a stay, and transferred the case to Department 67, to be related with *PERB v. San Diego.* Upon transfer and relation of the two cases, the *Boling* plaintiffs successfully moved to disqualify Judge Dato from any further participation in the matters. On March 27, newly assigned Judge Luis Vargas granted the City's renewed ex parte application for an immediate stay of the PERB

administrative proceedings as to PERB Case No. LA-CE-746-M. On April 11, 2012, the San Diego MEA filed a petition for writ of mandate in the California Court of Appeal for the Fourth Appellate District, Division One, seeking immediate relief from the stay of PERB's administrative proceedings.

Regarding case determinations during the time period since the last Public Meeting, PERB received four final court rulings as follows:

- *CDF Firefighters v. PERB; CalFIRE*, California Court of Appeal, Third Appellate District, Case No. C067592, PERB Decision No. 2162-S [Case No. SA-CE-1735-S]. The Court of Appeal summarily denied the Firefighters' petition on February 9, 2012.

- *County of Riverside v. PERB; SEIU 721*, U.S. Supreme Court, Case No. 11-737. After the California Court of Appeal summarily denied the County's petition in July 2011, and the California Supreme Court summarily denied the County's petition for review in September 2011, the United States Supreme Court denied the County's petition for writ of certiorari on February 21, 2012.

- *Williams & Halcoussis v. PERB; California Faculty Association*, California Court of Appeal, Second Appellate District, Case No. B233494, PERB Decision Nos. 2116-H and 2117-H [Case Nos. LA-CO-501-H, LA-CO-502-H]. Oral argument was held on March 9, 2012, and a final decision from the Court of Appeal, affirming the trial court decision in its entirety, was filed on March 13, 2012. PERB filed a request for publication of the Court of Appeal opinion, which was granted on April 9, 2012.

- *County of Riverside v. PERB; SEIU 721*, California Court of Appeal, Fourth Appellate District, Division Two, Case No. E053161, PERB Decision No. 2163-M [Case No. LA-CE-497-M]. The Court of Appeal summarily denied the County's writ petition on April 11, 2012.

Member Dowdin Calvillo commented about the heavy workload in PERB's Office of the General Counsel. Member Hugenin also commented about the tremendous amount of very high quality work and accomplishments with regard to litigation in that office. Chair Martinez concurred with both statements.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, first reported on rulemaking. He stated that, in addition to the matter on today's agenda related to Assembly Bill 646, PERB staff was formulating a package of other possible revisions, additions, repeal or amendment to PERB regulations over a broad range of topics. The package first would be circulated internally to Board Members and PERB staff for review, comment, questions or suggestions, then externally, starting with the PERB Advisory Committee in a workshop setting. PERB anticipates these processes culminating in a formal rulemaking package that can be submitted to the Office of Administrative Law by the end of the summer or early fall.

Mr. Chisholm reported that the Legislative Report was circulated to the Board for its review. He began his report on the Governor's reorganization plan which added to the Government Code a provision making PERB an agency under the Labor and Workforce Development Agency. Mr. Chisholm informed the Board that the plan is under review by the Little Hoover Commission, public hearings are scheduled April 23, 24 and 25, and the proposal affecting PERB would be heard on April 24. Mr. Chisholm also informed the Board that there would be meetings with regard to the budget proposal that transfers the State Mediation and Conciliation Service to PERB. With regard to legislation, Mr. Chisholm reported the following:

Assembly Bill 1606 (Perea) – Amends MMBA section 3505.4(a) to further clarify when factfinding can be initiated. This bill has passed out of the Assembly Committee on Public Employees, Retirement and Social Security (P.E., R. & S.S.), is in Assembly Appropriations and pending a hearing date.

Assembly Bill 1659 (Butler) – Amends MMBA section 3509 with respect to the County and City of Los Angeles by specifying that those entities are subject to PERB jurisdiction if their established employment relation commissions or boards do not meet the test for independence as defined in the proposed language in this bill. Mr. Chisholm stated that the bill arose out of a dispute in the county from an organizing effort of a certain group of employees. The bill is currently in the Assembly Committee on P.E., R. & S.S. with an anticipated hearing date of April 26.

Assembly Bill 1808 (Williams) – Revises the definition of public employee under the MMBA. The bill is tentatively scheduled for April 26 in the Assembly Committee on P.E., R. & S.S.

Assembly Bill 2328 (Olsen) – Would have eliminated the California Law Revision Commission. The bill failed passage in the Assembly Judiciary Committee.

Assembly Bill 2381 (Hernandez, Roger) – Would bring employees of the Judicial Council, including employees of the Administrative Office of the Courts, under the Ralph C. Dills Act, and would require a separate bargaining unit, or units, for those employees. The bill is in the Assembly Judiciary Committee with an anticipated hearing date of April 26.

Assembly Bill 2573 (Furutani) – Child care provider representation legislation. This bill is set for hearing on April 18 in the Labor and Employment Committee. Mr. Chisholm stated that this legislation is another attempt to bring child care providers under PERB jurisdiction with regard to representation processes, including card checks and annual elections, and also filing unfair practice charges. Mr. Chisholm provided clarification that the child care providers subject to this legislation are contracted with the Department of Social Services.

The Board held discussion regarding Assembly Bill 1808 which revises the definition of public employee under the MMBA.

Member Dowdin Calvillo asked Mr. Chisholm to provide to the Board a copy of the public hearing notice from the Little Hoover Commission. Mr. Chisholm informed the Board that, at Chair Martinez's request, he would appear at the public hearing to answer any questions which might arise regarding PERB's mission and responsibilities.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo that the Legal (including General Counsel and Chief Administrative Law Judge), Administrative, and Legislative Reports be accepted and filed.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Old Business

None.

New Business

Chair Martinez stated that the Board would consider a staff proposal seeking Board approval for the submission of a proposed rulemaking package to the Office of Administrative Law to initiate the formal rulemaking process regarding the implementation of Assembly Bill 646 (statutes of 2011, Chapter 680). If authorized by the Board, the rulemaking package, including notice of proposed rulemaking, proposed text and initial statement of reasons, would be forwarded to the Office of Administrative Law for review and publication pursuant to the Administrative Procedures Act. In addition, the notice of proposed rulemaking would be distributed by PERB to interested parties and posted on the PERB website. She stated that a public hearing on the proposed regulatory changes would be conducted by the Board at its June 14 Public Meeting. Chair Martinez asked Division Chief Les Chisholm to comment on the staff proposal.

Mr. Chisholm stated that, together with PERB staff Jonathan Levy and Katharine Nyman, a formal rulemaking package had been prepared. He recapped Assembly Bill 646 enacted last year stating that it established a mandatory factfinding procedure under the MMBA that did not exist previously. Emergency regulations had been adopted to enable PERB to fulfill its responsibilities under that legislation beginning as of January 1, 2012. Those regulations are currently in effect and will remain in effect for 180 days following January 1. Mr. Chisholm stated that the regulations would expire unless one of two things happen: (1) complete the regular rulemaking process to adopt the same or different regulations; or (2) request re-adoption of the emergency regulations by the Office of Administrative Law. PERB envisions completion of the rulemaking process within the 180 days by adopting the regulations which are currently in effect with only minor technical corrections. Assuming that the Board approves the staff proposal, the timeline would be as follows: (1) filing with Office of Administrative Law by next Tuesday for publication in the notice register on April 27; (2) PERB would concurrently post copies on its website and the information would also be mailed to interested parties; (3) a 45-day comment period would follow, through June 12, for interested parties to submit written comment; and (4) PERB would hold a public hearing on the proposed rulemaking at its June 14 Public Meeting where appearance or written comments could also be received. Mr. Chisholm concluded that the rationale for adoption of the regulatory changes and additions are the same as it was for the emergency regulations.

Motion: Motion by Member Huguenin and seconded by Member Dowdin Calvillo to forward the proposed rulemaking package to the Office of Administrative Law for review and publication.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through June 14, 2012 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member Dowdin Calvillo and seconded by Member Huguenin to recess the meeting to continuous closed session.

Ayes: Martinez, Dowdin Calvillo and Huguenin.
Motion Adopted – 3 to 0.

Respectfully submitted,

_____
Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

_____

_____
Anita I. Martinez, Chair

SENATE PUBLIC EMPLOYMENT & RETIREMENT BILL NO: AB 1606
Gloria Negrete McLeod, Chair Hearing date: May 7, 2012
AB 1606 (Perea) as introduced 2/07/12 FISCAL: YES

LOCAL LABOR RELATIONS: FACTFINDING PROVISIONS

HISTORY:

Sponsor: American Federation of State, County and Municipal Employees (Co-Sponsor)
California Professional Firefighters (Co-Sponsor)
Peace Officers Research Association of California (Co-Sponsor)
Service Employees International Union, California (Co-Sponsor)

Other legislation: AB 646 (Atkins)
Chapter 680, Statutes of 2011

ASSEMBLY VOTES:

PER & SS	4-1	3/28/12
Appropriations	12-5	4/18/12
Assembly Floor	46-24	4/23/12

SUMMARY:

AB 1606 clarifies the situations in which an employee organization representing local public employees may request factfinding upon reaching impasse in labor negotiations with the employer.

BACKGROUND AND ANALYSIS:

1) Current law:

a) establishes the Meyers-Milias-Brown Act (MMBA), which governs labor relations between local public employers and the recognized representatives of local public employees.

b) requires collective bargaining over wages, hours, and other terms and conditions of employment between public employers and public employee organizations.

c) in cases of impasse that occur in collective bargaining, establishes a mediation process intended to aid in resolving disputes.

d) allows public employee organizations to request factfinding if a mediator is unable to reach a settlement within 30 days of appointment, and establishes procedures and requirements for the fact-finding process.

e) allows an employer to implement its last, best and final offer once any applicable mediation and fact-finding procedures have been exhausted and, despite the implementation of the best and final offer, allows a recognized employee organization the right each year to meet and confer.

f) delegates jurisdiction over the employer-employee relationship to the Public Employment Relations Board (PERB) and charges PERB with resolving disputes and enforcing the statutory duties and rights of local public agency employers and employee organizations.

2) This bill clarifies that if the dispute leading to impasse was not submitted to mediation, the employee organization may request factfinding within 30 days after the date that either party provided the other with written notice of the declaration of impasse.

COMMENTS:

1) *Recent PERB Actions:*

On December 8, 2011, PERB approved amendments to three regulation sections and the adoption of two new regulation sections as emergency regulations necessary for the implementation of the provisions of AB 646. The emergency rulemaking package was submitted to the Office of Administrative Law (OAL) on December 19, 2011. On December 29, 2011, OAL approved the emergency regulatory action, effective on January 1, 2012. Below is the relevant excerpt from those new regulations:

32802. Request for Factfinding under the MMBA.

(a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:

(1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or

(2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

2) Arguments in Support:

According to the author, "Ambiguity in the drafting of AB 646 has called into question whether an employer can forgo all impasse procedures, including mediation and fact-

finding. In fact, several local government employers argue that AB 646 does not require fact-finding if the parties do not engage in mediation.

"Last December, PERB adopted emergency regulations to implement the provisions of AB 646. The adopted regulations provide that, if the parties opt to mediate, a fact-finding request can be filed not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator. In cases where a dispute is not submitted to a mediator, the request for fact-finding must occur within 30 days following the date that either party provided the other with written notice of declaration of impasse.

"However, the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains unresolved. AB 1606 would clarify that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have engaged in mediation."

Supporters state, "During the PERB rulemaking process, it became apparent that AB 646 was drafted in a manner that called into question whether mediation was a precondition to an employee organization's ability to request factfinding. Numerous employers and employee organizations provided public comments on the issue. The majority of interested parties, both employer and labor representatives, urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not. In December 2011, PERB adopted emergency regulations that implemented the majority opinion, allowing factfinding to be requested in all circumstances, because they found it to be the most efficient ways to implement the entirety of AB 646 and accurately reflect the intent of the Legislature.

"AB 1606 seeks to provide a final, statutory clarification of this question, by revising the Government Code to allow factfinding in all circumstances in which a local public employer and its employees have reached an impasse in their negotiations. AB 1606 properly reflects the intent of the Legislature to strengthen collective bargaining by ensuring employers and employees operate in good faith and work collaboratively to deliver government services in a fair, cost-efficient manner."

3) Arguments in Opposition:

Opponents state, "While it is indicated that this bill is intended to be technical and clarifying of existing law, the language states that the panel shall consider different items when reaching their decision. It is believed these factors take more and more discretion away from the Board (i.e., the financial ability of the public agency, consumer price index, etc.) and puts it into the hands of the fact finding panel. While it is not mentioned in the bill's text, the decision of the fact finding panel will be made public so it could also have political implications.

"This bill would be applicable to both formal contract negotiations and any Meet and Confer process involving changes to departmental operations that have an impact to the wages, hours or working conditions of employees. The fact finding panel would be required to consider, weigh, and be guided by the criteria outlines in arriving at their findings and recommendations. The broad criteria allows for the panel to consider factors

normally not considered by the County as being relevant to operations. The costs of this process or revenue impacts are unknown at this time. However, many County agencies/departments implement operational changes to gain efficiencies and/or lower costs that require a Meet and Confer process to address impacts to employees. This bill could significantly impact the proposed changes which could be implemented."

4) **SUPPORT:**

American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, Co-Sponsor
California Professional Firefighters (CPF), Co-Sponsor
Peace Officers Research Association of California (PORAC), Co-Sponsor
Service Employees International Union (SEIU), California, Co-Sponsor
California Labor Federation (CLF)
California Teachers Association (CTA)
Laborers' Locals 777 & 792

5) **OPPOSITION:**

County of Orange Board of Supervisors

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STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OPERATING ENGINEERS LOCAL 3, Charging Party, v. CITY OF CLOVIS, Respondent.	Case No. SA-CE-513-M PERB Decision No. 2074-M October 30, 2009

Appearance: Lozano Smith by David M. Moreno, Attorney, for City of Clovis.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the City of Clovis (City) to the proposed decision of an administrative law judge (ALJ). The ALJ found that the City violated the Meyers-Milias-Brown Act (MMBA)[1] when it failed to resume negotiations with Operating Engineers Local 3 (also referred to as Clovis Public Works Employees' Affiliation or CPWEA) after impasse was broken, and failed to implement the City's last, best, and final offer after it was accepted by CPWEA. The proposed decision ordered the City to implement a three percent salary increase effective July 1, 2007.

The Board has thoroughly reviewed the proposed decision and the record in light of the City's exceptions and the relevant law.[2] Based on this review, the Board finds that CPWEA

[1] MMBA is codified at Government Code section 3500 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2] The City's request for oral argument is denied. The Board has historically denied requests for oral argument where an adequate record has been prepared, the parties had ample opportunity to present briefs, and the issues before the Board are sufficiently clear to make oral

failed to establish that the City violated MMBA sections 3503, 3505, 3506 and 3509(b), and PERB Regulation 32603(a), (b) and (c).[3] Therefore, for the reasons stated herein, we reverse the proposed decision and dismiss the complaint.

FINDINGS OF FACT

CPWEA is the exclusive representative of a unit of City employees who work in the Public Works Department. CPWEA and the City are parties to a memorandum of understanding (MOU) effective July 1, 2005 through June 30, 2008. The MOU includes a provision that on or about March 2007, the parties would re-open negotiations regarding wages for July 2007 through June 2008, the third year of the MOU.

The parties began negotiations on the wage re-opener in May 2007. After multiple bargaining sessions the parties were unsuccessful in reaching agreement. On July 13, 2007, the City proffered its last, best, and final offer of a three percent salary increase, effective July 1, 2007. On July 17, 2007, CPWEA rejected the offer and declared impasse.

Following unsuccessful mediation sessions, the parties met to resume negotiations on September 21, 2007. The City proposed a three percent salary increase effective July 1, 2007, or in the alternative, a three percent salary increase effective October 1, 2007 plus a one-time payment of $400. CPWEA countered with a proposal for a four percent wage increase. The City rejected this proposal and informed CPWEA that the three percent salary increase effective July 1, 2007 constituted its last, best, and final offer.

On September 28, 2007, CPWEA chief negotiator Doug Gorman (Gorman) sent a letter to the City's chief negotiator, Jeff Cardell (Cardell), stating that the City's proposal had been

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argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

voted down by the union membership and the union again declared impasse. The letter also informed the City that CPWEA intended to file an unfair practice charge alleging that the City had engaged in surface bargaining.

On October 9, 2007, the City Manager sent a memorandum to employees represented by CPWEA regarding the status of negotiations, stating in part:

> Given the current fiscal conditions of the City, the declining economy in general, and considering the competitiveness of the existing wage scales for this unit in the marketplace, I believe that the City's offer of a 3.0% wage increase retroactive to July 1, 2007, for all employees in this unit, was a very good offer.
>
> CPWEA's labor representative informed the City's labor negotiators that the unit members who voted on the City's most recent wage proposal voted not to accept it. In view of the fact that CPWEA representatives/membership has rejected various versions of the City's wage offer several times, and considering that CPWEA representatives have declared on two (2) occasions that the negotiation process is at impasse, the City has decided to conclude its efforts to reach agreement on this issue.

On October 24, 2007, CPWEA filed an unfair practice charge alleging that the City had engaged in bad faith bargaining with respect to the wage re-opener.

After receiving the City Manager's October 9, 2007 memorandum, Gorman assumed the City would implement its last, best, and final offer of a three percent salary increase. Gorman was aware that the City had imposed final offers on other bargaining units. However, by late January 2008, Gorman realized the City had not implemented the three percent wage increase.

On February 1, 2008, after discussions with union membership, Gorman left a voicemail message advising Cardell that CPWEA would dismiss the pending unfair practice charge if the City would implement the three percent salary increase contained in its last, best, and final offer.

In response, on February 7, 2008, Cardell sent a letter to Gorman that stated, in part:

> Thank you for your telephone call of February 1, 2008, regarding resolution of the Unfair Labor Practice Charge (ULPC) filed by [CPWEA]. As I understand your proposed resolution, in recognition of improved labor relations made in the Public Utilities Department, CPWEA is willing to dismiss the ULPC in exchange for implementing the City's "last best and final offer" of three (3) percent effective July 1, 2007, which was offered by the City during the last meet and confer process.
>
> The City appreciates CPWEA's interest in resolving the ULPC. The City also desires to resolve this issue; however, we must decline the offer as stated above in view of the fact that CPWEA previously rejected the City's wage offer and declared the negotiations process to be at impasse. The City considers the negotiations concerning wages for the third year of the 2005-2008 MOU to be concluded. Additionally, the City considers the assertions made by CPWEA in the ULPC to be without merit, and therefore, not subject to the type of "trade off" you have proposed.

Cardell concluded the letter by stating that the City looked forward to opening negotiations on a successor MOU in the near future.

CPWEA did not respond to the City's February 7, 2008, letter.

On March 11, 2008, CPWEA amended its charge to allege that the City's February 7, 2008 letter was an unlawful rescission of the last, best, and final offer, and a further indicator of surface bargaining.

On March 27, 2008, the PERB General Counsel issued a complaint that alleged that by failing to implement its last, best, and final offer of a three percent wage increase for the third year of the MOU, the City had committed an unfair practice.[4]

[4] CPWEA withdrew all other allegations, leaving only the allegation regarding the refusal to implement the last, best, and final offer.

DISCUSSION

MMBA section 3505 provides that local government agencies and recognized employee organizations "shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment."

The parties in this matter engaged in negotiation efforts on the wage re-opener from May 2007, through September 28, 2007, when CPWEA rejected the City's last, best, and final offer of a three percent salary increase, and declared impasse. The proposed decision held that Gorman's subsequent voicemail message effectuated a valid acceptance of the City's offer, which automatically created a binding, enforceable agreement between the parties. In its appeal, the City contends that the evidence does not support finding that CPWEA accepted the City's offer.

The Board agrees with the City and concludes the record does not establish that CPWEA made a valid acceptance of the City's last, best, and final offer.[5]

At the hearing on this matter, the entirety of Gorman's testimony on this issue is as follows:

> Q . . . when you made the phone conversation to Jeff Cardell, was it your intent to accept the last, best and final offer?
>
> A Yes, it was.

The record is void of any direct testimony by Gorman (or any other CPWEA witness) as to the actual content of the voicemail message. The remainder of the CPWEA "testimony" on this issue is made by CPWEA's attorney, primarily during opening arguments, and thus cannot be considered evidence in support of CPWEA's charge.

[5] Pursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency "may implement its last, best, and final offer." This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer.

The bulk of the direct witness testimony as to the content of the voicemail message comes from Cardell, who testified as follows:

> Q Can you explain the nature of that contact?
>
> A Mr. Gorman gave me a telephone call and made a proposal that in exchange for dismissal of the unfair labor practice charge that we should go ahead and implement the 3 percent offer retroactive to July 1st. And it was with the spirit of, or the recognition that the reason for the call was that things were going well at the Public Utilities Department and let's try to put this behind us and let's, so let's try to make this go away by we'll dismiss this if a, [sic] if the 3 percent is provided back to July 1st.

Cardell further testified that he understood Gorman's proposal to be nothing more than a settlement offer of the unfair practice charge. The only other evidence of the content of Gorman's voicemail message is reflected in Cardell's February 7, 2008 letter. In the letter, Cardell summarized his understanding of the purpose of the call and CPWEA's proposal to settle the charge. The City declined CPWEA's settlement offer via the February 7, 2008 letter, explaining why it did not believe the offer to be an appropriate resolution to the unfair practice charge.

Gorman's testimony, simply responding "yes" to the CPWEA attorney's characterization of Gorman's subjective intent in making the telephone call to Cardell, is wholly insufficient to demonstrate the actual content of the voice message. Therefore, in the absence of evidence on the record to demonstrate that Gorman's telephone message was anything more than an attempt to open settlement negotiations with respect to the unfair practice charge, as reported by Cardell, we simply cannot make the leap to find that the

telephone message was a specific, and unconditional, acceptance of the City's last, best, and final offer, that created an agreement between the parties.[6]

Moreover, MMBA section 3505.1, provides that:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.

Consequently, even if Gorman's voicemail message represented a valid acceptance of the City's last, best, and final offer, the proposed decision's finding that it created a binding and enforceable agreement is in error. As the City correctly asserted in its appeal, Section 3505.1 requires that the agreement be reduced to writing and ratified by the City before it will become binding on the parties. Numerous cases have discussed and approved this interpretation. In *Long Beach City Employees Association, Inc. v. City of Long Beach* (1977) 73 Cal.App.3d 273, the court denied a petition to compel the city to adopt a memorandum of understanding, and soundly rejected the union's argument that it was bad faith for the city council to refuse to ratify the agreement. The Court explained that the MMBA,

> . . . expressly provides that the memorandum 'shall not be binding' but shall be presented to the *governing body* of the agency or its statutory representative for *determination*, thus reflecting the *legislative decision that the ultimate determinations are to be made by the governing body itself.*

(*Long Beach,* p. 278, citing *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22.)[7]

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[6] The absence of evidence that CPWEA made any attempt to respond to the City's February 7, 2008 letter to clarify its intent to accept the last, best, and final offer, as opposed to making a settlement offer on the unfair practice charge, further supports our finding herein.

[7] Also citing *Glendale City Employees' Assn., Inc.* v. *City of Glendale* (1975) 15 Cal.3d 328, and *Crowley v. City and County of San Francisco* (1977) 64 Cal.App.3d 450.

In the case at hand, the record is void of any evidence that an agreement was reduced to writing and ratified by the City. Therefore, a finding that a binding agreement was created which mandates implementation of the three percent salary increase is contrary to law.[8]

Unalleged Violation

The City also excepts to the ALJ's conclusion that Gorman's voicemail message amounted to changed circumstances that broke the impasse between the parties, such that the City's failure to resume bargaining was a violation of the duty to bargain in good faith.[9]

We conclude that no findings can be made as to the allegation that the City violated its duty to bargain in good faith when it failed to resume negotiations as a result of a significant concession by CPWEA because it was not alleged in the complaint. The Board may only review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*Fresno County Superior Court* (2008) PERB

[8] The proposed decision cites *Local 512, Warehouse & Office Workers' Union v. NLRB* (9th Cir. 1986) 795 F.2d 705, in support of the finding that acceptance of the City's last, best and final offer by CPWEA creates a binding, enforceable agreement. However, this case is distinguished, because the private sector parties in *Local 512* were not covered by a statutory scheme that mandated ratification of the parties' agreement. Furthermore, although the parties in *Local 512* were subject to a stipulation that any agreement reached would be binding only if ratified by the employees and approved by the employer, the court made a specific finding that these conditions had been satisfied.

[9] In *Modesto City Schools* (1983) PERB Decision No. 291, the Board held that "impasse suspends the bargaining obligation only until 'changed circumstances' indicate an agreement may be possible." Changed circumstances include concessions "which have a significant impact on the bargaining equation." (*Ibid.*) The duty to bargain in good faith is thus revived. Where concessions are made by one party, they must be given consideration by the other, and a good faith effort must be made to determine the potential for agreement. (*Ibid.*)

Decision No. 1942-C.) The unalleged violation also must have occurred within the applicable statute of limitations period. (*Ibid.*)

These criteria have not been met in this case. As stated previously, the complaint alleged only that the City violated its duty to bargain in good faith by failing to implement its last, best, and final offer. The claim that Gorman's voicemail message constituted a "changed circumstance" that revived the City's duty to bargain was not alleged in CPWEA's charge, was not alleged in the complaint, was not introduced at hearing, and was not raised by CPWEA until its post hearing brief. The City was not provided notice, or adequate opportunity to fully litigate the issue, and did not have the opportunity to examine and cross-examine witnesses on this issue. Therefore, we cannot consider whether the City's February 7, 2008, letter constituted an unlawful failure to resume bargaining in response to changed circumstances, in violation of the MMBA.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SA-CE-513-M are hereby DISMISSED.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.