ITEM 3

TEST CLAIM

PROPOSED DECISION

Government Code Sections 3505.4, 3505.5, and 3505.7

Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)

Local Agency Employee Organizations: Impasse Procedures II

16-TC-04

City of Oxnard, Claimant

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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 [January 2012], page 2, 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.

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.

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.

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

Public Meeting Minutes, PERB, April 12, 2012

Assembly Committee on Public Employees, Retirement, and Social Security, Committee Analysis of AB 1606 as introduced on February 7, 2012

Test Claim Decision on *Local Agency Employee Organizations: Impasse Procedures*, 15-TC-01, adopted January 27, 2017

Excerpt of Transcript of Commission Hearing, January 27, 2017

Assembly Floor Analysis of AB 646, as amended June 22, 2011

Assembly Floor Analysis of AB 1606, Third Reading

1. TEST CLAIM TITLE

Impasse Procedures persuant to AB 646 and AB 1606 (Ch 680, 2011 and Ch 314, 2012)

2. CLAIMANT INFORMATION

City of Oxnard
Name of Local Agency or School District

James Throop
Claimant Contact

Chief Financial Officer
Title

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City, State, Zip

(805) 385-7475
Telephone Number

(805) 385-7466
Fax Number

Jim.Throop@oxnard.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.

Patrick J. Dyer
Claimant Representative Name

Director
Title

MGT Consulting
Organization

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E-Mail Address

For CSM Use Only

Filing Date:

RECEIVED
May 12, 2017
Commission on State Mandates

Test Claim #: 16-TC-04

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 .

Chapter 680, Statutes of 2011 (AB 646) adding sections 3505.4, 3505.5 and 3505.7 to the government code and Chapter 314 of 2012 (AB 1606) adding clarifying language to 3505.

☑ *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 12.
6. Declarations: pages 13 to 16.
7. Documentation: pages 17 to 28.

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.

James Throop
Print or Type Name of Authorized Local Agency or School District Official

CFO
Print or Type Title

Signature of Authorized Local Agency or School District Official

9/14/17
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 Oxnard

Local Public Employee Organizations: Impasse Procedures

Chapter 680, Statutes of 2011
Chapter 314, Statutes of 2012

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. On September 14, 2012 Assembly Bill 1606 (Perea) prohibited a waiver of the factfinding process and provided further clarifying language and legislative intent of the process outlined in AB 646. 3505.4 was changed to clarify the ambiguity of AB 464 and imposes additional restrictions with respect to collective bargaining and additional state mandated activity on local agencies.

The bills 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.

These bills 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, AB 646:

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.

Specifically, AB 1606:
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.

Changes to 3505.4 (from AB 1606)
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.

A. NEW ACTIVITIES

This new legislation has led to increased costs to the Collective Bargaining process as it relates to Impasse declaration activities. The impasse activities are new and not revised or amended. The City did not have any previous requirements on or activities related to Impasse prior to AB 646 and AB 1606.

If mediation did not result in settlement after 30 days and if the employee organization requests factfinding (646):

1) **646 – 1:** The agency must notice impasse hearing if delay in factfinding request.
2) **646 – 2:** Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of its member

3) **646 – 3:** If chairperson is not approved by other party, agency must select a different chairperson.
4) **646 – 4:** PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.
5) **646 – 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) **646 – 6:** The agency shall participate in all factfinding hearings.
7) **646 – 7:** The agency shall review and make the panel findings publicly available within 10 days of receipt.
8) **646 – 8:** The agency shall pay for half of the costs of the factfinding.
9) **646 – 9:** The agency must hold a public impasse hearing, if it chooses to impose its last, best offer.
10) **646 – 10:** The agency shall meet and confer with union and submit/resubmit last, best offer.

AB 1606:

1. **1606 – 1:** This bill would again 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.
2. **1606 – 2:** Select Mediator- 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.
3. **1606 – 3:** 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.
4. **1606 – 4:** 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.
5. **1606 – 5:** Respond to inquiries by all parties resulting from panel contemplating 3505.4 (d) Items/paragraphs 1 through 8.
6. **1606 – 6:** Process procedural right of an employee organization to request a factfinding panel. Ensure that this cannot be expressly or voluntarily waived.

One-time costs would include:

For AB 646:

1) **646 – 1 (OTC):** Train staff on new requirements

2) **646 – 2 (OTC):** Revise local agency manuals, polices, and guidelines related to new factfinding requirements.

For AB 1606

1) **1606 – 1 (OTC):** Update policies and procedures as well as any city codes or resolutions to comply with clarifying language of 1606.
2) **1606 – 2 (OTC):** Training for staff on updated employee organization impasse process/rights/rules updated by 1606.

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. This process and mandatory procedures were further clarified by Chapter 314, Statutes of 2012, filed on September 14, 2012.

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 3505.7 were added by specified legislation and relate to the reimbursable provisions of this test claim.

D. COST ESTIMATES

The City of Oxnard contends that the actual increased costs to comply with this new mandate is $373,836.57 in total. For fiscal year fiscal year 2015-16, its total costs were $327,302.63 when the City had to enter mediation as required by these statutes for two separate impasse cases. The City first incurred increased costs as a result of this statute on May 12, 2016. A detail of the 2015-16 costs by new activity are as follows:

FY 2015-2016		Activities																			
Resource	Unit Cost per Hour	646-2 (OCT)	1606 - 1 (OCT)	646-1 (OCT)	1606 - 2 (OCT)	646-1	1606-1	1606-3	646-2	646-3	646-4	1606-2	646-5	646-6	646-7	1606-4	1606-5	1606-6	646-9	646-10	Units (hours) / TOTAL
Policy/Training																					
HR Director	$85.79	23	23	2	2																50
City Attorney	$98.56	14	14	2	2																32
Police Impasse Case																					
HR Director	$85.79					1	1	1		1		2	4	4	8	4	12	14	2	2	56
City Attorney	$98.56					1	1	1		1			4	4	2	4	8	10	2	2	40
Sr. HR Coord.	$33.02								0.5	0.5		1	4	4	2	4	10	14			40
Cont. Legal	$250	44	44								96	96	260	148	48	260	46				
Fire Impasse Case																					
HR Director	$85.79					0.5		1.5	1	1		2	2	2	12	4	8	12	1	1	48
City Attorney	$98.56					0.5		1.5	0.5	0.5		1	1	1	2	4	4	6	1	1	24
Sr. HR Coord.	$33.02												6	12		8	10				36
Cont. Legal	$250																42				
Labor $ by Activity		$3,353	$3,353	$369	$369	$277	$184	$461	$152	$336	$0	$475	$1,338	$1,536	$2,176	$1,871	$3,559	$4,270	$553	$553	$25,182.94
Overhead		$682	$682	$75	$75	$56	$37	$94	$31	$68	$0	$97	$272	$312	$442	$380	$724	$868	$112	$112	$5,119.69
Contract Legal		$11,000	$11,000								$24,000	$24,000	$65,000	$37,000	$12,000	$65,000	$22,000	$18,000	$4,000	$4,000	$297,000.00
TOTAL		$15,035	$15,035	$444	$444	$333	$222	$555	$182	$404	$24,000	$24,571	$66,610	$38,848	$14,618	$67,251	$26,282	$23,138	$4,665	$4,665	$327,302.63

Estimated annual costs to be incurred by the City of Oxnard to implement the alleged mandate during the fiscal year 2016-2017 is $46,533.94 – the fiscal year immediately following the fiscal year for which the claim was filed.

FY 2016-2017		Activities																			
Resource	Unit Cost per Hour	646-2 (OCT)	1606 - 1 (OCT)	646-1 (OCT)	1606 - 2 (OCT)	646-1	1606-1	1606-3	646-2	646-3	646-4	1606-2	646-5	646-6	646-7	1606-4	1606-5	1606-6	646-9	646-10	Units (hours) / TOTAL
Policy/Training																					
HR Director	$79.26	23	23	2	2																50
City Attorney	$100.53	14	14	2	2																32
Police Impasse Case																					
HR Director	$79.26					1	1	1		1		2	4	4	8	4	12	14	2	2	56
City Attorney	$100.53					1	1	1		1			4	4	2	4	8	10	2	2	40
Sr. HR Coord.	$35.36								0.5	0.5		1	4	4	2	4	10	14			40
Cont. Legal	$250.00																36				
Fire Impasse Case																					
HR Director	$79.26					0.5		1.5	1	1		2	2	2	12	4	8	12	1	1	48
City Attorney	$100.53					0.5		1.5	0.5	0.5		1	1	1	2	4	4	6	1	1	24
Sr. HR Coord.	$35.36												6	12		8	10				36
Cont. Legal	$250.00																32				
Labor $ by Activity		$3,230	$3,230	$360	$360	$270	$180	$449	$147	$327	$0	$453	$1,332	$1,544	$2,058	$1,863	$3,499	$4,164	$539	$539	$24,544.28
Overhead		$657	$657	$73	$73	$55	$37	$91	$30	$66	$0	$92	$271	$314	$418	$379	$711	$847	$110	$110	$4,989.66
Contract Legal		$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$17,000	$0	$0	$0	$17,000.00
TOTAL		$3,887	$3,887	$433	$433	$325	$216	$541	$177	$393	$0	$545	$1,603	$1,858	$2,476	$2,241	$21,210	$5,011	$649	$649	$46,533.94
																			TOTAL		$373,836.57

E. STATEWIDE COST ESTIMATES

Per 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 $10,000, with the local agency footing half the bill, reimbursable costs could exceed $2.5 million statewide. 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)*

Using similar methodology, the cost of policy and training would raise per case cost substantially. Using the Oxnard per case cost, multiplied by the assumption from the Floor Analysis above case count of 100, we have updated the statewide cost estimate. That statewide total could exceed $3.8 million with a million of that being for training and policy changes at agencies with impasse cases.

F. FUNDING SOURCES

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

G. ELIGIBILITY FOR REIMBURESMENT

The costs incurred by the City of Oxnard 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 Oxnard 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 Oxnard.

CONCLUSION

The enactment of Chapter 680, Statutes of 2011 adding sections 3505.4, 3505.5 and 3505.7 and the Chapter 314, Statutes of 2012 adding clarifying language to 3505.5 have imposed a new state mandated program and higher level of service which resulted in increased costs to the City of Oxnard 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
Exhibit 2: Chapter 314, Statutes of 2012

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 14 day of September, 2017, at Oxnard, California.

James Throop, Chief Financial Officer
300 West Third Street
Oxnard, California 93030
805-385-7475
Jim.Throop@Oxnard.org
City of Oxnard

DECLARATION OF JAMES THROOP

I James Throop, make the following declaration under oath:

I am the Chief Financial Officer for the City of Oxnard. 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 Oxnard'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 Oxnard first incurred increased costs as a result of this Test Claim statute on May 12, 2016.

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 14 day of September, 2017, at Oxnard, California.

James Throop, Chief Financial Officer
300 West Third Street
Oxnard, California 93030
805-385-7475
Jim.Throop@Oxnard.org
City of Oxnard

Declaration of Actual or Estimated Costs, Offsets and New Activities

Pursuant to 17553 (b) (2) of the Government code and per the Commission on State Mandates, I James Throop, Chief Financial Officer, under penalty of perjury, based on my personal knowledge, information and belief, I declare the following:

A. The City of Oxnard determined that costs required to comply with this mandated program totals $327,302.63 in the 2015-2016 fiscal year. For the 2016-2017 fiscal year, the City of Oxnard expended $46,533.94 to comply with the new activities. In total the City of Oxnard's costs of $373,836.57 are directly a result of the new activities required by Chapter 680, Statutes of 2011 and Chapter 314, Statutes of 2012 as follows:

FY 2015-2016		Activities																			
Resource	Unit Cost per Hour	646-2 (OCT)	1606 - 1 (OCT)	646-1 (OCT)	1606 - 2 (OCT)	646-1	1606-1	1606-3	646-2	646-3	646-4	1606-2	646-5	646-6	646-7	1606-4	1606-5	1606-6	646-9	646-10	Units (hours) / TOTAL
Policy/Training																					
HR Director	$85.79	23	23	2	2																50
City Attorney	$98.56	14	14	2	2																32
Police Impasse Case																					
HR Director	$85.79					1	1	1		1		2	4	4	8	4	12	14	2	2	56
City Attorney	$98.56					1	1	1		1			4	4	2	4	8	10	2	2	40
Sr. HR Coord.	$33.02								0.5	0.5		1	4	4	2	4	10	14			40
Cont. Legal	$250	44	44								96	96	260	148	48	260	46				
Fire Impasse Case																					
HR Director	$85.79					0.5		1.5	1	1		2	2	2	12	4	8	12	1	1	48
City Attorney	$98.56					0.5		1.5	0.5	0.5		1	1	1	2	4	4	6	1	1	24
Sr. HR Coord.	$33.02												6	12		8	10				36
Cont. Legal	$250																42				
Labor $ by Activity		$3,353	$3,353	$369	$369	$277	$184	$461	$152	$336	$0	$475	$1,338	$1,536	$2,176	$1,871	$3,559	$4,270	$553	$553	$25,182.94
Overhead		$682	$682	$75	$75	$56	$37	$94	$31	$68	$0	$97	$272	$312	$442	$380	$724	$868	$112	$112	$5,119.69
Contract Legal		$11,000	$11,000								$24,000	$24,000	$65,000	$37,000	$12,000	$65,000	$22,000	$18,000	$4,000	$4,000	$297,000.00
TOTAL		$15,035	$15,035	$444	$444	$333	$222	$555	$182	$404	$24,000	$24,571	$66,610	$38,848	$14,618	$67,251	$26,282	$23,138	$4,665	$4,665	$327,302.63

FY 2016-2017		Activities																			
Resource	Unit Cost per Hour	646-2 (OCT)	1606 - 1 (OCT)	646-1 (OCT)	1606 - 2 (OCT)	646-1	1606-1	1606-3	646-2	646-3	646-4	1606-2	646-5	646-6	646-7	1606-4	1606-5	1606-6	646-9	646-10	Units (hours) / TOTAL
Policy/Training																					
HR Director	$79.26	23	23	2	2																50
City Attorney	$100.53	14	14	2	2																32
Police Impasse Case																					
HR Director	$79.26					1	1	1		1		2	4	4	8	4	12	14	2	2	56
City Attorney	$100.53					1	1	1		1			4	4	2	4	8	10	2	2	40
Sr. HR Coord.	$35.36								0.5	0.5		1	4	4	2	4	10	14			40
Cont. Legal	$250.00																36				
Fire Impasse Case																					
HR Director	$79.26					0.5		1.5	1	1		2	2	2	12	4	8	12	1	1	48
City Attorney	$100.53					0.5		1.5	0.5	0.5		1	1	1	2	4	4	6	1	1	24
Sr. HR Coord.	$35.36												6	12		8	10				36
Cont. Legal	$250.00																32				
Labor $ by Activity		$3,230	$3,230	$360	$360	$270	$180	$449	$147	$327	$0	$453	$1,332	$1,544	$2,058	$1,863	$3,499	$4,164	$539	$539	$24,544.28
Overhead		$657	$657	$73	$73	$55	$37	$91	$30	$66	$0	$92	$271	$314	$418	$379	$711	$847	$110	$110	$4,989.66
Contract Legal		$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$17,000	$0	$0	$0	$17,000.00
TOTAL		$3,887	$3,887	$433	$433	$325	$216	$541	$177	$393	$0	$545	$1,603	$1,858	$2,476	$2,241	$21,210	$5,011	$649	$649	$46,533.94
																				TOTAL	$373,836.57

B. The City of Oxnard has no local, state, federal funding or fee authority to offset the increased costs that will be incurred by the city to implement this program.

C. The City of Oxnard is required to perform new activities as a result of both Chapter 680, Statutes of 2011 and Chapter 314, Statutes of 2012. These statutory changes require the city to process the procedural right of an employee organization to request a factfinding panel, select a mediator, respond to inquiries by all parties resulting from panel contemplating 3505.4 (d) Items/paragraphs 1 through 8.

D. This test claim is not for a Legislatively Determined Mandate and no payments have been received by City of Oxnard for the implementation of the new activities required by the statutes in question.

Executed this 14 day of September, 2017, at Oxnard, California.

James Throop, Chief Financial Officer
300 West Third Street
Oxnard, California 93030
805-385-7475
Jim.Throop@Oxnard.org
City of Oxnard

TEST CLAIM BACKUP DOCUMENTATION

IMPASSE PROCEDURES

AB 646, AB 1606

Pages 17-28

TEST CLAIM BACKUP DOCUMENTATION

IMPASSE PROCEDURES

1. City Council Agenda Report, Attorney Services
2. Bill Text for AB 646
3. Bill Text for AB 1606
4. Larger copy of Costs for New Activities FY 2015-16
5. Larger copy of Cost for New Activities FY 2016-17

CITY OF OXNARD CALIFORNIA	CITY COUNCIL AGENDA REPORT	TYPE OF ITEM: Report AGENDA ITEM NO.: L-3

DATE: November 17, 2015

TO: City Council

THROUGH: Greg Nyhoff, City Manager
Office of the City Manager

FROM: J. Tabin Cosio, Director of Human Resources

SUBJECT: **Third Amendment to Attorney Services Agreement for Special Counsel to Represent the City of Oxnard in a Variety of Human Resources Related Matters**

CONTACT: J. Tabin Cosio, Director of Human Resources
Tabin.Cosio@ci.oxnard.ca.us, 805-385-7947

RECOMMENDATION

That City Council:

1. Approve and authorize the Mayor to execute a Third Amendment to Attorney Services Agreement with Renne Sloan Holtzman Sakai LLP (Agreement No. 6862-14-CA) to increase the contract amount by $549,000 for a total not to exceed amount of $1,089,000; and

2. Authorize an appropriation in the amount of $235,000 cost allocated as follows: $177,444 (or 62%) from the one time Successor Agency Residual pass-through Loan Payment, which currently resides in the General Fund Reserve fund, $13,429 (or 5%) to Water fund, $17,859 (or 7%) to the Waste Water fund and $26,268 to the Environmental Resources fund (or 26%).

BACKGROUND

On March 24, 2015, your Council approved a Second Amendment to the original agreement to include in the scope of services representation in labor negotiations, drafting of memoranda of understanding ("MOU"), ongoing advice regarding negotiations and the administration of MOUs and such other services relating to labor relations matters as requested by the City Attorney or Human Resources Department. Since the approval of the Second Amendment, the City has entered into full scale labor negotiations over successor MOUs with six of the seven employee organizations ("unions") representing City employees. And, the City anticipates entering into labor negotiations with the seventh union on or around January 1, 2016.

The Myers-Milias Brown Act ("MMBA") is the state law that governs the labor negotiations process within California local governments. Specific to the collective bargaining process, the MMBA requires the parties to "meet and confer in good faith" (GC 3505) regarding wages, hours and other terms and conditions of employment. In the definition of "good faith" bargaining, the MMBA sets as one of the criteria the requirement for the parties to "endeavor to reach an agreement" on matters within the scope of representation. If the parties are not successful in reaching an agreement, the MMBA provides for impasse procedures including mediation and fact-finding – at the request of the union (GC 3505.4).

The labor team for the City of Oxnard is fully committed and intends to reach a mutual agreement over a successor agreement with each of the unions. However, the labor team must recognize the bilateral nature of the collective bargaining process that permits mediation and fact-finding should the union request it. Accordingly, the labor team has prepared an estimate for the cost of concluding these negotiations based on the amount of time and effort needed to be expended.

1. Comprehensive, Mutually Agreed Upon Tentative Agreement:	$200,000
2. Mediation Process	$69,000
3. Factfinding	$280,000
Grand Total	$549,000

The above costs are the team's best estimate for concluding the collective bargaining process for each of the seven unions. It is staff's goal and intent to achieve a mutually agreed upon successor agreement, but should that not be the case, we are requesting funds for mediation and factfinding should the need arise. Of course, should mutual agreement be reached and mediation or factfinding not be utilized, then the cost for those activities would not be realized.

FINANCIAL IMPACT

The approved Fiscal Year 2015/2016 budget has available funds in the amount of $314,000. Staff will cost allocate the $235,000 in the following manner: $177,444 (62%) from the one time Successor Agency Residual pass-through Loan Payment, which currently resides in the General Fund Reserve fund, $13,429 (5%) to Water fund, $17,859 (7%) to the Waste Water fund and $26,268 (26%) to Environmental Resources fund.

ATTACHMENTS

#1 – Third Amendment to Agreement for Attorney Services
#2 – Special Budget Appropriation

Agreement No. 6862-14-CA

THIRD AMENDMENT TO ATTORNEY SERVICES AGREEMENT

This Third Amendment ("Third Amendment") to the Attorney Services Agreement ("Agreement") is made and entered into in the County of Ventura, State of California, this 17th day of November 2015, by and between the City of Oxnard, a municipal corporation ("City"), and Renne Sloan Holtzman Sakai LLP ("Special Counsel"). This Third Amendment amends the Agreement entered into on July 25, 2014, by City and Special Counsel. The Agreement previously has been amended by a First Amendment on October 20, 2014 and a Second Amendment on March 24, 2015.

City and Special Counsel agree as follows:

1. In Section 10. a. (1) Compensation and Reimbursement, the figure "$540,000" is deleted and replaced with the figure "$1,089,000".

2. As so amended, the Agreement remains in full force and effect.

CITY OF OXNARD

Tim Flynn, Mayor

SPECIAL COUNSEL

Charles Sakai, Esq.

APPROVED AS TO FORM:

Stephen M. Fischer, Interim City Attorney

APPROVED AS TO INSURANCE:

Risk Manager

Attachment 1
Page 1 of 1

AB-646 Local public employee organizations: impasse procedures. (2011-2012)

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 09, 2011. Filed with Secretary of State October 09, 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.

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 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.

AB-1606 Local public employee organizations: impasse procedures. (2011-2012)

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.

FY 2015-2016		Activities																			
Resource	**Unit Cost per Hour**	646-2 (OCT)	1606 - 1 (OCT)	646-1 (OCT)	1606 - 2 (OCT)	646-1	1606-1	1606-3	646-2	646-3	646-4	1606-2	646-5	646-6	646-7	1606-4	1606-5	1606-6	646-9	646-10	**Units (hours) / TOTAL**
Policy/Training																					
HR Director	$85.79	23	23	2	2																50
City Attorney	$98.56	14	14	2	2																32
Police Impasse Case																					
HR Director	$85.79					1	1	1		1		2	4	4	8	4	12	14	2	2	56
City Attorney	$98.56					1	1	1		1			4	4	2	4	8	10	2	2	40
Sr. HR Coord.	$33.02								0.5	0.5		1	4	4	2	4	10	14			40
Cont. Legal	$250	44	44								96	96	260	148	48	260	46				
Fire Impasse Case																					
HR Director	$85.79					0.5		1.5	1	1		2	2	2	12	4	8	12	1	1	48
City Attorney	$98.56					0.5		1.5	0.5	0.5		1	1	1	2	4	4	6	1	1	24
Sr. HR Coord.	$33.02												6	12		8	10				36
Cont. Legal	$250																42				
Labor $ by Activity		$3,353	$3,353	$369	$369	$277	$184	$461	$152	$336	$0	$475	$1,338	$1,536	$2,176	$1,871	$3,559	$4,270	$553	$553	$25,182.94
Overhead		*$682*	*$682*	*$75*	*$75*	*$56*	*$37*	*$94*	*$31*	*$68*	*$0*	*$97*	*$272*	*$312*	*$442*	*$380*	*$724*	*$868*	*$112*	*$112*	$5,119.69
Contract Legal		$11,000	$11,000								$24,000	$24,000	$65,000	$37,000	$12,000	$65,000	$22,000	$18,000	$4,000	$4,000	$297,000.00
TOTAL		**$15,035**	**$15,035**	**$444**	**$444**	**$333**	**$222**	**$555**	**$182**	**$404**	**$24,000**	**$24,571**	**$66,610**	**$38,848**	**$14,618**	**$67,251**	**$26,282**	**$23,138**	**$4,665**	**$4,665**	**$327,302.63**

FY 2016-2017		Activities																			
Resource	**Unit Cost per Hour**	646-2 (OCT)	1606 - 1 (OCT)	646-1 (OCT)	1606 - 2 (OCT)	646-1	1606-1	1606-3	646-2	646-3	646-4	1606-2	646-5	646-6	646-7	1606-4	1606-5	1606-6	646-9	646-10	**Units (hours) / TOTAL**
Policy/Training																					
HR Director	$79.26	23	23	2	2																50
City Attorney	$100.53	14	14	2	2																32
Police Impasse Case																					
HR Director	$79.26					1	1	1		1		2	4	4	8	4	12	14	2	2	56
City Attorney	$100.53					1	1	1		1			4	4	2	4	8	10	2	2	40
Sr. HR Coord.	$35.36								0.5	0.5		1	4	4	2	4	10	14			40
Cont. Legal	$250.00																36				
Fire Impasse Case																					
HR Director	$79.26					0.5		1.5	1	1		2	2	2	12	4	8	12	1	1	48
City Attorney	$100.53					0.5		1.5	0.5	0.5		1	1	1	2	4	4	6	1	1	24
Sr. HR Coord.	$35.36												6	12		8	10				36
Cont. Legal	$250.00																32				
Labor $ by Activity		$3,230	$3,230	$360	$360	$270	$180	$449	$147	$327	$0	$453	$1,332	$1,544	$2,058	$1,863	$3,499	$4,164	$539	$539	$24,544.28
Overhead		$657	$657	$73	$73	$55	$37	$91	$30	$66	$0	$92	$271	$314	$418	$379	$711	$847	$110	$110	$4,989.66
Contract Legal		$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$17,000	$0	$0	$0	$17,000.00
TOTAL		**$3,887**	**$3,887**	**$433**	**$433**	**$325**	**$216**	**$541**	**$177**	**$393**	**$0**	**$545**	**$1,603**	**$1,858**	**$2,476**	**$2,241**	**$21,210**	**$5,011**	**$649**	**$649**	**$46,533.94**

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 18, 2017, I served the:

- **Notice of Complete Test Claim Filing, Tentative Hearing Date, and Schedule for Comments issued September 18, 2017**
- **Test Claim filed by City of Oxnard on May 12, 2017**

Impasse Procedures, 16-TC-04
Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, 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 18, 2017 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: 9/18/17

Claim Number: 16-TC-04

Matter: Impasse Procedures

Claimant: City of Oxnard

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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RECEIVED
October 18, 2017
Commission on
State Mandates

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

Exhibit B

October 18, 2017

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

Response to Test Claim 16-TC-04, Impasse Procedures

Dear Ms. Halsey:

The Department of Finance (Finance) has reviewed the test claim submitted by the City of Oxnard (City) that alleges reimbursable, state-mandated costs associated with Chapter 680, Statutes of 2011 (AB 646) and Chapter 314, Statutes of 2012 (AB 1606).

AB 646 allows local agency public employee organizations to request appointment of a fact-finding panel to address disputes concerning conditions of employment with local agency employers, if a mediator is unable to arrange a settlement within 30 days. AB 646 states that costs associated with the fact-finding shall be equally divided between the parties.

AB 1606 states that mediation is not a necessary pre-condition for a local agency public employee organization to request appointment of a fact-finding panel pursuant to AB 646. AB 1606 contains a legislative finding and declaration that its provisions are technical and clarifying of existing law.

The City alleges that AB 646 and AB 1606 require it to perform a host of new activities that are unique to government and that are necessary to carry out a state policy, and that are therefore state-reimbursable.

We first note that AB 646 was the subject of a previous Commission on State Mandates (Commission) ruling. In its February 1, 2017 Statement of Decision for Case No. 15-TC-01, the Commission found that the AB 646 fact-finding requirement was not state-reimbursable because the requirement was only triggered by the local agency's voluntary decision to participate in mediation with the public employee organization. The Commission stated that "The plain language of (Government Code) Section 3505.2 – the parties "may agree" to appoint a "mutually agreeable" mediator – means that mediation under the Meyers-Mlias-Brown Act is voluntary."

For the costs associated with a statute to be state-reimbursable, the statute must either create a new program unique to government in which local agencies are compelled to participate, or must require local agencies to provide a higher level of service via a new or an existing program (San Diego Unified School District v. Commission on State Mandates (2004) 33 Cal. 4th 859, 878). In City of Richmond v. Commission on State Mandates (1998) 64 Cal. App. 4th 1190, the court stated that "(a) higher cost to the local government for compensating its employees is not the same as a higher cost of providing services *to the public* (emphasis added)." This supports

the contention that, to be state-reimbursable, the higher level of service in question must be associated with a service provided to the public.

The City's test claim fails the second part of the two-part test above. When a local agency participates in a fact-finding panel with a public employee organization to resolve disputes concerning employment conditions, the local agency is not providing a service to the public. Consequently, none of the City's alleged costs qualify for reimbursement pursuant to this test.

We must now consider whether AB 646 or AB 1606 creates a new program unique to government in which local agencies are compelled to participate. We assert that neither statute creates a *new* program. Instead, the statutes add a new fact-finding element to the existing collective bargaining program. Because neither statute creates a *new* program that provides a higher level of service *to the public*, none of the alleged costs stated in the City's test claim are state-reimbursable.

We also note that the City alleges one-time, state-mandated costs associated with the activities listed below:

For AB 646

- Training staff on the legislation's new requirements.
- Revising local agency manuals, policies, and guidelines related to new fact-finding requirements.

For AB 1606

- Updating policies and procedures, as well as any city codes or resolutions, to comply with the clarifying language of AB 1606.
- Providing training for staff on the updated employee organization impasse process/rights/rules enacted by AB 1606.

In addition to being ineligible for reimbursement for the reasons previously stated, Finance further asserts the aforementioned one-time costs are ineligible for reimbursement based at least one previous Commission ruling. Specifically, we refer to the Commission's March 29, 2007 Statement of Decision in Case No. 01-TC-07, which concerns binding arbitration.

In its Test Claim, the Claimant in Case No. 01-TC-07 alleged a host of reimbursable activities related to, among other things, providing training to managers, counsel, staff, and governing board members concerning the statutes in question,

In the Statement of Decision for Case No. 01-TC-07, the Commission found that "...training agency, management, counsel, staff, and members of governing bodies regarding binding arbitration is *not required* (emphasis in original) by the plain language of the test claim statutes." Similarly, a plain reading of AB 646 and AB 1606 does not support the City's contention that it is required to provide training for staff on either statute. Consequently, no costs allegedly incurred by the City to provide such training are state-reimbursable.

Further applying the "plain language" test set forth in Case No. 01-TC-07, there is nothing in either statute that requires the City to revise local agency manuals, policies, and guidelines, or to update policies and procedures, or city codes or resolutions. Consequently, no costs allegedly incurred by the City for these activities are state-reimbursable.

Sincerely,

JUSTYN HOWARD
Program Budget Manager

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.

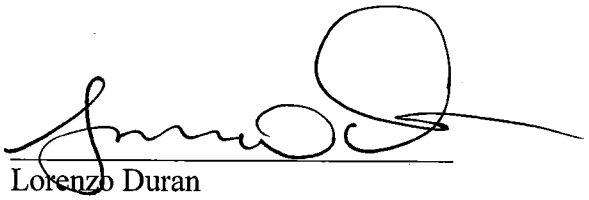
On September 18, 2017, I served the:

- **Finance's Comments on the Test Claim**

Impasse Procedures, 16-TC-04
Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, 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 18, 2017 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 10/3/17

Claim Number: 16-TC-04

Matter: Impasse Procedures

Claimant: City of Oxnard

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Exhibit C

MGT CONSULTING GROUP

RECEIVED
November 20, 2017
Commission on State Mandates

LATE FILING

November 17, 2017

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

Subject: Response to DOF Letter on 16-TC-04, Impasse Procedures

Dear Ms. Halsey:

This letter is in response to the comments submitted by the Department of Finance (DOF) in their letter dated October 18, 2017. MGT represents the test claimant, City of Oxnard (Oxnard) and filed the test claim after careful review of both bills in question, AB 646 of 2011 and AB 1606 of 2012 and previously denied test claim filing by City of Glendora (15-TC-01).

At the Commission on State Mandates hearing from January 27, 2017, Commission staff discusses differences between AB 646 and AB 1606. The combination of those two bills and changes in law are what makes this filing a reimbursable mandate. Although the Commission staff do not specifically analyze 1606 in the 15-TC-01 decision, staff indicated that AB 1606 clarified any misunderstand about AB 646 being voluntary. Until this filing of 16-TC-04, which pleads both bills, the Commission was unable to undertake a full analysis of the Impasse issue, until now. It would be premature for Oxnard, MGT or DOF to imply that any prior commission staff analysis or decision on 15-TC-01 has relevance to the Commission decision on 16-TC-04, since it identifies additional clarifying changes in law.

DOF asserts that AB 646 was not state-reimbursable because of "voluntary decisions" and "plain language reading of Government Code 3505.2." We find the statements by DOF to be misleading. As detailed in the new filing, 16-TC-04, the impasse procedures and fact-finding requirements are not voluntary. The combination of the two bills outlines the state requirements. Furthermore, Commission staff explained in detail that 15-TC-01 decision was in part, a matter of what was pled, not specifically the issues being alleged by DOF. The San Diego USD v. Commission case law described by DOF is not relevant as this is a new administrative program being created by the state specifically for local government and its use and implementation are required, not voluntary as DOF alleges.

We find DOF comments to be dismissive, self-serving and lacking relevance to the Impasse Procedures pled in this test claim. Should the Commission consider case law or arguments in the DOF letter, it would risk making an error in law as DOF cited cases and circumstances that are not applicable to the current test claim filing and the current decision before the Commission regarding Impasse Procedures outlined in 16-TC-04.

Sincerely,

Patrick J. Dyer
Vice President, MGT Consulting Group

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.

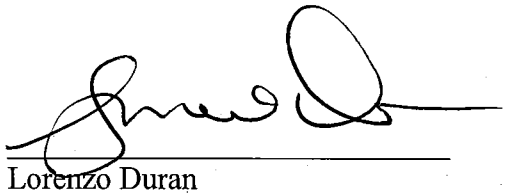
On November 20, 2017, I served the:

- **Claimant Late Rebuttal Comments filed November 20, 2017**

Impasse Procedures, 16-TC-04
Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
City of Oxnard, 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 20, 2017 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 11/20/17

Claim Number: 16-TC-04

Matter: Impasse Procedures

Claimant: City of Oxnard

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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Hearing Date: May 25, 2018
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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) and Statutes 2012, Chapter 314 (AB 1606)

Local Agency Employee Organizations: Impasse Procedures II

16-TC-04

City of Oxnard, Claimant

EXECUTIVE SUMMARY

Overview

This Test Claim alleges reimbursable state-mandated activities arising from amendments to the Meyers-Milias-Brown Act by Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606), which added a factfinding procedure after a local agency and an employee organization reach an impasse in their collective bargaining negotiations.

The Commission does not have jurisdiction to reconsider Statutes 2011, chapter 680, since that was the subject of a prior final decision of the Commission in *Local Agency Employee Organizations: Impasse Procedures* (15-TC-01). Staff finds, however, that Statutes 2012, chapter 314 constitutes a reimbursable state-mandated program on a local agency employer, for the activities and costs specified herein.

Procedural History

AB 646, Statutes 2011, chapter 680, was enacted on October 9, 2011. The effective date of the test claim statute was January 1, 2012. On December 8, 2011, the Public Employment Relations Board (PERB) adopted emergency regulations, effective January 1, 2012.[1] The emergency regulations became permanent after PERB transmitted a Certificate of Compliance to the OAL on or about June 22, 2012.[2] On September 14, 2012, AB 1606, Statutes 2012, chapter 314, was enacted.

The claimant alleged that it first incurred costs under the test claim statute on May 12, 2016.[3]

[1] Exhibit X, PERB Response to Commission Request for Rulemaking Files, August 26, 2016, pages 105-107.

[2] Register 2012, No. 31; Exhibit X, PERB Response to Commission Request for Rulemaking Files, August 26, 2016, page 330.

[3] Exhibit A, Test Claim, page 10.

On May 12, 2017, the claimant filed the Test Claim with the Commission.[4] On October 18, 2017, the Department of Finance (Finance) filed comments on the Test Claim.[5] On November 20, 2017, the claimant filed rebuttal comments.[6] Commission staff issued the Draft Proposed Decision on March 23, 2018.[7]

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."[8]

Claims

The following chart provides a brief summary of the claims and issues raised and staff's recommendation:

Subject	Description	Staff Recommendation
Was the Test Claim timely filed pursuant to Government Code section 17551 and California Code of Regulations, title 2, section 1183.1	Government Code section 17551(c) states: "test claims shall be filed not later than 12 months following the effective date of a statue or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later."	*The test claim was timely filed* – This Test Claim alleges costs first incurred on May 12, 2016, and the Test Claim was filed on May 12, 2017. Accordingly, the Test Claim was filed within 12 months of first incurring costs.

[4] Exhibit A, Test Claim, page 1.

[5] Exhibit B, Department of Finance's Comments on the Test Claim.

[6] Exhibit C, Claimant's Late Rebuttal Comments.

[7] Exhibit D, Draft Proposed Decision.

[8] *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.

	At the time of filing, Section 1183.1(c) of the Commission's regulations stated: "[f]or purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant."	
May the Commission take jurisdiction over Statutes 2011, chapter 680, which has already been the subject of a final binding Decision of the Commission?	The claimant pled Statutes 2011, chapter 680 and Statutes 2012, chapter 314.[9] However, Statutes 2011, chapter 680 was the subject of a prior Commission Decision, *Local Agency Employee Organizations: Impasse Procedures* (15-TC-01), which the Commission denied	*No, the Commission has jurisdiction only over Statutes 2012, chapter 314* – The Government Code does not permit successive claims on the same statute. Moreover, the Commission's Decision in 15-TC-01 is a final, binding Decision that cannot be reconsidered by the Commission.[10] Therefore, the Commission has jurisdiction only over Statutes 2012, chapter 314.
Does Government Code section 3505.4, as amended by Statutes 2012, chapter 314 impose a reimbursable state-mandated program to engage in a factfinding process?	Prior to the 2012 test claim statute, Government Code section 3505.4 made factfinding contingent on first submitting a dispute to voluntary mediation to resolve the impasse. Only if mediation did not result in a settlement, then the factfinding process, when requested by the employee	*Partially Approve* – Once factfinding is unilaterally requested by the employee organization, the 2012 test claim statute mandates local agencies defined in Government Code section 17518 (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)), to perform the following activities:

[9] It is also noteworthy that the claimant did not plead the Public Employment Relations Board's emergency regulations implementing Statutes 2011, chapter 680, which were effective January 1, 2012.

[10] Government Code section 17559; *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

	organization, was required to resolve the impasse. Thus, all activities triggered by the voluntary decision to engage in mediation, including factfinding, were not mandated by the state. Government Code section 3505.4, as amended by Statutes 2012, chapter 314, now requires local agency employers to submit to factfinding when requested by the employee organization whether or not the dispute has been first submitted to voluntary mediation.	• Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process.. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b)-(d).) • Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).) • Furnish the factfinding 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 factfinding panel. (Gov. Code § 3505.4(c-d).) • Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).) The test claim statute imposes a new program or higher level of

		service. Although the PERB regulations, which became effective on January 1, 2012, provided similarly, Statutes 2012, chapter 314 expressly states that it is intended to be clarifying of existing law, and therefore its operative provisions relate back to January 1, 2012, the effective date of the existing PERB regulations. Therefore, Statutes 2012, chapter 314 imposes new activities uniquely on local agencies. In addition, the statute provides a service to the public to promote efficiency in the collective bargaining process between public employers and their employee organizations, such that public services may be efficiently and continuously provided. And finally, substantial evidence in the record supports a finding of increased costs mandated by the state within the meaning of Government Code section 17514, and none of the exceptions identified in Government Code section 17556 apply.

Staff Analysis

A. This Test Claim Was Timely Filed pursuant to Government Code section 17551 and California Code of Regulations, title 2, section 1183.1.

This Test Claim was filed on May 12, 2017, and alleges costs first incurred on May 12, 2016.[11] Therefore, the fiscal year in which costs were first incurred, for purposes of the Commission's regulations, is fiscal year 2015-2016, and the claimant had until June 30 of fiscal year 2016-2017 to file its claim, based on the regulations in effect at that time.[12] A May 12, 2017 filing is therefore timely.

[11] Exhibit A, Test Claim, page 10.

[12] Code of Regulations, title 2, section 1183.1(c) (Register 2016, No. 38).

B. The Commission Does Not Have Jurisdiction to Reconsider Its Prior Final, Binding, Decision on Statutes 2011, Chapter 680; the Commission's Jurisdiction Is Limited to Statutes 2012, Chapter 314, Which Amended Government Code Section 3505.4.

This Test Claim pleads Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606).[13] The Commission does not have jurisdiction to re-hear and decide Statutes 2011, chapter 680, because that statute has been the subject of a previous test claim.[14] Successive test claims on the same statute are not permitted under the Government Code. Moreover, the Commission's decision in *Local Agency Employee Organizations: Impasse Procedures* (15-TC-01) is a final, binding decision that cannot be reconsidered by the Commission.[15] Therefore, the Commission's jurisdiction in this Test Claim is limited to Statutes 2012, chapter 314 (AB 1606), which amended Government Code section 3505.4.

C. Government Code Section 3505.4, As Amended By Statutes 2012, Chapter 314 (AB 1606), Imposes a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.

1. Government Code Section 3505.4, as amended by the 2012 test claim statute, requires local agencies to perform activities related to the factfinding process when the employee organization requests factfinding to resolve an impasse.

As determined by the Commission in *Local Agency Employee Organizations: Impasse Procedures* (15-TC-01), the plain language of section 3505.4, prior to the 2012 test claim statute, made factfinding contingent on first voluntarily submitting a dispute to mediation. Only if mediation did not result in a settlement, then the factfinding process, when requested by the employee organization, was required to resolve the impasse. Thus, all activities triggered by the voluntary decision to engage in mediation, including factfinding, were not mandated by state law, but were downstream requirements of the prior discretionary decision to mediate.

The plain language of section 3505.4(a), as amended by the test claim statute, now allows the employee organization to unilaterally request factfinding, whether or not the dispute was submitted to voluntary mediation. Staff finds that because a local agency's participation in the factfinding process, when requested by the employee organization, is now required regardless of whether the local government chooses to mediate, it is mandated by the state. Government Code section 3506.5 provides that a public agency shall not "[r]efuse to participate in good faith in an applicable impasse procedure."[16] And the plain language of section 3505.4(a) requires the public agency to select a person to serve on the factfinding panel within five days after receipt of the employee organization's request. Thus, public agencies have no choice but to participate in the factfinding process. However, Government Code section 3505.5(e) expressly exempts charter

[13] Exhibit A, Test Claim, pages 1, 8-10, 18, 24-28.

[14] See Exhibit X, Commission Decision, *Local Agency Employee Organizations: Impasse Procedures*, 15-TC-01.

[15] Government Code section 17559; *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

[16] Government Code section 3506.5 (Stats. 2011, ch. 271 (AB 195)).

cities, charter counties, and a charter city and county from the factfinding process if their charter outlines impasse procedures that include, at a minimum, a process for binding arbitration.

Thus, except for the charter agencies described in section 3505.5(e), local agencies are mandated by the state to participate in the factfinding process. And when section 3505.4 is read in context with the other statutes in the MMBA that address the factfinding process, the following activities and costs are mandated by the state:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding 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 factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

In addition to these activities, the claimant is seeking reimbursement for holding a public impasse hearing if it chooses to implement its last, best offer; responding to inquiries by "all parties," and not just from the panel itself; and ensuring the employee organization's right to request factfinding. These activities are not mandated by the plain language of the test claim statute.

The claimant also requests reimbursement for one-time activities to train staff and update policies and procedures to comply with the test claim statute. These activities are not mandated by the plain language of the statute. However, the claimant may propose them for inclusion in parameters and guidelines as activities reasonably necessary to comply with the mandated activities, and they may be approved if supported by substantial evidence in the record.[17]

2. <u>The mandated activities constitute a new program or higher level of service.</u>

   a) The mandated activities are new, with respect to prior law, because Statutes 2012, chapter 314 is clarifying of existing law and relates back to January 1, 2012, the operative date of the regulations.

Ordinarily, "a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute…"[18] Accordingly, under this general rule, Statutes 2012, chapter 314, enacted September 14, 2012, would become operative and

[17] California Code of Regulations, title 2, sections 1183.7(d), 1187.5.

[18] California Constitution, article IV, section 8(c).

effective January 1, 2013. Since the PERB regulations became effective a year prior, and Statutes 2012, chapter 314 largely restates and follows the PERB regulations both in the timeframes articulated and in the essential structure of the mandatory requirements,[19] the factfinding provisions of Statutes 2012, chapter 314 would not impose any new requirements.[20]

However, case law, using the rules of statutory interpretation, provides that "when the Legislature clearly intends a statute to operate retrospectively, [the courts] are obliged to carry out that intent unless due process considerations prevent [them]."[21] The courts have found a later enactment will relate back to clarify existing law when there is express legislative intent language or substantial legislative history;[22] ambiguity in the prior law or inconsistency in the courts' interpretation;[23] an existing interpretation by an agency charged with administering the statute;[24] and prompt legislative action to address either a novel legal question or an undesirable judicial interpretation.[25]

Here, the evidence of legislative intent with respect to the 2012 test claim statute as clarifying of existing law is supported by the statute and the legislative history. The statute itself provides, in uncodified language in section 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."[26] This represents an express statement of Legislative intent, appearing on the face of the statute itself. And, according to the Assembly Committee on Public Employees, Retirement, and Social Security analysis regarding the need for the bill, the author of the bill states that "[a]mbiguity in the drafting of [the 2011 statute,] 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."[27] The bill author further acknowledged, "whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to

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[19] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

[20] Government Code section 3505.4(a) (Stats. 2012, ch. 314 (AB 1606)).

[21] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[22] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 245-246.

[23] *In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 257-258; *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 930; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318.

[24] *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 399-400.

[25] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; *Carter v. Department of Veterans Affairs* (2006) 38 Cal.4th 914, 923.

[26] Exhibit A, Test Claim, page 28 [Stats. 2012, ch. 314, § 2 (AB 1606)].

[27] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Committee Analysis of AB 1606, page 1 [This document contains an erroneous date of March 28, 2011; the bill was introduced February 7, 2012, and therefore the correct date is presumed to be March 28, 2012].

request fact-finding remains *unresolved*."[28] And, according to a Senate committee analysis, supporters of AB 1606 stated "[d]uring 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." [29] Finally, both committees quote the author stating: "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."[30] This interpretation is consistent with the regulations adopted by PERB.

Furthermore, Statutes 2012, chapter 314 was proposed and adopted just months after the PERB regulations took effect. The timing of the amendment can be one of the circumstances indicating the Legislature intended to validate and clarify existing law: "[o]ne such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation…"[31]

Accordingly, staff finds that Statutes 2012, chapter 314 is clarifying of existing law and relates back to January 1, 2012, the operative date of the *prior law* regarding factfinding (here, the regulations). Therefore, the activities mandated by the state are new.

b) The mandated activities are unique to local government and provide a service to the public.

Here, the MMBA, and specifically the mandatory factfinding provisions and attendant activities imposed by the test claim statute, are not a law of general application resulting in incidental costs to local government. The MMBA and the impasse procedures apply specifically and exclusively to local agencies.

In addition, the test claim statute provides a service to the public: "The overall purpose of Government Code section 3500 et seq., was to establish a procedure for discussion of working conditions, etc., by organizations representing employees who are without the traditional means of enforcing their demands by collective bargaining and striking, thus providing an alternative

[28] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Committee Analysis of AB 1606, page 2 [emphasis added].

[29] Exhibit X, Senate Public Employment and Retirement Committee, Analysis of AB 1606 as introduced on February 7, 2012, page 3 [emphasis added].

[30] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Committee Analysis of AB 1606, page 2 [emphasis added]; Senate Public Employment and Retirement Committee, Analysis of AB 1606 as introduced on February 7, 2012, page 3 [emphasis added].

[31] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243. See also, *In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 257-258 [Amendment to Family Code held to be clarifying where it was clear from both timing and express language that Legislature intended to correct an inconsistent application of the law among the courts and abrogate a poorly-supported decision by the court of appeal.

which would discourage strikes and yet serve the public employees' interests."[32] With respect to the test claim statute specifically, the bill author 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.[33]

Therefore the stated purpose of the mandatory factfinding provisions of the MMBA is to promote employer-employee relations and ensure that the parties negotiate in good faith and "work collaboratively to deliver government services in a fair, cost-efficient manner."[34] This represents a clear state policy to promote efficiency in the collective bargaining process between public employers and their employee organizations, such that public services provided by those employees and their employers may be efficiently and continuously provided.

Based on the foregoing, the test claim statute imposes a new program or higher level of service within the meaning of article XIII B, section 6.

3. The mandated activities impose costs mandated by the state.

Here, there are new state-mandated activities imposed on local agencies that are required to be performed by staff or contractors. The claimant has alleged costs totaling $327,302.64 for fiscal year 2015-2016 and $46,533.94 for fiscal year 2016-2017 for city staff participating in impasse procedures, including the City Attorney, [Human Resources] Director, and Senior HR Coordinator; as well as costs for "Contract Legal."[35] Some of these costs may go beyond the scope of the mandated activities as indicated in this Decision, but clearly exceed the $1,000 minimum requirement for filing a test claim.[36]

Additionally, no law or facts in the record support a finding that the exceptions specified in Government Code section 17556 apply to this claim. There is, for example, no law or evidence in the record that additional funds have been made available for the new state-mandated activities, or that there is any fee authority specifically intended to pay the costs of the alleged mandate.[37]

Based on the foregoing, the 2012 test claim statute results in increased costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514.

Conclusion

Based on the foregoing analysis, staff recommends the Commission partially approve this Test Claim, with a reimbursement period beginning July 1, 2015, for local agencies defined in

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[32] *Service Employees' International Union, Local No. 22 v. Roseville Community Hospital* (1972) 24 Cal.App.3d 400, 409.

[33] Exhibit X, AB 1606, Assembly Floor Analysis, Third Reading, page 2.

[34] Exhibit X, AB 1606, Assembly Floor Analysis, Third Reading, page 3.

[35] Exhibit A, Test Claim, pages 10-11.

[36] Exhibit A, Test Claim, page 11.

[37] See Government Code section 17556(d-e).

Government Code section 17518 that are eligible to claim reimbursement under article XIII B, section 6 of the California Constitution[38] (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)), for the following reimbursable state-mandated activities and costs:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding 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 factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

All other activities and costs alleged in the Test Claim are denied.

Staff Recommendation

Staff recommends the Commission adopt the Proposed Decision to partially approve this Test Claim and authorize staff to make any technical, non-substantive changes following the hearing.

[38] Government Code section 17518 defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." However, the courts have made it clear that only those local agencies subject to the tax and spend provisions of articles XIII A and XIII B are eligible to claim reimbursement under article XIII B, section 6. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763 [quoting *County of San Diego v. State of California*, *supra*, 15 Cal.4th 68, 81]; *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282 [Redevelopment agencies cannot assert an entitlement to reimbursement under article XIII B, section 6, while enjoying exemption from article XIII B's spending limits.].)

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) And Statutes 2012, Chapter 314 (AB 1606) Filed on May 12, 2017 By City of Oxnard, Claimant	Case No.: 16-TC-04 *Local Agency Employee Organizations: Impasse Procedures II* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted May 25, 2018*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on May 25, 2018. [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/partially approve/deny] the Test Claim by a vote of [vote count will be included in the adopted Decision], as follows:

Member	**Vote**
Lee Adams, County Supervisor	
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	
Carmen Ramirez, City Council Member	
Jacqueline Wong-Hernandez, Representative of the Director of the Department of Finance, Chairperson	

Summary of the Findings

This Test Claim alleges reimbursable state-mandated activities arising from amendments to the Meyers-Milias-Brown Act (MMBA) by Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606).[39] The Test Claim statutes added a factfinding procedure after a local agency and an employee organization reach an impasse in their collective bargaining negotiations.

The Test Claim is timely filed pursuant to Government Code section 17551 and section 1183.1 of the Commission's regulations. A test claim must be filed not later than 12 months after the effective date of the statute or executive order, or within 12 months of the date costs are first incurred. At the time of filing, Commission regulations defined "within 12 months" for purposes of filing based on the date costs are first incurred to mean by the end of the fiscal year (June 30) following the fiscal year in which costs were first incurred. This Test Claim was filed May 12, 2017, based on costs first incurred May 12, 2016, and is therefore timely.

The Commission, however, does not have jurisdiction to reconsider its prior decision denying Statutes 2011, chapter 680 (*Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01). Therefore the Commission's jurisdiction in this Test Claim is limited to Statutes 2012, chapter 314, which amended Government Code section 3505.4.

Government Code section 3505.4, as amended by the 2012 test claim statute, authorizes an employee organization to request factfinding whether or not the parties previously engaged in voluntary mediation. The Commission finds that section 3505.4, as amended by the 2012 test claim statute, imposes state-mandated activities and costs when the employee organization requests factfinding. The mandated activities are new, with respect to prior law, because Statutes 2012, chapter 314 is clarifying of existing law and relates back to the January 1, 2012 operative date of the existing regulations. In addition, the statute is uniquely imposed on local government and provides a service to the public and, therefore, constitutes a new program or higher level of service. Finally, claimant has experienced increased costs mandated by the state within the meaning of Government Code section 17514 and no exceptions in Government Code section 17556 apply to deny this Test Claim.

Accordingly, the Commission partially approves this Test Claim, with a reimbursement period beginning July 1, 2015, for local agencies defined in Government Code section 17518 that are eligible to claim reimbursement under article XIII B, section 6 of the California Constitution (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)), for the following reimbursable state-mandated activities and costs:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay

[39] Claimant did not plead the Public Employment Relations Board's regulations implementing Statutes 2011, chapter 680, which were effective January 1, 2012.

half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)

- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding 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 factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

All other activities and costs alleged in the Test Claim are denied.

COMMISSION FINDINGS

I. Chronology

10/09/2011	Statutes 2011, chapter 680 was enacted.
01/01/2012	Effective date of Statutes 2011, chapter 680.
01/01/2012	Effective date of PERB emergency regulations.[40]
07/30/2012	OAL approved PERB's timely Certificate of Compliance, making the emergency regulations permanent.[41]
09/14/2012	Statutes 2012, chapter 314 was enacted.
05/12/2016	Date the claimant alleges it first incurred costs under Statutes 2011, chapter 680.[42]
05/12/2017	The claimant filed the Test Claim with the Commission.[43]
10/18/2017	Department of Finance (Finance) filed comments on the Test Claim.[44]
11/20/2017	The claimant filed late rebuttal comments.[45]

[40] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, pages 99; 106.

[41] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 218.

[42] Exhibit A, Test Claim, page 10.

[43] Exhibit A, Test Claim, page 1. If the Test Claim is approved by the Commission, the period of reimbursement would begin July 1, 2015, pursuant to Government Code section 17557(e).

[44] Exhibit B, Department of Finance's Comments on Test Claim.

[45] Exhibit C, Claimant's Late Rebuttal Comments.

03/23/2018 Commission staff issued the Draft Proposed Decision.[46]

II. Background

This Test Claim addresses Statutes 2011, chapter 680, and Statutes 2012, chapter 314, which amended the Meyers-Milias-Brown Act to add a factfinding procedure after a local agency and an employee union reach an impasse in negotiations.

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.[47]

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.[48] 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

[46] Exhibit D, Draft Proposed Decision.

[47] 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).)

[48] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.[49]

The courts have interpreted the duty to meet and confer on terms and conditions of employment to include all matters "directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls."[50] "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."[51] Accordingly, the scope of the MMBA is held to be very broad, and an impasse may occur on any matter that is subject to the expansive scope of collective bargaining.

Meeting and conferring is intended to result in a tentative agreement which, if adopted, is formalized into a Memorandum of Understanding (MOU).[52] From 1969 to 2013, the relevant provision of the Act, which was not amended by the test claim statutes, 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.[53]

2. <u>The Impasse Provisions of the Meyers-Milias-Brown Act, Under Prior Law, Were Limited to Voluntary Mediation.</u>

An "impasse" occurs when "despite the parties best efforts to achieve an agreement, neither

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[49] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

[50] *San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, 9 [quoting *International Association of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board* (2011) 51 Cal.4th 259, 272].

[51] *San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, 9.

[52] Government Code section 3505.1.

[53] Government Code section 3505.1. The quoted language was in effect from 1969 to 2013. After the test claim statutes were 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.

party is willing to move from its respective position."[54]

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 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."[55] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[56] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[57]

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 statutes) 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."[58] "Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization

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[54] *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 827.

[55] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[56] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[57] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[58] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

to agree to mediation but not to fact-finding or binding arbitration."[59]

B. Statutes 2011, Chapter 680

1. The Plain Language Statutes 2011, Chapter 680

Statutes 2011, chapter 680, effective January 1, 2012, contains four provisions. In Section One, the statute repeals the pre-existing version of Government Code section 3505.4, which read:[60]

> 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.[61]

In Section Two, the 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

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[59] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

[60] Statutes 2011, chapter 680, section 1.

[61] Statutes 2000, chapter 316, section 1.

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.[62]

In Section Three, the 2011 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

[62] Government Code section 3505.4 (Stats. 2011, ch. 680 (AB 646)).

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.[63]

In Section Four, 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.[64]

2. The Legislative History of Statutes 2011, Chapter 680 (AB 646)

The legislative history of AB 646 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. 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 AB 646 quotes the bill's author, Assembly Member Toni G. Atkins, who recognized that the Meyers-Milias-Brown Act, in its then-current form, did not mandate factfinding or any other form of impasse procedure stating: "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate

[63] Government Code section 3505.5 (Stats. 2011, ch. 680 (AB 646)).

[64] Government Code section 3505.7 (Stats. 2011, ch. 680 (AB 646)).

a collective bargaining agreement have failed."[65]

However, although Assembly Member Atkins argued in favor of the perceived benefits of *mandatory* impasse procedures stating that "[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,"[66] 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,"[67] 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."[68]

The author agreed to a series of amendments, which the Committee memorialized 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.
>
> 3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.[69]

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. . . . .

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[65] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[66] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[67] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2.

[68] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3.

[69] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3, emphasis added.

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."[70]

3. Critiques of Statutes 2011, Chapter 680

Almost immediately after enactment, Statutes 2011, Chapter 680 was criticized on the grounds that, while the author's intent had been to make factfinding mandatory under the Meyers-Milias-Brown Act, the statute as enacted merely made factfinding voluntary, not mandatory.

AB 646, as enacted, stated 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:

> 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

[70] Exhibit X, Senate Rules Committee, Floor Analysis of AB 646, as amended on June 22, 2011, pages 2-3.

procedures are permissive, but not necessarily required.[71]

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."[72] "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."[73] "Can factfinding be avoided by not agreeing to mediation?"[74] "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."[75]

C. PERB Emergency Regulations, Effective January 1, 2012

1. The Plain Language of PERB Emergency Regulations

After the enactment of Statutes 2011, chapter 680 (AB 646) PERB adopted emergency regulations to address whether the factfinding process was required if the parties had not gone through mediation. As discussed above, the issue of whether factfinding was mandated by the 2011 statute was the subject of some dispute and confusion. PERB filed the emergency rulemaking package with the Office of Administrative Law (OAL) on December 19, 2011.[76]

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[71] Exhibit X, Edward Ellis and Jill Albrecht, "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.

[72] Exhibit X, Renne Sloan Holtzman Sakai LP, Navigating the Mandatory Fact-Finding Process Under AB 646 [November 2011], pages 4, 11, http://www.pccfacultyassociation.org/wp-content/uploads/2012/09/fact_finding.pdf, accessed November 9, 2016.

[73] 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 2, 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.

[74] 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.

[75] 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.

[76] Exhibit X, Senate Committee on Public Employment and Retirement, Analysis of AB 1606, as introduced February 7, 2012, page 2.

The emergency regulations became operative on January 1, 2012[77] — the same date that AB 646 became effective.[78] The emergency regulations became permanent after PERB transmitted a Certificate of Compliance to OAL on or about June 22, 2012.[79]

Section 32802 of the regulations makes factfinding available at the option of the employee organization's representative whether or not an impasse has been submitted to mediation. Section 32802 provides:

> 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

[77] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2011, No. 52.

[78] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 106.

[79] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2012, No. 31; Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 330.

to the Board itself.[80]

Thus, section 32802(a)(1) specifies a timeline for the initiation of factfinding after mediation, and section 32802(a)(2) specifies a timeline for the initiation of factfinding when mediation has not occurred.

2. The Dispute Surrounding the PERB Emergency Regulations

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.[81] PERB also held formal meetings in its Sacramento headquarters about the regulations on December 8, 2011, and April 12, 2012.[82] At these meetings, whether Statutes 2011, chapter 680 mandated factfinding in the absence of mediation was questioned. At one of the 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."[83]

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."[84] 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."[85] As noted, OAL ultimately approved the regulations.[86]

According to PERB Minutes, Mr. Chisholm, the Division Chief of PERB's Office of General

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[80] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

[81] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, pages 177-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 4-8).

[82] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, pages 178-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5-8); Exhibit X, Minutes, Public Employment Relations Board Meeting, April 12, 2012, pages 6-7.

[83] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 180 [emphasis added] (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[84] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[85] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[86] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 330.

Counsel, "stated that AB 646 provides, for the first time, a mandatory impasse procedure under the MMBA."[87] Mr. Chisholm stated that AB 646 "established a mandatory factfinding procedure under the MMBA that did not exist previously."[88] "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."[89]

During the period of time when the emergency regulations were being reviewed by OAL, the City of San Diego submitted comments arguing that section 32802(a) was inconsistent with AB 646 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.[90] "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."[91]

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 . . . ."[92] 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."[93] PERB also argued that, since the test claim statute repealed

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[87] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 178 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 5).

[88] Exhibit X, Minutes, Public Employment Relations Board Meeting, April 12, 2012, page 6.

[89] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 179 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 6).

[90] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, 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).

[91] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, 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).

[92] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 124 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 1).

[93] Exhibit X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

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 mandatory step in the process which leads to the ability of the employer to implement its last, best, and final offer.[94]

D. Statutes 2012, Chapter 314 (AB 1606), Effective January 1, 2013.[95]

1. The Plain Language of Statutes 2012, Chapter 314

Statutes 2012, chapter 314 (AB 1606), enacted on September 14, 2012, contains two sections. Section One codifies the timelines and language contained in PERB Regulation 32802(a) and provides, as did the PERB Regulation, that an employee organization may demand factfinding whether or not mediation has occurred. Government Code section 3505.4(a) is amended 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.

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[94] "[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 X, PERB Response to Commission Request for the Rulemaking Files, August 26, 2016, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2).

[95] Statutes 2012, chapter 314 did not state that it was an urgency statute, and therefore its effective date is January 1 of the following calendar year. (California Constitution, article IV, section 8(c).) However, as discussed herein, Section Two of the bill states that it is intended to be clarifying of existing law, which would indicate an intent that the statute operate retrospectively. This issue is discussed further below.

Section Two makes a finding that the legislation is technical and clarifying of existing law, 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.

2. The Legislative History of Statutes 2012, Chapter 314

The analysis of the Assembly Committee on Public Employees, Retirement, and Social Security, quotes the author of AB 1606 stating, "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."[96]

According to the Assembly committee analysis, the author stated, prior to the PERB regulations being made permanent, "the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains unresolved."[97] And, according to the committee analysis, supporters of AB 1606 stated:

> 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.[98]

Finally, the committee analysis quotes the author stating: "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."[99] This interpretation is consistent with the regulations adopted by PERB.

According to the Senate Public Employment and 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

[96] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1.

[97] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1.

[98] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, pages 1-2.

[99] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1.

notice of the declaration of impasse."[100]

E. The Prior Test Claim Filed on Statutes 2011, Chapter 680 (AB 646) (15-TC-01, adopted January 27, 2017)

On January 27, 2017 Commission denied the Test Claim filed by the City of Glendora filed on Government Code sections 3505.4, 3505.5, and 3505.7, as amended by Statutes 2011, chapter 680 (AB 646), (*Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01).[101] The record of that Test Claim indicated that the claimant pled only Statutes 2011, chapter 680 (AB 646), and the Commission took jurisdiction only as to that statute. Though claimant did not plead the PERB regulations or the later enacted 2012 statute, at the hearing on 15-TC-01 the claimant acknowledged the emergency regulations issued by PERB and the subsequent amendments made by AB 1606 (the 2012 statute), but stated "the intent and the effect of AB 646 was always clear that it was mandatory for an employer to go to fact-finding, should it be requested by the employee organization… [a]nd to say not that it's not mandatory or that Glendora has some choice about going to fact-finding or not…it leads to an absurd result."[102] In addition, the claimant focused entirely on the perspective that in 2015, when it experienced an impasse with one of its employee organizations, the claimant engaged in a factfinding process "not because it wanted to, but because it was required to under section 3505.4 of the Government Code."[103] The claimant argued "*that statute*, 3505.4, was pled in our test claim."[104]

The Commission denied the Test Claim on the ground that Government Code section 3505.4, as amended by Statutes 2011, chapter 680, did not impose a state-mandated program. The plain language of Government Code section 3505.4 as amended by that test claim statute made factfinding, and all activities triggered by the factfinding request (as provided in sections 3505.5 and 3505.7), required *only* if an impasse is voluntarily submitted to mediation. Thus, the 2011 statute did not legally compel local agencies to engage in factfinding or any of the activities required in conjunction with the factfinding process. In addition, there was no evidence in the record that the claimant or any other local agency was, as a practical matter, compelled to engage in factfinding. Finally, the requirement to hold a public hearing before the implementation of a last, best, and final offer, as provided in Government Code section 3505.7, does not legally compel local agencies to hold a public hearing because the implementation of a last, best and final offer is a voluntary act.[105]

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[100] Exhibit X, Senate Committee on Public Employment and Retirement, Analysis of AB 1606 as introduced February, 7, 2012 [emphases omitted], page 2.

[101] Exhibit X, Decision adopted January 27, 2017, on *Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01.

[102] Exhibit X, Excerpt of Transcript of Commission Hearing, January 27, 2017, page 8.

[103] Exhibit X, Excerpt of Transcript of Commission Hearing, January 27, 2017, page 6.

[104] Exhibit X, Excerpt of Transcript of Commission Hearing, January 27, 2017, page 7 [Emphasis added. Claimant's testimony and argument during the hearing may reflect a misunderstanding of the distinction between a code section and a "statute."].

[105] Exhibit X, Commission Decision adopted January 27, 2017, on *Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01.

III. Positions of the Parties and Interested Person

A. City of Oxnard

The claimant alleges that Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606), read together, "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."[106] In addition, "[t]hese bills 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."[107] In other words, factfinding, and related activities described in the test claim statutes, are mandatory on the local government, at the option of the public employee union.

Claimant alleges specific new activities and costs under Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606), including:

- Selecting a member of the factfinding panel and a mutually agreeable chairperson;
- Participating in factfinding hearings, including providing documentation as requested;
- Reviewing and making publicly available the findings of the panel within 10 days of receipt;
- Paying for half the costs of the factfinding;
- Providing notice of an impasse hearing, and holding a public impasse hearing, before implementing the agency's last, best, and final offer;
- Meet and confer with the public employee union and "submit/resubmit last, best offer."[108]
- Train staff on new requirements;
- Revise local agency manuals, policies and guidelines related to new factfinding requirements;
- Update policies and procedures, as well as city codes or resolutions, to comply with AB 1606;
- Train staff on "updated employee organization impasse process/rights/rules updated by [AB] 1606."[109]

The claimant alleges that it first incurred costs for these activities on May 12, 2016, and during fiscal year 2015-2016, the total costs were $327,302.63.[110] During fiscal year 2016-2017,

[106] Exhibit A, Test Claim, page 3.

[107] Exhibit A, Test Claim, page 3.

[108] Exhibit A, Test Claim, pages 8-9.

[109] Exhibit A, Test Claim, pages 9-10.

[110] Exhibit A, Test Claim, page 10.

alleged costs of $46,533.94 were incurred.[111]

Finally, claimant argues that the new activities and costs alleged are uniquely imposed on local government, and are intended to carry out a state policy of requiring uniform impasse procedures for local governments when negotiating with their employee unions.[112]

B. Department of Finance

Finance argues that the Test Claim does not allege a new program or higher level of service, because "[w]hen a local agency participates in a fact-finding panel with a public employee organization to resolve disputes concerning employment conditions, the local agency is not providing a service to the public."[113] In addition, Finance argues that the test claim statutes do not create a new program, but instead "add a new fact-finding element to the existing collective bargaining program."[114]

Finance further argues that the one-time costs for training and revising local agency manuals and policies to comply with the test claim statutes are not required by the plain language of the test claim statutes. Finance refers to the Commission's Decision in a prior test claim *Binding Arbitration*, 01-TC-07, in which the Commission found that training agency staff and management was not required.[115]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> 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."[116] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[117]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

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[111] Exhibit A, Test Claim, page 11.

[112] Exhibit A, Test Claim, pages 12-13.

[113] Exhibit B, Department of Finance's Comments on the Test Claim, page 2.

[114] Exhibit B, Department of Finance's Comments on the Test Claim, page 2.

[115] Exhibit B, Department of Finance's Comments on the Test Claim, page 2.

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

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

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[118]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[119]
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.[120]
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.[121]

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 of the California Constitution.[122] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[123] In making its decisions, the Commission must strictly construe article 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."[124]

A. This Test Claim is Timely Filed Pursuant to Government Code Section 17551 and California Code of Regulations, Title 2, Section 1183.1.

Government Code section 17551(c) provides that test claims "shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of

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[118] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[119] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[120] *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.

[121] *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; Government Code sections 17514 and 17556.

[122] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[123] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

[124] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

incurring increased costs as a result of a statute or executive order, whichever is later."[125] The Commission's regulations effective at the time this claim was filed provided that "[f]or purposes of claiming based on the date of first incurring costs, 'within 12 months' means by June 30 of the fiscal year following the fiscal year in which increased costs were first incurred by the test claimant."[126]

This Test Claim was filed on May 12, 2017, more than five years after the effective date of the earlier of the two test claim statutes.[127] However, the claimant alleges costs were first incurred on May 12, 2016.[128] Therefore, the fiscal year in which costs were first incurred, for purposes of the Commission's regulations, is fiscal year 2015-2016, and the claimant had until June 30 of fiscal year 2016-2017 to file its claim. A May 12, 2017 filing is therefore timely.

B. The Commission Does Not Have Jurisdiction to Reconsider Its Prior Final, Binding Decision on Statutes 2011, Chapter 680; the Commission's Jurisdiction Is Limited to Statutes 2012, Chapter 314, Which Amended Government Code Section 3505.4.

This Test Claim pleads Statutes 2011, chapter 680 (AB 646) and Statutes 2012, chapter 314 (AB 1606).[129]

The Commission, however, does not have jurisdiction to re-hear and decide Statutes 2011, chapter 680. As indicated in the Background, the City of Glendora filed a Test Claim on that statute on June 2, 2016, which the Commission denied on the grounds that Statutes 2011, chapter 680 did not impose any state-mandated activities. (*Local Agency Employee Organizations: Impasse Procedures,* 15-TC-01, adopted January 27, 2017.) Successive test claims on the same statute are not permitted under the Government Code. Government Code section 17521 defines a "test claim" as "the *first claim filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state…*"[130] Accordingly, the Commission may only accept and decide, under the Government Code, the first claim filed alleging state-mandated costs from a particular statute or executive order. Moreover, the Commission's decision in *Local Agency Employee Organizations: Impasse Procedures* (15-TC-01) is a final, binding decision that cannot be reconsidered by the Commission.[131]

Based on the foregoing, the Commission's jurisdiction with respect to this Test Claim is limited to Statutes 2012, chapter 314 (AB 1606), which amended Government Code section 3505.4.

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[125] Government Code section 17551(c) (Stats. 2007, ch. 329).

[126] California Code of Regulations, title 2, section 1183.1(c) (Register 2016, No. 38).

[127] Exhibit A, Test Claim, page 1.

[128] Exhibit A, Test Claim, page 10.

[129] Exhibit A, Test Claim, pages 1, 8-10, 18, 24-28.

[130] Government Code section 17521 (Stats. 2007, ch. 329) (Emphasis added.).

[131] Government Code section 17559; *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

C. Government Code Section 3505.4, as Amended by Statutes 2012, Chapter 314 (AB 1606), Imposes a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.

As described below, the Commission finds that Government Code section 3505.4, as amended by the 2012 test claim statute, imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

1. Government Code Section 3505.4, as amended by the 2012 test claim statute, requires local agencies to perform activities related to the factfinding process when the employee organization requests factfinding to resolve an impasse.

As determined by the Commission in *Local Agency Employee Organizations: Impasse Procedures*, 15-TC-01, the plain language of section 3505.4, prior to the 2012 test claim statute, made factfinding contingent on first voluntarily submitting a dispute to mediation. Only if mediation did not result in a settlement, then the factfinding process, when requested by the employee organization, was required to resolve the impasse. Thus, all activities triggered by the voluntary decision to engage in mediation, including factfinding, were not mandated by the state but were instead triggered by the local agency's discretionary decision to mediate.

The plain language of section 3505.4, as amended by Statutes 2012, chapter 314, now requires local agency employers to submit to factfinding when requested by the employee organization whether or not the dispute has been first submitted to voluntary mediation; either 30 to 45 days after the appointment or selection of a mediator, or if the dispute is not submitted to mediation, 30 days after the impasse in negotiations is noticed by either party:

> 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.[132]

Accordingly, the plain language of section 3505.4(a), as amended by the test claim statute, now allows the employee organization to unilaterally request factfinding, whether or not the dispute was submitted to voluntary mediation. The Commission finds that a local agency's participation in the factfinding process, when requested by the employee organization, is required and mandated by the state. Government Code section 3506.5 provides that a public agency shall not "[r]efuse to participate in good faith in an applicable impasse procedure."[133] And the plain

[132] Government Code section 3505.4 (as amended by Stats. 2012, ch. 314 (AB 1606)).

[133] Government Code section 3506.5 (Stats. 2011, ch. 271 (AB 195)).

language of section 3505.4(a) requires the public agency to select a person to serve on the factfinding panel within five days after receipt of the employee organization's request. Thus, public agencies have no choice but to participate in the factfinding process. However, Government Code section 3505.5(e) expressly exempts charter cities, charter counties, and a charter city and county from the factfinding process *if their charter outlines impasse procedures that include, at a minimum, a process for binding arbitration*.[134]

Thus, except for the charter agencies described in section 3505.5(e), local agencies are mandated by the state to participate in the factfinding process.[135]

Further analysis is required, however, to determine what factfinding activities are mandated by the state. Under the rules of statutory construction, the plain language of the test claim statute must be construed in the context of the statute as a whole and the overall statutory scheme, and the courts give "significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose."[136]

As indicated above, section 3505.4(a) states that

> 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.[137]

Accordingly, the local agency employer must select a person to serve on the factfinding panel, and PERB will select a chairperson.[138] Section 3505.4(b) provides that within five days after PERB selects a chairperson, the parties may mutually agree on an alternate chairperson.[139] There is no express provision governing one party's unilateral disapproval of the chairperson selected by PERB, as implied by the claimant; the section only provides that the parties may

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[134] Government Code section 3505.5(e) states the following: "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."

[135] See also, *San Diego Housing Commission v. Public Employment Relations Board* (2016) 256 Cal.App.4th 1, 9, addressed the factfinding process and stated that "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."

[136] *People v. Canty* (2004) 32 Cal.4th 1266, 1277.

[137] Government Code section 3505.4(a) (Stats. 2011, ch. 680 (AB 646)).

[138] The PERB regulations state that "the Board shall request that each party provide notification of the name and contact information of its panel member within *five working days*."

[139] Government Code section 3505.4(b) (Stats. 2011, ch. 680 (AB 646)).

mutually agree on an alternate chairperson.[140] Section 3505.5 then addresses the costs of factfinding and provides that the costs of the chairperson, whether selected by PERB[141] or agreed to by the parties,[142] including per diem fees and travel expenses, as well as any other "mutually incurred costs,"[143] shall be shared equally by the parties, but the costs of the panel member selected by each party shall be borne by that party only.[144]

Therefore, reading the sections together, the test claim statute requires the local agency employer, upon receiving a written request for factfinding, to select its panel member, whose costs it will bear; and to pay half the costs of the chairperson, including per diem fees, if any, whether the chairperson is selected by PERB or mutually agreed upon by the parties; and half of any other "mutually incurred costs."[145]

Section 3505.4(c) then provides that the factfinding panel shall meet with the parties or their representatives within 10 days, and shall make inquiries and hold investigations, and shall have subpoena power.[146] Although this requirement is directed to the factfinding panel itself, local agencies are also required to meet with the factfinding panel, pursuant to their responsibility under section 3505 to meet and confer in good faith "regarding wages, hours, and other terms and conditions of employment..."[147] Accordingly, the Commission finds that meeting with the factfinding panel within 10 days is a requirement of section 3505.4(c).

Section 3505.4(c) further provides that "[a]ny 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."[148] This provision imposes a requirement to "furnish the panel" certain documentation and information, but it is not clear what entities are meant to be subject to this requirement. Counties

[140] The claimant alleges a requirement that the agency must select a different chairperson if the PERB-selected chair is "not approved by other party." (Exhibit A, Test Claim, page 9.)

[141] Government Code section 3505.5(b) (Stats. 2011, ch. 680 (AB 646)).

[142] Government Code section 3505.5(c) (Stats. 2011, ch. 680 (AB 646)).

[143] Government Code section 3505.5(d) (Stats. 2011, ch. 680 (AB 646)).

[144] Government Code section 3505.5(b-d) (Stats. 2011, ch. 680 (AB 646)).

[145] Government Code section 3505.4(a-b); 3505.5(b-d).

[146] Government Code section 3505.4 (Stats. 2012, ch. 314 (AB 1606)).

[147] Government Code section 3505 (Stats. 1971, ch 1676). See also, *San Diego Housing Commission v. Public Employment Relations Board* (2016) 246 Cal.App.4th 1, 9 [Duty to bargain extends to matters beyond what might typically be incorporated into a comprehensive MOU, including, implementation and effects of a decision to lay off employees.].

[148] Government Code section 3505.4 (Stats. 2012, ch. 314 (AB 1606)).

are generally held to be "political subdivisions" of the state,[149] but cities and special districts are not always viewed the same.[150] Courts have at times considered both cities and counties to be "political subdivisions of the state" with respect to the operation of specific statutes, when the Legislative intent is apparent.[151]

Here, the Assembly Floor Analysis of AB 646 (which added section 3505.4(c)) stated that the bill would require "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."[152] This is consistent with the broad coverage of the MMBA as a whole: section 3501 defines a "public agency" subject to the Act to 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."[153] Therefore, despite the lack of clarity in the statutory language, it appears that the legislative intent was that all state and local agencies would "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." Moreover, as stated, all local agencies subject to the act are required to meet and confer in good faith.[154] It would be incongruous, and potentially leading to absurd results, to interpret the requirements of section 3505.4(c) to apply to counties, but not cities and special districts. That would mean that counties would be required to furnish documents and information upon request, while cities and other local agencies could withhold information absent the exercise of the panel's subpoena power. Reading the MMBA as a whole, and in light of the legislative history, the more sensible interpretation is that all local agencies subject to the Act and to factfinding in the event of an impasse are subject to the requirement of section 3505.4(c) to provide documentation and information within their control "upon request." Accordingly, the Commission finds that all local agencies, other than charter cities and charter counties exempt from factfinding under section 3505.5(e), must furnish the panel, upon request, with all documents and information in their possession relating to any matter under investigation by the panel.

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[149] California Constitution, article XI, section 1 ["The State is divided into counties which are legal subdivisions of the State."]; *Dineen v. City and County of San Francisco* (1940) 38 Cal.App.2d 486.

[150] *Griffin v. Colusa County* (1941) 44 Cal.App.2d 915, 920 ["Counties are state agencies which exercise within their boundaries the sovereignty of the state, and in the absence of a specific statute imposing liability upon them they are no more liable than the state itself. Cities, however, are municipal corporations and not state agencies."]

[151] See, e.g., *State ex rel. Harris v. PricewaterhouseCoopers, LLP* (2006) 39 Cal.4th 1220 [noting definition of "political subdivision" in Government Code section 12560 permits a city attorney, on behalf of the city, to bring suit under the California False Claims Act].

[152] Exhibit X, AB 646 Assembly Floor Analysis, as amended June 22, 2011, page 1.

[153] Government Code section 3501 (Stats. 2003, ch. 215).

[154] Government Code section 3505 (Stats. 1971, ch. 1676).

Section 3505.4(d) outlines some of the criteria that the panel is to consider, including:

> (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.[155]

These criteria are not, themselves, required activities, but help to illuminate the kinds of documents, records, or other evidence that would be requested by the panel, for purposes of the activity to "furnish, upon request."[156]

The claimant asserts that an agency must respond "to inquiries by all parties,"[157] but the plain language of section 3505.4(c) only requires claimant to "furnish the *panel*, upon its request," records and information relating to the panel's investigation. Moreover, the general requirement to participate in good faith is not sufficient in itself to impose a plain language requirement to "respond to inquiries by all parties…" Thus, section 3505.4(d) provides for the scope of the panel's inquiry (though non-inclusive, pursuant to paragraph (8), above), but nothing in section 3505.4(c) or (d) requires the agency to respond to inquiries from "all parties."

Section 3505.5(a) provides that 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 factfinding panel shall make written advisory findings of fact and recommend terms of settlement, which the agency shall make publicly available within ten days.[158]

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[155] Government Code section 3505.4(d)(1-8) (Stats. 2012, ch. 314).

[156] Government Code section 3505.4(d) ["In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria…"].

[157] Exhibit A, Test Claim, page 9.

[158] Government Code section 3505.5(a) (Stats. 2011, ch. 680 (AB 646)).

Accordingly, Government Code section 3505.4, as amended by the 2012 test claim statute, results in the following state-mandated activities for local agencies eligible to claim reimbursement under article XIII B, section 6 (other than charter cities or counties with a charter prescribing binding arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)):

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding 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 factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

In addition to these activities, the claimant is seeking reimbursement to meet with the union and hold a public impasse hearing, after the factfinding process, *if it chooses* to impose its last, best offer."[159] Government Code section 3505.7, as amended by Statutes 2011, chapter 646, provides 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." As indicated above, the Commission fully addressed this statute in *Local Agency Employee Organizations: Impasse Procedures*, 15-TC-01, and denied the activity on the ground that imposing the last, best, and final offer is a voluntary decision of the local agency and is not mandated by the state. That Decision is a final, binding Decision and cannot be reconsidered by the Commission.[160] Thus, reimbursement is not required for these requested activities.

Furthermore, the claimant alleges that it is required under the test claim statute to "[p]rocess procedural right of an employee organization to request a factfinding panel…"[161] Government Code section 3505.4(e) provides that the "procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived."[162] But this provision is phrased in prohibitive, rather than mandatory language; there is nothing in the plain language

[159] Exhibit A, Test Claim, pages 8-9.

[160] Government Code section 17559; *California School Boards Assoc. v. State of California* (2009) 171 Cal.App.4th 1183, 1200.

[161] Exhibit A, Test Claim, page 9.

[162] Government Code section 3505.4 (Stats. 2012, ch. 314 (AB 1606)).

that requires the local agency employer to take any affirmative action to safeguard the "procedural right" of an employee organization to request a factfinding panel. Nor is there anything in the plain language that requires the local agency employer to "ensure" that those rights are not waived. Section 3505.4(e) does not impose an activity on the local agency employer. Thus, reimbursement is not required for this requested activity.

Finally, the claimant requests reimbursement for the one-time costs for training and updating policies and procedures.[163] These activities are not mandated by the plain language of the test claim statute. However, such activities may be proposed for inclusion in parameters and guidelines, and may be approved by the Commission if they are supported by evidence in the record as reasonably necessary activities.[164]

2. The mandated activities constitute a new program or higher level of service.

A mandated activity must be new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order, and provide a service to the public, in order to be eligible for reimbursement under article XIII B, section 6.[165] Here, PERB promulgated emergency regulations prior to the enactment of Statutes 2012, chapter 314, which Statutes 2012, chapter 314 substantially restated and recodified. Accordingly, the mandatory provisions of Statutes 2012, chapter 314 do not appear, facially, to require anything new. However, the statute also provides that it is intended to be clarifying of existing law, and thus it relates back to the date of the regulations, if that provision is given full effect. As described below, the CSM finds that the mandate activities are new, with respect to prior law, and constitute a new program or higher level of service.

a) The mandated activities are new, with respect to prior law, because Statutes 2012, chapter 314 is clarifying of existing law and relates back to January 1, 2012, the operative date of the regulations.

Ordinarily, "a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed."[166] Accordingly, under this general rule, Statutes 2012, chapter 314, enacted September 14, 2012, would become operative and effective January 1, 2013. Since the PERB regulations became effective a year prior, on January 1, 2012, and required factfinding whether or not the parties went through mediation to resolve their disputes, the factfinding provisions of Statutes 2012, chapter 314, which includes the same language, would not impose any new requirements. Statutes 2012, chapter 314 largely restates and follows the PERB regulations both in the timeframes articulated and in the essential structure of the mandatory requirements. Section 32802 of the PERB regulations states:

(a) An exclusive representative may request that the parties' differences be

[163] Exhibit A, Test Claim, page 10.

[164] California Code of Regulations, title 2, sections 1183.7(d), 1187.5.

[165] *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.

[166] California Constitution, article IV, section 8(c).

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.[167]

Section 3505.4 as amended by the 2012 test claim statute provides:

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.

[¶…¶]

[167] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

(e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.[168]

Thus, section 3505.4, as amended by Statutes 2012, chapter 314 substantially restates and codifies the regulation in question, and does not, on its face, impose any new or additional requirements. If Statutes 2012, chapter 314 is operative on January 1, 2013, in accordance with the general rule, the Commission would be compelled to find that the PERB regulations, effective January 1, 2012, impose the mandate, and the test claim statute does not impose anything new, with respect to prior law. And, since the regulations have not been pled, this Test Claim would then be denied.

However, in uncodified section 2, Statutes 2012, chapter 314 (AB 1606) also expressly states that the amendments to section 3505.4 are intended to be *technical* and *clarifying* of existing law.[169] If taken at face value, that provision could mean the amendments relate back to the operative date of the *prior law* regarding factfinding (here, the regulations).

The meaning and effect of a statute must be analyzed using the canons of construction. Foremost among them is to ascertain the intent of the Legislature.[170] All other rules of statutory construction "are subject to the controlling principle that the object and purpose of all interpretation is to arrive at the intent of the legislature."[171] In ascertaining intent, "[w]e look first to the words of the statute because they are the most reliable indicator of legislative intent."[172] If the plain language of the statute "answers the question, that answer is binding unless we conclude the language is ambiguous or it does not accurately reflect the Legislature's intent."[173] There is a presumption against the retroactive application of statutes, "rooted in constitutional principles" of due process and the prohibition against *ex post facto* application of penal laws.[174] Statutes therefore "do not operate retrospectively unless the Legislature plainly intended them to do so."[175]

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[168] Statutes 2012, chapter 314 (AB 1606).

[169] Statutes 2012, chapter 314 (AB 1606), § 2.

[170] *Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265, 1271. See also, *Yoshisato v. Superior Court* (1992) 2 Cal.4th 978, 989. See also *Mannheim v. Superior Court* (1971) 3 Cal.3d 678 [The canon of construction which "counsels that 'statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent'…*expressly subordinates its effect* to the most fundamental rule of construction, namely that a statute must be interpreted so as to effectuate legislative intent."].

[171] *In re Potter's Estate* (1922) 188 Cal. 55, 75.

[172] *Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265, 1271 [citing *In re J.W.* (2002) 29 Cal.4th 200, 209].

[173] *Palmer v. GTE California, Inc*. (2003) 30 Cal.4th 1265, 1271

[174] *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [citing *Landgraf v. USI Film Products (*1994) 511 U.S. 244].

[175] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

But "when the Legislature clearly intends a statute to operate retrospectively, [the courts] are obliged to carry out that intent unless due process considerations prevent [them]."[176] The courts have found a later enactment clarifying of existing law when there is express legislative intent language or substantial legislative history that the change is clarifying of existing law, rather than a substantive change in law;[177] ambiguity in the prior law or inconsistency in the courts' interpretation;[178] an existing interpretation by an agency charged with administering the statute;[179] and prompt legislative action to address either a novel legal question or an undesirable judicial interpretation.[180]

One of the seminal cases is *Western Security Bank v. Superior Court*, where the Legislature amended several provisions of the Code of Civil Procedure and the Civil Code with the express intent of clarifying the law applicable to letters of credit, before the matter reached the Supreme Court on appeal from the Second District Court of Appeal.[181] The Court recounted the Legislative intent language:

> The Legislature made its purpose explicit: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act to confirm the independent nature of the letter of credit engagement and to abrogate the holding [of the Court of Appeal in this case].... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats.1994, ch. 611, § 5.) The same purpose was echoed in the bill's statement of the facts calling for an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats.1994, ch. 611, § 6.)[182]

In considering whether to accept the Legislature's statement of intent, the Court first observed that "statutes do not operate retrospectively unless the Legislature plainly intended them to do so."[183] But "[o]f course, when the Legislature clearly intends a statute to operate retrospectively,

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[176] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[177] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 245-246.

[178] *In re Marriage of McClellan* (2005) 130 Cal.App.4th 247, 257-258; *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 930; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318.

[179] *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 399-400.

[180] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243; *Carter v. Department of Veterans Affairs* (2006) 38 Cal.4th 914, 923.

[181] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 241-242.

[182] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 242.

[183] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 242.

we are obliged to carry out that intent unless due process considerations prevent us."[184] The Court continued:

> A corollary to these rules is that a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. (Cf. *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568.) Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484; *GTE Sprint Communications Corp. v. State Bd. of Equalization* (1991) 1 Cal.App.4th 827, 833; see *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828, fn. 8.) […¶]
>
> One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: "'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute… [¶] If the amendment was enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act—a formal change—rebutting the presumption of substantial change.' (1A Singer, Sutherland Statutory Construction (5th ed. 1993) § 22.31, p. *244 279, fns. omitted.)" (*RN Review for Nurses, Inc. v. State of California* (1994) 23 Cal.App.4th 120, 125.)
>
> Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. (*California Emp. etc. California Employment Stabilization Com'n v. Payne* (1947) 31 Cal.2d 210, 213; *Bodinson Mfg. Co. v. California E.. Com.* (1941) 17 Cal.2d 321, 326; see *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8.) Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies. (Cf. *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 51–52.) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them.[185]

The Court went on to discuss the express language of legislative intent in the bill and in the preamble to the bill, and observed that "[t]he Legislature's unmistakable focus was the disruptive

[184] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[185] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243-244.

effect of the Court of Appeal's decision on the expectations of parties to transactions…"[186] The Court then reiterated that "[i]f the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect."[187]

Carter v. California Department of Veterans Affairs (*Carter*) and *Salazar v. Diversified Paratransit, Inc.* (*Salazar II*) also addressed a situation in which the Legislature acted to overrule or abrogate an unfavorable court of appeal decision by clarifying the intent of the prior law.[188] Both cases involved a 2003 amendment to the Fair Employment and Housing Act (FEHA), which the Legislature expressly declared to be clarifying of existing law.[189] In October 2002, the Second District Court of Appeal found that FEHA does not protect employees from harassment by an employer's customers or clientele.[190] The Supreme Court granted review, but before the matter was heard, the Legislature amended FEHA to provide:

> An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[191]

The Supreme Court then transferred the matter back to the Court of Appeal for reconsideration in light of the enactment of Statutes 2003, chapter 671.[192] *Carter v. California Department of Veterans Affairs* was also pending Supreme Court review at the time of the 2003 amendment to the FEHA, and was also remanded to consider that legislation.[193] Both cases observed the inconsistency between the preamble to the 1984 amendments to the FEHA, which referred to protecting employees from harassment by "clientele," and the plain text of the Act, limiting liability to harassment by employers.[194] And both cases ignored the statements of the bill author

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[186] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 245.

[187] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 246.

[188] *Carter v. California Department of Veterans Affairs* (*Carter*) (2006) 38 Cal.4th 914, 921; *Salazar v. Diversified Paratransit, Inc.* (*Salazar II*) (2004) 117 Cal.App.4th 318, 322

[189] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 921; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 322.

[190] *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 323 [citing *Salazar v. Diversified Paratransit, Inc.* (2002) 103 Cal.App.4th 131].

[191] *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 324; Government Code section 12940(j)(1) (Stats. 2003, ch. 671, § 1).

[192] *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 324.

[193] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 920.

[194] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 927-929; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 326-328.

regarding the limited scope of liability.[195] Ultimately, following *Western Security Bank*,[196] both cases gave substantial weight to the Legislature's expression of intent, and to the Legislature's prompt response to the unresolved legal question.[197]

Here, the evidence of legislative intent with respect the 2012 test claim statute as clarifying of existing law is supported by the statute and the legislative history. As noted, the statute itself provides, in uncodified language in section 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."[198] This represents an express statement of Legislative intent, appearing on the face of the statute itself, and thus, the Commission is not in a position to ignore it completely: "when the Legislature clearly intends a statute to operate retrospectively, [the courts] are obliged to carry out that intent unless due process considerations prevent [them]."[199] And, according to the Assembly Committee on Public Employees, Retirement, and Social Security analysis of the bill the author of the bill states, "[a]mbiguity in the drafting of [the 2011 statute,] 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."[200] The bill author further acknowledged, "the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains *unresolved*."[201] "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," just as stated in the regulations adopted by PERB.[202]

Furthermore, Statutes 2012, chapter 314 was proposed and adopted just months after the PERB regulations took effect. The timing of the amendment can be one of the circumstances indicating the Legislature intended to clarify existing law: "[o]ne such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation…"[203]

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[195] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 927-929; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 326-328.

[196] (1997) 15 Cal.4th 232.

[197] *Carter v. California Department of Veterans Affairs* (2006) 38 Cal.4th 914, 922-923; *Salazar v. Diversified Paratransit, Inc.* (2004) 117 Cal.App.4th 318, 325.

[198] Exhibit A, Test Claim, page 28 [Stats. 2012, ch. 314, § 2 (AB 1606)].

[199] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

[200] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1.

[201] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1 [emphasis added].

[202] Exhibit X, Assembly Committee on Public Employees, Retirement, and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1 [emphasis added].

[203] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243. See also, In re Marriage of McClellan (2005) 130 Cal.App.4th 247, 257-258 [Amendment to Family Code held

Accordingly, the Commission finds that Statutes 2012, chapter 314 is clarifying of existing law and relates back to January 1, 2012, the operative date of the *prior law* regarding factfinding (here, the regulations). Therefore, the activities mandated by the state are new.

b) The mandated activities are unique to local government and provide a service to the public.

The Court in *County of Los Angeles I*[204] held that a new "program" or higher level of service means "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."[205] The Court explained:

> The concern which prompted the inclusion of section 6 in article XIIIB 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 XIIIB 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." [citation omitted.] 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 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.[206]

Accordingly, the Court held that changes to workers' compensation did not result in reimbursable costs: "Workers' compensation is not a program administered by local agencies to provide a 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."[207]

Similarly, in *City of Sacramento v. State,*[208] the Court held that requiring local governments to provide unemployment compensation protection to their employees was not a "service to the public," and did not impose a state policy uniquely on local government:

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to be clarifying where it was clear from both timing and express language that Legislature intended to correct an inconsistent application of the law among the courts and abrogate a poorly-supported decision by the court of appeal.

[204] *County of Los Angeles v. State of California (County of Los Angeles I)* (1987) 43 Cal.3d 46.

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

[206] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56–57.

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

[208] *City of Sacramento v. State* (1990) 50 Cal.3d 51.

> Most private employers in the state already were required to provide unemployment protection to their employees. Extension of this requirement to local governments, together with the state government and nonprofit corporations, merely makes the local agencies "indistinguishable in this respect from private employers."[209]

Therefore, the Court held, consistently with *County of Los Angeles I*, that requiring local government employers to participate in unemployment compensation with respect to their employees was not a governmental "program" within the meaning of article XIII B. In both of these cases, the alleged mandate did not provide a service to the public, but rather a benefit to employees of the local government; and in both cases the statute alleged to impose the mandate resulted in the local government as an employer being treated under the law the same as private employer entities.

County of Los Angeles v. Dept. of Industrial Relations (1989) 214 Cal.App.3d 1538 (*County of Los Angeles II*) provides another example. In that case the County sought reimbursement for complying with earthquake and fire safety regulations applicable to elevators in public buildings, but the court concluded that the regulations did not impose a new program or higher level of service under the test articulated in *County of Los Angeles I.*[210] "County acknowledges that the elevator safety regulations apply to all elevators, not just those which are publicly owned."[211] The court concluded that therefore the regulations "do not impose a 'unique requirement' on local government, [and] they do not meet the second definition of 'program' established by [County of Los Angeles I]."[212] Additionally, the court found the deputy county counsel's declaration that passenger elevators in all county buildings are necessary for the performance of peculiarly governmental functions unpersuasive:

> Even if we were to treat the submitted declaration as something more than mere opinion, County has missed the point. The regulations at issue do not mandate elevator service; they simply establish safety measures. In determining whether these regulations are a program, the critical question is whether the mandated program carries out the governmental function of providing services to the public, not whether the elevators can be used to obtain these services. Providing elevators equipped with fire and earthquake safety features simply is not "a governmental function of providing services to the public."[213]

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[209] *City of Sacramento v. State of California* (1990) 50 Cal.3d 51, 67 [citing *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 58].

[210] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[211] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[212] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1545.

[213] *County of Los Angeles v. Department of Industrial Relations* (1989) 214 Cal.App.3d 1538, 1546 [quoting *County of Los Angeles I*, 43 Cal.3d at p. 56].

Thus, the elevator safety regulations were held not to constitute a new program or higher level of service *both* because they were not imposed uniquely, or differentially, on local government; *and* because the regulations did not provide a *governmental* service to the public.

Here, the MMBA, and specifically the mandatory factfinding provisions and attendant activities imposed by the test claim statute, are not a law of general application resulting in incidental costs to local government. The MMBA and the impasse procedures apply specifically and exclusively to local agencies. Section 3500 of the Government Code provides, in pertinent part provides:

> 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. Nothing contained herein shall be deemed to supersede the provisions of existing state law …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. This chapter is intended, instead, 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.[214]

In addition, the test claim statute provides a service to the public: "The overall purpose of Government Code section 3500 et seq., was to establish a procedure for discussion of working conditions, etc., by organizations representing employees who are without the traditional means of enforcing their demands by collective bargaining and striking, thus providing an alternative which would discourage strikes and yet serve the public employees' interests."[215] With respect to AB 1606 specifically, the Assembly Floor Analysis quotes the bill's author stating:

> 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.[216]

Therefore the stated purpose of the mandatory factfinding provisions of the MMBA is to promote employer-employee relations and ensure that the parties negotiate in good faith and "work collaboratively to deliver government services in a fair, cost-efficient manner."[217] This

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[214] Government Code section 3500 (Stats. 2000, ch. 901).

[215] *Service Employees' International Union, Local No. 22 v. Roseville Community Hospital* (1972) 24 Cal.App.3d 400, 409.

[216] Exhibit X, AB 1606, Assembly Floor Analysis, Third Reading, page 2.

[217] Exhibit X, AB 1606, Assembly Floor Analysis, Third Reading, page 2.

represents a clear state policy to promote efficiency in the collective bargaining process between public employers and their employee organizations, such that public services provided by those employees and their employers may be efficiently and continuously provided.

Based on the foregoing, the test claim statute imposes a new program or higher level of service within the meaning of article XIII B, section 6.

3. The mandated activities impose costs mandated by the state.

For the mandated activities to constitute reimbursable state-mandated activities under article XIII B, section 6 of the California Constitution, they must result in local agencies incurring increased costs mandated by the state. Government Code section 17514 defines "costs mandated by the state" as any increased cost that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) requires that no claim shall be made unless the claim exceeds $1,000. And, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim.

Here, there are new state-mandated activities imposed on local agencies that are required to be performed by staff or contractors. The claimant has alleged costs totaling $327,302.64 for fiscal year 2015-2016 and $46,533.94 for fiscal year 2016-2017 for city staff participating in impasse procedures, including the City Attorney, [Human Resources] Director, and Senior HR Coordinator; as well as costs for "Contract Legal."[218] Some of these costs may go beyond the scope of the mandated activities as indicated in this Decision, but clearly exceed the $1,000 minimum requirement for filing a test claim.[219]

Additionally, no law or facts in the record support a finding that the exceptions specified in Government Code section 17556 apply to this claim. There is, for example, no law or evidence in the record that additional funds have been made available for the new state-mandated activities, or that there is any fee authority specifically intended to pay the costs of the alleged mandate.[220]

Based on the foregoing, the Commission finds that the 2012 test claim statute results in increased costs mandated by the state within the meaning of article XIII B, section 6 and Government Code section 17514.

V. Conclusion

Based on the foregoing analysis, the Commission partially approves this Test Claim, with a reimbursement period beginning July 1, 2015, for local agencies defined in Government Code section 17518 that are eligible to claim reimbursement under article XIII B, section 6 of the California Constitution[221] (other than charter cities or counties with a charter prescribing binding

[218] Exhibit A, Test Claim, pages 10-11.

[219] Exhibit A, Test Claim, page 11.

[220] See Government Code section 17556(d-e).

[221] Government Code section 17518 defines "local agency" to mean "any city, county, special district, authority, or other political subdivision of the state." However, the courts have made it clear that only those local agencies subject to the tax and spend provisions of articles XIII A and

arbitration in the case of an impasse pursuant to Government Code section 3505.5(e)), for the following reimbursable state-mandated activities and costs:

- Within five (5) days after receipt of the written request from the employee organization to submit the parties' differences to a factfinding panel, select a member of the factfinding panel, and pay the costs of that member; pay half the costs of the PERB-selected chairperson, or another chairperson mutually agreed upon, including per diem, travel, and subsistence expenses, and; pay half of any other mutually incurred costs for the factfinding process. (Gov. Code §§ 3505.4(a) and (b); 3505.5(b), (c) and (d).)
- Meet with the factfinding panel within ten (10) days after its appointment. (Gov. Code § 3505.4(c).)
- Furnish the factfinding 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 factfinding panel. (Gov. Code § 3505.4(c-d).)
- Receive and make publicly available the written advisory findings and recommendations of the factfinding panel if the dispute is not settled within 30 days of appointment of the panel. (Gov. Code § 3505.5(a).)

All other activities and costs alleged in the Test Claim are denied.

XIII B are eligible to claim reimbursement under article XIII B, section 6. (*County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *Dept. of Finance v. Commission on State Mandates* (2016) 1 Cal.5th 749, 763 [quoting *County of San Diego v. State of California, supra*, 15 Cal.4th 68, 81]; *Redevelopment Agency of San Marcos v. Commission on State Mandates* (1997) 55 Cal.App.4th 976; *City of El Monte v. Commission on State Mandates* (2000) 83 Cal.App.4th 266, 281-282 [Redevelopment agencies cannot assert an entitlement to reimbursement under article XIII B, section 6, while enjoying exemption from article XIII B's spending limits.].)

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 March 23, 2018, I served the:

- **Draft Proposed Decision, Schedule for Comments, and Notice of Hearing issued March 23, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, 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 March 23, 2018 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 3/22/18

Claim Number: 16-TC-04

Matter: Local Agency Employee Organizations: Impasse Procedures II

Claimant: City of Oxnard

TO ALL PARTIES, INTERESTED PARTIES, AND INTERESTED PERSONS:

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RECEIVED
April 13, 2018
Commission on
State Mandates

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

Exhibit E

April 13, 2018

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

Response to Draft Proposed Decision, 16-TC-04, Impasse Procedures II

Dear Ms. Halsey:

The Department of Finance has reviewed the Draft Proposed Decision prepared by Commission on State Mandates (Commission) staff in response to the Test Claim submitted by the City of Oxnard (City) that alleges reimbursable, state-mandated costs associated with Chapter 680, Statutes of 2011 (AB 646), and Chapter 314, Statutes of 2012 (AB 1606).

AB 646 allows local agency public employee organizations to request appointment of a fact-finding panel to address disputes concerning conditions of employment with local agency employers, if a mediator is unable to arrange a settlement within 30 days. AB 646 states that costs associated with the fact-finding shall be equally divided between the parties.

AB 1606 states that mediation is not a necessary pre-condition for a local agency public employee organization to request appointment of a fact-finding panel pursuant to AB 646. AB 1606 contains a legislative finding and declaration that its provisions are technical and clarifying of existing law.

Commission staff recommend the Commission partially approve the Test Claim, with eligibility to claim state reimbursement recommended for the following activities:

- Selecting a member of the fact-finding panel and paying the member's costs, and paying half of any mutually incurred costs for the fact-finding process.
- Meeting with the fact-finding panel within 10 days of its appointment.
- Furnishing the fact-finding panel with specified information relating to any matter under investigation or issue before the fact-finding panel.
- Receiving and making publicly available the written advisory findings and recommendations of the fact-finding panel, if the dispute is not settled within 30 days.

Finance asserts that none of the activities listed above represent either a new program or the provision of a higher level of service to the public. We disagree with the Commission staff recommendations regarding the reimbursable nature of these activities. However, we do agree with the Commission staff conclusion that the Commission's jurisdiction in this case is limited to AB 1606.

In *City of Richmond v. Commission on State Mandates* (1998) 64 Cal. App. 4th 1190, the court stated that "(a) higher cost to the local government for compensating its employees is not the same as a higher cost of providing services *to the public* (emphasis added)." Thus, to be state-reimbursable, there must be a higher level of service provided to the public.

The activities that Commission staff conclude are reimbursable mandated activities do not constitute a new program or higher level of service. When a local agency participates in a fact-finding panel with a public employee organization to resolve disputes concerning employment conditions, the local agency is not providing a service to the public. The local agency's participation may have the salutary effect of promoting employer-employee relations and thus ensuring government services are delivered in a fair, cost-effective manner. However, the act of participating in the fact-finding panel does not, in itself, represent the provision of a service to the public. Consequently, none of the City's alleged costs qualify for reimbursement.

Furthermore, the statutes merely add a new fact-finding element to the existing collective bargaining program. Because the activities do not represent a new program that provides a higher level of service to the public, none of the activities identified as qualifying for reimbursement are, in fact, state-reimbursable.

Sincerely,

Erika Li

ERIKA LI
Program Budget Manager

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.

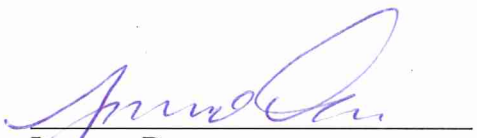
On April 16, 2018, I served the:

- **Finance's Comments on the Draft Proposed Decision filed April 13, 2018**

  Local Agency Employee Organizations: Impasse Procedures II, 16-TC-04
  Government Code Sections 3505.4, 3505.5, and 3505.7; as added or amended by Statutes 2011, Chapter 680 (AB 646) and Statutes 2012, Chapter 314 (AB 1606)
  City of Oxnard, 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 April 16, 2018 at Sacramento, California.



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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 4/13/18

Claim Number: 16-TC-04

Matter: Local Agency Employee Organizations: Impasse Procedures II

Claimant: City of Oxnard

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

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
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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
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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

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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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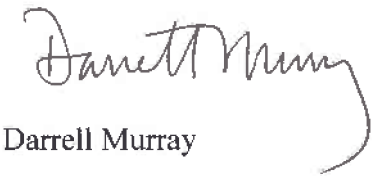
additional legislation. To the extent PERB could suggest clean-up legislation this option would be preferable to costly litigation.

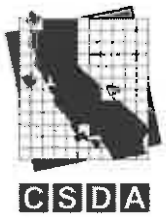
We appreciate your considering these comments. Please contact me at 510-761-9148 if you have any questions.

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

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:

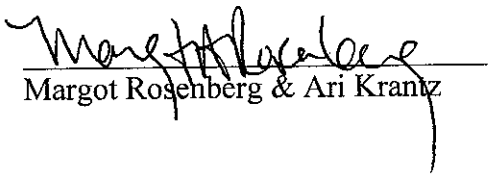
Since we submitted our initial comments on this matter, the PERB staff has revised its draft proposed regulations with respect to the events triggering an employee organization's request for factfinding. (See Staff Discussion Draft Re AB 646[November 14 Version], posted on PERB's website.) We are pleased 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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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.

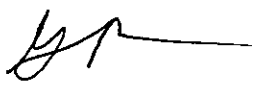
For these reasons, we propose the following substitute language for § 32802:

> 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.*

PUBLIC NOTICE
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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)	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
Factfinding under the Meyers-Milias-Brown Act	

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.

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: [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.

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

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: 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 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.

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	SELP	3521 LIDO BLVD. G. WEST, CA
DENNIS EN	CNA/NNU	5477 N. Fresno St. #104 Fresno, CA
Erasma 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: JUN 21

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

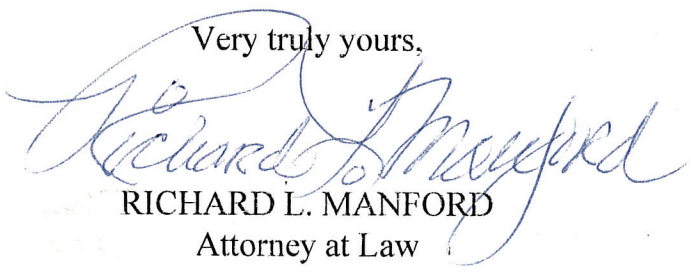
acting in the scope of employment must first file a verified claim with the Victim Compensation and Government Claims Board. (Govt. Code, § 910.) If that board rejects the claim, it notifies the claimant that she may then file a lawsuit against the offender. (Govt. Code, § 913(b).) With PERB, however, 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

Post Office Box 1128
Torrance, California 90505-0128
(800) 747-9245 (Voice) (800) 903-4266 (Fax)
(www.finaldisputeresolution.com philip@tamoush.com)
(Principal Office & Mailing Address)

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.

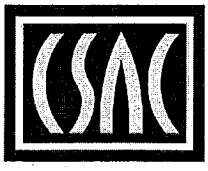
Under both EERA and HEERA, the employer has the ability to request fact-finding. (Gov. Code, §§ 3548.1, 3591.) Thus, under EERA and HEERA an employer can prevent an employee organization from unreasonably delaying fact-finding proceedings by initiating those proceedings itself. The same is not true under 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
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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.

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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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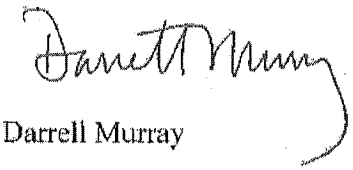
additional legislation. To the extent PERB could suggest clean-up legislation this option would be preferable to costly litigation.

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

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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 that is mutually agreed to by the parties, or that is required under this Chapter or 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
CITY ADMINISTRATIVE OFFICERS
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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

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)	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
Factfinding under the Meyers-Milias-Brown Act	

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
Anita M. Martinez	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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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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- ☐ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
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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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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 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: 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

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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

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
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(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

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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:

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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)
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

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: 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

STATE OF CALIFORNIA

NOTICE PUBLICATION/REGULATIONS SUBMISSION

STD. 400 (REV. 01-09) (REVERSE)

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	35214 LIDO BLVD. G. WBWAK, CA
DONNIE NIELSEN	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 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		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 _____ (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.*

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

EMERGENCY

NOTICE PUBLICATION/REGULATION SUBMISSION (See instructions on reverse)

STD. 400 (REV. 01-09)

For use by Secretary of State only

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
Office of Administrative Law
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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 A. Rosenberg
Margot Rosenberg

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

JOAN F. DAWSON
DEPUTY CITY ATTORNEY

OFFICE OF
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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
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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
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
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.

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, 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.

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	Sally M. Mc. Keag	Alice Dowdin Calvillo	A. Eugene Huguenin
Chair	Member	Member	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:

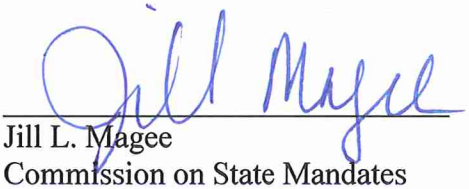
I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

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.



Jill L. Magee
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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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BILL ANALYSIS

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

BILL ANALYSIS

SENATE RULES COMMITTEE | AB 646
Office of Senate Floor Analyses
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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

CONTINUED

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 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.

CONTINUED

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.

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

CONTINUED

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 potentially significant not reimbursable			unknown,	Local

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

CONTINUED

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
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 Ýa] 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,

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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, Ýthis 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, "ÝThis 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. ÝThis 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 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,

CONTINUED

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 ****

CONTINUED

A Timely Analysis of Legal Developments

ASAP®

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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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

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Charles Sakai

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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.

BEST BEST & KRIEGER LLP

ATTORNEYS AT LAW

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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.

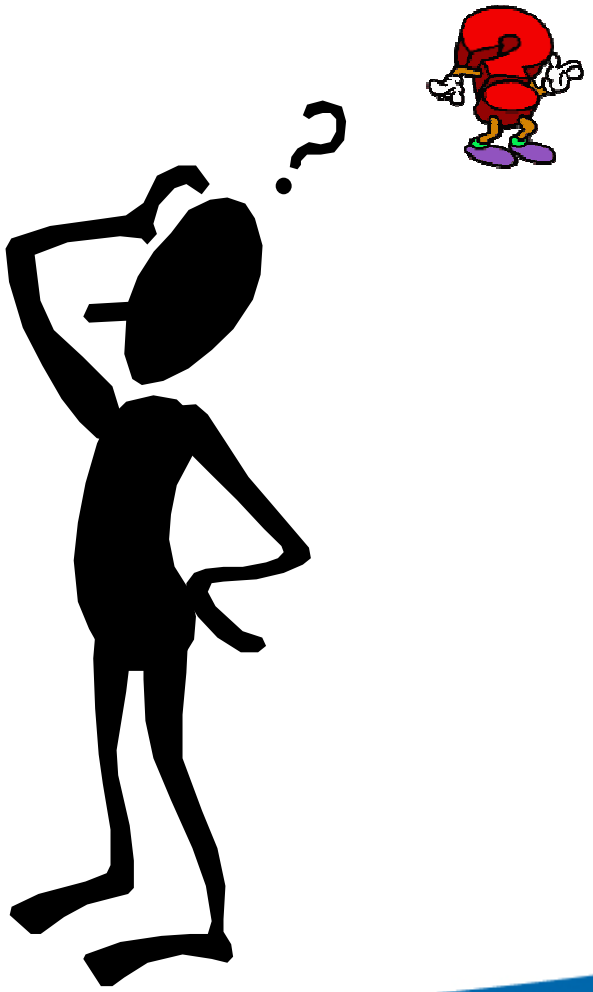
Preparation for fact-finding -- revisited.

- 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.

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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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

BILL ANALYSIS

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

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*) (*Served February 1, 2017*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on January 27, 2017. Melanie Chaney and Annette Chinn appeared on behalf of the City of Glendora. Danielle Brandon and Susan Geanacou appeared on behalf the Department of Finance (Finance), and Andy Nichols of Nichols Consulting appeared as an interested person.

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 the Proposed Decision to deny the Test Claim by a vote of 4-1 with 2 abstentions, as follows:

Member	**Vote**
Richard Chivaro, Representative of the State Controller, Vice Chairperson	Yes
Mark Hariri, Representative of the State Treasurer	Abstain
Scott Morgan, Representative of the Director of the Office of Planning and Research	Yes
Sarah Olsen, Public Member	Yes
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	Yes
Carmen Ramirez, City Council Member	Abstain
Don Saylor, County Supervisor	No

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). For this Test Claim, the Commission's jurisdiction is limited to Statutes 2011, chapter 680, the only statute which the claimant specifically pled. 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. 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, because the implementation of a last, best and final offer is a voluntary act. 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.[1]

06/02/2016 Claimant filed the Test Claim with Commission.[2]

07/25/2016 Department of Finance (Finance) filed comments on the Test Claim.[3]

08/24/2016 Nichols Consulting filed comments on the Test Claim.[4]

09/16/2016 Claimant filed rebuttal comments.[5]

11/16/2016 Commission staff issued the Draft Proposed Decision.[6]

12/07/2016 Claimant filed comments on the Draft Proposed Decision.[7]

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[1] Exhibit A, Test Claim, page 8.

[2] Exhibit A, Test Claim.

[3] Exhibit B, Department of Finance's Comments on Test Claim.

[4] 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).)

[5] Exhibit D, Claimant's Rebuttal Comments.

[6] Exhibit F, Draft Proposed Decision.

[7] Exhibit G, Claimant's Comments on the Draft Proposed Decision.

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.

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.[8]

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.[9] 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

[8] 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).

[9] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

ordinance, or when such procedures are utilized by mutual consent.[10]

Meeting and conferring is intended to result in a tentative agreement which, if adopted, is formalized into a Memorandum of Understanding (MOU).[11] From 1969 to 2013, the relevant 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.[12]

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."[13]

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

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[10] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

[11] Government Code section 3505.1.

[12] 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.

[13] *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 827.

> 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 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."[14] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[15] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[16]

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."[17] "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."[18]

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.[19] 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

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[14] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[15] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[16] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[17] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[18] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

[19] Statutes 2011, chapter 680, section 1.

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.[20]

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:

(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.

[20] Statutes 2000, chapter 316, section 1.

(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.

In Section Three, 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 Four, 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. 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 statute 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.[21]

However, although Assemblywoman Atkins argued in favor of the perceived benefits of *mandatory* impasse procedures stating that "[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,"[22] 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,"[23] opponents of AB 646 argued that "requiring mediation and factfinding prior to imposing a last, best and final offer would simply

[21] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

[22] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

[23] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

add costs and be unhelpful to both the employer and the employees."[24]

The author agreed to a series of amendments, which the Committee memorialized 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.
>
> 3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.[25]

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."[26]

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 enacted merely made factfinding voluntary, not mandatory.

AB 646, as enacted, stated 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.

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[24] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3).

[25] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3, emphasis added).

[26] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 24-25 (Senate Rules Committee, Floor Analysis of AB 646, as amended on June 22, 2011, pages 2-3).

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:

> 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.[27]

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."[28] "Without mediation — voluntary or

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[27] Exhibit H, pages 2-3 (Edward Ellis and Jill Albrecht, "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).

[28] Exhibit H, pages 8, 15 (Renne Sloan Holtzman Sakai LP, Navigating the Mandatory Fact-Finding Process Under AB 646 [November 2011], pages 4, 11, http://www.pccfacultyassociation.org/wp-content/uploads/2012/09/fact_finding.pdf, accessed November 9, 2016).

mandatory — there is no explicit trigger for fact-finding, and opinions as to whether fact-finding is truly mandatory are already split."[29] "Can factfinding be avoided by not agreeing to mediation?"[30] "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."[31]

C. The Subsequent Adoption of Regulations and Statutes 2012, Chapter 314 (AB 1606)

After the enactment of the test claim statute, the Public Employment 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.[32] 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,[33] adopted emergency regulations.[34] PERB filed the emergency rulemaking package with the Office of Administrative Law (OAL) on

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[29] Exhibit H, page 26 (Emily Prescott, *Mandatory Fact-Finding Under the Meyers-Milias-Brown Act*, California Labor & Employment Law Review, Vol. 26 No. 1 [January 2012], page 2, 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).

[30] Exhibit H, page 35 (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).

[31] Exhibit H, page 55 (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).

[32] See Section IV.A. for detailed discussion.

[33] Government Code section 3509; see also Statutes 2000, chapter 901.

[34] The emergency regulations amended or added PERB Regulations 32380, 32603, 32604, 32802 and 32804. See Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 178-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5-8). In response to a Commission request, PERB provided 503 pages of underlying rulemaking documents. See Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, filed August 26, 2016.

December 19, 2011.[35] The emergency regulations became operative on January 1, 2012[36] — the same date that the test claim statute became effective. The emergency regulations became permanent after PERB transmitted a Certificate of Compliance to the OAL on or about June 22, 2012.[37]

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.[38] 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

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[35] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (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 of hearing.

[36] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2011, No. 52.

[37] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2012, No. 31.

[38] 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.

officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.[39]

PERB Regulation 32802(a) begins by stating that "[a]n exclusive representative may request that 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.[40] PERB also held formal meetings in its Sacramento headquarters about the regulations on December 8, 2011, and April 12, 2012.[41]

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."[42]

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

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[39] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

[40] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 177-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 4-8).

[41] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 178-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5-8); Exhibit H, pages 62-63 (Minutes, Public Employment Relations Board Meeting, April 12, 2012, pages 6-7).

[42] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

mediation was not required by law."[43] 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."[44]

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 the MMBA."[45] Mr. Chisholm stated that AB 646 "established a mandatory factfinding procedure under the MMBA that did not exist previously."[46] "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."[47]

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.[48] "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."[49]

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

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[43] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[44] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[45] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 178 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 5).

[46] Exhibit H, page 62 (Minutes, Public Employment Relations Board Meeting, April 12, 2012, page 6).

[47] 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).

[48] 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).

[49] 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).

harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory . . . ."[50] 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."[51] 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 mandatory step in the process which leads to the ability of the employer to implement its last, best, and final offer.[52]

2. Statutes 2012, Chapter 314 (AB 1606) Amends Government Code Section 3505.4, Effective January 1, 2013.

Statutes 2012, chapter 314 (AB 1606), 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."[53]

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.[54] "AB 1606 would clarify that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have

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[50] 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).

[51] 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).

[52] "[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).

[53] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 37 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1).

[54] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

engaged in mediation."[55]

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.[56]

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."[57]

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

[55] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

[56] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

[57] Exhibit H, page 65 (Senate Public Employment & Retirement Committee, Analysis of AB 1606 as introduced February, 7, 2012 [emphases omitted], page 2).

panel cannot be expressly or voluntarily waived.

Section Two makes a finding that 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.
> 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.[58]

[58] Exhibit A, Test Claim, page 7.

In response to Finance's comments on the Test Claim, the claimant filed written rebuttal comments.[59] 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."[60] The claimant also challenged the specific stances taken by Finance regarding what activities were newly imposed, or were discretionary.[61]

In comments on the Draft Proposed Decision, the claimant took the position that AB 646 imposed mandatory fact-finding and was therefore a reimbursable state mandate. In support of this outcome, the claimant made the following additional arguments:

- Instead of limiting this Test Claim to the statutes enacted by AB 646, the Commission should review the entire record, including the statutes enacted the following year by AB 1606.[62]
- The statutory language enacted by AB 646 is ambiguous, and, as such, legislative history and other indicia of intent — which indicate that the bill's author intended to impose mandatory fact-finding — should be reviewed and enforced by the Commission.[63]
- In the event that the language of AB 646 is not ambiguous, the Commission's literal interpretation yields an absurd result.[64]

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:

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.

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.[65]

Finance further alleges that activities 1, 9, and 10, identified in the Test Claim are discretionary

[59] Exhibit D, Claimant's Rebuttal Comments.

[60] Exhibit D, Claimant's Rebuttal Comments, page 2, emphasis in original.

[61] Exhibit D, Claimant's Rebuttal Comments, pages 2-7.

[62] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 7.

[63] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 8-14.

[64] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 14-15.

[65] See Exhibit B, Department of Finance's Comments on the Test Claim, page 1.

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.[66]

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.[67]

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."

Finance did not file comments on the Draft Proposed Decision.

C. Nichols Consulting

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.[68]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> 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

[66] See Exhibit B, Department of Finance's Comments on the Test Claim, page 1.

[67] See Exhibit B, Department of Finance's Comments on the Test Claim, page 2.

[68] Exhibit C, Nichols Consulting's Comments on the Test Claim, pages 1-2.

articles XIII A and XIII B impose."[69] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[70]

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.[71]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[72]
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.[73]
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.[74]

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 of the California Constitution.[75] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[76] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an

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

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

[71] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[72] *Id*., pages 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[73] *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.

[74] *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.

[75] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[76] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[77]

A. The Commission's Jurisdiction Is Limited to Statutes 2011, Chapter 680, the Only Statute Which the Claimant Pled.

A threshold issue of this and every test claim is the identification of the statute or executive order which the Commission is to review. The claimant must identify at several points in the initial test claim filing which specific statute or executive order imposes, according to the claimant, a reimbursable state mandate.

The Draft Proposed Decision limited jurisdiction of this Test Claim to the Government Code sections that were enacted by Statutes 2011, chapter 680. In its comments on the Draft Proposed Decision, the claimant argues that the Commission should also analyze whether Statutes 2012, chapter 314 (AB 1606), the subsequent year's clean-up legislation, created a reimbursable state mandate.[78]

The Commission finds that the claimant pled only Statutes 2011, chapter 680 in this Test Claim. As detailed below, the Commission is a tribunal of limited jurisdiction, and a claimant must specifically plead a test claim statute or executive order in order to invoke the Commission's jurisdiction. Since the claimant pled Statutes 2011, chapter 680 — but did not plead Statutes 2012, chapter 314 or any other law in this Test Claim — the Commission's jurisdiction is limited to Statutes 2011, chapter 680.

1. A Claimant Is Obligated to Specifically Plead the Statute or Executive Order Which the Claimant Requests That the Commission Review.

Government Code section 17521 defines a "test claim" to mean the first claim filed with the Commission alleging a *particular statute or executive order* imposes costs mandated by the state…." (Emphasis added.)

Government Code section 17553, which governs the filing of test claims, specifically requires 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 and the effective date and register number of regulations alleged to contain a mandate . . . ."[79], and
- "The written narrative shall be supported with copies of . . . The test claim statute that includes the bill number or executive order, alleged to impose or impact a mandate."[80]

The test claim form reads in relevant part:

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[77] *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].

[78] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 6, 7.

[79] Government Code section 17553(b).

[80] Government Code section 17553(b)(3)(A)(i).

- In Section 4 of the test claim form, titled Test Claim Statutes Or Executive Orders Cited, the form states, "Please identify all code sections (*including 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."[81]
- In Section 4, the test claim form contains a large box on the right-hand side in which the claimant is to identify the statute, regulation, and/or executive order which allegedly imposes a reimbursable state mandate.[82]
- In Section 4 of the test claim form, the claimant is required to check a box to indicate compliance with the adjacent text which reads, "*Copies of all statutes and executive orders cited are attached*."[83]

Consequently, a claimant filing a test claim is repeatedly placed on notice of the claimant's obligation to specifically identify the code section, including the statute, chapter, and bill number by which it was added or amended, which the claimant requests that the Commission review.

2. The Claimant Pled Only Statutes 2011, Chapter 680 (AB 646).

The claimant specifically pled only Statutes 2011, Chapter 680 (AB 646) in its Test Claim. The claimant did not plead any later statutory amendment to the Meyers-Milias-Brown Act, such as Statutes 2012, Chapter 314 (AB 1606). The claimant did not plead Public Employment Relations Board Regulation 32802 or any other regulation promulgated to implement, interpret, or make specific the Meyers-Milias-Brown Act.

Throughout the Test Claim, the claimant pled, quoted, or referred at least eleven times to Statutes 2011, Chapter 680 (AB 646):

- In Section 4 of the test claim form, inside the box titled Test Claim Statutes Or Executive Orders Cited, the claimant wrote, "Government Code sectopm [*sic*] 3505.4, 3505.5 and 3505.7, Statutes 2011, Chapter 680 (AB 646)."[84]
- The first sentence of the Test Claim reads: "On June 22, 2011, Assembly Bill 646 (Atkins) added duties to Collective Bargaining activities under Milias-Meyers-Brown Act (MMBA)."[85]
- Consistent with Statutes 2011, Chapter 680 (AB 646), the claimant described the test claim legislation as requiring factfinding only after mediation. "The bill authorized the employee organization, if the mediator is unable to effect settlement of the controversy

[81] See Exhibit A, Test Claim, page 1, emphasis added.

[82] See Exhibit A, Test Claim, page 1.

[83] See Exhibit A, Test Claim, page 1, emphasis in original.

[84] Exhibit A, Test Claim, page 1.

[85] Exhibit A, Test Claim, page 3.

within 30 days of his or her appointment, to request that the matter be submitted to a factfinding panel."[86]

- In its Written Narrative, the claimant quoted Government Code sections 3505.4, 3505.5 and 3505.7 as those sections existed after the enactment of Statutes 2011, chapter 680 (AB 646), but before the enactment of Statutes 2012, chapter 314 (AB 1606) or any other subsequent amendment.[87]
- When listing the new activities which the claimant alleges were imposed by the test claim legislation, the claimant introduced the list by stating, "If mediation did not result in settlement after 30 days and if the employee organization requests factfinding . . . ."[88] The reference to mediation as a pre-requisite to factfinding is consistent with Statutes 2011, Chapter 680 (AB 646) but is not consistent with later amendments to the Meyers-Milias-Brown Act.
- In noting the legislative history of the Meyers-Milias-Brown Act, the claimant stated, "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."[89]
- With regard to a statewide cost estimate, the claimant quoted from an Assembly Floor Analysis of AB 646 which was dated September 1, 2011.[90]
- The Written Narrative portion of the Test Claim concluded, "The enactment of Chapter 680, Statutes of 2011 adding sections 3505.4, 3505.5 and 3505.7 imposed a new state mandated program . . . ."[91]
- In the Claim Requirements section of the Written Narrative, the claimant stated that it was complying with a Commission regulation by attaching only "Exhibit 1: Chapter 680, Statutes of 2011."[92]
- The first exhibit to the Test Claim was a copy of Statutes 2011, chapter 680 (AB 646) in slip law format.[93]
- The claimant attached to the Test Claim a copy of the Assembly Floor Analysis of AB 646 dated September 1, 2011.[94]

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[86] Exhibit A, Test Claim, page 3.

[87] Exhibit A, Test Claim, pages 4-7.

[88] Exhibit A, Test Claim, page 7.

[89] Exhibit A, Test Claim, page 8.

[90] Exhibit A, Test Claim, page 8.

[91] Exhibit A, Test Claim, page 11.

[92] Exhibit A, Test Claim, page 11.

[93] Exhibit A, Test Claim, page 15-18.

[94] Exhibit A, Test Claim, page 24-26.

In contrast to these eleven references to the 2011 statute, the Test Claim contains in the exhibits a computer printout from "leginfo.ca.gov" of the current version of Government Code section 3505.4, which contains language that was added by Statutes 2012, chapter 314. Neither in the leginfo printout nor anywhere else in the test claim filing is there a reference to Statutes 2012, chapter 314 or AB 1606, however.[95]

In light of the totality of the evidence, the Commission concludes that the claimant requested a ruling in this Test Claim on the question of whether Statutes 2011, chapter 680 (AB 646) — and only Statutes 2011, chapter 680 (AB 646) — imposed a reimbursable state mandate. The Test Claim's eleven references to Statutes 2011, chapter 680 — most of which are substantive references on the face of the test claim form or within the Written Narrative — outweigh the happenstance that one computer printout containing the current version of Government Code section 3505.4, as later amended, was appended as an exhibit.

The substantive portions of the Test Claim contain no references to or quotations from Statutes 2012, chapter 314 (AB 1606). The Test Claim contains no analysis of Statutes 2012, chapter 314 (AB 1606). The Test Claim contains no references to, quotations of, or analysis of PERB Regulation 32802 or any other regulation or executive order.[96]

The claimant also argues that the Commission should review Statutes 2012, chapter 314 (AB 1606) because AB 1606 states, in Section Two, that it is "intended to be technical and clarifying of existing law."[97]

Statements such as those contained in Section Two of AB 1606 — which purport to state what the Legislature meant when it passed a previous bill — are not binding upon judicial bodies or quasi-judicial bodies such as the Commission. A "subsequent legislative declaration as to the meaning of a preexisting statute is neither binding nor conclusive in construing the statute's application to past events. (Citation.) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration . . . ."[98]

On this record, the Commission concludes that the claimant invoked the Commission's jurisdiction to obtain an adjudication of whether Statutes 2011, chapter 680 (AB 646) imposed a reimbursable state mandate.[99] The Commission will now address this limited question.

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[95] Compare Exhibit A, Test Claim *passim*, with Exhibit A, Test Claim, pages 19-21 (the leginfo printout).

[96] The claimant repeatedly argues that the Commission should review Statutes 2012, chapter 314 (AB 1606) because the claimant first incurred costs after the effective date of Statutes 2012, chapter 314 (AB 1606). See Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 5, 7, 10, 11, 14. The claimant's assertion is not consistent with the test claim pleading requirements in Government Code sections 17521 and 17553.

[97] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 3-5.

[98] *Hunt v. Superior Court (Guimbellot)* (1999) 21 Cal. 4th 984, 1007-1008.

[99] The claimant did not request leave to amend its Test Claim to add Statutes 2012, chapter 314 (AB 1606). Government Code section 17557(e) and section 1183.1 of the Commission's regulations allow the claimant to amend a test claim at any time before the test claim is set for hearing, without affecting the original filing date, as long as the amendment substantially relates

B. 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.[100] 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.[101]

There, the *Kern* court reviewed and affirmed the holding of *City of Merced v. State of California*,[102] 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.[103]

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 mandatory elements of education-related programs in which claimants have

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to the original test claim and is timely filed within the statute of limitations required by Government Code section 17551(c). This matter was set for hearing when the Draft Proposed Decision was issued on November 16, 2016. (Exhibit F.) Moreover, the statute of limitations to file a test claim on Statutes 2012, chapter 314 has long past whether based on being 12 months from the effective date of the statute or on 12 months from the date of first incurring costs.

[100] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727.

[101] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 730.

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

[103] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743 (emphasis in original).

> participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*[104]

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).[105] 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."[106]

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 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.[107]

This is the only sentence in the test claim statute which addresses how factfinding would commence.[108] 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, as supported by numerous judicial decisions.[109] 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

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[104] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 731 (emphasis added).

[105] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1357.

[106] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366.

[107] Statutes 2011, chapter 680.

[108] The claimant does not identify any other language in the test claim statute which would trigger factfinding. See Exhibit G, Claimant's Comments on the Draft Proposed Decision.

[109] *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.

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.[110]

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."[111] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[112] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[113]

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."[114] "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."[115]

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 can be triggered by the union after an unsuccessful mediation — is a non-reimbursable downstream requirement of a discretionary decision by both parties to

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[110] "'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.

[111] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[112] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[113] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[114] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[115] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

engage in mediation.[116]

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."[117] "[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."[118]

Mediation is voluntary under the plain meaning of the test claim statute, and under the test claim statute, fact finding can only be triggered after 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 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 claimant contends that the test claim statute's language is ambiguous.[119] The Commission disagrees. "Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable."[120] 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

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[116] 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.

[117] *Department of Finance v. Commission on State Mandates (Kern High School District),* 30 Cal.4th 727, 742.

[118] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

[119] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 9-14.

[120] *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 778 [citations omitted].

plain meaning governs."[121] "[C]ourts should start . . . with the actual language of the statute, and if the text is clear as applied to a given case, and it does not fall into any of the exceptions, stop there. (Citation.) As Oliver Wendell Holmes said, 'we do not inquire what the legislature meant; we ask only what the statute means.'"[122]

The relevant language of the test claim statute is susceptible of only one meaning. At the time of the passage of the test claim statute (and currently), mediation under the Meyers-Milias-Brown Act was voluntary. The test claim statute allowed a union to request factfinding "[i]f the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment," and the test claim statute contained no other provision triggering factfinding. There is therefore only one way to read the plain language of the statute. No ambiguity exists.

The Commission notes that, in the Claimant's Comments on the Draft Proposed Decision, the claimant does not identify a second, reasonable reading of the test claim statute which relies *only* upon the language of the test claim statute and the other then-extant provisions of the Meyers-Milias-Brown Act. The claimant's argument of ambiguity is based entirely upon extrinsic evidence, specifically, the legislative and amendment history of the test claim statute.

To the extent that the claimant attempts to identify an ambiguity by relying upon committee reports and other legislative history,[123] the claimant fails because unambiguous language in a statute trumps arguably inconsistent statements in legislative history. "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."[124] "Committee reports, often drafted by unelected staffers, cannot alter a statute's plain language."[125]

In a 1994 decision, the Fourth District Court of Appeal summarized some of the myriad problems with using legislative history to discern intent:

> [W]e must acknowledge that the criticisms of judicial use of legislative history are formidable indeed: The Constitution does not elevate the bits and pieces that make up any legislative history to the status of law — it reserves that honor only for the text of legislation that has run the gauntlet of the Legislature and the Governor's possible veto. The members of the Legislature have no opportunity to disapprove legislative history, and the Governor has no chance to veto it. Legislative history directly represents only the views of the few actors in the legislative process, including lobbyists and committee staff people, who are intimately involved with particular legislation. It is virtually impossible to accurately reconstruct exactly what went on when a legislative body passed a bill. Legislative history has become contaminated by documents which are more

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[121] *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.

[122] *J.A. Jones Construction Co. v. Superior Court (Dai-Ichi Bank Kangyo Bank, Ltd.)* (1994) 27 Cal.App.4th 1568, 1575 [quoting Holmes, Collected Legal Papers (1920) page 207].

[123] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 9-14.

[124] *Sabi v. Sterling* (2010) 183 Cal.App. 4th 916, 934.

[125] *People v. Johnson* (2015) 60 Cal. 4th 966, 992.

> aimed at influencing the judiciary after the bill is passed than explaining to the rest of the legislature what the bill is about before it is passed. Most basically, the idea that the diverse membership of a democratically elected legislature can ever have one collective "intent" on anything is a myth; if there is ambiguity it is because the legislature either could not agree on clearer language or because it made the deliberate choice to be ambiguous — in effect, the only "intent" is to pass the matter on to the courts.[126]

To the extent that the claimant contends that an ambiguity exists in the test claim statute when it is compared to its legislative history, the Commission rejects the argument.

The claimant also argues that the test claim statute contains a latent ambiguity.[127] The Commission is not persuaded. The Third District Court of Appeal has warned, "As we have recently cautioned, although extrinsic evidence may reveal a latent ambiguity in a statute, such ambiguity must reside in the statutory language itself. It cannot exist in the abstract, or by ignoring the statutory language."[128]

No ambiguity exists within the language of the test claim statute. The claimant's alleged latent ambiguity exists only if a person ignores the test claim statute's plain language or reads the statute to include language which is not there.

While legislative history need not be reviewed when a statute's plain language is unambiguous, if the relevant legislative history were to be reviewed in this Test Claim, then the legislative history would be found to be consistent with the plain language of the statute. 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.[129] 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:

> [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

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[126] *J.A. Jones Construction Co. v. Superior Court (Dai-Ichi Bank Kangyo Bank, Ltd.)* (1994) 27 Cal.App.4th 1568, 1577 [footnotes omitted]. See also Katzman, Judging Statutes (2014) pages 40-41 [noting the criticism that legislative history fails to meet the constitutional requirements of bicameralism (passage by both houses) and presentation (providing a copy to the executive for signature or veto)].

[127] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 11-12.

[128] *Siskiyou County Farm Bureau v. Department of Fish and Wildlife* (2015) 237 Cal.App.4th 411, 420.

[129] See Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3) (wherein the author agrees to and takes amendments to "remove all of the provisions related to mediation").

> 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.)[130]

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.[131] 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 must 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 by the arguments of the claimant and of PERB 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 therefore mandatory.[132] 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 3505.4 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 is 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 the claimant's and 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 the claimant's or PERB's analysis explains how the phrase "any applicable mediation and factfinding procedures" can be construed to mean that mediation is voluntary while factfinding is mandatory. The determination of

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[130] *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.

[131] 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).

[132] 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).

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.[133] 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."[134]

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.[135]

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 whether mediation occurs or not."[136] 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.

The claimant argues that, even if the language of the test claim statute is unambiguous, then the Commission's reading is still erroneous because it yields an absurd result.[137] The "absurd result" rule is well-established. "If the [statutory] language is clear, courts must generally follow its

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[133] 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).

[134] *California Highway Patrol v. Superior Court (Allende)* (2006) 135 Cal.App.4th 488, 501.

[135] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3).

[136] 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).

[137] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 14-15.

plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."[138] "'Absurd' means when a statute is obviously not construed in a reasonable and commonsense manner."[139] "We must exercise caution using the 'absurd result' rule; otherwise, the judiciary risks acting as a 'super-Legislature' by rewriting statutes to find an unexpressed legislative intent."[140]

The Commission finds nothing absurd in the plain language of the test claim statute. Prior to the enactment of the test claim statute, the Meyers-Milias-Brown Act contained no provision regarding factfinding. After the enactment of the test claim statute, the Act required factfinding downstream of voluntary mediation. The test claim statute increased the bargaining options available to local government employees under certain circumstances. Although the test claim statute as passed may not have been the ideal envisioned by the bill's sponsor, it was consistent with the sponsor's intent in that (1) factfinding became a part of the Act, and (2) in certain downstream circumstances, an employee organization could require a local government to engage in factfinding.[141] There is nothing absurd in this result.

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 arguably be read to state 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. In *Operating Engineers Local 3 v. City of Clovis*, PERB held 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

[138] *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131.

[139] *People v. Kainoki* (1992) 7 Cal.App.4th Supp.8, 17.

[140] *California School Employees Ass'n v. Governing Board of South Orange County Community College District* (2004) 124 Cal.App.4th 574, 588.

[141] The unambiguous meaning of a statute cannot be altered or ignored merely because the law's sponsor did not understand the ramifications of her bill. "The [absurdity] doctrine does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions." Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) page 238.

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." [142] 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."[143]

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.

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.[144]

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 is not before the Commission, apparently under the mistaken belief that the test claim statute mandated factfinding.[145]

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

[142] Exhibit H, page 72 (*Operating Engineers Local 3 v. City of Clovis*, PERB Case No. SA-CE-513-M, page 5, footnote 5).

[143] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

[144] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 ("POBRA").

[145] Exhibit D, Claimant's Rebuttal Comments, pages 11-16 (Fact-finding Report & Recommendations, City of Glendora and Glendora Municipal Employees Association, dated August 24, 2015, pages 1-6).

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.[146]

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 within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514. Therefore, the Commission denies this Test Claim.

[146] Government Code section 3505.7, as added by Statutes 2011, chapter 680, section 4.

RE: **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

On January 27, 2017, the foregoing Decision of the Commission on State Mandates was adopted on the above-entitled matter.

Dated: February 1, 2017

Heather Halsey, Executive Director

ORIGINAL

PUBLIC MEETING

COMMISSION ON STATE MANDATES

TIME: 10:00 a.m.

DATE: Friday, January 27, 2017

PLACE: State Capitol, Room 444
Sacramento, California

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Representative for BETTY T. YEE
State Controller
(Vice Chair of the Commission)

MARK HARIRI
Representative for JOHN CHIANG
State Treasurer

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Representative for KEN ALEX
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Yolo County Supervisor
Local Agency Member

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Executive Director
(Item 14)

HEIDI PALCHIK
Assistant Executive Director

A P P E A R A N C E S

PARTICIPATING COMMISSION STAFF

continued

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Senior Commission Counsel
(Item 4 and Item 8)

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PUBLIC TESTIMONY

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A P P E A R A N C E S

PUBLIC TESTIMONY

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CHAIR ORTEGA: 4 and 8.

MS. HALSEY: I'm sorry, 4 and 8.

(Parties/witnesses stood to be sworn or affirmed.)

MS. HALSEY: Do you solemnly swear or affirm that the testimony which you are about to give is true and correct, based on your personal knowledge, information, or belief?

(A chorus of affirmative responses was heard.)

MS. HALSEY: Item 3 is reserved for appeals of Executive Director decisions. There are no appeals to consider for this hearing.

Senior Commission Counsel Paul Karl Lukacs will present Item 4, a test claim on *Local Agency Employee Organizations: Impasse Procedures*.

MR. LUKACS: Thank you.

Item Number 4. In 2011, the Legislature amended the Meyers-Milias-Brown Act by granting to labor unions the right, under certain circumstances, to force local governments to engage in a collective bargaining process known as "fact-finding."

The staff recommends that this test claim be denied.

The 2011 statute, which is the only law before the Commission today, the 2011 statute unambiguously states that fact-finding can only occur after mediation. And the law is clear that mediation, under the Act, is

voluntary. Since a local government can avoid fact-finding by simply not agreeing to mediation, the 2011 statute does not impose a mandate.

Staff recommends that the Commission adopt the proposed decision to deny the test claim.

Would the parties and witnesses please state their names?

MS. CHANEY: Good morning. My name is Melanie Chaney. I am counsel for the City of Glendora.

MR. NICHOLS: Andy Nichols, Nichols Consulting, interested party.

MS. CHINN: Annette Chinn, Cost Recovery Systems. I work with the City of Glendora.

MS. GEANACOU: Susan Geanacou, Department of Finance.

MS. BRENDAN: Danielle Brendan, Department of Finance.

CHAIR ORTEGA: Okay, please.

MS. CHANEY: Okay. So the City of Glendora issued this test claim to get reimbursed for its increased costs for fact-finding.

Now, the City of Glendora engaged in fact-finding in 2015 -- not because it wanted to, but because it was required to under section 3505.4 of the Government Code, which is the Meyers-Milias-Brown Act.

Now, prior to January 1, 2012, there was no requirement for fact-finding in impasse procedures. This was a new program that was instituted by AB 646, which implemented a new 3505.4, 3505.5, and 3505.7. So this is new.

We're not arguing that mediation was ever voluntary or not. Mediation has always been voluntary.

In this case, that's not the issue. The City of Glendora did not engage in fact-finding, yet it had -- there's no scenario under which the City of Glendora had any choice in engaging in fact-finding under 3505.4. It requires that once the bargaining unit makes a request to PERB for fact-finding, that we must engage in fact-finding, and that is exactly what we did. If we had not done that, we would have been subject to an unfair labor practice charge.

So there's no way around the fact that Glendora had to do this. It was mandated. It was required. They had to do it under 3505.4. And that statute, 3505.4, was pled in our test claim.

Now, what Commission staff is arguing is that AB 1606 is the statute or the bill that led to the mandatory portion of the fact-finding. That is not correct. AB 646 is the mechanism by which the MMBA was revised to make fact-finding mandatory.

Now, unfortunately, there was some ambiguity in that language which was pretty quickly found out. That's why PERB then issued emergency regulations clarifying that it is mandatory. That is why the Legislature went back and cleaned it up with AB 1606, to be clear that it was mandatory. But the intent and the effect of AB 646 was always clear that it was mandatory for an employer to go to fact-finding, should it be requested by the employee organization.

And to say now that it's not mandatory or that Glendora had some choice about going to fact-finding or not, going back to what the voluntary mediation, which is in a separate section of the MMBA, it doesn't lead -- it leads to an absurd result. It leads to the fact that Glendora had an obligation to engage in this fact-finding. But now, it's being said that that was not mandatory, when it very clearly was. And there's really no way around the fact that it was something mandatory for Glendora to do.

I am happy to answer any questions if anyone has any questions about it. We've submitted our papers and our comments; but that's really the gist of our argument here.

CHAIR ORTEGA: Okay, Mr. Nichols, or anyone else?

MR. NICHOLS: Would you like to go first?

MS. CHINN: No.

MR. NICHOLS: Okay. Thank you very much, Madam Chair and Commissioners.

Actually, I do appreciate all the effort that staff had put into the analysis, obviously reviewing PERB communication, all the discussion regarding it.

I guess I have two items.

One is a question; and it's just for me to gain an understanding.

The fact-finding activity is actually currently reimbursable for local education agencies under EERA. Not only for them, they also receive mediation costs. But mediation are not being alleged here.

So I was curious. I did not see -- unlike previous analysis when labor activities had been reviewed or looked at by the Commission -- and the most recent example is *Local Government Employee Relations*. That particular program also looked at PERB costs. And a comparison was drawn between that and the program, *Collective Bargaining* and *Collective Bargaining Agreement Disclosures*, which are eligible for school districts and college districts.

But, once again, not a criticism, but I was just curious why that was not looked at by staff.

Another program that also was reviewed under *Local*

Government Employee Relations, that affect local agencies, and is a reimbursable mandate, is the *Agency Fee Arrangement* claim for, once again, school districts and college districts. That was compared -- kind of a side-by-side comparison there. And I did not, once again, see that analyzed. And maybe I missed it. I'm sorry if I skipped over in the analysis somewhere. But I did not see that comparison, once again, between the fact-finding that is currently eligible for school and college districts to claim for their costs in comparison to what was alleged here by the City of Glendora.

The second point I wanted to mention, and actually Ms. Chaney kind of already touched upon it, I did have a chance to speak with -- unfortunately, he wasn't able to come here today, but Tim Yeung, whose materials he is the co-author of. He is with Renne, Sloan, Holtzman; and he is an author of the PERB Blog. And one of his documents that he co-authored navigating the mandate fact-finding AB 646 law basically went into description. It was reviewed, analyzed for the purpose of this proposed statement of decision. He actually -- he said there was potential unintended consequences here, once again, that Ms. Cheney had mentioned. Local agencies are required, as are bargaining units, to negotiate in good faith. And the fact that if this decision is as a way the Commission

is proposing it, could create, once again, an unintended consequence, and that consequence could lead to potential violation of bargaining good faith to avoid the trickle-down effects of getting to fact-finding. In other words, avoiding that cost. If you don't bargain in good faith, you could end up with an unfair labor practice charge.

Now, anyone looking at a PERB case report, going over to 18th and K Street and requesting that PERB case report, could look at the impasse for local agencies, and see the open filing date and closing dates of those. And those typically last weeks, sometimes months for impasse for local agencies.

However, unfair labor practice charges last months and years; and it usually is considerably much more expensive. And the reason I mention that is, once again, the program that has been approved by this Commission, *Local Government Employee Relations*, is reimbursable. So I don't know if that's an unintended consequence that this Commission has considered; but the fact that you may be saying "no" to something that we here feel is forced, required, or mandated, but the Commission staff is saying is optional, may have a trickle-down effect, where other claims will get more expensive. And that is something that Finance has argued in the past, that this process lacks cost-efficiency, and was argued in 2004 and 2008

not only by Finance, but also the State Controller's Office, where they wanted to rebate or reward those folks that reduced their state-mandated costs by trying to be more efficient.

I would like to respectfully ask that the Commission approve this test claim.

CHAIR ORTEGA: Okay, let's hear from --

MEMBER HARIRI: I have a question.

CHAIR ORTEGA: Oh, yes.

Can we hear from Ms. Chinn and then we will -- I'm kind of keeping track on the issues.

Ms. Chinn, did you have anything to --

MS. CHINN: No, I think they've covered it.

CHAIR ORTEGA: Okay. Let's have Camille respond to the issues -- or Paul -- on the comparison to the EERA statutes.

MR. LUKACS: The short answer is that certainly staff did, in fact, review both the EERA and the higher education; and I analyzed the history of both. Ultimately, when it came to write the decision, the Meyers-Milias-Brown Act has this very specific history. This is a test claim about an amendment to that one act. And while I certainly reviewed all those and kept the other sister acts in mind, you know, we here in California have made a decision that we don't have one

overarching statute regarding public employees. We have these multiple ones. And so this one was analyzed -- its specific language was analyzed; and the specific statute which was pled in the test claim is what was written up in the decision. But I do assure the Commission, all the other sister acts were read and analyzed in detail.

CHAIR ORTEGA: Then one follow-up question. Is mediation required under the Education Acts?

MR. LUKACS: Off the top of my head, I do not remember.

CAMILLE SHELTON: It is. I can tell you, it is.

CHAIR ORTEGA: I don't think that makes a difference in terms of the reimbursement decisions that have been made because in those statutes, mediation is required, and it's not required in the MMBA.

Mr. Hariri?

MEMBER HARIRI: I have a question of Chief Counsel and then my colleagues.

Can we reasonably assume that absent negotiation, mediation, or fact-finding, we can resolve any dispute, whether it relates to labor or otherwise? How can we resolve any problem without really delving into the issues through fact-finding?

Just logically, I'm not understanding that. Even though the law may be silent, was that the intent?

MS. HALSEY: Can I clarify one thing?

First of all, staff isn't finding that fact-finding is not required; it's just not required by AB 646. It's required by other law that wasn't pled. This is really a pleading issue. So it's not an issue of what the requirements are.

MEMBER HARIRI: And does it have to be specifically specified in statute?

CAMILLE SHELTON: Yes. For there to be a mandate, the State has to be imposing a duty by the statutes that are pled in a test claim.

In its claim, they've pled only the 2011 bill. That bill, almost immediately after it was enacted, came into question whether or not it was really mandatory or not, because it was triggered by a voluntary mediation. It wasn't until either, you can argue, the PERB regulations, which were not pled, or the 2012 statute that amended the code section, that it became arguably mandated. But we have not analyzed that here, since those two provisions have not been pled.

So the only statute that's been pled, the 2011 statute, is not a mandate pursuant to several Supreme Court and court decisions on mandates.

MEMBER HARIRI: I mean, my question is, can you really resolve any dispute without mediation -- without

fact-finding?

MR. LUKACS: Well, I would think so, sir. I mean, sometimes, you know, the parties may be in the same place, near the beginning of talks. Sometimes there can be informal talks. Sometimes there can be formal.

I think the idea behind fact-finding was that when the process is near its end and it appears that there is a very strong issue, then the idea is that a fact-finding panel is appointed. And the fact-finding panel will do some research and issue a set of recommendations. And I think that's important to understand.

No one is bound by the fact-finding report. It's, in this case, three people will put together issues, such as, what are the prevailing wages, what are the job classifications involved, how much was inflation.

The earliest example of fact-finding that I could find, to put this in context, is in 1946, the workers at General Motors had a strike because they had not had a wage increase; and President Truman appointed a fact-finding commission. The commissioners reviewed the state of the economy and the state of industry, and recommended that there be a wage increase for all General Motors employees of at least 19 and a half cents per hour.

CHAIR ORTEGA: Thank you.

Are there any other comments from commissioners?

Yes, Ms. Olsen?

MEMBER OLSEN: I've got some questions.

CHAIR ORTEGA: Yes.

MEMBER OLSEN: This has a little bit of the aspect of a "gotcha" in terms of it being about what section was pled.

And I know that our Commission staff is really good at working with folks who come before the Commission prior to setting the hearing and all of that, to work out difficulties. At least that is my sense of what has happened in the past.

So I'm kind of wondering what the history is here that's brought us to this point, where --

Well, okay, a simple question: If we find for the Commission staff today, if we agree with the Commission staff today, does that preclude Glendora or some other city from pleading other statutes in another test claim?

MS. HALSEY: Well, the statute of limitations has passed for those.

MEMBER OLSEN: Okay.

MS. HALSEY: And the regulation, for instance, became effective on the same date as this test-claim statute.

MS. CHINN: However, if another agency did not have

costs incurred, they could still file for that, is my understanding. They have a year.

MS. HALSEY: That would be an issue of law which has not been addressed yet. It would be an issue of first impression. So we can't really answer that right at this point.

CAMILLE SHELTON: Yes, that is a difficult question; and we haven't been faced with that. We've certainly talked about that in-house. Because the intent of a statute of limitations and about the test-claim process being similar to a class action, arguably, it would be a loophole to allow anybody to come in first, incurring costs later, when -- you know what I'm saying? -- when they should have brought it within the first year of the statute or regulation becoming effective.

That's just one argument.

I don't know how we would proceed. And I would certainly need to get briefing from both parties on that.

But I was going to just add that Government Code section 17553 is the statute that governs how to file a test claim. And it very specifically says that you have to plead the code section and the statute and the chapter that you are alleging created the mandate.

Here, the only thing that they've pled was the code section and Statutes 2011.

Staff can't -- it would be a violation of ex parte procedures if we were to go out and help the claimant.

MEMBER OLSEN: Right. I understood that.

CAMILLE SHELTON: So I can't call them and say, "Did you really just mean, you know, this 2011 statute?"

There have been occasions in the past where maybe the pleading is not that clear and where there are some ambiguities within the pleading itself, where it's not clear which one that they're pleading. It wasn't the case here, though. There were multiple occasions, as Mr. Lukacs can describe, where they were specifically pleading the 2011 statute, and that's all they pled.

MEMBER OLSEN: Okay, thank you.

CHAIR ORTEGA: Ms. Chaney, do you want to comment on the pleading issue?

MS. CHANEY: Yes. So AB 646 is the statute that created fact-finding for MMBA. And the intent clearly was for it to be mandatory, and the effect of it was for it to be mandatory. I understand that there was ambiguity in the actual language which led to the cleanup language from AB 1606. But statutory construction requires you to look at what was in the statute at the time. And if it's ambiguous, then you need to see what the legislative intent was. And all the legislative intent materials that we've provided show that the intent

was for it to be mandatory. The effect was for it to be mandatory. And PERB then came behind and said, "Yes, it's mandatory," and issued regulations saying that it was mandatory.

There is -- in no situation, did Glendora have an option not to go to fact-finding here. And so for that reason, I would say that it is a mandate for which they should be reimbursed.

MR. LUKACS: Could I respond to that?

CHAIR ORTEGA: Yes.

MR. LUKACS: Staff believes that the statute, the test-claim statute and the MMBA behind that, on this issue, there is no ambiguity.

Under the Government Code, specifically section 3505.2 -- that's the mediation provision -- that has been unchanged since Governor Reagan signed it in 1968. And there are several cases, court cases, which say flat out, that in this particular statute, mediation is voluntary.

Then in the test-claim statute, Government Code 3505.4(a) was amended to read, *"If the mediator is unable to effect settlement of the controversy within 30 days of his or her appointment, the employee organization may request that the parties' differences be submitted to a fact-finding panel."*

So as you can see, first, there is a voluntary decision to enter into mediation; and only downstream of that -- I mean, it's very clear: "If the mediator is unable to effect settlement," that is the precondition, that is the prerequisite, and it is a voluntary prerequisite. Ergo, we don't believe there's any ambiguity there.

As we noted in the decision, if a claimant wants to argue that there is an ambiguity, they need to find the ambiguity in the text of the statute. It is not appropriate to point to extra statutory material, such as the statements of sponsors, committee reports, statements and interviews. There is a -- when you simply read what the Legislature had passed, there is no ambiguity. Mediation is voluntary.

CHAIR ORTEGA: Yes?

MS. CHANEY: So I do not dispute that mediation is voluntary under 3505.2. I do not dispute that.

3505.4, as written by AB 646, has that phrase, "If the mediator doesn't find." I got that. But it does not say what happens when there isn't a mediation.

So in this case, there was no mediation. Nobody agreed to go to mediation. Glendora didn't have a mediation, nobody asked for a mediation. There was a request for fact-finding, and there was a request for

fact-finding that Glendora was not --

CHAIR ORTEGA: But then it would have been pursuant to the 1606 section; right? The amended -- the regs --

MS. CHANEY: Which clarified AB 646.

CHAIR ORTEGA: Yes, I get that, but --

MS. CHANEY: But it didn't create the new program. AB 646 is the statute that created the new program.

CHAIR ORTEGA: Yes, I think that's where we're not going to be able to…

CAMILLE SHELTON: Just to clarify. A requirement can be stated in a law; but it may not be mandated by the state. There's lots of cases that have requirements by a state law, but they're not considered state-mandated, especially if they're triggered by a voluntary decision.

CHAIR ORTEGA: I certainly can sympathize with your perspective. But I think the issue still remains that if you didn't have mediation and you were required to go to fact-finding, it was pursuant to the changes that were made in 1606, not in 646. And it's only 646 -- yes, 646 that's been pled. So I think that still remains the kind of fundamental problem for your test claim.

Are there any other comments from commissioners?

Mr. Saylor?

MEMBER SAYLOR: So that point comes up from time to time, the issue of timeliness.

Could staff describe again the reason that Glendora could not resubmit and plead based on additional statute?

CAMILLE SHELTON: Well, the Government Code requires that a test claim be filed within one year of the effective date of the test-claim statute or executive order, or within first incurring costs.

Again, there's some ambiguity, or legal differences, maybe, with the first incurring costs, which may be, if it comes forward, we'd have to analyze what that meant when it came forward.

MEMBER SAYLOR: Okay.

CAMILLE SHELTON: I was going to say, Ms. Chaney testified already that they incurred costs in 2015. So you're already technically past that date and have already incurring costs within the first year.

I was losing my train of thought.

The statutes also allow a test claim to be amended. But Government Code section 17557 says that it has to be amended before the matter is set for hearing. The matter is set for hearing when the draft proposed decision is issued under the law. So it could have been amended if they had caught it earlier, but it was not.

MS. HALSEY: And, actually, in this case, we didn't even catch it in time in our analysis. It was too late, pretty quickly, after the original was filed, in terms of

the statute of limitations.

MEMBER SAYLOR: Okay, so they --

MS. HALSEY: So not that it can't be amended just because we issued a draft; it was actually past the statute of limitations, before we even got into the analysis to see the issue for ourselves.

MEMBER SAYLOR: To the Claimant: Did you consider including additional statutes in your pleadings? Or did you not -- was there any reason that you didn't do that?

MS. CHANEY: It's our belief that AB 646 is the statute that made the new program; and it was under that statute that it was mandatory.

I would say, though, that if that is the issue, there's got to be some mechanism to conform the pleadings to the proof. I mean, we've shown you what it is and that it is mandatory, and that it was mandatory for the City of Glendora; and that the City of Glendora incurred the costs based on a requirement under 3505.4, which we did plead in our test claim.

And so I would say, just the same as you would in a civil trial, where you can go back and conform the pleadings to the proof, I would say we should be able to do that here, because we clearly incurred the costs based on a new program that was mandated.

CHAIR ORTEGA: Camille?

CAMILLE SHELTON: You know, in a civil pleading, unlike the pleading requirements here, you don't have to specifically plead each and every fact. You can claim them based on information and belief in a civil pleading, and then conform your pleadings to proof during trial.

Here, the statute, the Government Code section 17553, requires very specific pleading. You specifically have to plead the code section and the statute and chapter that you allege claims the mandate. So there is -- you can't go back and conform the pleading to the proof. You have to specifically plead it or amend your claim within the time frame.

MEMBER SAYLOR: What about a statement that the intent and the effect, and all of the other evidence that comes into play, to pretty much -- well, to require the local agency to carry out fact-finding, even in the absence of mediation, as they say?

CAMILLE SHELTON: Well, there is also some information in here -- first, under the rules of statutory construction, you don't get to the history. You don't even look at what the legislators were thinking until you've determined that the plain language is vague and ambiguous. And we don't believe that it is. It's pretty clear.

And when you do, I believe there was some bill

analyses, some actual amendments to the bill that came forward that I think Mr. Lukacs can probably talk about on page 39, where they specifically had mediation as being required during the first versions of the bill, and then they took it out, so…

MR. LUKACS: Yes, that's correct. When Bill 646 was originally submitted on February 16, 2011, there was a requirement for mandatory mediation. However, in amendments which the Assembly approved on March 23rd, 2011, that entire section was removed. So what was left, the staff finds to be unambiguous for the reasons I stated earlier.

MEMBER SAYLOR: Does the fact-finding only transpire if mediation has first taken place? Or in your case, I believe the claimant said that there was not mediation.

MS. CHANEY: There was no mediation.

MEMBER SAYLOR: The fact-finding request came forward.

MS. CHANEY: And if we had not engaged in fact-finding, we would been subject to an unfair labor practice charge.

MR. NICHOLS: Which is reimbursable.

CAMILLE SHELTON: I believe you said that was in 2015, however?

MS. CHANEY: That's correct.

CAMILLE SHELTON: Right, in 2015.

In 2012, the law changed, to make fact-finding required regardless of whether you have mediation or not. The law changed in 2012. That 2012 statute has not been pled. So that would be correct, that they were required, no matter whether they had mediation or not, in 2015.

MS. CHANEY: Well, that's where we disagree.

MEMBER SAYLOR: So we all agree that there's a requirement that the State imposed that the local agency have fact-finding?

CAMILLE SHELTON: Yes.

MS. HALSEY: Not under this statute, though.

MEMBER SAYLOR: Okay, so how do we get past this Procrustean bed here to get to the point of the claimant being able to claim something, when it's clear that they have a cost that's required by the State?

CAMILLE SHELTON: You would need a change in our Government Code statutes to do that. It's very clear that you have to plead specifically the code section and the statute and chapter. And we've been to court on this many times. It's a pleading problem. And until -- unless the Legislature makes a change to those statutes, we can't do anything.

CHAIR ORTEGA: Ms. Chaney, you were going to make one more?

MS. CHANEY: Well, I mean, I think you all understand what the issue is here. And I disagree that there was a change in the law. I believe it was a clarification of the law that already was in existence under AB 646. It's not a change. It was mandatory under AB 646. That's why PERB went and did its emergency regs, because it was ambiguous.

I understand that staff does not believe it was ambiguous, as read. I believe that it was ambiguous, because it does not address what happens if there's not a mediation at all. It just said, "If the mediator," you know, so forth and so on. If there is no mediator, it does not say what happens there. That was the problem. That's why everybody went back and tried to clarify it.

So I don't see it as there was a new law that AB -- that there was a new law that changed what was there. It just clarified what was already there.

MS. HALSEY: May I direct the Members to page 39 of the test-claim decision -- or proposed decision?

And there is an Assembly Committee on Public Employees, Retirement and Social Security analysis of what those amendments did, the amendments that Paul was just referring to. And specifically, the second thing that they say that they do is to remove requirements that an employer or an employee organization submit their

differences to a fact-finding panel, and, instead, provides employees' organizations with the option to participate in a fact-finding process established in 3505.4, added by this measure, which seems to signify that it is optional under this particular statute.

CHAIR ORTEGA: Yes?

MEMBER RAMIREZ: This is why people are frustrated with this Commission, because we're so legalistic; and that's why a lot of times, people don't like lawyers or legislators.

I'm actually going to abstain here because my city is sort of in the midst of this. But I totally respect the work of everybody here. That's why I will be abstaining. We're on the cusp there of this issue.

CHAIR ORTEGA: Thank you.

Okay, are there any additional comments from Commissioners?

(No response)

CHAIR ORTEGA: Is there any additional public comment on this item?

(No response)

CHAIR ORTEGA: Okay, with that, I'll call for a motion.

MEMBER MORGAN: I'm going to move to approve the staff recommendation.

MS. OLSEN: I'll grudgingly second it.

CHAIR ORTEGA: Thank you. A motion and a second. Let's go ahead and call the roll.

MS. HALSEY: Mr. Chivaro?

VICE CHAIR CHIVARO: Aye.

MS. HALSEY: Mr. Hariri?

MEMBER HARIRI: Abstain.

MS. HALSEY: Mr. Morgan?

MEMBER MORGAN: Aye.

MS. HALSEY: Ms. Olsen?

MEMBER OLSEN: Aye.

MS. HALSEY: Ms. Ortega?

CHAIR ORTEGA: Aye.

MS. HALSEY: Ms. Ramirez?

MEMBER RAMIREZ: Abstain.

MS. HALSEY: Mr. Saylor?

MEMBER SAYLOR: No.

CHAIR ORTEGA: The motion carries. Thank you. Thank you, everyone.

Move to Item 8.

MS. HALSEY: Senior Commission counsel Paul Karl Lukacs will present Item 8, an incorrect reduction claim on *Animal Adoption.*

The claimant notified Commission staff that they stand on the record but disagree with portions of the

REPORTER'S CERTIFICATE

I hereby certify:

That the foregoing proceedings were duly reported by me at the time and place herein specified; and

That the proceedings were reported by me, a duly certified shorthand reporter and a disinterested person, and was thereafter transcribed into typewriting by computer-aided transcription.

In witness whereof, I have hereunto set my hand on the 3rd day of February 2017.

Daniel P. Feldhaus
California CSR #6949
Registered Diplomate Reporter
Certified Realtime Reporter

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

BILL ANALYSIS

ASSEMBLY THIRD READING
AB 1606 (Perea)
As Introduced February 7, 2012
Majority vote

PUBLIC EMPLOYEES 4-1 APPROPRIATIONS 12-5

Ayes:	Furutani, Allen, Ma, Wieckowski	Ayes:	Fuentes, Blumenfield, Bradford, Charles Calderon, Campos, Davis, Gatto, Hall, Hill, Lara, Mitchell, Solorio
Nays:	Mansoor	Nays:	Harkey, Donnelly, Nielsen, Norby, Wagner

SUMMARY : Clarifies impasse procedures governing local public agencies and employee organizations. Specifically, this bill , 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 : According to the Assembly Appropriations Committee, "since this bill is meant to be declarative of existing law and mirrors existing regulations, there is no direct fiscal impact. However, the regulations in question are emergency regulations and PERB is in the process of developing the final regulations. If fact-finding were to be limited either through a different interpretation of AB 646 and/or the final regulations were to differ markedly, this bill could result in increased costs to PERB of approximately $50,000 and a possible reimbursement of state mandated local costs.
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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 way 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.

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

FN: 0003307