LCW LIEBERT CASSIDY WHITMORE

Labor Relations: The Meet and Confer Process

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This workbook contains generalized legal information as it existed at the time the workbook was prepared. Changes in the law occur on an on going basis. For these reasons, the legal information cited in this workbook should not be acted upon in any particular situation without professional advice.

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SECTION 1 LEGAL FRAMEWORK FOR COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

A. INTRODUCTION

The purpose of this workbook is to assist local agency officials and representatives to effectively administer the meet and confer process.

The Meyers-Milias-Brown Act (MMBA)—the California law that mandates that process for cities, counties and special districts—refers to it as "meeting and conferring in good faith." However, in light of the manner in which the courts have interpreted the MMBA, the traditional private sector terms "negotiating" and "collective bargaining" more aptly describe the process. Thus, this workbook uses these terms interchangeably.

Since its passage in 1968, labor disputes, strikes and litigation related to labor relations under the Meyers-Milias-Brown Act have been relatively infrequent. Periodically, however, public employee unions and their allies have sought to modify the law to create a labor relations environment more closely resembling their goals and objectives. Those efforts resulted in an amendment to the Meyers-Milias-Brown Act, effective 2001.[1] This amendment extends the jurisdiction of the Public Employment Relations Board (PERB) to cities, counties and other local government agencies. This workbook will discuss PERB jurisdiction and its impact on local government labor relations.

There is a wide divergence among California local agencies in the degree to which some continue to operate primarily along traditional civil service lines, and the extent to which others have changed to the private sector labor-management relations model. While the private sector model increasingly represents the norm, because of this divergence some workbook material may seem elementary to the reader who is an experienced labor negotiator and at the same time not sufficiently clear to the reader who is new to labor negotiations. It is hoped, however, that the workbook as a whole will serve readers as a helpful guide as they are involved in their agency's approach to the collective bargaining process.

B. THE LEGAL FRAMEWORK FOR NEGOTIATORS

State statutes form the legal framework for public sector labor relations and collective bargaining in California. PERB administers and has jurisdiction over disputes arising out of these various statutes, which include the following that address the majority of employees under PERB jurisdiction:

- The MMBA, discussed above, which applies to cities, counties and special districts;[2]
- The Educational Employment Relations Act (EERA), which applies to public schools and community colleges;[3]

- The State Employer-Employee Relations Act (SEERA, or the "Dills Act"), which applies to state government employees;[4]
- The Higher Education Employer-Employee Relations Act (HEERA), which applies to the California State University System and the University of California system;[5]
- Trial Court Employment Protection and Governance Act (TCEPGA), which governs labor relations between California courts and most court employees[6];
- Trial Court Interpreter Employment and Labor Relations Act (TCIELRA), which controls labor relations between California courts and court interpreters[7]; and,
- The Los Angeles Metropolitan Transportation Authority Transit Employer Employee Relations Act (TEERA), which covers only the supervisors of the Los Angeles Metropolitan Transportation Authority. Transit districts, generally, fall outside PERB's jurisdiction[8].

In addition to the case law interpreting the above-listed statutes, decisions of the National Labor Relations Board may be found relevant in interpreting the MMBA. This workbook covers the meet and confer process under the MMBA and related labor relations issues.

1. MMBA

The MMBA, Government Code sections 3500-3511, is the statutory basis for requiring local agency negotiating systems. A copy of the Act is included as Appendix A in the back of this workbook. The MMBA is unique among labor relations laws in that it establishes general rights and obligations only, and has left the specific procedures for implementing those rights and obligations up to local agencies - subject, however, to review and interpretation by the Public Employment Relations Board (PERB) and by the courts.[9] PERB's exclusive jurisdiction applies to all local agency employees except peace officers, management employees, most transit district employees and employees of the City of Los Angeles, and Los Angeles County.

2. LEGAL OBLIGATION TO MEET AND CONFER

a. General Scope of Obligation

The obligation to negotiate, or "meet and confer," generally arises when one of the parties makes a request to negotiate or when the agency decides to make a change in a matter within the statutory scope of representation. See Appendix B for an explanation of Labor Relations Terminology.

The statutory scope of representation is defined under Government Code Section 3504, as:

> [A]ll matters relating to employment conditions and employer-employee relations, including, but not limited to, *wages, hours and other terms and conditions of employment*, except, however, that the scope of representation shall not include consideration of

> the merits, necessity, or organization of any service or activity provided by law or executive order. *(Emphasis added).*

To determine whether a specific topic is subject to meet and confer requirements, PERB will apply a three part test. First, it will ask if the management action significantly and adversely affects bargaining unit wages, hours or working conditions. If not, there is no duty to meet and confer. Second, it will ask if the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, the requirement to meet and confer applies. Third, if both of the above factors apply, PERB will use a balancing test to determine whether the parties must meet and confer.[10] Specifically, it will ask whether the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.[11]

b. Notice

The MMBA requires local public agencies in California to provide reasonable written notice to each affected, recognized employee organization of "any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted."[12] Once a public agency has given reasonable written notice to the affected, recognized employee association, the burden shifts to the association to request a meet and confer session.[13]

The request to negotiate commonly occurs as one of the following scenarios:

- The Recognized Employee Organization (union) wishes to negotiate or renegotiate a Memorandum of Understanding (MOU) (an MOU is a labor agreement that modifies and/or incorporates the various terms and conditions of employment of unit employees for a specified term);
- The agency puts the union on notice that it wishes to make a change in an established practice, administrative procedure or adopt a new procedure that alters the unit employees' terms and conditions of employment (i.e., the subject of the proposed change is within the scope of representation). The union thereafter requests to meet and confer with the agency; or
- The union becomes aware of a change in unit members' employment terms, and demands that the agency negotiate such change.

c. The MMBA Scope is Broader than the NLRA's Scope for Private Sector Employers of the Obligation to Meet and Confer

As previously mentioned, Section 3505 of the MMBA imposes an obligation on both public agencies and employee organizations to negotiate on request with respect to changes on "matters within the scope of representation." Under the private sector labor relations model, the negotiating obligation extends to matters "with respect to wages, hours, and other terms and conditions of employment…" (Section 8(d) of the National Labor Relations Act (NLRA).

Thus, comparing the MMBA definitional language with that of the NLRA, we find that the MMBA wording at the beginning is broader ("all matters relating to employment conditions . . .

including, but not limited to…"), the wording at the end is narrower ("except, however, that…(it) shall not include…the merits, necessity or organization of any…activity provided by law…"), and the middle is the same ("wages, hours and other terms and conditions of employment").

d. The Good Faith Requirement

Both the MMBA and NLRA describe the bargaining obligation in terms of meeting and conferring in good faith (MMBA Sec. 3505, NLRA Sec. 8(d)).

Government Code § 3505 defines the concept of meet and confer in good faith as 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 the matters within the scope of representation…*

Good faith requires a subjective attitude with a genuine desire to reach agreement, manifested in conduct which indicates "a serious attempt to resolve differences and reach a common ground."[14] The effort required is inconsistent with a "predetermined resolve not to budge from an initial position."[15] PERB has adopted the standard for good faith as applied by National Labor Relations Board (NLRB) and the federal courts in application of the NLRA. For further discussion of the good faith standard and unfair practice charges relating to failure to bargain in good faith, see the section of this workbook entitled "PERB Review of Unfair Practices."

e. Duty to Meet and Consult

The MMBA authorizes an employer to adopt "reasonable rules and regulations" for the administration of employer-employee relations.[16] An employer is required to "meet and consult" with employee organizations over employment relations rules.[17] Generally, consultation required under Government Code Section 3507 over employment relations rules is no different from the good faith meet and confer process required under Government Code Section 3505.[18] PERB has held that the duty to "consult in good faith" under Section 3507 requires the agency to provide reasonable written notice to each employee organization affected by the rule or regulation proposed for adoption or modification and afford each organization a reasonable opportunity to meet and discuss the rule or regulation prior to the agency's adoption. Furthermore, the agency and exclusive representative have the mutual obligation to exchange information, opinions and proposals, and to make and consider recommendations under orderly procedures in a conscientious effort to reach agreement.[19]

While the duty to consult is virtually identical to the duty to confer, the subjects that must be discussed under each statute are different because Section 3507 specifically identifies subjects for consultation. However, PERB has taken an expansive view of the "mandatory subjects" for consultation, holding that they concern the system of collective representation established by the MMBA.[20] PERB's interpretation is subject to some dispute because a judicial appeal of the *City of Palo Alto* decision is pending. Therefore, agencies should not assume that permissive subjects

of bargaining under Section 3505 are necessarily permissive subjects of consultation under Section 3507.

This requirement does not necessitate the agreement of the employee organizations but a good faith attempt should be made to address the concerns of all parties. This is particularly important in light of appellate court and PERB decisions that implied that the obligation to "consult in good faith" is equivalent to the obligation to "meet and confer (negotiate) in good faith" as those terms are used in the Act. Most importantly, meet and consult matters do not require the agency to participate in impasse procedures. Accordingly, if after a good faith effort to meet and consult is made by the agency, it may unilaterally impose those matters which were the subject to consultation between the parties.

3. REPRESENTATIONAL SYSTEMS

a. Right to Representation

The MMBA confers upon public employees the right to "form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."[21] Public employees also have the right to refuse to join or participate in such activities, and have the right to represent themselves individually in their employment relationships with the public agency.[22] However, an individual's right to self-representation concerning employment relations does not confer the right to individually negotiate an employment contract when the individual is represented by an officially recognized employee organization.[23] Except as authorized by statute, public employees have no right to bargain over the terms and conditions of employment with their employer.[24]

i. Checklist: MMBA Representational Systems Must Provide:

1. Supervisory/Management/Confidential Employee Bargaining Rights

- The Act extends bargaining rights to all employees, including supervisory, management and confidential.[25]

2. Bargaining Units/Organizational Recognition

- Adoption by an agency of a procedure by which employees elect an *exclusive* representative forms the only reasonable basis for denying recognition to any and all bona fide employee organizations who seek to represent at least some employees in a unit.[26]
- An employer must follow the representation procedures and local rules that it enacts.[27]
- An employer may not restrict the right of peace officers to join or participate in employee organizations that are composed solely of peace officers.[28]

- However, the MMBA does not require peace officers to be in a separate unit from non-peace officers, if the peace officers so choose to join the mixed unit.[29]
- It is reasonable to require separate units for management and related non-management employees, including in the peace officer area.[30]
- It is unreasonable to include one police management position in a unit (e.g., Asst. Police Chief) and exclude another (e.g., Police Chief).[31]
- Represented management and confidential employees may not represent an employee organization which also represents other employees in the public agency on matters within the scope of representation.[32]
- It is reasonable to define "management" positions to include supervisory positions (first level of supervision), and to require a separate unit from the rank and file.[33]
- A court will look to private sector labor law to determine whether a particular position is supervisory.[34]

3. Organization's Representational Rights/Obligations

- Some courts have equated the Sec. 3505 "meet and confer" process rights pertaining to wages, hours and working conditions with the Sec. 3507 "consult" process rights pertaining to reasonable regulations.[35]
- Where *exclusive* recognition was granted to an employee organization pursuant to a secret ballot election, or through the card check process delineated in Govt. Code § 3507.1(c), that organization is the only one entitled to negotiate on behalf of unit employees.[36]
- Under private sector law, which may be found relevant in interpreting the MMBA, a union which is the exclusive representative and which breaches its duty of fair representation by failing to take a meritorious employee grievance to arbitration will be held liable for damages to the employee resulting from such breach.[37]
- In *Bowen v. U.S. Postal Service*, the court found that if the employer's discharge of the employee was improper, and where the union refused to appeal the discharge pursuant to the contractual arbitration procedure, damages due the employee were apportionable between the employer and the union.[38]

b. PERB Review of Unfair Practices

The Public Employment Relations Board has authority over (most) local agency employers much like the National Labor Relations Board in the private sector.[39] Effective July 1, 2001, PERB authority was expanded to administer and resolve disputes regarding unfair practices involving most agencies subject to the MMBA. PERB has the authority to hold hearings, subpoena witnesses, administer oaths, take testimony and depositions, issue subpoenas *duces tecum* to

require the production of documents and records of employers or employee organizations, conduct investigations, or bring actions in court.

Any final and binding arbitration agreement within a MOU that covers unfair labor practices under PERB's jurisdiction may bar PERB's review of such charges. If timely cited by an employer, PERB is statutorily required to place such charges in abeyance until the conclusion of the arbitration process and will generally dismiss the charge following the resolution of the matter through such procedures.[40]

i. Unfair Practices Defined

An unfair labor practice is "a complaint alleging any violation of this chapter (i.e., the MMBA) or of any rules and regulations adopted by the public agency pursuant to Section 3507" (e.g., representation matters, impasse procedures, access to employees, communication).[41] Under this language, a potentially broad scope of issues can constitute unfair practices. The statute of limitations to file an unfair practice charge under the MMBA is six months.[42]

Public agencies should look to current guidelines on identifying unfair practices, but should also recognize that under PERB, the definition is certain to expand. PERB regulations for unfair practice proceedings will specify the steps an agency needs to take in processing or responding to a charge.[43]

ii. Failure to Bargain in Good Faith

The most common unfair practice charge to arise out of bargaining is a charge for failure to bargain in good faith. The courts have been generally guided by private sector precedent in determining the nature of the good faith obligation and conduct which constitutes a violation of that obligation. PERB is obligated and expected to follow such existing judicial interpretations. In addition, PERB's many decisions interpreting statutes similar to the MMBA are likely to provide guidance as to how PERB will interpret unfair labor practice decisions under the MMBA.

In determining whether a party has violated the duty to bargain in good faith, PERB utilizes either the "per se" or "totality of conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process.[44]

- "Per Se" violations involve a unilateral change in a mandatory subject without giving the union the opportunity to bargain or without exhausting its bargaining or impasse obligations, or outright refusals to bargain. Such acts have such potential to frustrate bargaining and to undermine the exclusivity of the employee organization that they are unlawful without any determination of subjective bad faith.[45]
- The "Totality of Conduct" standard involves consideration of various factors (i.e., context) pertaining to negotiations. PERB will resolve the question of whether a party acted in good faith by analyzing the totality of the accused party's conduct. Generally, one indicator of bad-faith bargaining is insufficient to demonstrate a prima facie case of unlawful conduct.[46] Many relevant factors are considered by a court or PERB in deciding whether one party has violated the good faith obligation. These

factors are cumulative. PERB weighs the facts to determine whether the conduct at issue "indicates intent to subvert the negotiating process or is merely a legitimate position adamantly maintained."[47]

The following checklist provides examples which are considered material in determining whether the conduct of a party constitutes a lack of good faith when looking at the totality of the conduct.

iii. Checklist: Totality of Conduct Factors Evidencing Bad Faith Bargaining

- Take it or leave it proposals.
- Refusals to respond to proposals, or vague responses to detailed proposals.
- Unwillingness to provide reasons for positions.
- Going through motions of bargaining without any interest in reaching agreement - "surface bargaining."[48]
- Imposition of unreasonable conditions, such as conditioning further negotiations on agreement to certain issues.
- Refusal to supply relevant, available information.
- Knowingly providing inaccurate information regarding the agency's financial resources.
- Refusal to sign a written contract.
- Dilatory tactics, such as delays in scheduling meetings, not appearing at scheduled meetings, or failing to give negotiating representatives sufficient authority to carry on meaningful bargaining.
- Engaging in such "unfair labor practices" as unilateral changes in wages or discriminatory layoffs during negotiations.
- Bypassing the designated negotiating representative by directly communicating proposals to unit employees (by agency) or members of governing body (by union).
- A rude, patronizing attitude to the other party.
- Unreasonable changing of negotiators.
- Withdrawal of prior agreements.
- Violations of negotiated ground rules.
- Regressive proposals as negotiations continue.
- Proposing to hold a particular mandatory subject of bargaining for discussion after a new contract is agreed upon and subsequently refusing to bargain about the proposal.[49]
- Insistence to impasse on permissive (non-mandatory) subjects of bargaining.

- Demanding agreement on illegal issues (Per Se Violation).

iv. Checklist: Bad Faith Bargaining Decisions

The following decisions also provide guidance regarding conduct in the bargaining process which may be evidence of bad faith:

1. Unilateral Action without Bargaining; Clear and Unmistakable Waiver

- A unilateral change by the employer of a bargainable matter without first giving the union notice and an opportunity to bargain is in and of itself an unfair practice, absent a "clear and unmistakable waiver" by the union.[50]
- An exclusive representative is free to negotiate a waiver of its right to bargain over certain mandatory subjects of bargaining for a specified contractual period. The waiver must be clear and unmistakable and cover all aspects of the particular matter in question. Such a waiver may authorize the employer to make unilateral changes in that mandatory subject.[51]
- A contractual management rights provision that reserves to the county "the exclusive right to assign employees" does not constitute the requisite clear and unmistakable waiver by the union of the right to meet and confer that would allow a unilateral change of shift assignments.[52]
- A union's silence in negotiations on an issue previously in dispute does not constitute a waiver by the union of its right to negotiate on that issue during the term of the contract.[53]
- A unilateral change to a mandatory subject without bargaining creates intolerable working conditions.[54]
- PERB has no jurisdiction to remedy an alleged violation of the collective bargaining agreement unless the violation also constitutes an unlawful unilateral change. Change in the application of the Personnel Rules, that did not result in a rule or policy change, fails to establish a prima facie case of a unilateral change.[55]
- A subsequent offer to meet and confer cannot cure an alleged unlawful unilateral change.[56]

2. Unilateral Action During Negotiations After Expiration of Agreement

- The good faith obligation requires that the employer maintain the status quo as to wages, benefits and working conditions during negotiations on a new agreement after expiration of the predecessor agreement. The status quo includes what was in the expired contract.[57]
- After the expiration of the contract, the employer may not make a change in terms and conditions of employment, but an arbitration provision will not be extended to require arbitration of post-expiration disputes, unless drafted to require extension of that provision.[58]

3. Refusal to Make Concession

- Agency's refusal to make a concession on its proposal that firefighter schedules be changed to eight hour shifts is not bad faith. Totality of conduct indicated legal hard bargaining - not illegal bad faith.[59]
- Adamant insistence on a bargaining position does not equate to a refusal to bargain, or violate the duty to bargain in good faith.[60]
- Seeking across-the-board concessions from multiple bargaining units is not bad faith bargaining. However, an agency may not engage in coalition bargaining, refusing to bargain unless the bargaining units meet jointly or conditioning the settlement of one contract on the settlement of another.[61]
- However, the definition of good faith, which includes a willingness to compromise as an important factor, must also be weighed in determining whether there was a violation.[62]

4. Refusal to Use Impasse Resolution Procedures

- Under the MMBA, the refusal to agree to accept the assistance of a mediator to resolve a negotiating impasse is not bad faith.[63]
- Failure to follow the impasse resolution procedures set forth in the local rules was not good faith conduct.[64]

5. Bypassing Designated Representatives

- Unless negotiated "ground rules" prohibit it, factual communications directed to employees which are not designed to undermine the authority of the union do not violate the good faith requirement.[65]
- Where the union bypasses the school board's designated representatives by making negotiating proposals directly to board members, it violates the union's obligation to bargain in good faith.[66]
- Direct dealing with employees whom employer did not agree were in bargaining unit is not bad faith.[67]
- An agency cannot circumvent its meet and confer obligation by using the citizen initiative process to submit a proposal to the voters that might otherwise have been rejected by the union.[68]

6. Surface Bargaining

- Surface bargaining occurs when one party goes through the motions without any real intent to reach an agreement.[69]
- Insistence on a firm position is not necessarily evidence of bad faith because the law merely requires the parties to maintain a sincere interest in reaching agreement, even if the reasons for a particular position are questionable.

The duty to bargain in good faith requires the parties to explain the reasons for their positions with sufficient detail to allow for mutual understanding.[70]

7. Failure to Provide Requested Information

- An agency must provide requested information (provided that information is available to the agency) concerning subjects within the union's scope of representation.[71]
- The exclusive bargaining representative is entitled to obtain the personal contact information, including home addresses and phone numbers, of all represented employees, including those who have not joined the union.[72]
- An agency may not knowingly provide inaccurate information regarding the agency's financial resources.[73]

C. LOCAL RULES

1. EMPLOYER–EMPLOYEE RELATIONS RESOLUTION

As stated previously, section 3507 of the MMBA authorizes local agencies to adopt "reasonable rules and regulations after consulting in good faith" with representatives of all its employee organizations.

Commonly, local agencies exercise this rulemaking authority by adopting an Employer-Employee Relations Resolution or Ordinance. In Appendix C of this workbook is the Suggested Employer-Employee Relations Resolution published by the League of California Cities, with minor changes, along with a commentary to more fully explain the labor relations system it calls for. Also included in this workbook are a sample City Rights clause (Appendix D) and sample Union Security clauses (Appendix E). While referring to "City" throughout these documents for consistency, the Suggested Employer-Employee Relations Resolution and contract provisions can be easily adopted for use by any agency governed by MMBA. Unique local circumstances, needs or concerns may require adaptation or deviation from the policies suggested herein.

The document is presented in the form of a resolution. With minor reconstruction, the policies could be presented in the form of an ordinance. Each agency should decide whether its basic policy regarding employee relations should be adopted as a resolution or an ordinance.

A resolution may be easier to enact or amend inasmuch as it does not carry the requirement of two readings as does an ordinance. There may also be some minor cost savings since there is no publishing requirement.

On the other hand, if the agency is adopting a carefully developed Employer-Employee Relations Policy, it may choose to use an ordinance to achieve as much permanence as possible. Furthermore, inasmuch as memoranda of understanding are commonly adopted in resolution form, there is an advantage to having the underlying policy that controls the procedural basis for

negotiating such memoranda in ordinance form so that the policy cannot be inadvertently modified through such a resolution. In either case, the governing board or council is required to approve adoption or amendment.

For use by a charter city, appropriate reference to the city charter should be added where indicated.

Checklist: Employer-Employee Relations Resolution

- ❑ The provisions of the Employer-Employee Relations Resolution are meet and consult matters, when initially introduced and when amendments are proposed[74]. As such, the parties are required to negotiate in good faith. However, disputes are not subject to impasse procedures.
- ❑ The Resolution should contain a strong and clear Management Rights provision. A Management Rights provision should also be contained in each MOU.
- ❑ The Resolution should enable the Employee Relations Officer to modify existing units on his/her own motion on behalf of the agency. The modification procedure should also permit individual employees to petition for modification of the unit.
- ❑ Initiation of impasse procedures should not be based upon mutual agreement. Either the agency or the union should be able to trigger the impasse procedure based upon a good faith belief that negotiations are deadlocked.
- ❑ AB 646 (effective January 1, 2012) modified the MMBA to mandate that an employee association be given the opportunity to request fact-finding following unsuccessful impasse mediation.[75] Mediation remains voluntary under the MMBA, but is not a prerequisite to fact finding.[76] While not necessary to include AB 646 fact-finding procedures in the impasse procedures of the Employer-Employee Relations Resolution, public agencies should look to revise such impasse procedures if they are inconsistent with AB 646's requirements.
- ❑ The Resolution should provide for unit determination rules which require separate bargaining units comprised exclusively of safety classifications. It is generally not recommended to include both Fire and Police classifications in one safety unit. Units comprised of both Fire and Police classifications may not comply with the provisions of Government Code § 3508. Inclusion of these classifications may also pose significant administrative difficulties during labor disputes.
- ❑ The Resolution may also require management and confidential employees to be in units separate from non-management and non-confidential positions.[77]

2. IMPASSE PROCEDURES

Part of the local employer-employee relations rules adopted by an agency should include impasse procedures. Impasse is generally the point in negotiations at which one or both parties determine that no further progress can be made toward reaching an agreement. Declaration of impasse usually precedes implementation of impasse resolution procedures or unilateral action

by the employer. Up until recently, public agencies covered by the MMBA had wide discretion in establishing impasse procedures that needed to be followed before a governing body could unilaterally implement the agency's last, best, and final offer. However, AB 646 (effective January 1, 2012) reduced some of an agency's discretion regarding impasse procedures by granting an employee association the ability to request mandatory fact-finding to resolve an impasse.[78]

a. Mediation

MMBA Sec. 3505.2 authorizes the parties to agree to the appointment of a mediator. Parties may mutually agree on a mediator, or commonly, they request the California State Mediation and Conciliation Service to designate one of its staff mediators to assist the parties. The mediator thereupon joins the negotiations and seeks to persuade both parties to compromise their positions sufficiently so as to bring them together in an agreement.

Unless expressly authorized by employer-employee relations rules, the mediator does no more than seek to persuade in private. A mediator does not conduct a hearing nor make public recommendations.

b. Fact-Finding

Contrary to mediation, fact-finding is a procedure that provides for a hearing on the issues in dispute and public recommendations. Fact-finding is similar to advisory arbitration. Effective January 1, 2012, the MMBA was amended to require that, if either party provides a written notice of impasse, an employee organization be provided the opportunity to request impasse fact-finding prior to an agency's unilateral implementation of a last, best, and final offer. This new law (AB 646) modifies Government Code section 3505.4 and sets forth the fact-finding procedures that must be followed.[79] An employee organization can request impasse fact-finding even though no impasse mediation has taken place.[80]

If impasse mediation is used, the employee organization can request fact-finding not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator. If impasse mediation is not used, the employee organization may request fact-finding not later than 30 days following the date either party provided the other with a written notice of a declaration of impasse.[81] The employee organization's 30-day period to request fact-finding will not be extended based on the date an agency rejects the organization's request to mediate, even if the agency does not respond to the request until after the 30-day period passes.[82] Nor will the 30-day period be tolled based on delays or other problems related to mediation scheduling, or an employee organization's mistaken belief that the deadline was put on hold or that it shared an unspoken understanding with the employer that impasse was broken.[83] PERB has made clear that the deadline to request fact-finding is statutory and cannot be tolled once a written declaration of impasse has been issued. Employee organizations that fail to request fact-finding within the appropriate window period may waive their right to such procedures.[84]

If fact-finding is requested by the employee organization within the established time frame, both the agency and the employee organization will select an individual to serve on a fact-finding panel, with PERB selecting a chairperson to complete the three-member panel unless the parties

mutually agreed to use someone else. A fact-finding hearing is then set to allow the panel to review the parties' respective positions in dispute at impasse through document production and witness testimony. The panel will then issue findings and recommendations based on the issues remaining in dispute.[85]

If the impasse dispute is not resolved through the fact-finding process, the panel shall issue its findings of fact and recommended terms of settlement that are advisory. Such findings and recommendations are then made public within ten days after they are received by the agency.[86]

c. Interest Arbitration

"Interest arbitration" is a quasi-judicial mechanism for resolving negotiation stalemates that has been used in various American state and municipal governments, including several California charter agencies, for many years. It is triggered when the parties reach an impasse in negotiations over the terms of a collective bargaining agreement. It is a process in which a third party arbitrator defines the contract between the parties by theoretically evaluating the merits of the parties' respective "interests."

Binding arbitration of negotiation impasses with respect to compensation issues has been rejected by California courts as unconstitutional, unless it is expressly provided for in a local charter.[87] If binding interest arbitration is provided for in a local charter, the covered agency is not required to engage in impasse fact-finding otherwise required under the MMBA.[88]

d. Exhaustion of Impasse Procedures

After any required impasse procedures have been utilized, it is up to the legislative body to take such legally authorized action as it may deem appropriate, or to take no action and thereby leave compensation and employment terms unchanged. For a discussion of unilateral implementation, see Section 3(C) of this workbook.

SECTION 2 SUBJECTS OF BARGAINING

A. THE CONTRACT AND PAST PRACTICE

1. THE MEMORANDUM OF UNDERSTANDING (MOU)

MMBA Sec. 3505.1 provides that "if a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization… 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… [i]f the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of such understanding." Once the governing body approves the MOU, it becomes binding on both parties.[89]

a. Checklist: The Effects of MOUs

- ❑ An MOU, once adopted by the legislative body, is a labor agreement that contractually binds the parties.[90]
- ❑ The fact that the agency was motivated to ratify an MOU because of a strike, legal or illegal, does not make it void.[91]
- ❑ Where one party to the MOU materially breaches it (e.g., breach of no strike clause), the other party is entitled to rescind it.[92]
- ❑ A broad "no strike clause," is insufficient to establish a waiver of the right to engage in "sympathy strikes" (i.e. refusal to cross a picket line).[93]
- ❑ Fiscal emergencies will likely not authorize agencies to abrogate the financial provisions of MOUs unless the emergency was so extreme that the agency would be forced to cease operations if the contractual monetary obligations were not deferred.[94]
- ❑ In Chapter 9 bankruptcy, a debtor may be able to reject an unexpired labor agreement if the debtor shows that (1) the agreement burdens the estate, (2) after careful scrutiny, the equities balance in favor of contract rejection, and (3) reasonable efforts to negotiate a voluntary modification have been made, and are not likely to produce a prompt and satisfactory solution.[95]

2. PAST PRACTICE

The current status of a matter or subject within the scope of representation may exist in the form of an agreement (MOU or side letter), policy or past practice. In order for a method or procedure to be a valid past practice, it must be:

- unequivocal;
- clearly enunciated and acted upon; and
- readily ascertainable over a reasonable period of time as a fixed and established practice."[96]

An employer generally may not change a past practice within the scope of representation without providing the opportunity to meet and confer to the exclusively recognized representative of the affected employees, as a past practice affecting conditions of employment has the same dignity as "an existing agreement or rule."[97] However, an employer does not commit an unlawful unilateral change in policy when its actions are consistent with an unambiguous, but previously unenforced, provision of the collective bargaining agreement.[98]

The areas most commonly associated with past practice arguments include such benefits or working conditions as procedures for granting personal leave, overtime, seniority rights, call back procedures, and lunch and other breaks. The issue of leaves of absence can be a thorny one for supervisors in terms of the past practice. The granting of leaves is a management prerogative, absent some language in the MOU or the agency's own rules which restricts

management's authority. However, a supervisor can unwittingly establish a binding practice of laxity by the manner in which he or she implements or "audits" the taking of leaves.

a. Identifying and Avoiding Negative Past Practice

The following are some basic questions to ask:

- Am I consistently implementing, and if necessary, enforcing current rules and policies?
- Am I holding rank and file employees in my unit accountable for basic responsibilities to their employer (e.g., punctuality, satisfactory attendance, etc.)?
- Is there any laxity or lack of even-handedness in the application of disciplinary practice, benefits or assignments?
- Are there any procedures which I now need to curtail or eliminate before they become a binding and undesirable past practice?

b. Revising Past Practice

What steps can be taken by management and supervisors when there is a desire to curtail or eliminate an unfavorable past practice?

If the practice constitutes a binding past practice on an issue subject to negotiations, then, unless the practice is inconsistent with an unambiguous provision of the labor agreement, or the union has waived, by agreement or otherwise, its right to negotiate the issue, the first step would be to give the union an opportunity to meet and confer concerning the proposed change in the practice.

Upon completion of the meet and confer obligation, in order to modify an established practice, the supervisor/manager must (a) put employees on clear notice of the change, and (b) give them a reasonable opportunity to adjust to the change.

The first and foremost consideration is the need to publicize the intent to curtail or correct the practice. It is very important that supervisors be able to show by documentation that the employees were notified of the intention to modify a practice. This may be done by memoranda, directives or bulletins in which the supervisor points out how it has come to his or her attention that certain procedures are not being followed, or that the procedures need to be adjusted. It is important to remember the supervisor is merely putting employees on notice of an impending change; the supervisor should not make the effective date of such modification or change immediate.

The next critical factor in initiating change or elimination of past practice is the time element. That is, the supervisor having publicized his or her intent to make such an alteration, must now allow a sufficient amount of time for all employees to become duly informed, and to make the adjustment to what may constitute "new" ground rules. This period should also provide an opportunity for dialogue with employees regarding the change. There is, of course, no hard and fast rule as to what length of time is required for a reasonable interval between announcement and implementation. The experienced supervisor will understand the purpose here is to provide

ample transition time for conscientious employees to adapt to the change, and also to allow for any possible objections which might be forthcoming from individuals or the union. Finally, the supervisor should remove or rescind all previous written directives regarding the practice.

However, should an agency desire to change a long-standing past practice which does not constitute a matter within the scope of representation, it is not subject to meet and confer requirements. For example, in one case a Sheriff's Department had a longstanding policy which permitted a deputy under investigation to access their investigative file prior to the investigative interview commencing. The Sheriff eventually determined that this practice undermined the integrity of the disciplinary investigation and issued an order delaying access to the investigative file until after the investigative interview. The deputy sheriff's employee association filed a writ of mandate alleging that the Sheriff's order was an impermissible unilateral change in their working conditions that instead required the Sheriff to meet and confer with the association under the MMBA. However, the Court of Appeal disagreed and ruled in favor of the Sheriff and noted that a long-standing past practice of preinvestigative interview access to the investigative file, alone, does not constitute a "working condition" within the meaning of the MMBA.[99]

B. SCOPE OF REPRESENTATION

1. SCOPE OF BARGAINING

In the years after enactment of the MMBA in 1968, there were a great number of court proceedings involving the issue of whether the MMBA obligation to negotiate was equally as broad as that applicable under the private sector law. That issue was largely resolved in 1974, when the California Supreme Court concluded that the MMBA obligation was indeed equally as broad. Thus, forty years of private sector decisional law defining the scope of the process was, to a large extent, incorporated into the MMBA in one fell swoop.[100]

While the scope of bargaining generally encompasses wages, hours and terms and conditions of employment, the MMBA does recognize two exceptions, explained below.

a. Merits, Necessity or Organization

The MMBA states that "the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.[101]

To determine whether a specific decision is subject to meet and confer requirements, PERB will apply a three part test. First, it will ask if the management action significantly and adversely affects bargaining unit wages, hours or working conditions. If not, there is no duty to meet and confer. Second, it will ask if the significant and adverse effect arises from the implementation of a fundamental managerial or policy decision. If not, the requirement to meet and confer applies. Third, if both of the above factors apply, PERB will use a balancing test to determine whether the parties must meet and confer.[102] Specifically, it will ask whether the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.[103]

In *Claremont Police Officers Association v. City of Claremont*, a Police Officers' Association sought a writ of mandate challenging the city's policy requiring officers to record race and ethnicity of persons subject to vehicle stop, but not arrested or cited. The California Supreme Court found that the city was not required, under the MMBA, to meet and confer with the association because requiring recordkeeping regarding race and ethnicity did not have a significant and adverse effect on the officers' working conditions. Because the Court found no significant and adverse effect, it was not required to balance the City's need for unencumbered decision-making against the benefit to employer-employee relations from bargaining about the subject.[104]

Public policy matters may also be excluded from the scope of bargaining, subject to the *Claremont* balancing test. For example, while a police department rule defining the circumstances under which an officer may use deadly force impacts the bargaining issue of employee safety, because it primarily involves a public policy issue, it is not a mandatory subject of bargaining.[105] In another case, though involvement of a civilian review board in departmental investigations of citizen complaints against police officers impacts the bargaining issue of discipline, it is not a mandatory subject of bargaining because it primarily involves a public policy issue.[106] Similarly, a policy prohibiting deputy sheriffs from collectively consulting legal counsel and/or labor representatives following a deputy-involved shooting ("huddling") was found to be a fundamental managerial or policy decision outside of the MMBA's meet and confer requirement because its primary purpose was to collect accurate information regarding deputy-involved shootings.[107]

However, in another case involving a City's unilateral move to contract out its Police Department and law enforcement services to the County's Sheriff Department, the Court of Appeal ruled that such act was in violation of the MMBA. In its decision, the Court noted that contracting out such employee work not only significantly affected the wages, hours, and working conditions of the employees, but also outweighed any management rights authority that the City had in making this decision unilaterally without meeting and conferring with the union under the MMBA.[108]

In an example involving the Dills Act, which governs state employees, a unilateral decision to change the evaluation tool for Department of Corrections physicians, and to provide remedial training, was found to be a fundamental managerial decision outside the scope of representation, as the decision was made to bring health care in prisons to a constitutionally acceptable level. Under the Dills Act, as under the MMBA, the scope of representation does not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

b. Emergency

An agency's governing board can declare an emergency, which suspends the duty to meet and confer regarding a particular rule if the governing board provides notice and opportunity to meet and confer at earliest practical time following adoption of ordinance, rule or regulation.[109] In order to justify a declaration of emergency, a situation must create a "dislocation possessing a qualitative dimension that goes beyond irritation and inconvenience."[110]

A work stoppage may constitute such an emergency. For example, a concerted series of intermittent work stoppages by public employees, particularly employees at public health facilities, constituted an emergency exempting a county from meet and confer obligations otherwise imposed on public agency employers.[111]

In *Sonoma County Organization of Public/Private Employees v. County of Sonoma*, the County was the target of a series of unannounced job actions constituting an absence of workers, directed at the County's public health facilities, which were staffed by workers whose jobs required unique skills and training and whose absence clearly endangered the public health and safety. The County passed an emergency ordinance authorizing the immediate suspension of employees' participation in the "rolling job action." The Court of Appeal defined an emergency as follows:

> [A]n emergency may well be evidenced by an imminent and substantial threat to public health or safety . . . Without question, an emergency must have "a substantial likelihood that serious harm will be experienced" . . . unless immediate action is taken. The anticipation that harm will occur if such action is not taken must have a basis firmer than simple speculation . . . Emergency is not synonymous with expediency, convenience, or best interests . . . and it imports "more ... than merely a general public need . . . Emergency comprehends a situation of "grave character and serious moment."[112]

The Court of Appeal found that the evidence as a whole showed that County was amply justified in concluding that it confronted an emergency of grave character and serious moment demanding immediate action.[113]

2. IMPACTS AND EFFECTS BARGAINING

While a fundamental managerial decision may be exempt from the meet and confer requirement, an agency may still be required to meet and confer over the "impacts and effects" of a decision, so far as the decision impacts terms and conditions of employment.[114]

For example, an agency may decide to lay off certain employees. The decision to lay off employees is not subject to the meet and confer requirement as it is a policy matter concerning the level of services.[115] However, the agency is required to meet and confer over the impacts and effects of that decision.[116] Issues related to the implementation of layoffs, such as notice and timing of layoffs, and the number or identity of the employees affected, are negotiable.[117] In addition, an employer is required to bargain over the creation of or a change in rules on seniority or bumping rights.[118] An employer's duty to provide notice and an opportunity to negotiate the effects of its decision to lay off employees arises when the employer reaches a firm decision to lay-off.[119] Although it must provide notice of the decision to the Union, an employer is not obligated to further specify any reasonably foreseeable effects of the decision for the Union so that it can determine whether or not to demand bargaining.[120]

Instead, any Union's demand to bargain over effects must clearly identify the negotiable areas of impact within the scope of representation and clearly indicate a desire to bargain over the effects of the decision as opposed to the decision itself.[121] Absent such identification by the Union, the Union may waive the right to bargain reasonably foreseeable effects and relieve the employer of its duty to bargain.[122] For example, where a school district unilaterally adopted a policy that required teachers to provide to parents, upon request, a copy of their child's examination(s) for review outside the classroom, the Union's failure to articulate to the District the negotiable effects of the policy resulted in the dismissal of the Union's unfair practice charge that the District failed to bargain.[123] However, to state a prima facie case of unilateral change, the charging party is only required to show that an effect on working conditions is reasonably foreseeable.[124]

PERB has indicated that an employer has a secondary duty to seek clarification from the Union regarding any effects bargaining before it can reject such requests as not falling within the scope of representation because impacts or effects were not identified in their request to bargain. If an employer refuses to bargain without first seeking clarification of the Union's rationale for requesting to bargain and what potential impacts/effects may apply, it fails to meet and confer in good faith.[125] However, there is no duty to bargain effects or seek clarification when the Union inadequately requests to bargain the managerial decision itself and fails to indicate any matter within the scope of representation affected by the non-negotiable decision.[126]

Nonetheless, a Union may be able to sustain an unfair practice charge against and agency without first demanding to bargain the effects of a managerial decision if the agency implements a change without providing reasonable notice and an opportunity to bargain over foreseeable effects on matters within the scope of representation.[127]

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Recent PERB decisions have focused on an agency's failure to provide an affected employee association proper notice and an opportunity to bargain over foreseeable effects on managerial decisions as unfair labor practices in violation of the MMBA. Therefore, we recommend that an agency provide advance notice to employee associations of any managerial decisions that may have an impact/effect on matters within the scope of representation to provide an opportunity for the employee association to request impact/effects bargaining in order to avoid any potential unfair practice charges.

a. Contracting Out

The decision to contract out bargaining unit work is typically a mandatory subject of bargaining.[128] However, where the decision to contract out is based on considerations other than labor costs, it is outside the scope of negotiation.[129] In *Professional Engineers of California Government v. California Department of Personnel Administration*, PERB found that to force mandatory bargaining where the decision to contract out is based on considerations other than

labor costs would allow unions to be involved in decision-making beyond their own interests in wages and hours.[130] In this case, PERB provided an example whereby the state may want to hire a particular private firm for disposal of hazardous waste on the grounds that it has better equipment, is better equipped to take on the risk of liability, and is more expert than state employees, even though the outside firm would not be more economical.[131] This decision would not turn on labor costs, and therefore should not be subject to meet and confer requirements. However, an employer is required to meet and confer over the decision to contract out where the decision is motivated by the desire to reduce labor costs, or by other issues suitable for resolution through collective bargaining, such as employee morale, level of service and conflicts with management.[132]

For example, in *Rialto Police Benefit Assn. v. City of Rialto,* the Court of Appeal ruled that a City's decision to contract out its Police Department and law enforcement services to the County Sheriff's Department was a mandatory subject of bargaining. The Court made this determination after noting that such action would have a significant impact on wages, hours, and working conditions of affected employees at the Police Department and that this outweighed any management rights the City may have in this regard. The Court noted that where labor costs and other economic matters are significant factors in the decision to contract out, the collective bargaining process with the affected bargaining unit may provide a forum to address such concerns to seek a resolution through concessions or other action in lieu of the ultimate decision to contract out the bargaining unit work.[133]

General law cities and counties with civil service systems should be aware that Government Code sections 37103 and 53060 prohibit contracting with the private sector unless the contract is with a specially trained and experienced person, firm, or corporation for special services and advice in financial, economic, accounting, engineering, legal or administrative matters.[134] Whether services are "special" or not is determined by the nature of the services, the necessary qualifications required of a person furnishing the services, and the availability of the service from public sources.[135] Services may be "special" because of the outstanding expertise of the individual furnishing them.[136]

In addition to "special services," there are a number of statutorily authorized services which can be contracted out. Some examples include Public Resources Code § 49300 [collection/disposal of garbage]; Penal Code § 6031.6 [operation of a detention facility]; Public Utility Code § 99288 [operation of public transportation]; Gov. Code § 39731.1 [operation of a ferry system]; Gov. Code § 45008 [personnel selection and administrative services]; Gov. Code § 50474 [construction or maintenance of airports or employing pilots]; Gov. Code § 38794 [ambulance services]; Gov. Code § 25358 [county contracts for maintenance personnel] and Gov. Code § 53997 [financial services].

3. SUBJECTS OF BARGAINING AND RELATED LEGAL CONSIDERATIONS

To determine whether a subject falls within the scope of representation, the courts and PERB generally look to ascertain whether the subject has a significant or material relationship to wages, hours or other conditions of employment.[137]

a. Wages

As part of the bargaining process, employee organizations will often advocate for cost of living increases for members of the bargaining unit. Some agencies agree to link a cost of living increase to the level the Consumer Price Index (CPI) published by the United States Department of Labor, Bureau of Labor Statistics. Other times, employers will agree to a specified percentage increase.

Employee organizations may also negotiate for equity increases based on the "market rate." Because public sector compensation is public information and therefore accessible, an agency may compare its compensation to that of other comparable public agencies, in order to determine the market average or market median. This type of survey may provide a foundation for negotiation of wage increases.

Examples of wage provisions subject to the meet and confer requirement include:

- A change in wages paid to employees for after-hours work for the public agency unrelated to their jobs.[138]
- A change in practice on timing of a merit increase in relation to probationary period.[139]

i. Retroactivity

When bargaining extends past the date of the expiration of the contract, an employee organization will likely advocate for agreed-upon wage increases to apply dating back to the day after the expiration of the prior contract. Retroactivity of wage increases is generally allowed to the effective date of successor MOU, and is a required subject of bargaining.[140] However, one court has found reduction of a wage offer in response to continued impasse was consistent with the employer's stated position on retroactivity, where reduction for failure to reach agreement within a certain time frame was part of the offer, and thus did not interfere with the organization's right to bargain or declare impasse.[141]

With their initial proposal, employers should propose that wage increases are effective upon ratification and approval of the agreement, or the expiration of the MOU, whichever occurs later.

ii. Parity/"Me Too"/Most-Favored Nation Agreements

A "me too" agreement is an agreement that should the agency later negotiate a higher salary or benefit increase with Union "B," then Union "A" will automatically receive the same increase. This type of agreement is not, in and of itself, a per se violation of the agency's good faith obligation to Union "B."[142]

However, "me too" agreements are not recommended. Such agreements may lead to animosity by Union "B" and lead to a challenge that it has an unreasonable burden in its negotiations on behalf of its members. Also, with such agreements, agencies must remember to take into account the cost of these provisions each time a new agreement is negotiated that pertains to one of the affected employee organizations. Finally a "me too" provision may create confusion when an employer is in negotiations with both organizations simultaneously, but reaches agreement

with one before the other, thus raising questions as to the effective date of the increase for the organization without a contract.

If an agency has existing "me too" provisions in MOU's with employee organizations, or decides to negotiate them in the future, the agency must ensure consistency in labor relations to make certain that the agreements are accounted for estimating the costs of labor packages. Also, agencies should try to negotiate specific dates to apply to parity agreements to avoid ongoing "me too" requirements.

iii. Pro rata

Employers should also negotiate provisions that specify that benefits are pro-rated for part time employees.

b. Health and Welfare Benefits

Group insurance benefits are a mandatory subject of bargaining. The term "benefits" includes the level of benefits, the level of employer contribution, the level of employee contribution, and the method of payment by employees of their contribution.[143]

Employers may venture to establish a Section 125 Flexible Benefits Plan. Section 125 is the section of the Internal Revenue Service (IRS) regulations which allow an employer to deduct employee contributions for certain benefits on a pre-tax basis, such as health, dental and vision premiums. Under a flexible benefits plan, employees can use pre-tax salary or wages to create their own customized benefits package. Section 125 plans may also allow employees to pay for dependent care and out-of-pocket medical costs with pre-tax dollars.

When bargaining over employer-paid benefits, including contributions to flexible spending plans, employers should endeavor to limit employer contributions to fixed dollar amounts to avoid automatic liability should costs to maintain coverage levels increase. Also, employers should endeavor to limit the "cash-back" available to those employees who waive participation in employer-sponsored benefit plans sometimes referred to as "opt out" provisions.

c. Retirement Benefits

Most public sector employees are covered by statutorily-established retirement systems, such as the California Public Employees' Retirement System (CalPERS) or the County Employees Retirement Law of 1937.[144] Generally, retirement benefit matters involving current employees are within scope of representation, while matters affecting current retirees are permissive subjects of bargaining.[145]

i. Vesting of Retirement Benefits

Because certain retiree benefit levels are vested for current employees (to be expected when they retire) and current retirees, an individual's right to receive a specific retirement benefit can only be modified in limited circumstances.

A public employee's right to a pension or retirement benefits are protected by the contract clauses of the state and federal constitutions.[146] The right to a post-employment pension benefit

vests upon acceptance of employment.[147] An employee's contractual pension expectations are measured by benefits which are in effect not only when the employee begins work, but also which are conferred during employment.[148] A vested pension right may not be reduced or eliminated without impairing the public entity's contractual obligation.[149]

Current retirees are usually vested in their rights to a continuing pension, and the benefit cannot be impaired unless both parties agree to the change. As for current employees, a vested pension benefit may be changed in only two limited circumstances. The first circumstance is when both parties agree to the change. There is no impairment of a contract if both contracting parties agree to change the contract terms.[150] The second circumstance is if, *prior to the time of retirement*, the employer makes reasonable modifications to maintain the integrity of the pension system.[151] Whether a modification is reasonable must be determined on a case-by-case basis. However, in order to be deemed "reasonable" the modification "must bear some material relation to the theory of a pension system and its successful operation, *and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.*"[152]

In determining whether an employer impermissibly modified a vested benefit, the court will interpret the language that provided the benefit. For example, in *Sappington v. Orange Unified School District*, the school district had been providing retirees fully paid PPO and HMO plans for twenty years.[153] Due to increasing health insurance costs, the district decided to require a contribution for the PPO plan. However, the district continued to provide fully paid HMO benefits. The retirees filed suit, alleging that the district was obligated to continue providing fully paid PPO benefits. In support of their position, the retirees relied upon language in a district policy which stated, "The District shall underwrite the cost of the District's Medical and Hospital Insurance Program for all employees who retire from the District provided they have been employed in the District for the equivalent of ten (10) years or longer." In finding for the district, the court found that this language only required that the district provide some type of insurance coverage, not a specific type of coverage. The court found that the district's actions in providing free coverage for both HMO and PPO plans did not create a contractual obligation to do so, stating, "Generous benefits that exceed what is promised in a contract are just that: generous. They reflect a magnanimous spirit, not a contractual mandate."[154]

However, the California Supreme Court decided in 2011 in *Retired Employees Association of Orange County, Inc. v. County of Orange* ("*REAOC*") that vested benefits may be implied under certain circumstances depending on the language of the underlying agreement.[155] The Court distinguished the *Sappington* case by noting that while the Court of Appeal found that express language of the agreement in that case did not provide a vested benefit, there was nothing in the Court of Appeal's decision to indicate that vested benefits could not be implied in the public employee context. Based on the *REAOC* case, it is possible that vested benefits may be implied from an agreement, ordinance, or resolution where the language and surrounding circumstances clearly evidence a legislative intent to create that right. In 2014, in later REOAC litigation, the Ninth Circuit provided much needed clarification regarding implied rights when it held that "a practice or policy extended over a period of time does not translate into an implied contract right without clear legislative intent to create that right."[156]

There is no bright line rule on this issue and courts will most likely have to analyze individual agreements and expectations to make a determination on the potential vesting of retiree benefits for current and former employees and an agency's ability to modify such benefits. It appears, however, that a practice or policy of providing a benefit will not by itself create a vested right to continue receiving that benefit in the future.

On the other hand, prospective employees have no vested rights. Consequently, from a constitutional standpoint a public employer may reduce or discontinue pension benefits prior to employment, unless an MOU clearly grants vested rights to future employees, or another statute prohibits or limits the changes that can be made.[157] If otherwise allowed, the public employer would then have to meet and confer with the affected bargaining unit over any changes to such pension benefits for future employees. For example, many public agencies have negotiated lower tiers of retirement plans for future employees to achieve long term cost savings for the agency.

ii. Defined Benefit Pension Plan

Public employees are often provided a pension which provides a guaranteed monthly benefit amount, or a guaranteed amount after a set number of years of service. With a defined benefit plan, the amount of income an employee receives on retirement is defined - or decided - in advance. For example, where employees have a pension plan with a "2% at age 55" formula, they receive an annual pension equal to 2% of their final compensation multiplied by the number of years of service to the agency, up to any statutory maximum percentage. Defined benefit plans are organized so that both the employer and employee make contributions to the plan.

The extent to which the parties can agree to defined benefit formula modifications has decreased since the enactment of the California Public Employees' Pension Reform Act of 2013 (PEPRA). For example, the available retirement formulas are limited.[158] All "new members" who are in the miscellaneous retirement classification receive the "2% at 62" benefit formula.[159] Three formulas exist for new members who are classified as safety members: the Basic Safety Plan (2% at 57), Safety Plan I (2.5% at 57), and Safety Plan II (2.7% at 57). (Gov. Code §§ 7522.25(a)-(d).) Though new members will receive the formula that is closest to the formula applicable to safety members hired on December 31, 2012, while providing a lower benefit, the parties may agree to a lower formula; however, a lower formula may not be imposed through impasse procedures.[160]

The provisions that prohibit any agency from implementing a new tier other than the new law's tiers after January 1, 2013, clearly apply to "new members." It is unclear whether agencies may negotiate a new and lower tier for classic members hired after a specified future date. Although the PEPRA does not expressly prohibit this practice, there is language that is susceptible to that interpretation.[161] It is advised that an agency consult with legal counsel before pursuing a bargaining proposal that seeks a new defined benefit formula for either classic members hired before January 1, 2013 or lateral classic members hired after.

The PEPRA provides that benefit enhancements adopted on or after January 1, 2013, may only be applied to the employee's future service.[162] This requirement applies to both new and existing employees.

After PEPRA, the parties only may agree to the employer "pick up" of part or all of the classic members' contribution. Although the issue has not been fully settled, there is authority finding that this practice of paying part or all of the employee's contribution does not become a vested right. In 2009, in *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System*, the police officers' association argued that the City's practice of picking up officers' pension contributions had become a vested contractual right that could not be taken away. In that case, a federal court found that employees do *not* have the same vested contractual right to their employer's pension pickup that they have in their pension benefits.[163] As of the date of this publication, no California court has ruled on this question.

iii. Defined Contribution Plans

A defined contribution plan is an employer-sponsored pension plan that defines the contributions to be made by the employee and the employer but does not define the amount of pension income to be received at retirement. These are typically savings plans that allow participants to make pre-tax contributions that accumulate tax-free. Contributions, plus any earnings, are generally not subject to state or federal taxes until withdrawn, in most cases after retirement.

The California Public Employees' Pension Reform Act of 2013 (PEPRA) limited but did not eliminate the use of defined contribution plans, such as a 401(k) or 457 plan, which often were offered by employers as an alternative in negotiations to a defined benefit plan enhancement, the cost of which may increase over time. The limitations are aimed at ensuring that public agencies do not use defined contribution plans to aggressively compensate higher waged employees with the result of discriminating against workers earning a lower wage.

iv. Retiree Health

Retiree health benefits are established through a promise, express or implied, by an employer to provide an employee with continued medical benefits upon retirement as deferred compensation for services performed for the employer.[164] Such benefits are often established through collective bargaining agreements.

There has been some uncertainty as to whether retiree health care benefits can become a vested contractual right that cannot easily be reduced or eliminated, although several State and Federal courts have recently held that contractual vested rights, including retiree health benefits included in an MOU, are only created when the legislative body expressly intends to create such a vested right. In 2009, in *San Diego Police Officers' Ass'n v. San Diego City Employees' Retirement System*, the Ninth Circuit Court of Appeals (which interprets federal law in several western states, including California) found that retiree health care benefits were not a vested right because, based on the terms of the MOU, they were earned on a year-to-year basis under previous MOUs that expired under their own terms and the MOU clearly stated that its provisions would be superseded and suspended if found in violation of the law.[165] In 2013, the California Court of Appeal also concluded that the City's retiree health benefit was not a benefit

under the City's retirement system, consistent with the Ninth Circuit's 2009 decision. Because the retiree health benefit was renegotiated every few years between the City and its labor organizations and there was no express language or evidence that it was intended to be a permanent benefit, the retiree health benefit was not a vested right and could be modified by the City.[166]

Generally, where retiree medical benefits are set forth in an MOU, it is presumed that the benefit expires at the expiration of the MOU except where the benefit was already vested prior to inclusion in the MOU or where there is an express or implied term which indicates the parties intended the benefit to extend beyond the life of the MOU. For example, where an MOU promised to provide 50% paid retiree medical premiums for each retiree presently enrolled "and for each retiree in the future," a court held that this potentially could indicate that the benefit would extend beyond the life of the MOU.[167]

In the 2011 REAOC case cited above, the California Supreme Court determined that retiree health benefits may become vested contractual rights in certain circumstances; essentially vesting is simply a matter of the parties' intent.[168] The court did not announce that the benefit in question was vested, but rather stated that such a circumstance could exist and sent the case back to the Ninth Circuit for a decision based on the specific facts. The Ninth Circuit eventually affirmed a decision finding that the benefit in question was not vested.[169] In a case related to REAOC, the Ninth Circuit upheld a dismissal where each MOU had durational language in which the agreements therein, including an agreement to provide monthly grants toward retiree health insurance, expired upon the MOU's expiration unless otherwise specified.[170]

Standards issued by the Governmental Accounting Standards Board in Statement 45 (GASB 45) require that all public sector agencies report the cost of providing retiree health care benefits, as well as "other post-employment benefits" (OPEBs) as the liability incurs, rather than as a cost when paid.[171] Due to this accounting standard, failure to fund liability from retiree health benefits results in the appearance of unfunded liabilities on the agency's financial statements. Agencies are therefore keen to reduce liability from OPEB's where possible.

Agencies covered by the Public Employees' Medical and Hospital Care Act ("PEMHCA") face additional restrictions which impede the ability to modify retiree health care benefits; employers covered by the County Employees Retirement Law of 1937 (CERL) may have more flexibility to reduce or eliminate retiree health care benefits.

However, once it is established that an employee or retiree has a vested right to a post-employment benefit, the employer may only reduce that vested right in very narrow circumstances. In some cases, employers are prohibited from altering retiree health benefits via an MOU altogether.[172] For this reason, employers should examine their retiree health benefits on a case-by-case basis before attempting to reduce or modify them through negotiations.

1. PEMHCA Requirements

Under PEMHCA, contracting employers are required to provide benefits by means of the "equal contribution" method. This method requires an employer to contribute an equal amount towards

the medical insurance premiums of both employees and retirees.[173] In providing this equal contribution, employers must satisfy a minimum contribution requirement. For calendar year 2013, an agency is required to provide a minimum contribution of at least $115.00 per month for each employee and retiree. This minimum contribution requirement is adjusted each year.[174]

2. County Employees Retirement Law of 1937 (CERL)

Government Code Section 31692 specifically states that the adoption of an ordinance or resolution providing for retiree health care benefits by the County from its funds pursuant to Section 31691 gives no vested right to any member or retired member.[175] However, in spite of this statutory provision, agencies covered by CERL should seek legal counsel before attempting to reduce or eliminate benefits, as documents such as MOUs or retiree handbooks may establish a reasonable expectation that benefits will continue indefinitely, thus creating a vested right in retiree health benefits.

d. "Zipper" or "Waiver" Clause

A zipper clause is a provision in an MOU which states that the Agreement reflects all understandings of the parties.

In some cases, a zipper clause may permit a party to reject a request to negotiate a change in an existing policy or contract language during the contract term.[176] In rare instances, a zipper clause may also act as a waiver of the right to bargain. For example, where a collective bargaining agreement contained a zipper clause as well as an extensive provision addressing the effects of layoffs, the employer had no duty to further negotiate the impacts and effects of the layoff.[177] PERB has also found that during the life of the contract, a zipper clause may insulate either party from a demand to reopen negotiations in order to change the status quo in regard to negotiable matters, including those matters not previously considered.[178]

An employer should consult with legal counsel before asserting that a zipper clause acts as a waiver of the right to bargain over a negotiable matter.

Prior to beginning the negotiation process, agencies should consider whether a zipper clause would be beneficial to the agency. It will likely be more beneficial to the employee groups. Such a provision may act as a defense by the employee association from agreeing to enter into concession bargaining needed by the agency during fiscal downturns. It may also prevent negotiations over matters within the scope of bargaining that are set forth outside the MOU, e.g., agency policies. If an agency anticipates a need to make a change to matters within the scope of bargaining during the term of the contract, and the agreement contains a zipper clause, the agency should negotiate to remove the provision, or propose a mid-term re-opener pertaining to the specific provision.

e. Agency Shop/Organizational Security

The MMBA permits the negotiation of an agency shop agreement between a public agency and a recognized employee association.[179] An agency shop requires that, as a condition of employment, an employee within the defined bargaining unit either join the recognized employee organization, or pay a service fee to the organization. Such an agreement under the

MMBA cannot apply to management employees.[180] The MMBA does not allow a recognized employee organization to file an agency shop petition at any time. Rather, an employee organization desiring an agency shop must first request that the public agency employer negotiate over this issue. Once this request is made, the MMBA requires that the parties negotiate in good faith regarding an agency shop arrangement for a period of thirty calendar days. If, after thirty days of good faith negotiations, the parties have not agreed to an agency shop arrangement, the employee organization may submit an agency shop petition. This petition must be signed by thirty percent of the employees in the bargaining unit. After the petition is filed, an election will be held. If the agency shop option is selected by a majority of the employees who cast their ballots, it will be placed in effect.[181]

An employee organization may not insist on an agency shop clause as part of a contract.[182] However, an agency which agrees to negotiate with an employee organization over agency shop may have the opportunity to clarify issues such as indemnification, the process to change member status, rescission of agency shop, and charities which may receive the religious exemption fee. An agency may also choose not to agree to an agency shop, thus requiring the employee organization to seek a petition and election.

An agency cannot, however, refuse to bargain with an employee organization over an agency shop arrangement or prevent an election, even if the arrangement is potentially illegal or would circumvent the purpose of such an arrangement (e.g., require employees, as a condition of employment, to join the union or pay a service fee). For example, after an employer withheld its approval of a "modified agency shop" that exempted current employees and applied only to future employees, PERB explained that the MMBA's agency shop provisions were intended to reduce employer control over whether to adopt such arrangements by refusing to bargain. Thus, PERB held that the employer unilaterally prevented an agency shop election in violation of the MMBA.[183]

Under the MMBA, an employee who is a member of a bona fide religion, body or sect that has historically held conscientious objections to joining or financially supporting employee organizations may not be required to financially support a public employee organization.[184] However, such an employee may be required to contribute an amount, in lieu and equal to the agency fee, to a non-religious, non-labor, tax-exempt, charitable fund.[185]

f. Discipline and Disciplinary Procedures

Public employers are required to meet and confer with employee organizations regarding the adoption of rules and charter amendments governing grounds for disciplinary action and disciplinary procedures.[186] However, once the parties have met and conferred in good faith to impasse, the employer need not reach agreement and is free to implement its own decision after exhausting required impasse procedures.[187]

g. Charter Amendments

The California Constitution gives charter cities wide latitude to place charter amendments on the ballot. However, this right is not absolute. Charter cities must meet and confer with employee

organizations before placing a charter amendment on the ballot that affects matters within the scope of representation.[188]

h. Other Subjects of Bargaining

In addition to the major contractual provisions discussed above, the following checklist addresses other subjects within the scope of representation, along with a list of corresponding employer interests and concerns:

i. Hours of Work / Schedule

Hours of Work

- ❑ Working hours and working days are required bargaining subjects.[189]
- ❑ An employer should specify normal hours per week or other work period.
- ❑ An employer should avoid delineating specific days as work days (i.e., five eight-hour days, Monday through Friday).
- ❑ An employer should clarify that an hours provision is no guarantee of work hours.
- ❑ Both mandatory and voluntary work furloughs are generally required bargaining subjects under the MMBA.

Overtime and Compensatory-Time-Off (CTO)

- ❑ An employer should establish a requirement and procedure for advance supervisor approval of overtime and shift times.
- ❑ Reassigning overtime work to temporary employees is a mandatory subject of bargaining.[190]
- ❑ The Fair Labor Standards Act (FLSA) requires employers to pay overtime compensation to non-exempt employees at not less than one and one-half times the regular rate of pay for all hours worked beyond a specified number, usually forty hours in a seven-day workweek.[191]
- ❑ Declaring an FLSA partial overtime exemption (i.e., Section 7(k) partial overtime exemption) for specified classifications is within the scope of representation to the extent it effects an employee's eligibility for overtime wages (i.e., establishing different "work periods" under 29 USC §207(k), to determine when FLSA overtime pay is due for police, fire or some EMS employees.) However, if an agency declares a FLSA partial overtime exemption that does not effect an employee's eligibility for overtime wages, this would not fall within the scope of bargaining (i.e., an employer establishes a 14-day/86 hour FLSA Section 7(k) partial overtime period for police officers but still contractually agrees to pay overtime for any hours worked over 80 hours in a 14-day period would not invoke the duty to bargain as the working conditions and agreement to pay overtime have not changed.)
- ❑ An employer should maintain its management right to assign mandatory overtime.
- ❑ An overtime provision should define which hours qualify as overtime, and the rate of overtime compensation.

- ❑ An employer should negotiate to limit the maximum accrual of compensatory time off, which should be at or less than statutory maximum accruals (480 hours for public safety, 240 hours for all other jobs).
- ❑ An employer should negotiate to retain discretion over whether overtime is compensated by money or time off.

Standby/On-call pay

- ❑ Whether standby or on-call time is considered hours actually worked under the Fair Labor Standards Act (FLSA) depends on: (a) the degree to which an employee is free to engage in personal activities; and (b) the agreement between the parties.[192]
- ❑ A standby or on-call provision should specify the extent to which an employee's personal activities are restricted, and should specify compensation (including any minimum compensation), if applicable.

Rest and Meal Periods

- ❑ Provisions should address length of period, the time of day rest and meal periods are to be taken, and mealtime compensation, if applicable.

Vacation

- ❑ Personal leave is a mandatory subject of bargaining.[193]
- ❑ Personal leave is not a vested right; leave can be altered through collective bargaining.[194]
- ❑ Issues to negotiate may include amount of accrual and maximum accrual and procedures for accrual, preference, approval, employer cancellation, and pay-out upon separation.
- ❑ An employer should clarify that no vacation may be taken without a supervisor's approval and reasonable notice, and employers should retain the right to cancel scheduled vacations for operational purposes.

Sick Leave

- ❑ Entitlement to accumulated unused sick leave on retirement is a proper subject for bargaining.[195]
- ❑ An employer should consider negotiating incentives for non-use, such as retirement service credit. However, employers should also negotiate to limit maximum accrual, and refrain from agreeing to pay-out sick leave upon separation or from permitting donation of sick leave to a catastrophic leave program. Sick leave should be regarded as a resource to use on an as-needed basis, rather than a vested benefit.
- ❑ Agencies should retain the ability to require verification of illness, and to discipline for abuse or excessive use of sick leave.

Holidays

- ❑ An employer should specify how employees who must work on holidays will be compensated (i.e., additional time off).
- ❑ An employer should negotiate a provision requiring that employees must be in paid status on the day before or after that holiday in order to receive "holiday" pay. However, if this exists as a practice or policy, employers should refrain from raising this issue at the bargaining table.

ii. Other Terms and Conditions of Employment

Promotional Procedures

- ❑ Promotional procedures for unit positions fall within the scope of bargaining.[196]

Layoff Procedures/Reduction in Force / Reemployment

- ❑ Layoff rules are a mandatory subject of bargaining.[197]
- ❑ Historically, specific impacts of layoffs that are not covered by a negotiated layoff procedure are within the scope of bargaining, but not the decision to reorganize or lay off employees. However, PERB has indicated that a decision to reorganize and lay off employees is negotiable where an entire classification is eliminated and bargaining unit work is transferred to another bargaining unit that was already performing many of the same duties.[198] The Court of Appeal has also recognized a distinction between an employer's managerial decision and the implementation of that decision. In *Indio Police Command Unit v. City of Indio*, the Court ruled that an employer's reorganization plan is subject to bargaining where the action significantly affects employees' wages, hours, or working conditions, outweighing the employer's decision-making authority.[199] Thus, it is increasingly likely that an agency must negotiate regarding a reorganization and not just over the effects of the reorganization.
- ❑ An employer should ensure specificity and clarity in layoff procedures while avoiding any limitations on the agency's authority to make layoff decisions.
- ❑ Employers should also negotiate specific provisions pertaining to determination of seniority, such as whether any leaves of absences are excluded from the calculation of seniority.
- ❑ Other layoff procedures may cover such issues as the order of layoff, demotion in lieu of layoff, notice of layoff, reemployment lists, recall from layoff (including restoration of seniority and benefits), exceptions to the order of layoff, bumping rights, and transfer rights.

Job Descriptions/Job Duties

- ❑ Changing a job description to reflect new job requirements, (e.g., skills, experiences or education) comes within the scope of representation.
- ❑ When the change in a job description only updates an out-of-date description to reflect current requirements, the change is not within the scope of representation.[200]

Workload/Caseload

- Eligibility worker caseload assignments are a mandatory subject of bargaining.[201]
- Union proposals concerning staffing which intrude into managerial policy decisions regarding the level of fire prevention is beyond the scope of representation.[202]

Safety in the Workplace

- When a rule concerns human health and safety, it is within the scope of bargaining regardless of the number of unit members it affects, or of its materiality or significance.[203]
- Firefighter staffing levels as they affect safety are a mandatory subject of bargaining.[204]

Drug Testing

- Mandatory drug testing is within the scope of representation, as it has the potential to affect the continued employment of employees who become subject to it.[205]
- An employer cannot order a represented employee to submit to a drug test, for reasonable suspicion or because the employer has a special need to justify the testing, until the issue of mandatory drug testing has been submitted to the meet and confer process.[206]

Civil Service Commission Rules

- Civil Service Commission Rules are a required subject of bargaining if they fall within the scope of wages, hours, or terms and conditions of employment.[207]

Charter Amendments

- Charter cities and counties must bargain with unions regarding proposed charter amendments relating to matters within the scope of members' representation by union.[208]
- A County's proposed charter amendment ballot measure relating to binding interest arbitration involves a permissive but not mandatory subject of bargaining that did not require bargaining. However, the County's proposed charter amendment ballot measure related to the calculation of prevailing wage rates for County employees related to the mandatory subject of bargaining of wages and the County breached its duty to bargain in good faith by placing it on the ballot without exhausting the meet and confer process.[209]

Right to Representation

- A change in the practice of allowing police officers involved in a shooting incident access to an attorney before preparing a report is a required subject of bargaining.[210]
- A policy prohibiting deputy sheriffs from collectively consulting legal counsel and/or labor representatives following a deputy-involved shooting ("huddling") was found to not have a significant and adverse effect on wages, hours or working conditions, and the objective of the policy to collect accurate information regarding deputy-involved shootings was a fundamental managerial or policy decision outside of the MMBA's meet and confer requirement.[211]

Use of City Facilities

- Rule prohibiting prior practice of using agency facilities to wash personal cars is subject to bargaining because it affects working conditions and imposes potential discipline.[212]

iii. Miscellaneous Contract Provisions

Preamble or Purpose Clause

- An employer should avoid "motherhood and apple pie" phrases such as "assure harmonious relations and equitable treatment." Unions will use these types of provisions to claim contractual violations every time there is a disagreement, even if the disagreement does not pertain to any substantive contract provisions and generally lacks grievability.
- Ideally, a change to preamble or purpose language should indicate the following as purposes: achieving optimum efficiency and quality public services; assuring continuity of operations; and expressing the complete agreement between the parties.

Grievance Procedure

- Grievance procedures are within the scope of representation under the MMBA.[213]
- A grievance procedure should specify the definition of a grievance, which should be limited to alleged violations of the MOU, particularly if the grievance procedure culminates in binding arbitration. Specify what is excluded from the grievance procedure, such as claims of discrimination or harassment, disciplinary appeals, and/or preamble.
- An employer should avoid binding arbitration where possible.
- A grievance procedure should specify time limits and the consequences of failure to meet the time limits.
- An employer should specify expiration upon expiration date of MOU.

Severability/Savings Clause

- A savings clause provides that if a provision of the MOU becomes inoperable by law, then it is severed from the agreement, and the remainder of the agreement is preserved.
- An employer should not agree to language that promises to provide a replacement benefit of equal value. If there is such an agreement, it should state that discussions will be postponed until the expiration of the agreement if parties cannot reach agreement on a substitute provision within a specified time period.

Term/Duration of Agreement

- This provision defines the duration of the MOU, and may provide a time frame for initiating the meet and confer process for a successor MOU.
- An employer should avoid deadlines which, if they are not met, require automatic extension of the contract.

Management Rights

- A management rights clause will not set aside an agency's bargaining obligation during the term of the MOU unless language is a clear and unmistakable waiver of bargaining rights by the union.[214] For example, an employer's argument that it was entitled to unilaterally impose furloughs because it reserved the right to "relieve employees from duty because of lack of funds" and to "take all necessary actions… to carry out its mission in emergencies" failed because the employer did not establish an express exemption from its general obligation to arbitrate contractual interpretation disputes. Binding arbitration did not constitute an unlawful delegation of discretionary authority and the employer was contractually obligated to arbitrate employee grievances.[215]
- A management rights clause may include the following reserved rights: determinations about the nature of service(s) to be rendered by the agency; what the work is and how it is to be performed; location or organization structure; type of equipment and machinery used; size of work force; selection of work force; right to discipline employees; overall financial decisions; determination of work rules; employee performance evaluation; promotion and/or demotion of personnel; hiring; and assignment of duties.
- A management rights clause should assert that failure of the employer to insist upon strict compliance of contract language is not deemed a waiver of the right to later enforce the language.[216]

Eliminating Unit Work

- Eliminating bargaining unit positions and reassigning that work to non-unit employees is a required subject of bargaining—even if the eliminated positions are vacant.[217]
- Reassigning overtime work performed by unit employees out of the unit is a required subject of bargaining.[218]
- Contracting out work provided by unit positions is a required subject of bargaining if the decision hinges on labor costs and other matters suitable for resolution through collective bargaining.[219]

Employee Representatives/Release Time

- Agencies are required by statute to allow a reasonable number of public agency employee representatives meeting on behalf of the exclusive representative to have reasonable paid release time for the purpose of meeting and conferring.[220] This includes time spent at the negotiating table, time in caucus with one's own bargaining team, time in mediation and fact-finding sessions, and time testifying or appearing as a union representative before PERB in proceedings related to a charge filed by or against the union.[221]
- However, release time is not to be determined unilaterally, and must be negotiated.[222] Consider negotiating a limit to the number of employee representatives at the bargaining table.

- ❑ An employer should endeavor to negotiate a separate provision to address release time for other types of meetings, such as those pertaining to grievance representation, which may be more definitively limited.
- ❑ An agreement may specify what activities can be carried out during work hours and on work time or government property. The agreement may also spell out the functions of union representatives, their number, and restrictions on their activities.
- ❑ An employer must permit union representatives (who are not employees) to visit the premises in order to check working conditions or investigate grievances. To prevent abuse of these rights, rules usually exist requiring advance notice to management and requesting permission from area supervisors for such visitations.
- ❑ Time spent in adjusting grievances between an employer and employees during the time the employees are required to be on the premises is hours worked.[223] However, where there is a formal union relationship, the Department of Labor (DOL) regulations indicate that the DOL will defer to the collective bargaining process in regard to calculation of such time.[224]
- ❑ When an employee spends time on labor management disputes voluntarily and outside normal working hours, the time is not considered hours worked for the purpose of calculating overtime liability.[225]

Bulletin Boards

- ❑ An employer should avoid any obligation to buy or put up bulletin boards.
- ❑ An employer should exert limited control over the content, requiring that content not include defamatory statements or violate laws prohibiting public agencies supporting candidates for public office or ballot measures.
- ❑ An agreement should identify the type of notices to be posted, require that notices be signed by a union representative, and may limit posted notices' duration.

Dues Deduction

- ❑ An agreement should address indemnification of the employer by the association pursuant to any disputes arising out of dues deduction.
- ❑ An agreement should require refund of erroneously transmitted deductions.
- ❑ An agreement should state that it is the responsibility of association to collect dues if an employee has insufficient salary to cover the required dues.
- ❑ An employer should negotiate a provision which identifies circumstances for cessation of dues deduction (i.e. rescission of agency shop).

Recognition

- ❑ A recognition clause should carefully specify classes and positions included in unit and covered by MOU (if necessary, by attachment), and should carefully specify all exclusions.

- ❑ An employer should negotiate to exclude employees designated as temporary and part-time.
- ❑ A description of the initial grant of recognition may be useful for historical purposes.
- ❑ If applicable, a recognition provision may address the representation status of newly created classifications.

Concerted Activity/"No Strike" Clause

- ❑ An agreement should specify that the "no strike clause" covers sympathy strikes.
- ❑ A "no strike" clause should specify that in the event of a strike, the agency may suspend dues deduction.
- ❑ A "no strike" clause should specify that each party consents to and waives any defenses against any injunctive action by the other party to enforce the provision.

Waiver of Rights

- ❑ The union cannot by labor agreement waive unit employees' constitutional rights.[226] (i.e. "*Skelly* Procedure" due process rights).
- ❑ A union can waive individual employees' statutory right to bring an employment discrimination claim in court by a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate all such claims.[227]

SECTION 3 THE NEGOTIATION PROCESS

A. PREPARATION FOR NEGOTIATIONS

1. ORGANIZING FOR NEGOTIATIONS

The success of governmental operations depends in large measure upon successful employee relations; and successful employee relations, in turn depends more and more upon successful negotiations. It follows that successful employee relations and successful negotiations require the involvement of all agency officials, managers and supervisors.

Establishing a negotiations system requires policy direction from the governing body, the chief administrative official, the agency's attorney, and the management official(s) responsible for the agency's personnel administration and employee relations. Someone with labor relations expertise is needed to advise these officials, and to handle the consultations with the agency's employee organizations regarding the rules.

The organizational functions for negotiating labor agreements should include the following:

a. The Governing Body

- ❑ Receives ongoing information and advice from its staff relevant to formulating negotiating objectives and parameters, and fixes limits of authority of its negotiating representatives.
- ❑ Considers the tentative agreement reached by the parties.[228]
- ❑ Disapproves or Approves MOUs and their implementing ordinances and resolutions.

b. Chief Administrative Officer (CAO)

- ❑ Assesses overall financial and operational impact of issues being negotiated and makes recommendations to governing body.
- ❑ Supervises agency's negotiating teams and often represents the agency before the media and community groups.

c. Human Resources Director and Staff

- ❑ Directs and coordinates staff support activities for negotiations.
- ❑ Prepares negotiating data, including surveys and costing data.
- ❑ Coordinates input from agency operating managers.
- ❑ Handles communications with management and, as applicable, with unit employees.
- ❑ Actively participates in all phases of negotiations and provides information to the Chief Negotiator concerning agency bargaining history and other administrative issues.

d. Chief Negotiator

- ❑ Handles negotiations and communications with unions within guidelines established by governing body.
- ❑ Advises the governing body, CAO, Human Resources Director and other designated agency staff regarding the negotiations on a regular and ongoing basis.
- ❑ Consults with agency staff on negotiation-related issues (e.g., costing, negotiation data, internal and external communications, impasse/strike planning).
- ❑ Provides guidance and advice concerning negotiating positions, and supervises the negotiating team.
- ❑ Determines negotiating strategies.
- ❑ Drafts agreements.
- ❑ Provides management training and advice regarding negotiated agreements.

e. Legal Counsel

- ❑ Provides advice to negotiating team, staff and governing body regarding the legal implications of negotiation issues, agreements, and procedural matters related to the negotiations.

f. Agency Operating Managers

- ❑ Review personnel and departmental rules, MOUs, and established practices that are subject to negotiations that unduly restrict management operational discretion or otherwise impede efficient operations.
- ❑ Review grievances under the current MOU or personnel rules to determine whether changes to such provisions are appropriate.
- ❑ Consider recommendation of new employment-related policies or procedures to enhance efficient operations.
- ❑ Communicate such recommendations and information to those responsible for developing negotiating proposals.
- ❑ Act as resource to negotiating team.
- ❑ Oversee effective administration of agreements.

g. Tax Advisor

- ❑ Provides advice to negotiating team, staff and governing body regarding any unintended tax implications or issues related to the proposals involving compensation provided to employees. A tax advisor should periodically review existing MOU agreements to determine if the agency's implementation of existing provisions complies with applicable tax laws.

2. SELECTING THE NEGOTIATING TEAM

Ideally, every agency negotiating team should include four areas of expertise: a person experienced in local agency labor relations and negotiations to serve as chief negotiator; someone fully familiar with agency finances and budgetary issues; a staff member knowledgeable about the agency's personnel administration; and one or more departmental representatives to provide operational expertise.

Beyond these areas of expertise, it is desirable that at least one member of the team has, in the normal course of his or her responsibilities, day-to-day contact with the CAO to ensure that the CAO is kept apprised of the status of negotiations on an ongoing basis.

In addition to being knowledgeable, members of the negotiating team should be individuals that are tactful, insightful, flexible, listen well, and are perceived as credible and fair by employees and supervisors. Individuals that tend to "fly off the handle" easily, are hostile and antagonistic to the process, are preoccupied with being seen as the "good guy," are "nit-pickers," lack patience, a sense of humor, and/or human relations sensitivity, should not be designated as members of a negotiating team.

Some larger agencies have found it helpful to designate a management backup group for providing guidance to the negotiating team in caucuses. This can be a group of varying size

consisting of a City Manager, Assistant City Manager, City Attorney, Controller and/or Department Heads that are not directly involved in the negotiations.

With the organizational framework in place, the negotiating process itself can be initiated.

B. NEGOTIATION PROCESS

1. GROUND RULES

The employer and union typically negotiate ground rules for the negotiations to address procedural matters. Refusing to bargain or reneging on agreed-upon ground rules may constitute a violation of the duty to bargain.[229] A sample set of Ground Rules can be found in Appendix F.

2. NEGOTIATING NOTES

While the Chief Negotiator should take personal notes, he or she will be too busy negotiating to keep a reasonably complete record of the negotiations. It is important to keep such a record in the event of later disputes concerning what has and has not been agreed to, the intended meaning of provisions, questions of good faith negotiations, which party advanced what arguments and the like. Thus, one member of the team should be assigned the responsibility of taking fairly complete notes, or a confidential secretary should be assigned that function.

3. COMMUNICATION WITH EMPLOYEES IN THE BARGAINING UNIT DURING BARGAINING

a. Agency Direct Communication with Employees

The MMBA prohibits an employer from using direct communications with employees to bypass the exclusive representative and undermine the representative's exclusive authority to represent unit members and negotiate with the employer.[230]

However, not all communication with employees violates the Act.[231] PERB consistently has held that in order to show a violation of the MMBA based on employer speech, it must first be shown the conduct contains reprisals, discrimination, threats, interference or coercion.[232] Employers must be aware that any communications that appear to be "negotiating" directly with represented employees could also be challenged. Purely factual statements are less objectionable. However, negotiated ground rules may provide additional restrictions on such communications, regardless of content.

To determine if an expression or communication contains such a threat of reprisal or force, or a promise of benefit, PERB will consider the following: (1) the accuracy of the statement;[233] (2) the context in which the statement occurred;[234] (3) the impact that such communication had or is likely to have on the employee who may be more susceptible to intimidation or receptive to the coercive import of the employer's message;[235] and (4) the effect on the authority of the exclusive representative.[236] In order to prove that an employer has unlawfully bypassed the exclusive

representative by negotiating directly with unit employees, PERB has held that it must be demonstrated that the employer sought either to create a new policy of general application or to obtain a waiver or modification of existing policy applicable to such employees.[237]

b. Union Use of Agency Communication Systems to Communicate with Employees

The MMBA provides that agencies may adopt reasonable rules and regulations regarding an employee organization's access to employee work locations and means of communication.[238]

Access rights not described by statute become available to a union in two circumstances: (1) when the usual means of communication are ineffective or unreasonably difficult; or (2) when an employer's prohibition on access is discriminatory on its face or as applied.[239]

Once an employer has opened a forum for non-business communication, it cannot prohibit employees from using the same forum for a similar level of communication regarding union activities.[240]

Further, while labor organizations generally have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, are subject to reasonable regulation. Thus, as long as an agency's policies and practices are not discriminatory on their face or as applied, the agency can properly limit use of its website and prohibit the union from communicating through that forum.

c. Union Use of Agency Email During Negotiations

Neither the PERB nor the courts have required a public employer to open up its electronic mail system to labor organizations if the employer reserves its computer system for business purposes only. In other words, *if an employer desires to exclude an employee organization (or any other group or individual) from using its computer system, it may do so by reserving the system for business purposes only*.[241]

In contrast, if a public agency permits its computer system to be used for non-business reasons, e.g., social or recreational uses, a labor organization is entitled to an equal right to such use. An employer's failure to grant a union the right to use the agency's email or computer system, when it grants access for other non-business purposes, would likely constitute unlawful discrimination and a denial of rights guaranteed to employees and employee organizations.[242] For example, PERB has held that it was a violation of the Dills Act for the State of California to allow minimal personal communication by email while it prohibited such communication by a labor organization.[243]

However, the NLRB has ruled that employers must allow employees to use email for statutorily protected communications on nonworking time if the employer has given employees access to the employer's email system.[244] In the decision, the NLRB overturned prior precedent distinguishing between email for personal communications and organizational-related communications.[245] The NLRB reasoned that email has become a natural gathering place,

pervasively used for employee conversations, and is an essential means of communication to employees' exercise of their protected rights.[246]

Though the NLRB's decision does not directly apply to public agencies, PERB regularly follows the NLRB's guidance. Therefore, it is likely that employee organizations will also urge PERB to adopt the NLRB's decision and determine that a public agency's electronic use policies are an infringement on employees' representation rights. However, the NLRB's *Purple Communications* decision does state that employers can apply uniform and consistently enforced controls over their email systems to maintain production and discipline. Therefore, while an agency may not discriminate against employee organizations in the use of email or computer resources, unions are not entitled to unfettered use of those resources. Ultimately, even if an employer permits non-business use of its email system, it retains the ability to place reasonable time, place and manner restrictions over how its system will be used.

For example, an employer may limit access to non-work time or incidental use. It may also prohibit the transmittal of voluminous email or burdensome attachments. In the Dills Act case noted above, although PERB found that the State's refusal to allow the union access to its email system (when it allowed access for other minimal personal communication) was unwarranted, the State's action prohibiting voluminous email from the labor organization was found to be *lawful*, because there was no evidence that the State had ever permitted others to conduct, for personal reasons, the frequent and heavy levels of communication that the union sought to disseminate.[247]

4. TYPES OF BARGAINING

There are now generally two forms of bargaining used by employers and labor organizations. The first is the traditional form of bargaining contemplated by the private sector model. This, of course, involves the well-known exchange of proposals between the agency and the union, and the resulting withdrawal and modification of issues over time by both sides until a comprehensive agreement is reached.

Interest-based bargaining (sometimes referred to as collaborative, principled or win-win bargaining) is being utilized more frequently in labor negotiations. This form of bargaining attempts to change the inherently adversarial relationship between management and labor, and focuses on each side acknowledging the other's interests in a particular issue.

a. Checklist: Traditional Negotiations Process

The following checklist describes in detail the traditional bargaining process:

Preparation for Negotiations

- ❑ Hold in-service training sessions for supervisors and managers.
    - Explain agency philosophy regarding labor relations.
    - Explain the MMBA, the agency's employer-employee organization relations system, and relevant personnel ordinances and rules.

- Explain the role of the managers and supervisors in the negotiations process.
- Specify procedures for management input.
- Specify procedures for keeping management informed as to progress of negotiations.

❑ If there are one or more new members of governing body, individual meeting(s) or closed session to brief such new member(s).

- Establish agency approach to labor relations.
- Explain the MMBA, the agency's employer-employee organization relations system, and relevant personnel ordinances and rules.
- Give background on unions, union officers and history of negotiations.
- Explain how the process works; the role of governing board members; closed sessions; and what to expect.

❑ Develop negotiating data.

- Gather salary and other benefit survey data.
    - Other "comparable" public agencies.
    - Private employers in area.
- Multi-year agreements in effect.
- Recent settlements.
- Consumer Price Index (CPI).
- Compile current payroll costs for unit.
    - Unit "profile," including:
        - Number and job classes of employees.
        - Distribution of salary schedule.
        - Insurance costs (medical, dental, vision, etc.).
        - Total base wages.
        - Total wage related by item (e.g., retirement, overtime, "incentive" pay, etc.).
        - 1% factor (i.e., determine the amount of a 1% increase in the current top-step base wage).
        - Total non-wage related by item (e.g., insurance, flat dollar premium pay).
        - Cost of salary range movements in forthcoming year.
        - Average unit wage.
        - Paid leave time usage.
        - Turnover.

- ❑ Review with operating management the last MOU and ordinances/rules/established practices subject to meet and confer requirements.
    - What provisions adversely affect efficiency.
    - What provisions result in excessive grievances.
    - Problems caused by ambiguous provisions.
    - Provisions restricting management's right to act.
    - What problems arose which could have been resolved through appropriate contract language.
    - Unforeseen costs.
    - Excessive costs.
- ❑ Establish coordination channels with other public employers in area.
    - Review each other's negotiations, MOUs, and "brainstorm" new ideas.
- ❑ Anticipate union demands.
    - Union demands from prior negotiations (which were not adopted).
    - Terms and conditions of other units in the agency.
    - Same demands by same union in another jurisdiction.
    - Resolutions passed at union conventions.
    - Speeches by union officials.
    - List of grievances/complaints filed.
    - New enabling legislation regarding increased benefits that may be offered.

Analyze/Cost the Union Package

- ❑ Cost impact of compensation and benefit items.
- ❑ Meet with affected agency operational managers to assess impact(s) of working condition items.
    - Is there a real (bona fide) problem?
    - Is it a continuing problem?
    - Is it general in nature or specific and limited?
    - Will the proposal change the problem?
    - Is the proposal the same size as the problem?
    - Is the cost reasonable in relation to the problem?
    - Is the proposal free from unacceptable operating effects or unanticipated costs, now or in the future, and does it infringe on management's rights?

Analyze Union Negotiating Team

- ❑ Learn as much as possible about the union's chief negotiator.
    - Check with other management negotiators who have dealt with him/her.
    - Does the negotiator live up to his/her commitments?
    - What approach does he/she take in the negotiating process?
    - Will he/she control the committee or will they control the negotiation?
    - Quick settlement or will he/she wait until there is no other alternative?
- ❑ Learn as much as possible about the other team members.
    - Job.
    - Employment history with agency.
    - History of union involvement.
    - Personality (Emotional? Militant? Reasonable?)
    - Which item(s) in union package of personal interest?
    - Any special "axe(s) to grind"?
    - How much influence? With leadership? With rank and file?

Establish Roles of Negotiating Team Members

- ❑ Who will take notes.
- ❑ Who will participate in at-the-table negotiations.
- ❑ Who will be chief negotiator.

Establish Negotiating Goals and Authority

- ❑ Under guidance and direction of CAO, thoroughly prepare for extended closed session with the Governing Body to establish its role, general negotiating goals and review upper limits of overall authority.
- ❑ Explain process to Governing Board; the "whys" and "hows" of their policy direction and their role under it.
- ❑ At the beginning of negotiations and at regular intervals, provide Governing Body members with all relevant information.
    - Analysis of union package, including cost and other impacts.
    - Survey data.
    - CPI data.
    - Other settlements.

- Budget data.
- Proposed goals (i.e., management's proposed issues).
- Proposed goals of union, if known.
- Proposed upper authority for total compensation package.
- Proposed positions on key non-economic policy issues.

Establish Communication Procedures to be Followed During Negotiations

- ❑ With Governing Body.
- ❑ With CAO and key managers.
- ❑ With agency management and supervisors.
- ❑ Question of factual negotiation bulletins to employees.
- ❑ With the bargaining team members in regards to communication while sitting at the table.

Initial Meeting

- ❑ Create constructive, friendly, professional atmosphere.
  - Introductions.
  - Basis for rapport between chief negotiators.
- ❑ Discuss negotiating procedures (ground rules).
  - Meeting schedules, location.
  - No "docking" of pay for reasonable number of employees during normal working hours ("release" time).
  - Exchange of proposals?
    - In writing?
  - Tentative agreement procedure.
    - In writing?
    - In contract language form?
  - Union negotiating team authority?
  - Confidentiality until agreement or impasse?
    - Union communications to unit employees?
    - Union communications to Governing Body, media?
    - Union team recommendation?
    - Ratification procedure?
  - Submission of MOU to Governing Body.

- Consider setting cut-off date (for proposals)?

Successor Meetings

- ❑ Review union items.
  - Ask who, what, where, when, why and how questions to:
    - Determine justifications for each proposal.
    - Determine importance to union team.
    - Begin process of eroding employee expectations.
- ❑ Submit affirmative management proposals.
  - Be prepared to meet good faith obligation by explaining and/or justifying.
  - Keep union team focused on management's affirmative proposals.
- ❑ Management counter proposals.
  - Seek to negotiate from own proposals.
  - Set positive tone.
  - Initially resolve easier items.
  - But consider holding back in order to have enough to bargain with later on.
- ❑ Tradeoffs.
  - Know your priorities.
  - Determine union's priorities.
  - Determine areas of possible compromise.
  - Maximize "ante" to get as much as possible from agency concessions (make union feel they won major victory).
- ❑ Tactics. Depend on such factors as:
  - Personalities of negotiating teams.
  - Relationship between chief negotiators.
  - Agency's employee relations atmosphere.
  - Politics and political relationship between Governing Body and Union.
  - Significance of issue.
  - Parties' previous dealings.
  - Respective negotiating objectives.
  - Parties' perception of detriment of no agreement compared to detriment of making concessions.

- Relative power factors.

- ❑ Negotiating approaches.
    - Have a high aspiration level.
    - Demonstrate good faith by:
        - Justifying positions.
        - Treating union representatives with respect.
    - Be flexible to meet changing circumstances and positions.
    - Be alert to union team comments, facial expressions, and body language.
    - Distinguish between union's majority interests and vocal minority positions.
    - Negotiate significant money issues as a package.
    - Tie together as many unresolved issues as possible at the time major issues fall into place.
    - Clearly restate tentative agreements and reduce them to writing in clear language.
    - Maintain ongoing communications with CAO and Governing Board to assure their positions are being correctly reflected.
- ❑ Avoid:
    - Pushing technicalities and legalities.
    - Rejecting union proposals on ground of illegality.
    - Being pressured into making a proposal or responding to one on the spur of the moment.
    - Representing facts of which you are not sure.
    - Making commitments you may not keep.
    - Describing a proposal as the last, best offer unless you mean it.

Checklist: Negotiations Notes (Traditional Bargaining)

- ❑ Indicate the date, time, and location of the session.
- ❑ Identify the persons attending, and their arrival and departure times.
- ❑ Indicate length of caucuses and who proposed.
- ❑ Record discussions by listing the topic, proposal and/or the contract section, and identify:
    - Who raised the issue.
    - The position/rationale stated.
    - Who responded and the content of the response.

- ❑ The outcome of the discussion:
    - No resolution/resolution.
    - If more information to be obtained, by whom, and when.
    - Tentative agreement – summarize the understanding.
- ❑ Attach all proposals and supporting documents to notes of the relevant session. Note the time proposal is exchanged and supporting documents are provided.
- ❑ Review the notes after the session, and consider having them transcribed or typed up.
- ❑ Have team members review the notes to ensure that they agree with their content.
- ❑ Retain all notes and other documents in a confidential location.
- ❑ Retain notes after agreement is reached (often for the life of agency).

b. Interest-Based Bargaining

One of the recent trends in negotiations is the use of what is commonly referred to as "interest-based bargaining." Interest-based bargaining is known by a variety of names. Among the more common names are: integrative bargaining, principled bargaining, collaborative bargaining, best practices bargaining, mutual gain, and win-win bargaining.

Interest-based bargaining has three essential components: 1) problem solving orientation; 2) an "interest" versus a "position" approach; and 3) a modified structure/format to bargaining "at the table."

While some advocates of the interest-based bargaining approach extol the process as fundamentally different from the traditional bargaining approach, many experts view the collective bargaining process more broadly. These experts see a difference in cultures and disagreements as an inherent part of the labor-management relationship. They view the collective bargaining process as a recognition of this inherent conflict and see negotiations as an implicitly adversarial process.

Interest-based bargaining seeks to channel whatever conflict exists in the labor-management relationship in the most productive direction possible. It seeks to build trust through openness and cooperation while eliminating suspicion, secrecy and competition.

As set forth in the tables below, advocates of interest-based bargaining claim that this process differs from traditional "positional" bargaining in the following ways:

- Separates the People from the Problem
- Focuses on Interests, Not Positions
- Invents Options for Mutual Gain
- Insists on Using Objective Criteria

Positional v. Interest-Based Bargaining

POSITIONAL BARGAINING		INTEREST-BASED BARGAINING
SOFT	**HARD**	
Participants are friends	Participants are adversaries	Participants are problem-solvers
The goal is agreement	The goal is victory	The goal is a wise outcome reached efficiently and amicably
Make concessions to cultivate relationship	Demand concessions as a condition of the relationship	**Separate the people from the problem**
Be soft on the people and the problem	Be hard on the problem and the people	Be soft on the people, hard on the problem
Trust others	Distrust others	Proceed independent of trust
Change your position easily	Dig in to your position	**Focus on interests, not positions**
Make offers	Make threats	Explore interests
Disclose your bottom line	Mislead as to your bottom line	Avoid having a bottom line
Accept one-sided losses to reach agreement	Demand one-sided gains as the price of agreement	**Invent options for mutual gain**
Search for the single answer: the one *they* will accept	Search for the single answer: the one *you* will accept	Develop multiple options to choose from; decide later
Insist on agreement	Insist on your position	**Insist on using objective criteria**
Try to avoid a contest of will	Try to win a contest of will	Try to reach a result based on standards independent of will
Yield to pressure	Apply pressure	Reason and be open to reasons; yield to principle, not pressure

Adapted from Getting to Yes, Negotiating Agreement Without Giving In, Fisher and Ury, Penguin Books, 1981.

TRADITIONAL	INTEREST-BASED
▪ Issues	▪ Issues
▪ Positions	▪ Interests
▪ Arguments	▪ Options
▪ Power/Compromise	▪ Standards
▪ Settle/Win-Lose	▪ Settle/Mutual Gain

While a thorough examination of the philosophy and components of interest-based bargaining are beyond the parameters of this workbook, a brief explanation is needed to understand the value of this process.[248]

Interest-based bargaining contains terms that are not generally used in traditional bargaining. Accordingly, it is appropriate to review the definitions of the more commonly used terms.

Issue: Means a topic or subject of negotiations
Interest: One party's concern, motivation, fear or aspiration about an issue
Position: One party's (predetermined) solution to an issue
Options: Solutions that can satisfy an interest
Standards: Objective characteristic or factors to compare and rank options
Consensus: Decision reached by the group when it finally agrees upon a single alternative and each group member can honestly say:

- I believe that you understand my point of view;
- I believe that I understand your point of view; and
- Whether or not I prefer this decision, I support it because it was arrived at openly and fairly, and it is the best solution for us at this time.

i. Features of Interest-Based Bargaining

One way to understand the process is to think of interest-based bargaining as containing the following features:

- **P**rinciples
- **A**ssumptions
- **S**teps
- **T**echniques

1. Principles

There are four primary Principles:

- Focus on Issues Not Personalities
- Focus on Interests Not Positions
- Create Options to Satisfy Both Mutual and Separate Interests
- Rank and Evaluate Options with Standards, Not Power

2. Assumptions

There are also four Assumptions:

- Bargaining Enhances Relationships
- Both Parties Can Win

- Open and Honest Discussion Expands Mutual Interests and Options
- Standards Can Replace Power Regarding Bargaining Outcome

3. Steps

The Steps used in interest-based bargaining can be summarized as follows:

- ❑ Preparation
  - Preparation of information, data collection, etc., is similar to traditional bargaining; unlike traditional bargaining, however, parameters are not generally obtained prior to the start of bargaining.
  - In contrast to traditional bargaining, in interest-based bargaining, all group members participate in discussions; to assist the group in its discussions of issues a facilitator is selected; the parties can either select a person to act as facilitator or more commonly, appoint someone from the group to act as a facilitator on a rotating basis.
  - Record keeping is done by a designated record-keeper for the group. Most often charts are used to record the discussions of the parties.
- ❑ Opening Statements
  - Opening statements represent each party's goals and aspirations for the negotiating process; usually the stated goals are broad based; the parties generally reaffirm their commitment to work cooperatively toward a more effective working relationship and to use the interest-based bargaining approach as the means to achieve that relationship.
  - Ground rules are used and typically include the ones used in traditional bargaining as well as those which indicate a more interest-based or collaborative approach (e.g., joint information gathering).
- ❑ Identify Issues
  - Clarifying and understanding the issue(s) and the problems which created the need to present the issues are essential.
- ❑ Identify Interests
  - Clarifying and understanding each party's interests is essential. Parties should not proceed to the next step in the process unless they thoroughly understand each other's issues and interests on a particular matter.
- ❑ Create Options
- ❑ Create Standards
  - Use objective criteria whenever possible to focus on the option(s) which have the greatest potential for resolving a particular problem.
  - Typical standards include legality, operational efficiency, safety, consistency with the marketplace, and mutual gain.

- ❑ Rank and Evaluate Options with Standards
- ❑ Achieve Agreement

4. Techniques

The Techniques used in interest-based bargaining include:

- Active Listening
- Brainstorming
- Consensus Seeking
- Idea Charting/Group Memory

Brainstorming is a technique for group generation of ideas. It is an informal but structured process used to generate as many ideas as possible solutions to a problem.

Brainstorming involves several steps:

- Define the problem or questions, making sure that every group member has a clear and accurate perception;
- Write the problem or question on a flip chart so that all group members can see it;
- Ask group members to present their ideas for solving the problem or answering the questions without evaluating responses; and
- Record each idea on chart paper exactly as it is offered.

5. RULES OF BRAINSTORMING

- Make No Criticism
  - Judging is Forbidden
  - Focus on Likes
- Be Free-Wheeling
  - Use Imagination
  - Take Risks
- Go for Quantity
  - More Ideas the Better
  - More Variety the Better
- Combine—Expand—Hitch-Hike Ideas
  - Build on Others' Ideas

a. Advantages of the Interest-Based Bargaining Approach

Interest-based bargaining has a number of advantages, including:

- Compels a Problem Solving Orientation. There is a reduction in posturing and more "buy-in" into problem solving as part of the relationship.
- Total Table Participation. Brings all issues, concerns to the table (allows the parties to discover the "true" issues). Bargaining team members are empowered.
- Brainstorming develops options which may not have been realized.
- Particularly useful in resolving non-economic issues.
- Increased potential for improvement in overall relationship (e.g., information sharing, problem sharing, honest and full communications).

b. Challenges with Interest-Based Bargaining.

Although interest-based bargaining has tremendous potential, in practice, it also has tremendous challenges. Among these challenges are the following:

i. Structural Issues

One of the primary problems facing advocates of the process is constituent involvement.

Too often there is a failure to educate and train constituents (i.e., bargaining groups "too far ahead" on issues) and/or a failure to communicate with constituents ("in the dark"). To be successful, interest-based bargaining requires the parties to determine and check their constituents' interests and to keep them informed of progress so that there can be a "buy in" into the process when problems arise.

Another problem often encountered is that there is a dependence on the relationship between key players. When these "players" leave the agency or are otherwise no longer involved, the investment and understanding of the process by others are often lacking.

A third problem is commitment to the process. Key leaders on both management and labor must view the process as important and worthy of support. Management must recognize the legitimacy of the union as an equal partner in the relationship. Management must also recognize that if it attempts to use interest-based bargaining in isolation, and then revert back to the "old style" when not negotiating, the union may not continue to see the value of continuing this type of relationship.

Typical stress points occur when: turnover occurs among key leaders; one side plays by the rules, the other side does not (e.g., end-runs, publicity, picketing); and continued use of parameters.

ii. Unrealistic Expectations

The reason for entering into interest-based bargaining invariably results from a situation in which the existing system is not effectively resolving the problems between the parties. Interest-based

bargaining is designed to examine issues using a less adversarial approach, while seeking to resolve problems and strengthen the relationship between the parties. Unfortunately, both sides may enter into interest-based bargaining for the wrong reasons or with unrealistic expectations.

Management sometimes enters into interest-based bargaining because of: pressure from the union or the governing body; to obtain "labor peace"; it's the latest fad; and/or it's a way to get the union to make concessions (e.g., agree to no raise). The union, for its part, sometimes enters into the process to obtain power sharing and/or a resolution of all of its perceived problems in the workplace.

The key to success is creating realistic expectations. Initially, by understanding that interest-based bargaining is not a "cure all," and that it requires a long-term commitment, a recognition that mistakes and problems will occur, and the willingness to regularly check the progress of the process.

iii. Conditions for Success

- Commitment
- Management Must Recognize Legitimacy of the Union
- Long Term Orientation
- Careful Consideration of Proper Linkage Between Traditional Bargaining and Problem Solving
- Establish Realistic Expectations
- Labor-Management Cooperation Programs Should Avoid Entanglement in Internal Politics
- Ownership May be Lost If Too Much Weight Placed on Role of Neutrals
- Crucial Information Must be Available to Both Parties
- Both Sides Must Articulate Objectives
- Both Sides Must Listen to One Another
- Constituent Communication is Essential
- Relative Equality of Power between Union & Management
- Trust

C. AGREEMENT AND IMPASSE

1. DRAFTING THE AGREEMENT

Being the one to draft agreement language affords an advantage and imposes a disadvantage. The advantage is the element of control to ensure that the language correctly reflects the

agreements reached. The disadvantage is that in the event the language is not completely clear, any later disputes concerning the intended meaning or effect of the language will tend to be interpreted against the drafter of the language by a court or an arbitrator.

On balance, it is suggested that the agency representatives draft the language, relying on any union proposed language to the optimum extent consistent with the agency's interest.

When reducing items of agreement into contract language, it is important to keep in mind the approaches relied on by arbitrators and judges in resolving disputes involving contract interpretation.

a. Criteria Used in Interpreting Agreement Language

The following material on standards used by arbitrators in disputes over interpretation of agreement language is adapted loosely from a section of the book *How Arbitration Works* by Elkouri and Elkouri, Bureau of National Affairs, Inc., Washington, D.C. (6th edition 2003). The material is based on a survey of a number of cases and must be used as a guide, not an authoritative statement of how a particular arbitrator will judge a particular case.

i. Intent of the Parties

The basic consideration for the arbitrator is what the parties intended the language in question to mean. The other criteria listed below provide "handles" which help the arbitrator determine such intent.

ii. Clarity of the Language

Language which the arbitrator finds to be "clear and unequivocal" will generally be taken at face value; that is, as sufficient indication of what the parties wanted the language to mean. For example, the use of the term "shall" or "will" means an act must be taken; whereas "may" is not considered mandatory.

iii. Specific Versus General Language

Where agreement language is specific in some respects, it will normally be found to control another more general clause.

Example: One article of an agreement specifies that management shall "continue to make reasonable provisions for the safety and health of its employees." Another clause states that "wearing apparel and other equipment shall be provided by management in accordance with practices now prevailing…or as such practices may be improved from time-to-time by management." How would you expect an arbitrator to rule on a case asking that rain clothes be provided to certain employees who have not had such clothes to this point?

iv. Agreement Construed as a Whole

Arbitrators normally will hold that all parts of the contract have some meaning, or the parties would not have included them in the agreement.

Example**:** A clause on distribution of overtime states that "Overtime will be distributed equitably among employees qualified to do the work." It also specifies that "The distribution of overtime will not be used to either reward or punish employees." The agreement's "management's rights" clause reserves to management the right to "assign work" and "maintain efficiency." Could management use its management's rights clause to justify denying an employee who is consistently tardy or absent a Saturday overtime assignment if other employees cannot begin their own work until the person taking that overtime assignment arrives? Would an arbitrator be less likely to accept an argument that "qualifications" for the assignment include such things as reliability, dependability, etc., if the management's rights clause was not in agreement?

v. Bargaining History of the Language

Arbitrators generally construe ambiguous language against the party who proposed or drafted it.

vi. Interpretation in Light of the Law

Arbitrators will seek an interpretation that validates an agreement over one that invalidates it.

vii. Use of Dictionary Definition

Arbitrators will use the usual and ordinary definitions of words from a reliable dictionary when there is no mutual understanding between the parties as to a different meaning, such as if the word or phrase is specifically defined in the agreement.

viii. Assumption Against Harsh, Absurd or Nonsensical Results

Arbitrators generally will assume that the parties did not intend their language to have harsh, absurd or nonsensical consequences unless other evidence clearly points in this direction.

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Many MOU provisions related to compensation provided to employees can raise a number of tax issues. Therefore, we recommend that an agency have a tax advisor review any new MOU provisions or revisions related to compensation provided to employees and periodically review MOU's to ensure compliance with tax laws and to avoid any unintended tax issues or consequences.

2. PRESENTING THE AGREEMENT

The MMBA provides that the agreement reached by the parties shall not be binding until it is presented to the "governing body or its statutory representative for determination."[249] The governing body has two options for responding: "either that the MOU is approved and shall be effective or that it is not approved, in which event further negotiations to reach an acceptable agreement are in order."[250] PERB has rejected a bargaining representative's argument that, when a body does not approve the agreement, it is required to provide some "specific directive" or "guidance" regarding what changes were needed to obtain later approval of such an agreement.[251]

3. UTILIZING IMPASSE PROCEDURES

Impasse is the point in negotiations at which one or both parties determine that no further progress can be made toward reaching an agreement. The MMBA does not contain a definition of impasse. PERB has held that the EERA's definition of impasse is appropriate under the MMBA as well.[252] It is defined to mean that "the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile."[253] Declaration of impasse precedes implementation of impasse resolution procedures or unilateral action by the employer. Because of the fact-finding regulations, discussed below, declaration of impasse should be in writing.[254]

As discussed in the first part of this workbook, mediation and fact-finding are impasse procedures used by public agencies to the extent provided for in their employer-employee relations procedures and as required under the MMBA. Agencies must attempt to closely follow the impasse resolution procedures in their local rules to satisfy the obligation to meet and confer in good faith.[255]

a. Mediation

The mediator acts as an impartial "go-between" for the parties. The mediator should act strictly behind the scenes, attempting to convince one and/or both of the parties to compromise and agree. A mediator may be helpful if emotions and tensions make fruitful direct negotiations futile, or if one party is convinced that it cannot achieve closure without the pressures of mediation.

However, one should not come to rely on mediation to bring closure to every negotiation because of the danger that the union will assume that it can only get everything that is to be had by going to mediation every time.

b. Fact-finding

Until recently, the specific procedures for fact-finding depended upon the scope outlined in the public agency's employer-employee relations procedures and similar local rules. However, AB 646 (effective January 1, 2012) modified Government Code sections 3505.4 and 3505.5 of the MMBA to require that an employee association be given the opportunity to request impasse fact-finding prior to an agency being allowed to unilaterally implement where mediation did not resolve the underlying impasse.[256] AB 1606 clarified that an employee organization can submit a dispute for fact-finding without mediation as a prerequisite. Charter cities and counties with binding interest arbitration in their charters are exempt from these fact-finding impasse procedures.[257]

Under the MMBA's fact-finding procedures, only the employee association can request fact-finding.[258] PERB's regulations clarify that this can happen in one of two ways where the parties are at impasse:

1. Where the parties go to impasse mediation, the employee association request must be made with PERB no sooner than 30 days, but no more than 45 days following the appointment or selection of the mediator; or
2. If the parties do not go to impasse mediation, the employee association request must be made with PERB no later than 30 days following the date that either party provided the other party with a written notice of a declaration of impasse.[259]

The fact-finding takes place before a three member fact-finding panel. The panel issues non-binding findings of fact and recommended terms of settlement if the parties do not settle the issues in dispute. See Appendix C for recommended Employer Employee Relations Resolution language related to impasse procedures and the MMBA, respectively.

Although the Legislature failed to specify whether an employee organization may request fact-finding for any dispute arising from mandatory bargaining or only for disputes arising when the parties are bargaining over a new or successor MOU, PERB has determined that AB 646's fact-finding procedures apply to the former.[260] In 2016, the Fourth District Court of Appeal agreed, holding, in two cases, that fact-finding is available for any "impasses arising during the negotiation of any bargainable matter."[261] The agencies in both cases filed separate Petitions for Review with the California Supreme Court. Until the Supreme Court denies the Petitions or issues a contrary decision, employee organizations may request fact-finding under the MMBA for any negotiable dispute, including effects bargaining and other disputes arising from or outside of negotiations for a MOU.

c. Negotiations in an Interest Arbitration Environment

Charter cities and counties with provisions providing for the binding arbitration of negotiating impasses should take some special steps to prepare for negotiations.

i. Research Issues to be Negotiated

Conduct careful advance preparation on economic *and* non-economic issues. The line between economic and non-economic issues is blurry, so it is essential to conduct thorough planning regarding all issues in the event that they are resolved by an arbitrator. Your advocate cannot effectively represent your agency at the interest arbitration if your agency does not have this supporting survey information. Even if your agency does not go to interest arbitration, this information will assist your agency to make better-informed proposals and counter proposals. It is therefore best to go through this process before negotiations even begin.

Preparation should include:

- ❑ Collect evidence and arrange for expert witnesses prior to negotiations. For example, if your agency does not have a list of comparable agencies, it might be necessary to retain a professional survey consultant to determine a favorable list that will be accepted as legitimate by an arbitrator. The expertise that a professional survey consultant brings adds some expense to the negotiations, but will give your agency a head start, in the event of interest arbitration, as to the appropriateness of the selected agencies, the method of surveying the agencies, and the manner in which wages and other economics were

calculated. Assessment of what the most representative "market" consists of is often a subject for expert testimony, study and analysis. Typically, the factors given the most weight are:

- Job duties and nature of the employment;
- Geographical spread of the "relevant labor market";
- Size of the employer (typically, the similarity of job duties of public employees working for different employers turns in part on the size of the employer);
- Similarity in working conditions; and
- Consideration of total compensation package (wages, benefits, retirement pickup, etc.).

- ❑ Research the wages and benefits of comparable employees in the comparable agencies. Examine any list of lists that the parties have historically used as well as any new list that your agency or an outside expert developed.
- ❑ Determine changes in the Consumer Price Index for your area. This information is available on the internet from the Department of Labor's Bureau of Labor Statistics website.
- ❑ Ensure that all key decision-makers in the agency are kept apprised of developments and are involved in policy decisions and the development of negotiation proposals.
- ❑ Develop sound economic proposals. The agency's economic proposals should be consistent with the following three factors:
    - They must be genuine, good faith proposals;
    - They must be reasonable and supported by defensible and sound evidence, such as comparability surveys, changes in agency revenue, changes in the Consumer Price Index and prevailing industry practice; and
    - They may require the union to make takeaway concessions. The current contract is not the floor.

ii. Develop Negotiations Strategy

An employer facing the possibility of interest arbitration should consider serious, defensible management proposals as part of an overall strategy. Prioritizing these management proposals may help identify which will be presented to an arbitrator and which can be dropped or packaged with other items before arbitration.

In strategizing about management proposals, the contours of the last offer should be at least roughly anticipated before your agency puts the initial offer on the table. Your agency should also have a tentative plan for justifying your initial and final positions. Attempt to think about all of the issues from the union's perspective both to improve your agency's proposals and also to head-off incorrect union arguments.

Your agency should also have a strategic plan regarding how and when to make movement in negotiations. This includes having a plan for reaching last, best positions at the most opportune time. Remember, there should be no commitment to individual economic matters until all economic issues are resolved in a comprehensive proposal.

iii. Negotiations in an Interest Arbitration Environment

It is important to have a disciplined approach to negotiations when the agency has a charter which provides for an impasse procedure that results in interest arbitration. Public agencies should consider taking the following steps during negotiations:

1. Ground Rules

If there is a possibility of interest arbitration, management may want to discuss as part of the ground rules what happens in the event of such arbitration. For example, do tentative agreements unravel and proceed to arbitration or are they deemed resolved and not a dispute that goes to arbitration? What about dropped proposals? Can they resurface in arbitration? All of these are issues that management should consider before formal negotiations begin.

2. Take Good Notes

Take good notes. That sounds so simple, but it often does not happen, with potentially dire consequences in an arbitration. Accurate and thorough notes can help a public agency prove its case and defend itself in several ways.

In our experience, unions will sometimes have a plan to take negotiations to interest arbitration. In those circumstances, they carefully posture the negotiations in an attempt to be able to "blame" the impasse on the public agency. Questions can also arise during the arbitration hearing about whether a particular proposal was dropped, whether there was an understanding as to what certain contract language meant, and a myriad of other questions that can only be introduced at the arbitration through witness testimony. We have seen in these circumstances that sometimes union negotiators will be able to testify in remarkable detail to the manner in which each party presented evidence, made representations, made proposals or withdrew proposals, while management negotiators have little or no recollection. Taking good notes will preserve a record that negotiators can use to refresh their recollection if they need to testify.

It will also be a daily reminder that everything that happens at the negotiating table could be replayed in an interest arbitration, making it necessary to remain focused on the agency's goals.

3. Costing

Carefully cost all proposals (agency and union). It is imperative for the public agency to be able to show the exorbitant cost of all union proposals and the relatively reasonable cost of all agency proposals. A component of costing is determining the amount of a 1% increase in current top-step base wage. This 1% of base wage number is used in interest arbitration to help gauge the cost and therefore, the reasonableness, of economic proposals. Focusing on this issue during negotiations will help preserve this issue for arbitration.

4. Comparable Jurisdictions

Reach agreement on comparable jurisdictions. This could be easy if the parties have historically used a particular list of agencies and there is no reason to make a change. If they have not, your agency should be ahead of the Union because your agency will have researched and developed its own list, or retained a professional survey consultant to determine an appropriate "universe" for comparison in negotiations and arbitration. It is always better to have an understanding with the Union about what jurisdictions are comparable. If there is a difference of views, the facts should be shared in negotiations so that the matter can be fully presented in arbitration.

5. Maintain a Balance of Issues on the Table

Strive for agreement but maintain an appropriate number of important issues on the table pending arbitration, consistent with what the Union is maintaining. While it is important to develop management economic proposals during the planning phase, it is equally important not to prematurely withdraw them during negotiations.

4. UNILATERAL IMPLEMENTATION

If negotiations in a non-interest arbitration environment are unsuccessful in arriving at an agreement, and if any impasse procedures that are utilized or required under the MMBA do not resolve the impasse, then the governing body may choose to hold a public hearing to exercise its legal option to unilaterally implement changes in compensation or other employment terms. Where the impasse dispute was submitted to fact-finding under Government Code sections 3505.4 and 3505.5, the governing body cannot take action to unilaterally implement the agency's last, best, and final offer until 10 days after the fact-finders' written report has been submitted to the parties.[262]

Unilateral implementation action may be taken only after good faith negotiations have reached a bona fide impasse and required impasse procedures have been fully utilized in good faith.[263] An agency may be found to have prematurely imposed its last, best, and final offer if it rushes to and through impasse resolution procedures or sets artificial deadlines during negotiations.[264] Impasse is deemed broken if the union or the agency makes a significant shift in its negotiating posture.[265] Once impasse is broken, an agency may not proceed to unilateral implementation unless impasse is reached again.

After impasse is reached and all required impasse procedures have been utilized in good faith, the agency may take unilateral action. What changes in employment terms can the Governing Body then unilaterally implement? Only those offered to the union negotiating representatives and rejected by them. If the agency chooses to take unilateral action, it must only implement its last, best and final offer or changes that were "reasonably contemplated within its last, best and final offer."[266] Agencies may not, for example, implement recommendations of a fact-finding panel even though these may be more favorable to the union.[267]

It is particularly important that any unilateral implementation action (including any plan to unilaterally implement terms that differ in any way from the agency's last, best and final offer)

be carefully structured to comply with these legal restrictions because the chances of legal challenges by unions to such action are normally very high. For example, PERB recently held that implementation of a last, best, and final offer interfered with "vested" rights agreed to in a prior bargaining agreement, specifically stating that parties may expressly agree to limit an employer's right to impose terms at impasse, or that they may impliedly achieve the same result by agreeing to terms that do not mature until after the agreement has expired.[268] Although this decision is under appeal, PERB's decision indicates the scrutiny unilateral implementation actions will receive.

With respect to the unilateral implementation of meet and confer policy issues that do not require the approval of the Governing Body or that have been delegated to an agency's Chief Administrator (e.g., City Manager, CAO, General Manager), it is not settled what process must be followed in such circumstances. The most defensible position would be to follow the impasse procedures to the same extent as the agency would if the impasse was over a successor MOU, culminating on a decision by the agency's governing body. In this circumstance, legal counsel should be consulted as to the proper procedure.

Please consult with legal counsel and refer to the following checklist before unilaterally implementing changes in employment terms.

Checklist: Unilateral Implementation by Agency

- ❑ Agency engaged in good faith negotiations to impasse.
- ❑ Agency participated in good faith in any impasse procedure required by local ordinance/resolution or the MMBA.
- ❑ If impasse broken by a union request to negotiate accompanied by a substantive change in union position(s), agency representatives resumed good faith negotiations to renewed impasse.
- ❑ Agency complied with all elements of the impasse and implementation procedures required by its own ordinance/resolution or MMBA.
- ❑ After exhausting all required impasse procedures by local ordinance/resolution or the MMBA, Agency puts the union on notice that the governing body will consider the impasse at a specified public meeting.
- ❑ Union given an opportunity to address issue at meeting.
- ❑ Governing body may deliberate the matter in closed session, and announce its closed session action at that meeting; or take action at a subsequent public meeting; or announce that it intends to take no action on the impasse.
- ❑ Governing body may consider only the disputed issues submitted to it.
- ❑ Governing body may only unilaterally implement an offer made by agency representatives to union negotiators and rejected by union. Generally this should be the agency's last, best offer made to union. It is especially risky to unilaterally implement regressive proposals or positions. An agency is not necessarily required to unilaterally implement proposals

absolutely identical to its last, best, and final offer, but the terms and conditions unilaterally imposed must be reasonably comprehended within the agency's last, best, and final offer.[269] We advise however, that the agency impose the last, best and final offer exactly, unless there is a valid reason to do otherwise. You should consult legal counsel prior to imposing terms and conditions that differ at all from the agency's last, best and final offer.

- ❑ Since the union has right under the MMBA to negotiate increased compensation for each budget year, a unilateral implementation action can only be for the remainder of the current fiscal year before the union may seek to negotiate an MOU.

5. CONCERTED ACTIVITY

Protected concerted activity occurs when two or more employees act together to protest or complain about terms and conditions of employment, such as wages and benefits. The MMBA protects an individual employee's right to engage in, or not to engage in, protected, concerted activities.

Certain forms of concerted activity can impact the workplace, agency services, labor relations and the negotiations process. These types of activity include information distribution (i.e. flyers), picketing and work stoppages, or "strikes."

a. Types of Concerted Activity

i. Information Distribution

During the negotiation process, employee associations will often distribute flyers or leaflets. See Section above regarding *Union Use of Agency Communication Systems to Communicate with Employees* for information regarding Union use of agency mailboxes, email and internet for distribution purposes. Leafleting is protected conduct under the First Amendment of the U.S. Constitution. [270] PERB has also found that leafleting is protected under EERA if the leaflet is the product of an employee organization, and the content is not malicious or defamatory.[271]

ii. Picketing

Peaceful, informational picketing at an employer's facility for the purpose of informing the public is a lawful, First Amendment-protected activity.[272] An agency must have a compelling governmental interest to override this free speech right (i.e. disruption of governmental operations).[273] A court can, however, place reasonable restrictions on disorderly conduct, unlawful blocking of access or egress to premises where a labor dispute exists, or other unlawful activities involving a labor dispute. And, courts can restrict picketing in a residential area if it invades the tranquility of one's home.[274]

In deciding the legality of picket line conduct, PERB will review whether the conduct reasonably tends to coerce or intimidate non-striking employees in the exercise of their rights not to participate in a strike.[275] Threats of physical violence and bodily injury are unlawful, but name calling, abusive language and vulgar epithets are not enough to constitute a violation.

Furthermore, short delays in getting to the work site that are not accompanied by violence are not unlawful intimidation or coercion.[276]

1. Sympathy Strikes/ Honoring Picket Lines

A sympathy strike is the concerted refusal to cross the lawful picket line of another union. The right to engage in a sympathy strike may be waived only by a clear and unmistakable waiver.[277] PERB has held that a general "no strike" clause in an MOU does not prohibit sympathy strikes.[278]

iii. Work Stoppages – Right to Strike

If the union in good faith participates in negotiations to impasse, and participates in good faith in any required impasse procedures, it may then engage in a strike to the extent such a strike does not pose a "substantial and imminent threat to public health or safety."[279] However, a strike prior to the completion of impasse procedures, which is not in response to the employer's unfair labor practice, is a violation of the duty to bargain in good faith, and is an unfair practice that can be enjoined.[280] Only firefighters are prohibited by statute from striking or from recognizing a picket line of a labor organization.[281] By judicial decision, police officers are prohibited from striking as well due to the threat to public safety.[282]

1. Types of Work Stoppages

Below is a list of various types of work stoppages. Note that all illegal or prohibited types of strikes are subject to injunction.

Economic Strike: A strike to gain concessions at the bargaining table.

Illegal Strike: A strike that poses a substantial and imminent threat to health and public safety (i.e. firefighters' strike); a strike that violates a "no strike" clause; or a strike prior to completion of impasse procedures.

Intermittent Strike: A series of intermittent strikes (i.e. one-day long). A series of one-day strikes within two months following completion of impasse procedures was unprotected and an unlawful partial strike.[283] But an employer cannot respond with a lockout or discharge of economic strikers.

Legal Strike: A strike not prohibited by common or statutory law. A legal strike may still be subject to discipline if the strike is not protected under labor statutes.

Partial Strike: A situation in which employees attempt to work and strike at the same time; partial strikes of short duration are presumptively protected.

Protected Strike: A strike protected by labor statutes (e.g., an unfair practice strike).

Sickouts: A labor action where employees refuse to work claiming they are sick. Sickouts are unprotected concerted activity under California public sector labor laws.

Sit-in Strike: Employees stop work, but remain on the employer's premises in order to prevent work. This is unprotected activity for which employees may be disciplined.

Slowdown: Employees accept compensation while slowing down their production. This is unprotected activity for which employees may be disciplined.

Sympathy Strike: A strike in sympathy with other striking employees. The legality of such a strike depends on whether a "no strike" clause is in effect.

Unfair Practice Strike: A strike to protest employer unfair practices. If precipitated by employer unfair labor practices, such a strike is generally permitted, absent any substantial and imminent threat to health and public safety.

Wildcat Strike: A strike by employees that has not been approved by the exclusive collective bargaining agent or the union.

While many of the above-listed types of strikes are illegal, the alleged illegality of a strike is not a valid defense to a public employer's refusal to meet and confer.[284]

2. Effect of Expiration of Collective Bargaining Agreement

The good faith obligation requires that the employer maintain the status quo as to wages, benefits and working conditions during negotiations on a new agreement, after expiration of the predecessor agreement. The status quo includes what was in the expired contract.[285] After the expiration of the contract, the employer may not make a change in terms and conditions of employment, but an arbitration provision will not be extended to require arbitration of post-expiration disputes, unless drafted to require express extension of that provision.[286]

Many collective bargaining agreements will include a "no strike" clause. Generally, a "no strike" clause will expire with the contract. Also, an organizational security clause will expire with the contract, unless the agency shop agreement is contained outside of the MOU, or unless agency shop was obtained by election under Government Code § 3502.5(b).

3. Injunctive Relief

Injunctive relief may be appropriate where a work stoppage is in progress.[287] However, strike preparation (including strike authorization votes or urging members to picket) or threatened work stoppages before the exhaustion of impasse procedures is likely insufficient for injunctive relief.[288] Where illegal strike activity (i.e., refusal by employees to perform essential services which substantially threaten health or safety) is imminent, an agency should seek an injunction to prevent employees from participating in such a strike. Only strikes that are illegal can be enjoined.[289] Also, when a charging party files an unfair practice charge, it can include a request for injunctive relief. Injunctive relief (i.e., an injunction) is statutorily defined as "a writ or order requiring a person to refrain from a particular act."[290]

Additionally, injunctive relief can compel the performance of an affirmative act.[291] For instance, PERB has sought injunctive relief to order the reinstatement of an employee/union leader, who

was placed on administrative leave during a pending union organizing election and ordered to not speak to other employees or come to the workplace.[292] Typically, an injunction is sought to restrain certain conduct pending the outcome of an unfair practice case, such as bad faith bargaining, unlawful unilateral changes, and illegal strikes.

6. JURISDICTION

The question of whether PERB or the superior courts have initial jurisdiction over "essential employee" strikes that threaten public health and safety was settled by the California Supreme Court in *City of San Jose v. Operating Engineers Local Union No. 3*.[293] In that case, the Court found that PERB has exclusive initial jurisdiction over a claim by a public agency that a strike by some or all of its employees is illegal.

However, PERB has no jurisdiction over employees designated as "management" or over peace officers as defined in Penal Code Section 830.1.[294] Where an agency seeks an injunction over a strike by management or peace officers as defined in Penal Code Section 830.1, the injunction should be filed with the Superior Court.

a. Damages

An employer cannot file a civil tort action to recover damages caused by an illegal strike.[295] However, an employer can sue an employee organization for breach of a "no strike" clause under Labor Code Section 1126, which provides remedies for breach of collective bargaining agreements.[296] In addition, an employer can rescind the collective bargaining agreement if the employee association breaches the "no strike" clause.[297]

An employer cannot revoke union recognition as a penalty for the union's involvement in illegal strike, because revocation interferes with the employee's right to be represented by an organization of their choice.[298]

b. Striking Employees

i. Salary and Benefits

An employer can refuse to pay strikers for time not worked, including fringe benefits.[299] When an employee has previously authorized vacation time, personal leave, comp time-off, or floating holiday time scheduled during the time that the strike is taking place, the agency can withdraw authorization and require that the employee attend work.

ii. Discipline

While no discipline can be imposed against employees engaged in a legal, protected strike, an agency may decide to take disciplinary action against employees who engage in illegal concerted activity.

Unauthorized absence due to participation in an illegal strike is a terminable offense.[300] An employer may also initiate disciplinary proceedings if it suspects that employees are using sick leave while not truly ill.[301] And, an agency is entitled to impose discipline on employees who

take possession of the agency's premises during a strike.[302] However, an employer cannot use emergency authority to do away with due process rules, because doing away with due process rules will not alleviate the emergency.[303] Agencies must be careful to follow *Skelly* and other due process rights when disciplining employees for participation in illegal strikes.

If an employee has taken sick leave during an unprotected work stoppage, the employer can use evidence that the employee participated in picketing, or other evidence of abuse, to support discipline of the employee for abuse of sick leave. Furthermore, unless an agency policy prohibits it, the employer can require that the employee submit sick leave certification from a doctor before returning to the workplace. However, agencies must be careful to treat all employees who commit similar offenses equally to avoid claims for retaliation based on union activity.

In the private sector, the distinction between economic strikes and unfair labor strikes is crucial in determining reinstatement rights.[304] Unfair labor practice strikers have an absolute right to reinstatement whereas economic strikers may be permanently replaced if the employer had previously filled the position.[305] Until there is further clarification of the employer's ability to replace striking public employees, this distinction may apply to the private sector only.

California public employee strike rights have not been further materially defined since 1985, possibly because there are so few strikes in the public sector. Issues that may arise in the future include, for example, will private sector law prohibiting partial or intermittent strikes be held to apply? And will it be determined that public employers have the right to temporarily or permanently replace economic strikers as is true under private sector labor laws?

c. *Strike Contingency Planning*

The legal sanctioning of strikes further emphasizes the importance that agencies have available a strike contingency plan that is maintained on a current basis at all times. Whether employees engage in a legal or illegal strike, LCW strongly recommends that an agency prepare in advance with a "strike plan" that can be quickly implemented.

The strike plan should address issues such as whether the agency will continue to operate, what arrangements must be made to deal with essential public services, what security is needed to deal with picketers impeding operations, security against potential sabotage, and other issues.

i. Maintaining Service During a Strike

In order to maintain service during a strike, an employer may hire substitute workers. An employer has a right to take prudent actions which do not violate the law. Such legal and prudent measures may include hiring substitutes to replace strikers and suspending the employment policy that interferes with such hiring.[306]

ii. Public Relations

An agency with striking employees should have a strong public relations campaign, and should consider hiring a public relations firm to handle communication with the press and the public.

Agencies should also have press releases reviewed by attorneys in advance. Agency representatives are advised to establish strong relationships with reporters in advance of a strike.

d. Other Types of Concerted Activity

Other types of concerted activity may include the following:

- Work-to-Rule Campaigns Overly meticulous adherence to rules, including compliance with rules found to be impractical. Work-to-Rule campaigns are unprotected in California public sector if they result in failure to perform "normally required assigned and assigned adjunct duties."[307]
- Slowdowns: Unprotected concerted activity under federal private sector labor law.[308] Slowdowns are unprotected in California public sector if they result in failure to perform "normally required assigned and assigned adjunct duties."[309]
- Sit-ins: Seizure and retention of employer premises by employees, preventing the employer's continued operation with replacement workers. Sit-ins are unprotected concerted activity under federal private sector labor law.[310]
- Sickouts: A labor action where employees refuse to work claiming they are sick. Sickouts are unprotected concerted activity in California public sector.[311]

In the event of any type of illegal concerted activity, employers should immediately respond by requiring sick leave certification in accordance with agency policy, proceeding with disciplinary action and filing injunctions (or requesting PERB pursue it) to enjoin the illegal conduct, where appropriate.

APPENDIX A

MEYERS MILIAS BROWN ACT

See the following.

GOVERNMENT CODE
SECTION 3500-3511

3500. (a) 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 and the charters, ordinances, and rules of local public agencies that establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies 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.

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

3500.5. This chapter shall be known and may be cited as the "Meyers-Milias-Brown Act."

3501. As used in this chapter:

(a) "Employee organization" means either of the following:

(1) Any organization that includes employees of a public agency and that has as one of its primary purposes representing those employees in their relations with that public agency.

(2) Any organization that seeks to represent employees of a public agency in their relations with that public agency.

(b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

(c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not

mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 5 (commencing with Section 45100) of Part 25 and Chapter 4 (commencing with Section 88000) of Part 51 of the Education Code or the State of California.

(d) "Public employee" means any person employed by any public agency, including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state.

(e) "Mediation" means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice.

(f) "Board" means the Public Employment Relations Board established pursuant to Section 3541.

3501.5. As used in this chapter, "public agency" does not mean a superior court.

3502. Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

3502.1. No public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit.

3502.5. (a) Notwithstanding Section 3502, any other provision of this chapter, or any other law, rule, or regulation, an agency shop agreement may be negotiated between a public agency and a recognized public employee organization that has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and enactments, in accordance with this chapter. As used in this chapter, "agency shop" means an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization.

(b) In addition to the procedure prescribed in subdivision (a), an agency shop arrangement between the public agency and a recognized employee organization that has been recognized as the exclusive or majority bargaining agent shall be placed in effect, without a negotiated agreement, upon (1) a signed petition of 30 percent of the employees in the applicable bargaining unit requesting an agency shop agreement and an election to implement an agency fee arrangement, and (2) the approval of a majority of employees who cast ballots and vote in a secret ballot election in favor of the agency

shop agreement. The petition may be filed only after the recognized employee organization has requested the public agency to negotiate on an agency shop arrangement and, beginning seven working days after the public agency received this request, the two parties have had 30 calendar days to attempt good faith negotiations in an effort to reach agreement. An election that may not be held more frequently than once a year shall be conducted by the Division of Conciliation of the Department of Industrial Relations in the event that the public agency and the recognized employee organization cannot agree within 10 days from the filing of the petition to select jointly a neutral person or entity to conduct the election. In the event of an agency fee arrangement outside of an agreement that is in effect, the recognized employee organization shall indemnify and hold the public agency harmless against any liability arising from a claim, demand, or other action relating to the public agency's compliance with the agency fee obligation.

(c) An employee who is a member of a bona fide religion, body, or sect that has historically held conscientious objections to joining or financially supporting public employee organizations shall not be required to join or financially support a public employee organization as a condition of employment. The employee may be required, in lieu of periodic dues, initiation fees, or agency shop fees, to pay sums equal to the dues, initiation fees, or agency shop fees to a nonreligious, nonlabor charitable fund exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, chosen by the employee from a list of at least three of these funds, designated in a memorandum of understanding between the public agency and the public employee organization, or if the memorandum of understanding fails to designate the funds, then to a fund of that type chosen by the employee. Proof of the payments shall be made on a monthly basis to the public agency as a condition of continued exemption from the requirement of financial support to the public employee organization.

(d) An agency shop provision in a memorandum of understanding that is in effect may be rescinded by a majority vote of all the employees in the unit covered by the memorandum of understanding, provided that: (1) a request for that type of vote is supported by a petition containing the signatures of at least 30 percent of the employees in the unit, (2) the vote is by secret ballot, and (3) the vote may be taken at any time during the term of the memorandum of understanding, but in no event shall there be more than one vote taken during that term. Notwithstanding the above, the public agency and the recognized employee organization may negotiate, and by mutual agreement provide for, an alternative procedure or procedures regarding a vote on an agency shop agreement. The procedures in this subdivision are also applicable to an agency shop agreement placed in effect pursuant to subdivision (b).

(e) An agency shop arrangement shall not apply to management employees.

(f) A recognized employee organization that has agreed to an agency shop provision or is a party to an agency shop arrangement shall keep an adequate itemized record of its financial transactions and shall make available annually, to the public agency with which the agency shop provision was negotiated, and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by its president and treasurer or corresponding principal officer, or by a certified public accountant. An employee organization required to file financial reports under the federal Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. Sec. 401 et seq.) covering employees governed by this chapter, or required to file financial reports under Section 3546.5, may satisfy the financial reporting requirement of this section by providing the public agency with a copy of the financial reports.

3503. Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency.

3504. The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

3504.5. (a) Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.

(b) In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation.

(c) The governing body of a public agency with a population in excess of 4,000,000, or the boards and commissions designated by the governing body of such a public agency shall not discriminate against employees by removing or disqualifying them from a health benefit plan, or otherwise restricting their ability to participate in a health benefit plan, on the basis that the employees have selected or supported a recognized employee organization. Nothing in this section shall be construed to prohibit the governing body of a public agency or the board or commission of a public agency and a recognized employee organization from agreeing to health benefit plan enrollment criteria or eligibility limitations.

3505. The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation

personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

3505.1. 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. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

3505.3. Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation.

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.

3506. Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

3506.5. A public agency shall not do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations the rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with a recognized employee organization. For purposes of this subdivision, knowingly providing a recognized employee organization with inaccurate information regarding the financial resources of the public employer, whether or not in response to a request for information, constitutes a refusal or failure to meet and negotiate in good faith.

(d) Dominate or interfere with the formation or administration of any employee organization, contribute financial or other support to any employee organization, or in any way encourage employees to join any organization in preference to another.

(e) Refuse to participate in good faith in an applicable impasse procedure.

3507. (a) A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of a recognized employee organization or organizations for the administration of employer-employee relations under this chapter.

The rules and regulations may include provisions for all of the following:

(1) Verifying that an organization does in fact represent employees of the public agency.

(2) Verifying the official status of employee organization officers and representatives.

(3) Recognition of employee organizations.

(4) Exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself or herself as provided in Section 3502.

(5) Additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment.

(6) Access of employee organization officers and representatives to work locations.

(7) Use of official bulletin boards and other means of communication by employee organizations.

(8) Furnishing nonconfidential information pertaining to employment relations to employee organizations.

(9) Any other matters that are necessary to carry out the purposes of this chapter.

(b) Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of recognition.

(c) No public agency shall unreasonably withhold recognition of employee organizations.

(d) Employees and employee organizations shall be able to challenge a rule or regulation of a public agency as a violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive, of Section 3509.

3507.1. (a) Unit determinations and representation elections shall be determined and processed in accordance with rules adopted by a public agency in accordance with this chapter. In a representation election, a majority of the votes cast by the employees in the appropriate bargaining unit shall be required.

(b) Notwithstanding subdivision (a) and rules adopted by a public agency pursuant to Section 3507, a bargaining unit in effect as of the effective date of this section shall continue in effect unless changed under the rules adopted by a public agency pursuant to Section 3507.

(c) A public agency shall grant exclusive or majority recognition to an employee organization based on a signed petition, authorization cards, or union membership cards showing that a majority of the employees in an appropriate bargaining unit desire the representation, unless another labor organization has previously been lawfully recognized as exclusive or majority representative of all or part of the same unit. Exclusive or majority representation shall be determined by a neutral third party selected by the public agency and the employee organization who shall review the signed petition, authorization cards, or union membership cards to verify the exclusive or majority status of the employee organization. In the event the public agency and the employee organization cannot agree on a neutral third party, the Division of Conciliation of the Department of Industrial Relations shall be the neutral third party and shall verify the exclusive or majority status of the employee organization. In the event that the neutral third party determines, based on a signed petition, authorization cards, or union membership cards, that a second labor organization has the support of at least 30 percent of the employees in the unit in which recognition is sought, the neutral third party shall order an election to establish which labor organization, if any, has majority status.

3507.3. Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute.

"Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction,

including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists.

3507.5. In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization.

3508. (a) The governing body of a public agency may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws or local ordinances, and may by resolution or ordinance adopted after a public hearing, limit or prohibit the right of employees in these positions or classes of positions to form, join, or participate in employee organizations where it is in the public interest to do so. However, the governing body may not prohibit the right of its employees who are full-time "peace officers," as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of those peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

(b) (1) This subdivision shall apply only to a county of the seventh class.

(2) For the purposes of this section, no distinction shall be made between a position designated as a peace officer position by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code at the time of the enactment of the 1971 amendments to this section, and a welfare fraud investigator or inspector position designated as a peace officer position by any amendment to that Chapter 4.5 at any time after the enactment of the 1971 amendments to this section.

(3) It is the intent of this subdivision to overrule San Bernardino County Sheriff's Etc. Assn. v. Board of Supervisors (1992) 7 Cal.App.4th 602, 611, with respect to San Bernardino County designating a welfare fraud investigator or inspector as a peace officer under this section.

(c) (1) This subdivision shall apply only to a county of the seventh class and shall not become operative until it is approved by the county board of supervisors by ordinance or resolution.

(2) For the purposes of this section, no distinction shall be made between a position designated as a peace officer position by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code at the time of the enactment of the 1971 amendments to this section, and a probation corrections officer position designated as a peace officer position by any amendment to that Chapter 4.5 at any time after the enactment of the 1971 amendments to this section.

(3) It is the intent of this subdivision to overrule San Bernardino County Sheriff's Etc. Assn. v. Board of Supervisors (1992) 7 Cal.App.4th 602, 611, to the extent that it holds that this section prohibits the County of San Bernardino from designating the classifications of Probation Corrections Officers and Supervising

Probation Corrections Officers as peace officers. Those officers shall not be designated as peace officers for purposes of this section unless that action is approved by the county board of supervisors by ordinance or resolution.

(4) Upon approval by the Board of Supervisors of San Bernardino County, this subdivision shall apply to petitions filed in May 2001 by Probation Corrections Officers and Supervising Probation Corrections Officers.

(d) The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section.

3508.1. For the purposes of this section, the term "police employee" includes the civilian employees of the police department of any city. Police employee does not include any public safety officer within the meaning of Section 3301.

(a) With respect to any police employee, except as provided in this subdivision and subdivision (d), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 2002. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the police employee of its proposed disciplinary action within that year, except in any of the following circumstances:

(1) If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period.

(2) If the police employee waives the one-year time period in writing, the time period shall be tolled for the period of time specified in the written waiver.

(3) If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

(4) If the investigation involves more than one employee and requires a reasonable extension.

(5) If the investigation involves an employee who is incapacitated or otherwise unavailable, the time during which the person is incapacitated or unavailable shall toll the one-year period.

(6) If the investigation involves a matter in civil litigation in which the police employee is named as a party defendant, the one-year time period shall be tolled while the civil action is pending.

(7) If the investigation involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year time period shall be tolled during the period of that defendant's criminal investigation and prosecution.

(8) If the investigation involves an allegation of workers' compensation fraud on the part of the police employee.

(b) When a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.

(c) If, after investigation and predisciplinary response or procedure, the public agency decides to impose discipline, the public agency shall notify the police employee in writing of its decision to impose discipline, including the date that the discipline will be imposed, within 30 days of its decision, except if the police employee is unavailable for discipline.

(d) Notwithstanding the one-year time period specified in subdivision (a), an investigation may be reopened against a police employee if both of the following circumstances exist:

(1) Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

(2) One of the following conditions exists:

(A) The evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency.

(B) The evidence resulted from the police employee's predisciplinary response or procedure.

3508.5. (a) Nothing in this chapter shall affect the right of a public employee to authorize a dues or service fees deduction from his or her salary or wages pursuant to Section 1157.1, 1157.2, 1157.3, 1157.4, 1157.5, or 1157.7.

(b) A public employer shall deduct the payment of dues or service fees to a recognized employee organization as required by an agency shop arrangement between the recognized employee organization and the public employer.

(c) Agency fee obligations, including, but not limited to, dues or agency fee deductions on behalf of a recognized employee organization, shall continue in effect as long as the employee organization is the recognized bargaining representative, notwithstanding the expiration of any agreement between the public employer and the recognized employee organization.

3509. (a) The powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter and shall include the authority as set forth in subdivisions (b) and (c). Included among the appropriate powers of the board are the power to order elections, to conduct any election the board orders, and to adopt rules to apply in areas where a public agency has no rule.

(b) A complaint alleging any violation of this chapter or of any rules and regulations adopted by a public agency pursuant to Section 3507 or 3507.5 shall be processed as an unfair practice charge by the board. The initial determination as to whether the charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board, except that in an action to recover damages due to an unlawful strike, the board shall have no authority to award strike-preparation expenses as damages, and shall have no authority to award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike. The board shall apply and interpret unfair labor practices consistent with existing judicial interpretations of this chapter.

(c) The board shall enforce and apply rules adopted by a public agency concerning unit determinations, representation, recognition, and elections.

(d) Notwithstanding subdivisions (a) to (c), inclusive, the employee relations commissions established by, and in effect for, the County of Los Angeles and the City of Los Angeles pursuant to Section 3507 shall have the power and responsibility to take actions on recognition, unit determinations, elections, and all unfair practices, and to issue determinations and orders as the employee relations commissions deem necessary, consistent with and pursuant to the policies of this chapter.

(e) Notwithstanding subdivisions (a) to (c), inclusive, consistent with, and pursuant to, the provisions of Sections 3500 and 3505.4, superior courts shall have exclusive jurisdiction over actions involving interest arbitration, as governed by Title 9 (commencing

with Section 1280) of Part 3 of the Code of Civil Procedure, when the action involves an employee organization that represents firefighters, as defined in Section 3251.

(f) This section shall not apply to employees designated as management employees under Section 3507.5.

(g) The board shall not find it an unfair practice for an employee organization to violate a rule or regulation adopted by a public agency if that rule or regulation is itself in violation of this chapter. This subdivision shall not be construed to restrict or expand the board's jurisdiction or authority as set forth in subdivisions (a) to (c), inclusive.

3509.3. Notwithstanding any other law, if a decision by an administrative law judge regarding the recognition or certification of an employee organization is appealed, the decision shall be deemed the final order of the board if the board does not issue a ruling that supersedes the decision on or before 180 days after the appeal is filed.

3509.5. (a) Any charging party, respondent, or intervenor aggrieved by a final decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, and any party to a final decision or order of the board in a unit determination, representation, recognition, or election matter that is not brought as an unfair practice case, may petition for a writ of extraordinary relief from that decision or order. A board order directing an election may not be stayed pending judicial review.

(b) A petition for a writ of extraordinary relief shall be filed in the district court of appeal having jurisdiction over the county where the events giving rise to the decision or order occurred. The petition shall be filed within 30 days from the date of the issuance of the board's final decision or order, or order denying reconsideration, as applicable. Upon the filing of the petition, the court shall cause notice to be served upon the board and thereafter shall have jurisdiction of the proceeding. The board shall file in the court the record of the proceeding, certified by the board, within 10 days after the clerk's notice unless that time is extended by the court for good cause shown. The court shall have jurisdiction to grant any temporary relief or restraining order it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as modified, or setting aside in whole or in part the decision or order of the board. The findings of the board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Title 1 (commencing with Section 1067) of Part 3 of the Code of Civil Procedure relating to writs shall, except where specifically superseded by this section, apply to proceedings pursuant to this section.

(c) If the time to petition for extraordinary relief from a board decision or order has expired, the board may seek enforcement of any final decision or order in a district court of appeal or superior court having jurisdiction over the county where the events giving rise to the decision or order occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the party. The board shall file in the court the record of the proceeding, certified by the board, and appropriate evidence

disclosing the failure to comply with the decision or order. If, after hearing, the court determines that the order was issued pursuant to the procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce the order by writ of mandamus or other proper process. The court may not review the merits of the order.

3510. (a) The provisions of this chapter shall be interpreted and applied by the board in a manner consistent with and in accordance with judicial interpretations of this chapter.

(b) The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees.

3511. The changes made to Sections 3501, 3507.1, and 3509 of the Government Code by legislation enacted during the 1999-2000 Regular Session of the Legislature shall not apply to persons who are peace officers as defined in Section 830.1 of the Penal Code.

APPENDIX B

LABOR RELATIONS TERMINOLOGY

Agency Shop:
An agreement under which all employees covered by a bargaining agreement are required, as a condition of employment, to either become union members or pay service fees to the union. Employees who object on religious grounds to supporting unions must pay an amount equal to union dues to a non-labor, non-religious charity.

Arbitration:
A method of resolving disputes between an employer and employee organization by submitting the dispute to a neutral third-party, whose decision may be binding or merely advisory. "Grievance" or "rights" arbitration is typically the final step in resolving disputes over interpretation or application of an existing agreement. "Interest" arbitration is a procedure for resolving impasse in negotiations concerning terms for a new agreement.

Authorization Card:
A form signed by an employee authorizing a union to represent him or her in relations with an employer.

Bargaining Unit:
A group of employees who share a community of interest and form an appropriate grouping to be represented by a union for the purpose of collective bargaining. All employees holding positions included in the bargaining unit are covered by the agreement between the employer and employee organization, whether or not they are dues-paying union members.

Binding Interest Arbitration:
An impasse procedure in which unresolved issues are submitted to an arbitration panel that has the power to decide which party's proposal will be implemented.

Business Agent:
A full-time employee of a labor union who represents the union in negotiations and perform tasks (such as grievance processing) necessary to the enforcement of the agreement. Also called "field representative", "labor representative", or "union representative."

Caucus:
A recess during negotiations when either the union's or employer's bargaining committee needs to discuss an issue in private.

Certification:
Formal recognition of a union as the exclusive representative of a bargaining unit, typically following a representation election by employees in the bargaining unit.

Certified Employee Organization (or Representative):
A union that has been certified as the exclusive representative of employees in a bargaining unit.

Checkoff:
An arrangement whereby union dues, assessments, and other fees automatically are deducted from employee paychecks by the employer and forwarded to the employee organization.

Confidential Employee:
An employee who is privy to information that affects employee relations. The MMBA permits employers to adopt rules for designating confidential employees, and for excluding them from representing any employee organization that represents other employees in the agency.

Contract:
See Memorandum of Understanding.

Contract Bar:
A rule prohibiting a rival employee organization from attempting to decertify the exclusive representative during the life of a bargaining agreement between the employer and employee organization.

Contracting Out:
Employment of outside contractors to perform work formerly performed by the employer's employees.

Decertification:
Withdrawal of recognition of a union as the exclusive representative of a bargaining unit, usually following an election by the employees in the unit.

Duty of Fair Representation:
The responsibility of the exclusive representative to fairly represent all members of the bargaining unit, including those who are not members of the union.

Exclusive Representative:
A union that has been recognized as having exclusive authority to negotiate wages, hours, and working conditions on behalf of an employee bargaining unit.

Fact-finding:
A method of impasse resolution required by the MMBA under Government Code sections 3505.4 and 3505.5 that involves investigation of a labor-management dispute by a three member fact-finding panel chaired by a neutral third party. If not otherwise settled, the fact-finding panel issues a written report of findings and recommendations for settlement that is nonbinding on the agency.

Fair Share Fee (also known as "Service Fee"):
In agency shop units, an assessment paid by non-members of the union for representation services.

Favored-Nations Clause:
A provision in a contract that gives the union the chance to share in the terms of a more favorable contract if another union within the jurisdiction later negotiates a better deal with management.

Good Faith:
The mutual obligation of the employer and the employee organization to negotiate over mandatory subjects of bargaining. In practical terms, this means approaching bargaining with an open mind, following procedures that will enhance the prospects of settlement, being willing to meet as often as necessary, providing the union with information it needs to bargain meaningfully, discussing the demands of employees freely and justifying negative responses to these demands, and considering compromise proposals.

Grievance:
A complaint that the bargaining agreement (or other policies and procedures of the agency) has been violated.

Impasse:
The point in negotiations at which one or both parties determine that no further progress can be made toward reaching an agreement. Declaration of impasse usually precedes implementation of impasse resolution procedures or unilateral action by the employer. The only impasse resolution procedure authorized under MMBA is mediation, but agencies may adopt other procedures such as arbitration or fact-finding.

Job Action:
Concerted activity by employees, designed to influence bargaining. These include actions such as work stoppages or slowdowns, sickouts, and protest demonstrations.

Labor-Management Advisory Committee:
Groups with representatives from both labor and management that meet between negotiations to work out troublesome, unresolved issues. These committees do not negotiate.

Last, Best, and Final Offer:
The final proposal. Submitting the last, best and final offer signals a serious intent to settle by notifying the other side that you have reached your bottom line.

Lockout:
An employer's refusal to allow employees to work or be paid in order to gain bargaining concessions from an employee organization.

Maintenance of Membership:
A union security provision within a contract, stating that once employees join the union, they must maintain their membership for the duration of the contract. There typically is a window in the term of the contract during which employees may withdraw from the union.

Mediation:
A method of resolving impasse in which a neutral third party, or mediator, assists the parties in reaching agreement. The mediator's role is to act as a go-between and help the parties discover areas of agreement.

Meet and Confer:
Refers to the process in which the parties bargain on negotiable subjects and attempt to reach agreement.

Meet and Consult:
The process in which the parties meet to discuss labor relations rules.

Memorandum of Understanding (MOU):
An agreement between management and labor concerning wages, hours, and conditions of employment for a stated period of time that is reached as a result of collective bargaining. Also called a contract or a collective bargaining agreement.

Negotiation:
The process by which union and management representatives strive to reach agreement on subjects within the scope of representation. The process involves the exchange of information, the presentation of proposals and counterproposals, and the expression of opinions concerning bargaining positions.

Organizational Security:
A provision in a contract that protects the employee organization by assuring it income through membership dues or agency fees. See Agency Shop, Checkoff, and Maintenance of membership.

Past Practice:
An unwritten but long-standing practice or procedure that has become the customary and expected practice. In absence of contract language on a subject, past practice may be binding.

Ratification:
Formal approval of a tentative agreement by submitting it to the rank-and-file union membership for a vote.

Reopener Clause:
A provision of a collective bargaining agreement that states the time and circumstances under which parties can reopen negotiations on some part of the contract before it expires and negotiations begin on a full successor agreement.

TA:
Short for "tentative agreement," the process of signing-off on portions of the contract as negotiations progress. TAs often are conditioned on reaching agreement on the whole contract.

Unfair Labor Practice:
An allegation that management or the union has violated the controlling statute (MMBA, EERA, etc.). In the context of negotiations, this often involves practices such as refusing to meet at reasonable times, refusing to provide information, or "surface" bargaining in which one participant goes through the motions, but does not intend to reach agreement. Unfair practices also include interfering with employees' rights to organize, or retaliating against employees for engaging in protective activity, such as filing grievances.

Zipper or Waiver Clause:
A provision in a collective bargaining agreement which specifically states that that written agreement is the complete agreement of the parties, and anything not contained therein is not agreed to unless put into writing and signed by both parties. Depending on how it is drafted, it can impact the employer's flexibility to make changes to items within the scope of bargaining set forth outside the MOU (practices, policies, etc.).

APPENDIX C

SAMPLE EMPLOYER-EMPLOYEE RELATIONS RESOLUTION

Sample Employer-Employee Organization Relations Resolution

Be it Resolved by the City Council of the City of _____

Article I -- General Provisions

Sec. 1. Statement of Purpose:

This Resolution implements Chapter 10, Division 4, Title 1 of the Government Code of the State of California (Sections 3500 *et seq.*) captioned "Local Public Employee Organizations," (the Meyers-Milias-Brown Act) by providing orderly procedures for the administration of employer-employee relations between the City and its employee organizations. However, nothing contained herein shall be deemed to supersede the provisions of state law, (the City Charter), ordinances, resolutions and rules which establish and regulate the civil service system, or which provide for other methods of administering employer-employee relations. This Resolution is intended, instead, to strengthen civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communications between employees, employee organizations and the City.

It is the purpose of this Resolution to provide procedures for meeting and conferring in good faith with Recognized Employee Organizations regarding matters that directly and significantly affect and primarily involve the wages, hours and other terms and conditions of employment of employees in appropriate units and that are not preempted by federal or state law (or the City Charter). However, nothing herein shall be construed to restrict any legal or inherent exclusive City rights with respect to matters of general legislative or managerial policy, which include among others: The exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; determine the procedures and standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other lawful reasons; determine the content of job classifications; subcontract work; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

COMMENTARY

This sample Employer Employee Relations resolution is drafted using a "City" as the public agency implementing the resolution. Other local public agencies (e.g., counties, special districts, etc.) should revise this accordingly to match the appropriate references to your agency and governing body.

The suggested resolution recommends inclusion of language protecting management rights in the "statement of purpose." This is a means of protecting basic management rights decisions without the "red flag" of a "management rights clause." Some public agencies may choose to incorporate this language as a specific management rights section.

However, it is strongly recommended that in addition there be a delineation of management rights in negotiated agreements with employee organizations. To the extent actions of the State Legislature or the final judgments of an appellate court preempt or invalidate the Resolution's management rights provisions, the memorandum of understanding would still be in effect and binding. The negotiated memorandum of understanding should include not only the management rights included in this Resolution, but also others that are felt to be important. Further, it is desirable to negotiate language into agreements relieving management of the duty to meet and confer regarding the impacts of management rights decisions.

Sec. 2. Definitions:

As used in this Resolution, the following terms shall have the meanings indicated:

a. "Appropriate unit" means a unit of employee classes or positions, established pursuant to Article II hereof.

b. "City" means the City of _____, and, where appropriate herein, refers to the City Council or any duly authorized City representative as herein defined.

c. "Confidential Employee" means an employee who, in the course of his or her duties, has access to confidential information relating to the City's administration of employer-employee relations.

d. "Consult/Consultation in Good Faith" means to communicate orally or in writing with all effected recognized employee organizations for the purpose of presenting and obtaining views or advising of proposed actions in a good faith effort to reach a consensus; and, as distinguished from meeting and conferring in good faith regarding matters within the required scope of the meet and confer process, does not involve an exchange of proposals and counterproposals in an endeavor to reach agreement in the form of a Memorandum of Understanding, nor is it subject to Article IV hereof.

e. "Day" means calendar day unless expressly stated otherwise.

f. "Employee Relations Officer" means the City Manager or his/her duly authorized representative.

g. "Exclusively Recognized Employee Organization" means an employee organization which has been formally acknowledged by the City as the sole employee organization representing the employees in an appropriate representation unit pursuant to Article II hereof, having the exclusive right to meet and confer in good faith concerning statutorily required subjects pertaining to unit employees, and thereby assuming the corresponding obligation of fairly representing such employees.

Such recognition status may only be challenged by another employee organization as set forth in Article II section 8.

COMMENTARY

As reflected by the definition of "Exclusively Recognized Employee Organization," the recognition process calls for a single recognized employee organization per unit. The organization so recognized then has the right and duty to represent all unit employees in negotiations and, to the extent requested by an employee, in grievances. Other organizations are prevented from claiming a right to represent unit employees in negotiations within 12 months of such recognition.

The only legal alternative to such "exclusive recognition" is to recognize every employee organization that requests it and that has any members in the unit. Generally, this would not be conducive to stable employer-employee relations.

h. "Impasse" means that the representatives of the City and a Recognized Employee Organization have reached a point in their meeting and conferring in good faith where their differences on matters to be included in a Memorandum of Understanding, and concerning which they are required to meet and confer, remain so substantial and prolonged that further meeting and conferring would be futile.

i. "Management Employee" means an employee having responsibility for formulating, administering or managing the implementation of City policies and programs.

COMMENTARY

This reflects the definition set forth in the other public sector laws. It should be noted that those laws, contrary to the Meyers-Milias-Brown Act (MMBA), deny or limit bargaining rights for management and supervisory employees. Under California case law, it is permissible under MMBA to combine managerial and supervisory positions under the designation of management employee. See *United Clerical Employees Local 2700 v. County of Contra Costa* (1977), 76 Cal.App.3d 119, 142 Cal.Rptr.735. That appellate court decision would allow an agency to add the words "and employees who exercise supervisory authority" at the end of the noted definition of management employee. In that event, the heading of subparagraph k. below should be changed from "Supervisory Employee" to "Supervisory Authority."

j. "Proof of Employee Support" means (1) an authorization card recently signed and personally dated by an employee, provided that the card has not been subsequently revoked in writing by the employee (2) a verified authorization petition or petitions recently signed and personally dated by an employee, or (3) employee dues deduction authorizations, using the payroll register for the period immediately prior to the date a petition is filed hereunder, except that dues deduction authorizations for more than one employee organization for the account of any one employee shall not be considered as proof of employee support for any employee organization. The only authorization which shall be considered as proof of employee support hereunder shall be the authorization last signed by an employee. The words "recently signed" shall mean within ninety (90) days prior to the filing of such proof of support.

k. "Supervisory Employee" means any employee having authority, in the interest of the City, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

l. Terms not defined herein shall have the meanings as set forth in the MMBA.

COMMENTARY

The definitions offered for management, confidential and supervisory employees are consistent with those used under private and other public sector laws. It is not necessary for a "supervisory employee" to perform all of the functions outlined in the definition. However, as far as courts and labor boards are concerned, an agency calling a position "supervisory" or having a job description specifying these supervisory elements when actual assigned job responsibilities do not include them does not make a position supervisory. The importance of agencies actually vesting adequate authority and responsibility covering a majority of the areas specified in the supervisory definition in an adequate number of supervisory positions cannot be overemphasized. Only in that way will an agency be able to build and maintain the needed "management team" with which to counterbalance rank and file employee organization pressures and maximize its ability to provide an acceptable level of public services in the face of "job actions."

Article II -- Representation Proceedings

Sec. 3. Filing of Recognition Petition by Employee Organization:

An employee organization which seeks to be formally acknowledged as an Exclusively Recognized Employee Organization representing the employees in an appropriate unit shall file a petition with the Employee Relations Officer containing the following information and documentation:

a. Name and address of the employee organization.

b. Names and titles of its officers.

c. Names of employee organization representatives who are authorized to speak on behalf of the organization.

d. A statement that the employee organization has, as one of its primary purposes, the responsibility of representing employees in their employment relations with the City.

e. A statement whether the employee organization is a chapter of, or affiliated directly or indirectly in any manner, with a local, regional, state, national or international organization, and, if so, the name and address of each such other organization.

f. Certified copies of the employee organization's constitution and bylaws.

g. A designation of those persons, not exceeding two in number, and their addresses, to whom notice sent by regular United States mail will be deemed sufficient notice on the employee organization for any purpose.

h. A statement that the employee organization has no restriction on membership based on race, color, religion, creed, sex, national origin, age, sexual orientation, mental or physical disability or medical condition.

i. The job classifications or position titles of employees in the unit claimed to be appropriate and the approximate number of member employees therein.

j. A statement that the employee organization has in its possession proof of employee support as herein defined to establish that a majority of the employees in the unit claimed to be appropriate have designated the employee organization to represent them in their employment relations with the City. Such written proof shall be submitted for confirmation to the Employee Relations Officer or to a mutually agreed upon disinterested third party.

k. A request that the Employee Relations Officer formally acknowledge the petitioner as the Exclusively Recognized Employee Organization representing the employees in the unit claimed to be appropriate for the purpose of meeting and conferring in good faith.

The Petition, including the proof of employee support and all accompanying documentation, shall be declared to be true, correct and complete, under penalty of perjury, by the duly authorized officer(s) of the employee organization executing it.

COMMENTARY

To gain recognition, an employee organization must file a recognition petition with the public agency's Employee Relations Officer. Among other things, the petition must state that a majority of the employees in the proposed unit have designated the organization to represent them in their employment relations. Written proof of this support must be submitted to the Employee Relations Officer or to a disinterested third party for confirmation. For these purposes, "disinterested third party" generally refers to representatives of the California State Mediation and Conciliation Service, though it could be any third party upon which the agency

and the employee organization can agree. The requirement that a majority of the employees designate the employee organization as their representative is the same requirement imposed by state law on school/college, higher education, state labor relations (see Gov't. Code, Secs. 3544, 3520.5 and 3573) agricultural labor relations (Agricultural Labor Relations Act, Labor Code 1140 *et seq*. and the private sector (Section 9 of the National Labor Relations Act)).

Sec. 4. <u>City Response to Recognition Petition:</u>

Upon receipt of the Petition, the Employee Relations Officer shall determine whether:

a. There has been compliance with the requirements of the Recognition Petition, and

b. The proposed representation unit is an appropriate unit in accordance with Sec. 9 of this Article II.

If an affirmative determination is made by the Employee Relations Officer on the foregoing two matters, he/she shall so inform the petitioning employee organization, shall give written notice of such request for recognition to the employees in the unit and shall take no action on said request for thirty (30) days thereafter. If either of the foregoing matters are not affirmatively determined, the Employee Relations Officer shall offer to consult thereon with such petitioning employee organization and, if such determination thereafter remains unchanged, shall inform that organization of the reasons therefore in writing.

The petitioning employee organization may appeal such determination in accordance with Sec. 12 of this Resolution.

COMMENTARY

Upon receiving a petition for recognition, the Employee Relations Officer determines whether the petition is in compliance with requirements for filing petitions. In addition, the Employee Relations Officer determines whether the proposed unit is an appropriate unit in accordance with the criteria for unit determination outlined in Article II, Section 9. The Employee Relations Officer may offer to consult with the petitioning employee organization to consider questions of unit determination and on the appropriateness of the unit.

Sec. 5. <u>Open Period for Filing Challenging Petition:</u>

Within thirty (30) days of the date written notice was given to affected employees that a valid recognition petition for an appropriate unit has been filed, any other employee organization may file a competing request to be formally acknowledged as the exclusively recognized employee organization of the employees in the same or in an overlapping unit (one which corresponds with respect to some, but not all the classifications or positions set forth in the recognition petition being challenged), by filing a petition evidencing proof of employee support in the unit claimed to be appropriate of at least thirty (30) percent and otherwise in the same form and manner as set forth in Sec. 3 of this Article II. If such challenging petition seeks establishment of an overlapping unit, the Employee Relations Officer shall call for a hearing on such overlapping

petitions for the purpose of ascertaining the more appropriate unit, at which time the petitioning employee organizations shall be heard. Thereafter, the Employee Relations Officer shall determine the appropriate unit or units in accordance with the standards in Sec. 9 of this Article II. The petitioning employee organizations shall have fifteen (15) days from the date notice of such unit determination is communicated to them by the Employee Relations Officer to amend their petitions to conform to such determination or to appeal such determination pursuant to Sec. 12 of this Article II.

COMMENTARY

If the petition is in order and the proposed unit is deemed to be appropriate, other employee organizations are given thirty days to file competing requests for recognition. The challenging organizations must have the support of at least 30% of the employees in the unit they propose. The challenging petition may designate a proposed unit which is identical to or overlaps the unit proposed in the original recognition petition. The requirement of 30% support for a challenging organization is consistent with the State's other public sector labor laws, the Agricultural Labor Relations Act and the National Labor Relations Act.

Sec. 6. Granting Recognition Without an Election:

If the Petition is in order, and the proof of support shows that a majority of the employees in the appropriate unit have designated the petitioning employee organization to represent them, and if no other employee organization filed a challenging petition, the petitioning employee organization and the Employee Relations Officer shall request the California State Mediation and Conciliation Service, or another agreed upon neutral third party, to review the count, form, accuracy and propriety of the proof of support. If the neutral third party makes an affirmative determination, the Employee Relations Officer shall formally acknowledge the petitioning employee organization as the Exclusive Recognized Employee Organization for the designated unit.

COMMENTARY

Previously the Sample Resolution called for an election in all cases. However, with legislation effective January 1, 2002, the Meyers-Milias-Brown Act was amended to require recognition without an election in the case of an unchallenged majority recognition petition.

Sec. 7. Election Procedure:

Where recognition is not granted pursuant to Sec. 6, the Employee Relations Officer shall arrange for a secret ballot election to be conducted by a party agreed to by the Employee Relations Officer and the concerned employee organization(s), in accordance with such party's rules and procedures subject to the provisions of this Resolution. All employee organizations who have duly submitted petitions which have been determined to be in conformance with this Article II shall be included on the ballot. The ballot shall also reserve to employees the choice of representing themselves individually in their employment relations with the City. Employees entitled to vote in such election shall be those persons employed in regular permanent positions within the designated appropriate unit who were employed during the pay period immediately

prior to the date which ended at least fifteen (15) days before the date the election commences, including those who did not work during such period because of illness, vacation or other authorized leaves of absence, and who are employed by the City in the same unit on the date of the election. An employee organization shall be formally acknowledged as the Exclusively Recognized Employee Organization for the designated appropriate unit following an election or run-off election if it received a numerical majority of all valid votes cast in the election. In an election involving three or more choices, where none of the choices receives a majority of the valid votes cast, a run-off election shall be conducted between the two choices receiving the largest number of valid votes cast; the rules governing an initial election being applicable to a run-off election.

There shall be no more than one valid election under this Resolution pursuant to any petition in a 12-month period affecting the same unit.

In the event that the parties are unable to agree on a third party to conduct an election, the election shall be conducted by the California State Mediation and Conciliation Service.

Costs of conducting elections shall be borne in equal shares by the City and by each employee organization appearing on the ballot.

COMMENTARY

Elections may be conducted by the California State Mediation and Conciliation Service, or another mutually agreed upon neutral third party. In addition to including the qualifying employee organizations on the ballot, the choice of no organizational representation is also required to be on the ballot.

Sec. 8 <u>Procedure for Decertification of Exclusively Recognized Employee Organization:</u>

A Decertification Petition alleging that the incumbent Exclusively Recognized Employee Organization no longer represents a majority of the employees in an established appropriate unit may be filed with the Employee Relations Officer only during the month of March of any year following the first full year of recognition or during the thirty (30) day period commencing one hundred twenty (120) days prior to the termination date of a Memorandum of Understanding then having been in effect less than three (3) years, whichever occurs later. A Decertification Petition may be filed by two or more employees or their representative, or an employee organization, and shall contain the following information and documentation declared by the duly authorized signatory under penalty of perjury to be true, correct and complete:

a. The name, address and telephone number of the petitioner and a designated representative authorized to receive notices or requests for further information.

b. The name of the established appropriate unit and of the incumbent Exclusively Recognized Employee Organization sought to be decertified as a representative of that unit.

c. An allegation that the incumbent Exclusively Recognized Employee Organization no longer represents a majority of the employees in the appropriate unit, and any other relevant and material facts relating thereto.

d. Proof of employee support that at least thirty (30) percent of the employees in the established appropriate unit no longer desire to be represented by the incumbent Exclusively Recognized Employee Organization. Such proof shall be submitted for confirmation to the Employee Relations Officer or to a mutually agreed upon disinterested third party within the time limits specified in the first paragraph of this Section.

An employee organization may, in satisfaction of the Decertification Petition requirements hereunder, file a Petition under this Section in the form of a Recognition Petition that evidences proof of employee support of at least thirty (30) percent, that includes the allegation and information required under this Section 8, and otherwise conforms to the requirements of Section 3 of this Article.

The Employee Relations Officer shall initially determine whether the Petition has been filed in compliance with the applicable provisions of this Article II. If his/her determination is in the negative, he/she shall offer to consult thereon with the representative(s) of such petitioning employees or employee organization and, if such determination thereafter remains unchanged, shall return such Petition to the employees or employee organization with a statement of the reasons therefore in writing. The petitioning employees or employee organization may appeal such determination in accordance with Sec. 12 of this Article II. If the determination of the Employee Relations Officer is in the affirmative, or if his negative determination is reversed on appeal, he/she shall give written notice of such Decertification or Recognition Petition to the incumbent Exclusively Recognized Employee Organization and to unit employees.

The Employee Relations Officer shall thereupon arrange for a secret ballot election to be held on or about fifteen (15) days after such notice to determine the wishes of unit employees as to the question of decertification and, if a Recognition Petition was duly filed hereunder, the question of representation. Such election shall be conducted in conformance with Sec. 7 of this Article II.

During the "open period" specified in the first paragraph of this Sec. 8, the Employee Relations Officer may on his/her own motion, when he/she has reason to believe that a majority of unit employees no longer wish to be represented by the incumbent Exclusively Recognized Employee Organization, give notice to that organization and all unit employees that he/she will arrange for an election to determine that issue. In such event any other employee organization may within fifteen (15) days of such notice file a Recognition Petition in accordance with this Sec. 8, which the Employee Relations Officer shall act on in accordance with this Sec. 8.

If, pursuant to this Sec. 8, a different employee organization is formally acknowledged as the Exclusively Recognized Employee Organization, such organization shall be bound by all the terms and conditions of any Memorandum of Understanding then in effect for its remaining term.

COMMENTARY

Decertification and unit modifications (Sec. 10) may not be requested during the first year following recognition. Thereafter, changes may be requested only during the month period beginning four months prior to the end of the fiscal year (e.g., the month of March based on a June 30 fiscal year end) or in a thirty-day period four months prior to the termination of the memorandum of understanding, whichever occurs later. Because of this feature, it is important to consider carefully the termination date of a memorandum of understanding. One election is all that would be necessary to decertify one employee organization and certify another, unless a runoff is necessitated as a result of no choice receiving a majority of the votes.

In the event the challenging employee organization wins the election, it is bound by the memorandum of understanding that will remain in effect for up to another two to three months.

Sec. 9. Policy and Standards for Determination of Appropriate Units:

The policy objectives in determining the appropriateness of units shall be the effect of a proposed unit on (1) the efficient operations of the City and its compatibility with the primary responsibility of the City and its employees to effectively and economically serve the public, and (2) providing employees with effective representation based on recognized community of interest considerations. These policy objectives require that the appropriate unit shall be the broadest feasible grouping of positions that share an identifiable community of interest. Factors to be considered shall be:

a. Similarity of the general kinds of work performed, types of qualifications required, and the general working conditions.

b. History of representation in the City and similar employment; except however, that no unit shall be deemed to be an appropriate unit solely on the basis of the extent to which employees in the proposed unit have organized.

c. Consistency with the organizational patterns of the City.

d. Effect of differing legally mandated impasse resolution procedures.

e. Number of employees and classifications, and the effect on the administration of employer-employee relations created by the fragmentation of classifications and proliferation of units.

f. Effect on the classification structure and impact on the stability of the employer-employee relationship of dividing a single or related classifications among two or more units.

Notwithstanding the foregoing provisions of this Section, managerial, supervisory and confidential responsibilities, as defined in Sec. 2 of this Resolution, are determining factors in establishing appropriate units hereunder, and therefore managerial, supervisory and confidential employees may only be included in a unit consisting solely of managerial, supervisory or confidential employees respectively. Managerial, supervisory and confidential employees may not represent any employee organization which represents other employees.

COMMENTARY

This language is designed to require separate units for each of these three groups of positions. It may be that an agency (particularly smaller ones) would opt to include two or all three of these type employees in one unit. In that case, the language of the preceding paragraph should read as follows:

Notwithstanding the foregoing provisions of this Section, managerial, supervisory and confidential responsibilities, as defined in Sec. 2 of this Resolution, are determining factors in establishing appropriate units hereunder, and therefore such managerial, supervisory and confidential employees may only be included in units that do not include non-managerial, non-supervisory and non-confidential employees. Managerial, supervisory and confidential employees may not represent any employee organization which represents other employees.

Peace Officers have the right to be represented in separate units composed solely of such peace officers.

Also under the MMBA, professional employees have the right to be represented separately from non-professional employees.

The Employee Relations Officer shall, after notice to and consultation with affected employee organizations, allocate new classifications or positions, delete eliminated classifications or positions, and retain, reallocate or delete modified classifications or positions from units in accordance with the provisions of this Section. The decision of the Employee Relations Officer shall be final.

COMMENTARY

The unit requested by the employee organization is not necessarily appropriate just because it has been so requested. The criteria for defining an appropriate unit are designed to prevent the excessive proliferation of units. Representation units should consist of the broadest feasible grouping of positions that share an identifiable community of interest.

Decisions by the Employee Relations Officer regarding the appropriateness of a unit may take into consideration the agency's ability to operate during strikes or work stoppages, as long as there is a community of interest.

Management, supervisory and confidential positions are accorded negotiating and representation rights under the MMBA. It is very important to assure separate dealings between an agency and its managers and supervisors on the one hand, and its regular employees on the other, in view of the obvious conflicts of interest and divided loyalties engendered by combining them. Furthermore, combining managers/supervisors and rank-and-file employees will preclude the agency from building and maintaining a "management team," which is so essential to a viable labor relations system.

Section 3508 of the Government Code includes special provisions pertaining to appropriate representation units for peace officers. Peace officers may not be prohibited from joining and participating in employee organizations composed entirely of other peace officers.

Sec. 10. Procedure for Modification of Established Appropriate Units:

Requests by employee organizations for modifications of established appropriate units may be considered by the Employee Relations Officer only during the period specified in Sec. 8 of this Article II. Such requests shall be submitted in the form of a Recognition Petition and, in addition to the requirements set forth in Sec. 3 of this Article, shall contain a complete statement of all relevant facts and citations in support of the proposed modified unit in terms of the policies and standards set forth in Sec. 9 hereof. The Employee Relations Officer shall process such petitions as other Recognition Petitions under this Article II.

The Employee Relations Officer may by his own motion propose that an established unit be modified. The Employee Relations Officer shall give written notice of the proposed modification(s) to any affected employee organization and shall hold a meeting concerning the proposed modification(s), at which time all affected employee organizations shall be heard. Thereafter the Employee Relations Officer shall determine the composition of the appropriate unit or units in accordance with Sec. 9 of this Article II, and shall give written notice of such determination to the affected employee organizations. The Employee Relations Officer's determination may be appealed as provided in Section 12 of this Article. If a unit is modified pursuant to the motion of the Employee Relations Officer hereunder, employee organizations may thereafter file Recognition Petitions seeking to become the Exclusively Recognized Employee Organization for such new appropriate unit or units pursuant to Sec. 3 hereof.

Sec. 11. Procedure for Processing Severance Requests:

An employee organization may file a request to become the recognized employee organization of a unit alleged to be appropriate that consists of a group of employees who are already a part of a larger established unit represented by another recognized employee organization. The timing, form and processing of such request shall be as specified in Sec. 10 for modification requests.

Sec. 12. Appeals:

An employee organization aggrieved by an appropriate unit determination of the Employee Relations Officer; or an employee organization aggrieved by a determination of the Employee Relations Officer that a Recognition Petition (Sec. 3), Challenging Petition (Sec. 5), Decertification Petition (Sec. 8), Unit Modification Petition (Sec. 10) --- or employees aggrieved by a determination of the Employee Relations Officer that a Decertification Petition (Sec. 8) or Severance Request (Sec. 11) ---has not been filed in compliance with the applicable provisions of this Article, may, within ten (10) days of notice of the Employee Relations Officer's final decision, request to submit the matter to mediation by the State Mediation and Conciliation Service, or may, in lieu thereof or thereafter, appeal such determination to the City Council for final decision within fifteen (15) days of notice of the Employee Relations Officer's determination or the termination of mediation proceedings, whichever is later.

Appeals to the City Council shall be filed in writing with the City Clerk, and a copy thereof served on the Employee Relations Officer. The City Council shall commence to consider the matter within thirty (30) days of the filing of the appeal. The City Council may, in its discretion, refer the dispute to a non-binding third party hearing process. Any decision of the City Council on the use of such procedure, and/or any decision of the City Council determining the substance of the dispute shall be final and binding.

Article III -- Administration

Sec. 13. Submission of Current Information by Recognized Employee Organizations:

All changes in the information filed with the City by an Exclusively Recognized Employee Organization under items (a.) through (h.) of its Recognition Petition under Sec. 3 of this Resolution shall be submitted in writing to the Employee Relations Officer within fourteen (14) days of such change.

Exclusively Recognized Employee Organizations that are party to an agency shop provision shall provide annually to the Employee Relations Officer and to unit members within 60 days after the end of its fiscal year the financial report required under Government Code Section 3502.5 (f) of the Meyers-Milias Brown Act.

Sec. 14. Employee Organization Activities -- Use of City Resources:

Access to City work locations and the use of City paid time, facilities, equipment and other resources by employee organizations and those representing them shall be authorized only to the extent provided for in Memoranda of Understanding and/or administrative procedures, shall be limited to lawful activities consistent with the provisions of this Resolution that pertain directly to the employer-employee relationship and not such internal employee organization business as soliciting membership, campaigning for office, and organization meetings and elections, and shall not interfere with the efficiency, safety and security of City operations.

COMMENTARY

Use of public agency resources such as agency paid time, facilities, equipment, access to work locations and others are all negotiable items. In addition, state law and local ordinances may require additional restrictions in the use of public facilities.

Sec. 15. Administrative Rules and Procedures:

The City Manager is hereby authorized to establish such rules and procedures as appropriate to implement and administer the provisions of this Resolution after consultation with affected employee organizations.

Article IV -- Impasse Procedures

Sec. 16. Initiation of Impasse Procedures:

If the meet and confer process has reached impasse as defined in Section 2 of this Resolution, either party may initiate the impasse procedures by filing with the other party a written request for an impasse meeting, together with a statement of its position on all issues. An impasse meeting shall then be scheduled promptly by the Employee Relations Officer. The purpose of such meeting shall be:

a. To review the position of the parties in a final effort to reach agreement on a Memorandum of Understanding; and

b. If the impasse is not resolved, to discuss arrangements for the utilization of the impasse procedures provided herein.

COMMENTARY

In the event the parties are unable to settle disputes arising from the negotiations process, a multi-stage impasse resolution procedure is suggested. First, at the initiation of either party, an impasse meeting is scheduled wherein the parties attempt one last time to reach agreement on a memorandum of understanding.

Sec. 17. Impasse Procedures:

Impasse procedures are as follows:

a. If the parties agree to submit the dispute to mediation, and agree on the selection of a mediator, the dispute shall be submitted to mediation. All mediation proceedings shall be private. The mediator shall make no public recommendation, nor take any public position at any time concerning the issues.

COMMENTARY

If the dispute is not resolved in the impasse meeting, both parties may agree to explore new avenues to settlement through mediation.

If mediation is agreed to, the parties must agree on a mediator or a method for selecting the mediator. It may be a private individual agreed to by the parties, or a staff mediator of the California State Mediation and Conciliation Service. Inasmuch as a mediator's job is simply to attempt, in private, to persuade the respective negotiating representatives to voluntarily reach agreement, voluntary mediation is suggested.

b. Otherwise, the parties can utilize any other impasse procedures provided in accordance with the Meyers-Milias-Brown Act.

COMMENTARY

This sample Employer-Employee Relations Resolution addresses the agency's mediation obligations. Agencies are further obligated to engage in fact-finding if timely requested by the recognized employee organization as provided under the MMBA. This sample section notes that the agency will comply with the MMBA's impasse procedures but requires the employee organization to research their own responsibilities to request impasse fact-finding as provided under the MMBA and does not provide any further details on this.

Effective January 1, 2012, under AB 646, the California legislature authorized the use of fact-finding when local government agency labor negotiations under the MMBA reach an impasse. AB 646 required fact-finding, upon request of the union, if a mediator was unable to effect a settlement. Effective January 1, 2013, the Legislature passed AB 1606, which included "clean-up" legislation addressing fact-finding rights when the agency did not agree to mediation.

If the parties agreed to, and participate in mediation, and if the mediator is unable to effect settlement, the employee organization may submit a fact-finding request to the agency and PERB no sooner than 30 days, but no later than 45 days, following the selection of a mediator by the parties. If the dispute is not submitted to mediation, the employee organization may submit a fact-finding request to the agency and PERB no later than 30 days following the date that either party provided the other with written notice of impasse. (Gov. Code, § 3505.4(a).)

c. After any applicable impasse procedures have been exhausted, the City Council may hold a public hearing regarding the impasse, and take such action regarding the impasse as it in its discretion deems appropriate as in the public interest, including implementation of the City's last, best and final offer. Any legislative action by the City Council on the impasse shall be final and binding.

COMMENTARY

If an employee organization timely requests fact-finding and PERB determines the request is sufficient, a three (3)-member fact-finding panel shall be appointed. The agency's Employee Relations Officer and employee organization each appoint one member. PERB will provide the parties with a list of seven (7) neutral fact-finders and designate one of individuals to serve as the chairperson, unless notified by the parties within five (5) working days that they have mutually agreed upon a chairperson in lieu of the individual selected by PERB. (Gov. Code, §3505.4(a), (b).)

Within ten (10) days of their appointment, the fact-finding panel must meet with the parties and may hold a hearing, or take any other steps it deems appropriate, to make findings and recommendations. Gov. Code §3505.4(c) specifies a list of criteria for fact finders' consideration, including "any other facts, which are normally or traditionally taken into consideration in making the findings and recommendations." "Any other facts" includes, but is not limited to: (1) Maintaining appropriate compensation relationships between classifications and positions within the agency; (2) Other legislatively determined and projected demands on agency resources (e.g., budgetary priorities as established by the governing body); (3) Allowance for equitable compensation increases for other employees and employee groups for the

corresponding fiscal period(s); (4) Revenue projections not to exceed currently authorized tax and fee rates for the relevant fiscal year(s); (5) Assurance of sufficient and sound budgetary reserves; and (6) Constitutional, statutory, and Municipal Code/Charter limitations on the level and use of revenues and expenditures. It is recommended that the agency address the expanded criteria listed above. The indicated criteria put controlling emphasis on the public agency's financial condition, based on the current tax rates, council determined budgetary priorities, consideration of compensation increases to other employee groups, and the need to maintain sound reserves. Agencies should be cautious as they embark on fact-finding proceedings. Thorough preparation in terms of the applicable criteria, and professional presentation of the agency's case, are essential.

Within thirty (30) days after the appointment of the fact-finding panel, or upon agreement by both parties for a longer period, the panel shall make written findings of fact and advisory recommendations for the resolution of issues in dispute. Members of the panel may file dissenting written findings. The fact-finding chairperson must submit all written findings upon the parties. The findings and recommendations should be held in confidence for ten (10) days while the parties attempt to resolve their impasse. If the impasse is not resolved within the ten (10) day period, the agency shall make the written findings and recommendations publicly available. (Gov. Code, § 3505.5(a).) The costs for any mutually incurred costs, including the services of the panel chairperson, such as per diem fees, travel and subsistence expenses are typically split evenly between the parties. The expenses incurred by each party's panel member are borne by that party alone. (Gov. Code, §3505.5(b)-(d).)

Finally, should the dispute remain unresolved after exhausting all impasse procedures, the agency's governing body may hold a public hearing to examine the issues, and determine whether to take unilateral action regarding employee wages and benefits based on the last, best, and final offer made to the union in negotiations, or to take no action and leave employment terms as is. The governing body may also accept the union's last best offer or break the impasse by granting additional negotiating authority to its negotiators. The governing body cannot take any such unilateral action except after the following applicable timelines:

(a) If fact-finding is not requested by the employee association, the governing body cannot take unilateral action until the timeline for requesting such fact-finding has lapsed. Where no mediation takes place, this timeline is 30 days from the date of the written impasse declaration. If mediation does take place, this timeline is 30 to 45 days from the selection of the mediator (although an agency probably would want to complete any pending mediation before taking any such unilateral action).

(b) If fact-finding is requested by the employee association, the governing body cannot take unilateral action until after 10 days following the issuance of the fact-finding panel's written recommendations.

Sec. 18. Costs of Impasse Procedures:

The cost for the services of a mediator and other mutually incurred costs of any impasse procedures, shall be borne equally by the City and Exclusively Recognized Employee Organization. The cost for other separately incurred services or costs shall be borne separately by each party.

Article V -- Miscellaneous Provisions

Sec. 19. Construction:

This Resolution shall be administered and construed as follows:

(a) Nothing in this Resolution shall be construed to deny to any person, employee, organization, the City, or any authorized officer, body or other representative of the City, the rights, powers and authority granted by federal or state law (or City Charter provisions).

(b) This Resolution shall be interpreted so as to carry out its purpose as set forth in Article I.

(c) Nothing in this Resolution shall be construed as making the provisions of California Labor Code Section 923 applicable to City employees or employee organizations, or of giving employees or employee organizations the right to participate in, support, cooperate or encourage, directly or indirectly, any strike, sickout or other total or partial stoppage or slowdown of work. In consideration of and as a condition of initial and continued employment by the City, employees recognize that any such actions by them are in violation of their conditions of employment except as expressly otherwise provided by legally preemptive state or contrary local law. In the event employees engage in such actions, they shall subject themselves to discipline up to and including termination, and may be replaced, to the extent such actions are not prohibited by preemptive law; and employee organizations may thereby forfeit rights accorded them under City law or contract.

COMMENTARY

The California Supreme Court has held there is no generally applicable common law prohibition against public employee strikes under the MMBA. Your agency may want to consider including a no-strike provision in the Sample Resolution despite the possibility that it may be unenforceable. However, the court's decision makes it all the more important to negotiate no-strike clauses into MOUs.

Sec. 20. Severability:

If any provision of this Resolution, or the application of such provision to any persons or circumstances, shall be held invalid, the remainder of this Resolution, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

APPENDIX D

SAMPLE CITY RIGHTS CLAUSE

It is understood and agreed that the City retains all of its powers and authority to manage municipal services and the work force performing those services.

It is agreed that during the term hereof, the City shall not be required to meet and confer on matters which are solely a function of management, including the right to:

- ❑ Determine and modify the organization of City government and its constituent work units.
- ❑ Determine the nature, standards, levels, and mode of delivery of services to be offered to the public.
- ❑ Determine the methods, means, and the number and kinds of personnel by which services are to be provided.
- ❑ Determine whether goods or services shall be made or provided by the City, or shall be purchased, or contracted for.
- ❑ Direct employees, including scheduling and assigning work, work hours, and overtime.
- ❑ Establish employee performance standards and to require compliance therewith.
- ❑ Discharge, suspend, demote, reduce in pay, reprimand, withhold salary increases and benefits, or otherwise discipline employees, subject to the requirements of applicable law.
- ❑ Relieve employees from duty because of lack of work or lack of funds or for other legitimate reasons.
- ❑ Implement rules, regulations, and directives consistent with law and the specific provisions of this MOU.
- ❑ Take all necessary actions to protect the public and carry out its mission in emergencies.
- ❑ Determine the content of job classifications.
- ❑ Contract out and transfer work out of the bargaining unit.

Decisions under this Article shall not be subject to the grievance procedure herein.

Failure by the City to exercise and/or implement any rights expressly provided for in this Agreement shall in no way extinguish and/or diminish the City's right to do so in the future.

APPENDIX E

SAMPLE UNION SECURITY CLAUSES

Preliminary Comments

Beyond membership dues/initiation fee/assessment payroll deductions ("checkoff"), the parties may under the MMBA negotiate "maintenance of membership" and "agency shop" provisions. Agency shop arrangements can also be voted in by employees in accordance with the procedures discussed below.

Maintenance of Membership: Requires specified unit employees who voluntarily joined or will join the Union to retain such membership for such term of the MOU (subject to negotiated specified open [resignation] periods).

Agency Shop: Requires specified unit employees who chose not to join the Union to pay the Union a service fee ("fair share fee") to compensate the Union for its representational services, such as collective bargaining, contract administration, and grievance adjustment.

A service fee should not exceed the standard initiation fee, periodic dues and general assessments of such organization for the duration of the agreement. Such a "union security" provision is a major bargaining goal for most unions in their negotiations with the employer.

California Government Code section 3502.5 authorizes an agency shop arrangement without a negotiated agreement upon a signed petition by a minority of 30% of the employees in the bargaining unit. After the submission of the petition, an election will be held, and if the majority of employees voting vote in favor of the agency shop, it will be implemented. The amendment also provides that the petition can be filed only after 30 days of negotiations.

California Government Code section 3502.5(d) provides that a negotiated agency shop provision can be rescinded during the term of the MOU only by a majority vote of all unit employees, in accordance with statutory requirements. An elected agency shop provision may be rescinded in accordance with the same procedures.

Under U.S. Supreme Court decisions, such service fees may only be the service fee payer's proportionate share of Union expenditures "necessarily or reasonably incurred" in connection with the Union carrying out its obligations of fair representation as the exclusive representative of all unit employees, and may not be expended for partisan political or ideological purposes. (*See Ellis v. Brotherhood of Railway, Airline & Steamship Clerks* (1984) 466 U.S. 435, 104 S.Ct. Rptr. 1883).

Further, the U.S. Supreme Court has imposed on unions the obligations of providing financial information and an administrative appeals mechanism to facilitate making available to non-members a meaningful and prompt opportunity to challenge the propriety of the union's use of

such service fee funds. (*See Chicago Teachers Union Local 1 v. Hudson* (1986) 475 U.S. 292, 106 S.Ct. Rptr. 1066).

In *Mitchell v. Los Angeles School District* (9th Cir. 1992) 963 F.2d 258 *cert. denied* (1992) 113 S.Ct. 375, the court rejected the argument that affirmative consent to deduction of full agency fees from non-union employees was required. Non-union members' rights are adequately protected when they are given the opportunity to object and pay a fair share fee to support the union's representation costs.

There are many variations possible in negotiating a more or less encompassing agency shop provision, e.g., applies only to future unit employees ("modified agency shop"), requires majority approval by unit employees of the agency shop provision in a vote separate from the MOU ratification vote as a condition of implementing it, allowing for rescission elections during the term of the MOU, an employee's failure to pay is not a condition of employment and therefore not grounds for termination, employees authorized to pay directly to the Union rather than through contractually required payroll deductions, and others.

Moreover, employers who negotiate such Union security provisions will want to consider proposals that require the Union to reimburse them for the administrative cost incident to effectuating and disbursing such funds to the Union. One approach is to negotiate this by specifying a certain amount per deduction or per payroll period.

Under law, the Union and the employer are potentially liable to employees that are required to pay a service fee which violates employees' rights. It is thus essential that negotiated agency shop provisions clearly impose specific obligations and responsibilities on the Union and contain comprehensive indemnification language to protect the employer to the maximum extent possible.

General: Union security, particularly agency shop provisions, are a highly sought after goal of most unions, and thus employers have typically sought significant "quid pro quos" in return. When agency shop provisions are negotiated into agreements, management invariably seeks protection from litigation and its resulting costs, and most often obtains desired negotiating provisions as "tradeoffs" for its agreement. Under Government Code Section 3502.5 there is less incentive for a labor organization to agree to a negotiated agreement, when it can obtain its desired goal without trading off anything of significance. Instead, it could demand negotiations, negotiate for 30 days, and then submit its petition. Although Section 3502.5(b) does contain indemnification and hold harmless language for agency fee arrangements, its failure to mention an employee organization's obligation to defend any action against an employer raises concerns about the adequacy of the protection for employers. Clearly it is in the best interest of both the Union and the employer to come to agreement on agency shop.

Both parties have an interest in language regarding the "nuts and bolts" of how agency shop works. Employers should also seek clearer and more comprehensive hold harmless and indemnification language. The following sample MOU counterproposals contain language

addressing the respective rights and obligations of management and the Union under "Maintenance of Membership" and "Agency Shop" arrangements.

"Maintenance of Membership" Counterproposal

All regular full-time [insert: non-managerial, supervisory, confidential, or other bargaining unit employee classifications, if applicable] employees who chose to belong to or become members of the Union, [insert: may elect/shall be required – *LCW advises agencies not to include "shall be required" in their initial counterproposal*] to maintain their membership in the Union in good standing during the term of this MOU, subject however, to the right to resign from membership effective during any of the following resignation periods:

(a) The first thirty-day period after this MOU is ratified and adopted by the Union and the City.

(b) The first thirty-day period after an employee initially falls within the coverage of this Section.

(c) The first thirty-day period of the second and third contract years of this MOU.

Any unit employee may exercise his rights to resign by notice in writing to the Union and to the City prior to or during the said resignation periods.

"Agency Shop" Counterproposal

1) All regular full-time non-probationary [insert: non-managerial, supervisory, confidential, or other bargaining unit employee classifications, if applicable] unit employees who on the effective date of this MOU are members of the Union in good standing and all such employees who thereafter voluntarily become members of the Union shall [insert: (as a condition of employment) – *LCW advises agencies not to include "(as a condition of employment)" in their initial counterproposal*] pay a representation service fee that represent each such employee's proportionate share of the Union's cost of meeting and conferring and administering the MOU beginning ninety days after the MOU is ratified and adopted by the Union and the City, or after an employee attains such status, or after the Union has provided the employee(s) and the City with the legally requisite expenditure information (paragraph 3 below), whichever is latest. Such representation service fee shall in no event exceed the regular, periodic membership dues paid by unit employees.

2) The representation service fee arrangement provided by this Section may be rescinded by majority vote of all unit employees determined in a secret ballot election in which all regular full-time [insert: non-managerial, supervisory, confidential, or other bargaining unit employee classifications, if applicable] unit employees are eligible to vote provided that (a) a request for such vote is supported by a petition containing the signatures of at least thirty percent of the employees in the unit, and (b) the vote may be taken at any time during the term of the MOU, but in no event shall there be more than one vote taken during any one

contract year. The sufficiency of petitions shall be determined, and the election conducted by the State Mediation and Conciliation Service or any other entity or individual(s) agreed to by the Union and the City.

3) A unit employee who is subject to the payment of a representation service fee hereunder shall have the right to object to any part of that fee payable by him or her which is claimed to represent the employee's additional pro rata share of expenditures by the Union that is in aid of activities or causes of a partisan political or ideological nature, or that is applied towards the cost of benefits available only to members of the Union, or that is utilized for expenditures that are not necessarily or reasonably incurred for the purpose of performing the duties incident to meeting and conferring or administering the MOU.

Prior to a unit employee having any obligation to pay a representation service fee hereunder, the Union must have given sufficient financial information to such unit employees to allow them to gauge the propriety of the Union's representation service fee. This information must be updated by the Union and provided to unit employees and the City at least annually. The financial information must be itemized and adequately describe all categories of expenses, and the information must be verified as complete and accurate by a qualified independent auditor. The information must cover local expenditures as well as uses made by county, state, national and international organizations with which the local Union is directly or indirectly affiliated and to whom the local Union transmits a portion of its dues and/or representation service fee funds.

The Union shall make available, at its expense, an expeditious administrative appeals procedure to unit employees who object to the payment of any portion of the representation service fee. Such procedure shall provide for a prompt decision to be made by an impartial decision-maker jointly selected by the Union and the objecting employee(s). A copy of such procedure shall be made available by the Union to Non-Union member unit employees and the City.

4) Any employee who is a member of a religious body whose traditional tenets or teaching include objections to joining or financially supporting employee organizations shall not be required to financially support the Union. Such employee, in lieu of a representation service fee, shall instruct the City in writing, with a copy to the Union, to deduct and pay a sum equal to the representation service fee to a non-religious, non-labor charitable organization selected by such employee, or, in the absence of such selection, as agreed upon by the Union and the City.

5) When an authorized agent of the City is served with written notice by a concerned unit employee or employees, or by the Union that a dispute exists between such unit employee or employees and the Union involving claimed violation of employee rights with respect to (1) representation service fee expenditures or obligations by the Union, or (2) employee exemption pursuant to paragraph 4, the City shall thereafter deposit such disputed dues or fees in an interest bearing escrow or comparable account pending final resolution of the dispute, and shall so advise in writing the employee or employees and the Union. The City shall not be obligated to take any other or further action pending final resolution of the dispute. Final resolution as used in this subdivision shall mean resolution of the dispute by

way of legally binding settlement agreement between the employee(s) and the Union, or non-appealable final judgment of an administrative agency and/or court of competent jurisdiction. The sole obligation of the City with respect to such disputes is as set forth in this paragraph. The City shall not be made a party to administrative or court proceedings except to the limited extent where such administrative body and/or court determine such to be necessary for the purpose of enforcing its order or judgment. In such event, the City shall be entitled to payment of its attorney fees and costs by the Union.

6) The Union agrees to hold harmless, indemnify and defend the City and its officers, employees and agents against any and all claims, proceedings and liability arising, directly or indirectly, out of any actions taken or not taken by or on behalf of the City under this Section.

7) This Article shall not be included in the MOU, and shall not be binding in any manner, unless a majority of (non-managerial, supervisory, confidential) unit employees vote in favor if its inclusion in a secret ballot election conducted by the State Mediation and Conciliation Service separate from the Union's MOU ratification election.

APPENDIX F

SAMPLE GROUND RULES AGREEMENT

The <EMPLOYEE ORGANIZATION> and <EMPLOYER> agree on the following ground rules for meeting and conferring until settlement is reached to modify the current collective bargaining agreement or until one of the parties [or PERB] determines that an impasse exists.

1. Meetings shall occur at mutually acceptable dates, time and locations. Any changes shall be discussed at least 24 hours in advance.

2. Release time shall be one hour before the scheduled meeting time and end one hour after each session is completed.

3. The <EMPLOYEE ORGANIZATION> and <EMPLOYER> shall designate a chief spokesperson.

4. The chief spokesperson of either party may call a caucus at any time. The party hosting the meeting shall leave the room or furnish a private room where either party may request to caucus. The party requesting the caucus should give an estimate of the time needed.

5. Only the chief spokesperson or his or her designee shall transmit or receive documents between the two parties. Enough copies of each document shall be provided for each member of the other party, unless otherwise agreed.

6. All proposals and counter proposals shall be in writing.

7. Any written or verbal press releases or statements to the press or public regarding the substance of negotiations shall be done through mutually agreed-to releases or statements. Otherwise, confidentiality should be observed by both parties during the meet and confer process. This does not preclude discussions between <EMPLOYEE ORGANIZATION> representatives and their members or constituents nor does it preclude management discussions with <EMPLOYER> officials. Neither group is precluded from discussions with groups and individuals for purposes of research.

8. As agreements are reached they shall be put in written form, dated and timed, and labeled as Tentative Agreements, and two copies of each shall be signed by the chief spokesperson for each party.

9. Agreements on specific items of negotiation shall not be binding on either party until the entire package of Tentative Agreements is ratified /approved by both parties.

10. When the complete package of Tentative Agreements is accepted, the negotiating teams of both parties shall promote the ratification/ approval of the package by their respective sides.

FOR THE EMPLOYEE ORGANIZATION FOR THE EMPLOYER

_____ _____

ENDNOTES

[1] Gov. Code, § 3509.

[2] Gov. Code, § 3500 et seq.

[3] Gov. Code, § 3540 et seq.

[4] Gov. Code, § 3512 et seq.

[5] Gov. Code, § 3560 et seq.

[6] Gov. Code, § 71600 et seq.

[7] Gov. Code, § 71800 et seq.

[8] See, *Amalgamated Transit Union, Local 1605* (2012) PERB Decision No. 2263-M [36 PERC ¶ _177].

[9] Effective July 1, 2001, PERB has the authority to determine most alleged violations of the MMBA and agency regulations adopted pursuant to the MMBA. Such authority will include the right to determine whether the parties are negotiating in good faith and what matters are subject to the duty to negotiate.

[10] *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 638 [47 Cal.Rptr.3d 69, 80].

[11] *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 638 [47 Cal.Rptr.3d 69, 80].

[12] Gov. Code, § 3504.5.

[13] *Stockton Police Officers' Assn. v. City of Stockton* (1988) 206 Cal.App.3d 62 [253 Cal.Rptr. 183].

[14] *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 [129 Cal.Rptr. 126, 137].

[15] *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 [129 Cal.Rptr.126, 137].

[16] Gov. Code, § 3507, subd. (a).

[17] Gov. Code, § 3507, subd. (a).

[18] *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959, 976 [129 Cal.Rptr. 68, 80]. See also, *Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482 [195 Cal.Rptr. 206]; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908]; *City of Palo Alto* (2014) PERB Dec. No. 2388-M [39 PERC ¶ 25], judicial appeal pending.

[19] *City of Palo Alto* (2014) PERB Dec. No. 2388-M [39 PERC ¶ 25], judicial appeal pending.

[20] *City of Palo Alto* (2014) PERB Dec. No. 2388-M [39 PERC ¶ 25], judicial appeal pending.

[21] Gov. Code, § 3502.

[22] Gov. Code, § 3502.

[23] *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875 [3 Cal.Rptr.2d 614].

[24] *Relyea v. Ventura County Fire Protection Dist.* (1992) 2 Cal.App.4th 875 [3 Cal.Rptr.2d 614], citing *City of Hayward v. United Public Employees* (1976) 54 Cal.App.3d 761, 763, 766 [126 Cal.Rptr. 710, 711, 713].

[25] *Public Employees of Riverside County, Inc. v. County of Riverside* (1977) 75 Cal.App.3d 882 [142 Cal.Rptr. 521].

[26] *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48 [146 Cal.Rptr. 155].

[27] *County of Yolo* (2013) PERB Dec. No. 2316-M [37 PERC ¶ 208] (A governing body must act on a properly filed petition, not on a petition it wished or imagined had been filed or hypothesized should have been filed).

[28] *Santa Clara County Dist. Attorney Investigators Assn. v. County of Santa Clara* (1975) 51 Cal.App.3d 255 [124 Cal.Rptr. 115].

[29] *County of Calaveras* (2012) PERB Decision No. 2252-M [36 PERC ¶ 158].

[30] *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331 [122 Cal.Rptr. 210].

[31] *Reinbold v. City of Santa Monica* (1976) 63 Cal.App.3d 433 [133 Cal.Rptr. 874].

[32] Gov. Code, § 3507.5; See also, *United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119 [142 Cal.Rptr. 735].

[33] *United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 126-129 [142 Cal.Rptr.735, 740-741].

[34] *United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 126 [142 Cal.Rptr.735, 740].

[35] *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959 [129 Cal.Rptr. 68]. See also, *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908].

[36] *Covina-Azusa Fire Fighters Union v. City of Azusa* (1978) 81 Cal.App.3d 48, 59 [146 Cal.Rptr.155, 160]; See also, *Andrews v. Board of Supervisors* (1982) 134 Cal.App.3d 274 [184 Cal.Rptr. 542] [which held that an MOU binds all unit employees].

[37] *Bowen v. U.S. Postal Service* (1983) 459 U.S. 212 [103 S.Ct. 588].

[38] *Bowen v. U.S. Postal Service* (1983) 459 U.S. 212 [103 S.Ct. 588].

[39] Gov. Code, § 3509.

[40] Gov. Code, § 3505.8.

[41] Gov. Code, § 3509, subd. (b).

[42] *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072 [29 Cal.Rptr.3d 234].

[43] Cal. Code Regs. tit. 8, § 32602 *et seq.*

[44] *Stockton Unified School District* (1980) PERB Dec. No. 143-E [4 PERC ¶ 11189].

[45] *Pajaro Valley Unified School Dist.* (1978) PERB Dec. No. 51-E [2 PERC ¶ 2107].

[46] *University of California* (1985) PERB Dec. No. 520-H [9 PERC ¶ 16207]; But see *City of San Jose* (2013) PERB Dec. No. 2341-M [__ PERC ¶ __].

[47] *Oakland Unified School District* (1982) PERB Dec. No. 275-E [7 PERC ¶ 14029].

[48] It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. *Muroc Unified School District* (1978) PERB Dec. No. 80-E [3 PERC ¶ 10004].

[49] *City of San Jose* (2013) PERB Dec. No. 2341-M [__ PERC ¶ __].

[50] *Trustees of Cal. State Univ.* (2006) PERB Dec. No. 1842-H [30 PERC ¶ 125]; *N.L.R.B. v. McClatchy Newspapers, Inc. Publisher of The Sacramento Bee* (D.C. Cir. 1992) 964 F.2d 1153, rehg. den. (Jul. 23, 1992); *Pajaro Valley Unified School Dist.* (1978) PERB Dec. No 51-E [2 PERC ¶ 2107]; *N.L.R.B. v. Katz* (1962) 369 U.S. 736 [82 S.Ct. 1107].

[51] *Redwoods Community College District* (1996) PERB Dec. No. 1141-E [20 PERC ¶ 27048], citing *Los Angeles Community College District* (1982) PERB Dec. No. 252-E [6 PERC ¶ 13241]; *Amador Valley Joint Union High School Dist.* (1978) PERB Dec. No. 74-E [2 PERC ¶ 2192].

[52] *Independent Union of Pub. Service Employees v. County of Sacramento* (1983) 147 Cal.App.3d 482 [195 Cal.Rptr. 206].

[53] *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1011 [175 Cal.Rptr. 105, 108].

[54] *N.L.R.B. v. Haberman Const. Co.* (5th Cir. 1980) 618 F.2d 288, 296.

[55] *City of San Juan Capistrano* (2012) PERB Decision No. 2238-M [36PERC ¶ 125].

[56] *Stanislaus Consolidated Firefighters, Local 3399* (2012) PERB Decision No. 2231-M [36PERC ¶ 111].

[57] *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818–819 [207 Cal.Rptr. 876, 878].

[58] *Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. N.L.R.B.* (1991) 501 U.S. 190, 200-201 [111 S.Ct. 2215, 2222-2223].

[59] *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 22-23 [129 Cal.Rptr. 126, 135].

[60] *Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797, 804–805 [213 Cal.Rptr. 491, 495].

[61] *County of Solano* (2014) PERB Dec. No. 2402-M [39 PERC ¶ 78].

[62] *Sparks Nugget, Inc. v. N.L.R.B.* (9th Cir. 1992) 968 F.2d 991, 994-995.

[63] *Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal.App.3d 518 [106 Cal.Rptr. 441].

[64] *Davis City Employees Association* (2012) PERB Decision No. 2271-M [37 PERC ¶ 12].

[65] *Proctor & Gamble Mfg. Co.* (1966) 160 NLRB 334 [160 NLRB No. 36].

[66] *Oregon City School Dist. No. 62 v. Oregon City Education Assn.* Case No. C-179-79 (1981) 5 PECBR 4246.

[67] *Placentia Fire Fighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 25 [129 Cal.Rptr.126, 137].

[68] *San Diego Municipal. Employees Assn. v. Superior Court* (2012) 206 Cal.App.4th 1447, 1463-1465 [143 Cal.Rptr.3d 49, 62-64].

[69] *Sparks Nugget, Inc. v. N.L.R.B.* (9th Cir. 1992) 968 F.2d 991, 995.

[70] *City of Glendale* (2012) PERB Decision 2251-M [36 PERC ¶ 157], judicial appeal pending.

[71] *Operating Engineers Local 3 v. Town of Paradise* (2007) PERB Dec. No. 1906-M [31 PERC ¶ 108].

[72] *County of Los Angeles v. Los Angeles County Employee Relations Commission* (2013) 56 Cal.4th 905 [157 Cal.Rptr.3d 481].

[73] AB 195 codified Gov. Code § 3506.5.

[74] *County of Riverside* (2012) PERB Decision No. 2280-M [37 PERC ¶ 51].

[75] Gov. Code, § 3505.4.

[76] Senate Floor Analysis for AB 1606, November 13, 2012; Gov. Code § 3505.4.

[77] *Reinbold v. City of Santa Monica* (1976) 63 Cal.App.3d 433, 439-440 [133 Cal.Rptr. 874, 877-879]; *Organization of Deputy Sheriffs v. County of San Mateo* (1975) 48 Cal.App.3d 331 [122 Cal.Rptr. 210].

[78] Gov. Code, § 3505.2; Cal. Code Regs., tit. 8, § 32802(a)(2).

[79] Gov. Code, §§ 3505.4, 3505.5.

[80] Gov. Code § 3505.4; Cal. Code Regs., tit. 8, § 32802(a)(2).

[81] Gov. Code, § 3505.4(a).

[82] *City of Redondo Beach v. Redondo Beach Police Officers Association* (Police Management Unit) (2014) PERB No. Ad-409-M [38 PERC ¶ 152].

[83] *Santa Cruz Central Fire Protection District* (2016) PERB Order No. Ad-436-M [__ PERC ¶ ___]; *see also Lassen County In-Home Supportive Services Public Authority* (2015) PERB Order No. Ad-426-M [40 PERC ¶ 20].

[84] *Santa Cruz Central Fire Protection District* (2016) PERB Order No. Ad-436-M [__ PERC ¶ ___].

[85] Gov. Code, § 3505.4.

[86] Gov. Code, § 3505.5.

[87] *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 [132 Cal.Rptr.2d 713]; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322 [93 Cal.Rptr.3d 39], review den. (Jul. 8, 2009).

[88] Gov. Code, § 3505.5, subd. (e).

[89] *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 332 [124 Cal.Rptr. 513, 515].

[90] *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328 [124 Cal.Rptr. 513].

[91] *City & County of San Francisco v. Cooper* (1975) 13 Cal.3d 898 [120 Cal.Rptr. 707].

[92] *Crowley v. City & County of San Francisco* (1976) 64 Cal.App.3d 450 [134 Cal.Rptr. 533].

[93] *International Broth. of Elec. Workers, Local 387, AFL-CIO v. N.L.R.B.* (9th Cir. 1986) 788 F.2d 1412.

[94] *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296 [152 Cal.Rptr. 903], referring to *Subway-Surface Sup'rs Ass'n v. New York City Transit Authority* (1978) 44 N.Y.2d 101 [375 N.E.2d 384].

[95] *In re City of Vallejo* (Bankruptcy.E.D.Cal. 2009) 403 B.R. 72 [51 Bankruptcy Ct. Dec. 131].

[96] *Riverside Sheriff's Ass'n. v. County of Riverside* (2002) 106 Cal.App.4th 1285, 1291 [131 Cal.Rptr.2d 454, 459], review den. (June 25, 2003), citing *California State Employees Assn., Service Employees Internat. Union Local 1000* (2002) PERB Dec. No. 1601-S [28 PERC ¶ 87]; See also *Hacienda La Puente Unified School District* (1997) PERB Dec. No. 1186-E [21 PERC ¶ 28056].

[97] *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 [165 Cal.Rptr.908], citing *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959 [129 Cal.Rptr. 68].

[98] *Marysville Joint Unified School District* (1983) PERB Dec. No. 314-E [7 PERC ¶ 14163].

[99] *Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29 [158 Cal.Rptr.3d 135].

[100] *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].

[101] Gov. Code, § 3504.

[102] *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 638 [47 Cal.Rptr.3d 69, 80].

[103] *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 638 [47 Cal.Rptr.3d 69, 80].

[104] *Claremont Police Officers Ass'n v. City of Claremont* (2006) 39 Cal.4th 623, 638-639 [147 Cal.Rptr.3d 69, 80-81].

[105] *San Jose Peace Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935 [144 Cal.Rptr. 638].

[106] *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931 [143 Cal.Rptr. 255].

[107] *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625 [83 Cal.Rptr.3d 494].

[108] *Rialto Police Benefit Ass'on. v. City of Rialto* (2007) 155 Cal.App.4th 1295 [66 Cal.Rptr.3d 714].

[109] Gov. Code, § 3504.5, subd. (b).

[110] *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 278 [1 Cal.Rptr.2d 850, 856].

[111] *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267 [1 Cal.Rptr.2d 850].

[112] *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 277 [1 Cal.Rptr.2d 850, 856].

[113] *Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 279 [1 Cal.Rptr.2d 856, 857].

[114] *Newman-Crows Landing Unified School District* (1982) PERB Dec. No. 223-E [6 PERC ¶ 13162]; See also *County of Santa Clara* (2013) PERB Dec. No. 2321-M [38 PERC ¶ 30].

[115] *International Ass'n. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Bd.* (2011) 51 Cal.4th 259 [120 Cal.Rptr.3d 117].

[116] *Newman-Crows Landing Unified School District* (1982) PERB Dec. No. 223-E [6 PERC ¶ 13162].

[117] *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 621 [116 Cal.Rptr. 507, 515].

[118] *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55, 60-64 [151 Cal.Rptr. 547, 549-553].

[119] *Mt. Diablo Unified School District* (1983) PERB Dec. No. 373-E [8 PERC ¶ 15017].

[120] *El Dorado County Deputy Sheriff's Association v. County of El Dorado* (2016) 244 Cal.App.4th 950 [198 Cal.Rptr.3d 502].

[121] *City of Richmond* (2004) PERB Dec. No. 1720-M [29 PERC ¶ 31]; See also *Rio Hondo Community College District* (2013) PERB Dec. No. 2313-E [37 PERC ¶ 197].

[122] *County of Santa Clara* (2013) PERB Dec. No. 2321-M [38 PERC ¶ 30].

[123] *Beverly Hills Unified School District* (2008) PERB Dec. No. 1969-E [32 PERC ¶ 115].

[124] *Trustees of the California State University* (2012) PERB Decision No. 2287-H [37 PERC ¶ 79].

[125] *Rio Hondo Community College District* (2013) PERB Decision No. 2313-E [37 PERC ¶ 197].

[126] *County of Sacramento* (2013) PERB Dec. No. 2315-M [37 PERC ¶ 206].

[127] *County of Santa Clara* (2013) PERB Dec. No. 2321-M [38 PERC ¶ 30].

[128] See, *Fibreboard Paper Products Corp. v. N.L.R.B.* (1964) 379 U.S. 203 [85 S.Ct. 398] [PERB relies on this private sector case in numerous decisions].

[129] *Cal. Department of Personnel Administration* (1987) PERB Dec. No. 648a-S [13 PERC ¶ 20013].

[130] *Cal. Department of Personnel Administration* (1987) PERB Dec. No. 648a-S [13 PERC ¶ 20013].

[131] *Cal. Department of Personnel Administration* (1987) PERB Dec. No. 648a-S [13 PERC ¶ 20013].

[132] *Rialto Police Benefit Ass'n. v. City of Rialto* (2007) 155 Cal.App.4th 1295 [66 Cal.Rptr.3d 714].

[133] *Rialto Police Benefit Ass'n. v. City of Rialto* (2007) 155 Cal.App.4th 1295 [66 Cal.Rptr.3d 714].

[134] *See*, 76 Ops.Cal.Atty.Gen. 86 (1993).

[135] *Darley v. Ward* (1982) 136 Cal.App.3d 614, 627-628 [186 Cal.Rptr. 434, 441-443].

[136] *Darley v. Ward* (1982) 136 Cal.App.3d 614, 627-628 [186 Cal.Rptr. 434, 441-443].

[137] *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 659 [224 Cal.Rptr. 688, 692].

[138] *American Federation of State etc. Employees v. City of Santa Clara* (1984) 160 Cal.App.3d 1006 [207 Cal.Rptr. 57].

[139] *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959 [129 Cal.Rptr. 68].

[140] *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin* (1974) 39 Cal.App.3d 83 [113 Cal.Rptr. 912].

[141] *Public Employees Assn. v. Board of Supervisors* (1985) 167 Cal.App.3d 797 [213 Cal.Rptr. 491].

[142] *Banning Teachers Assn. v. Public Employment Relations Bd.* (1988) 44 Cal.3d 799 [244 Cal.Rptr. 671] [however, the court acknowledged that there may be examples of circumstances wherein an employer may violate statutory labor relations requirements by entering a parity agreement].

[143] *Social Services Union v. Board of Supervisors* (1990) 222 Cal.App.3d 279 [271 Cal.Rptr. 494]; *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818 [207 Cal.Rptr. 876, 878]; *City of Modesto* (2004) PERB Dec. No. 1724-M [29 PERC ¶ 36].

[144] Gov. Code, §§ 20000 et seq. & 31200.

[145] *County of San Joaquin* (2003) PERB Dec. No. 1570-M [28 PERC ¶ 37].

[146] *Miller v. State of California* (1977) 18 Cal.3d 808, 815-16 [135 Cal.Rptr. 386, 390-391].

[147] *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749 [129 Cal.Rptr. 289, 291]; *Miller v. State of California* (1977) 18 Cal.3d 808, 817 [135 Cal.Rptr. 386, 391].

[148] *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 866 [148 Cal.Rptr. 158, 162].

[149] *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 852-53 [179 P.2d 799, 803-804].

[150] *Mulcahy v. Baldwin* (1932) 216 Cal. 517, 526 [15 P.2d 738,742].

[151] *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 864 [148 Cal.Rptr. 158, 161].

[152] *Betts v. Board of Administration* (1978) 21 Cal.3d 859, 864 [148 Cal.Rptr. 158, 161] [emphasis in original].

[153] *Sappington v. Orange Unified School District* (2004) 119 Cal.App.4th 949 [14 Cal.Rptr.3d 764], rehg & review den. (2004).

[154] *Sappington v. Orange Unified School District* (2004) 119 Cal.App.4th 949, 955 [14 Cal.Rptr.3d 764, 770], rehg. & review den. (2004).

[155] *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 [134 Cal.Rptr.3d 779].

[156] *Retired Employees Ass'n of Orange County, Inc. v. County of Orange* (9th Cir. 2014) 742 F.3d 1137, 1142.

[157] *International Broth. v. City of Redding* (2012) 210 Cal.App.4th 1114.

[158] Gov. Code, § 7522.15.

[159] Gov. Code, § 7522.20.

[160] Gov. Code, §§ 7522.25(e)-(f).

[161] Compare Government Code Section 7522.02(c), which uses the mandatory "shall" with Government Code Section 7522.02(d), which permits an agency to adopt a new defined benefit formula on or after January 1, 2013.

[162] Gov. Code, § 7522.44(a).

[163] *San Diego Police Officers' Ass'n. v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725.

[164] Whitmore & Roufougar, *Further Storm Warnings in the Territory of Retiree Health Care Benefits* (2007) CPER Journal No. 185.

[165] *San Diego Police Officers' Ass'n. v. San Diego City Employees' Retirement System* (9th Cir. 2009) 568 F.3d 725, 739; but see *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472 [pursuant to city's charter and municipal code, changes to the pension system effecting future employees must be done by ordinance].

[166] *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237 [167 Cal.Rptr.3d 123].

[167] *International Broth. v. City of Redding* (2012) 210 Cal.App.4th 1114, 1119 [148 Cal.Rptr.3d 857, 860].

[168] *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1189 [134 Cal.Rptr.3d 779].

[169] *Retired Employees Ass'n of Orange County, Inc. v. County of Orange* (9th Cir. 2014) 742 F.3d 1137.

[170] *Harris v. County of Orange* (9th Cir. 2012) 682 F.3d 1126 [upholding dismissal but granting leave to amend to establish contractual right to grant in perpetuity based on specific County ordinances or resolutions].

[171] *Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions* (June 2004) GASB Statement No. 45.

[172] *City of San Diego v. Haas* (2012) 207 Cal.App.4th 472 [pursuant to city's charter and municipal code, changes to the pension system effecting future employees must be done by ordinance].

[173] Gov. Code, § 22892, subd. (b)(1).

[174] Gov. Code, § 22892, subd. (b)(2); CalPERS Circular Letter No. 600-006-12. http://www.calpers.ca.gov/eip-docs/employer/cir-ltrs/2012/600-006-12.pdf, (March 6, 2012).

[175] Gov. Code, § 31692.

[176] *South San Francisco Unified School District* (1963) PERB Dec. No. 343-E [7 PERC ¶ 14243]; *Fountain Valley Elementary School District* (1987) PERB Dec. No. 625-E [11 PERC ¶ 18115].

[177] *Sylvan Union Elementary School District* (1989) PERB Dec. No. 780-E [14 PERC ¶ 21014].

[178] *Cupertino Union School District* (1993) PERB Dec. No. 987-E [17 PERC ¶ 24069]; *Sylvan Union Elementary School District* (1989) PERB Dec. No. 780-E [14 PERC ¶ 21014]; *Los Angeles Community College District* (1982) PERB Dec. No. 252-E [6 PERC ¶ 13241]; See also, *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753* (1999) 71 Cal.App.4th 82, 97-98 [83 Cal.Rptr.2d 603, 612-613], review den. (Jul. 21, 1999).

[179] Gov. Code, § 3502.5.

[180] Gov. Code, § 3502.5, subd. (e).

[181] Gov. Code, § 3502.5, subd. (b).

[182] *City of Hayward v. United Public Employees* (1976) 54 Cal.App.3d 761, 764 [126 Cal.Rptr. 710, 712].

[183] *Orange County Water District* (2015) PERB Dec. No. 2454 [40 PERC ¶ 60].

[184] Gov. Code, § 3502.5, subd. (c).

[185] Gov. Code, § 3502.5, subd. (c).

[186] See, *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 817 [165 Cal.Rptr. 908, 917]; *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 601 [205 Cal.Rptr. 794, 800].

[187] *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 601 [205 Cal.Rptr. 794, 800].

[188] *People ex. rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591, 602 [205 Cal.Rptr. 794, 801].

[189] *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].

[190] *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 119 [119 Cal.Rptr. 182, 183].

[191] 29 U.S.C. § 207.

[192] *Berry v. County of Sonoma* (9th Cir. 1994) 30 F.3d. 1174.

[193] *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1219, 1224 [79 Cal.Rptr.2d 634, 636, 639]. Distinguished by, *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 [134 Cal.Rptr.3d 779].

[194] *San Bernardino Public Employees Assn. v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1219, 1224 [79 Cal.Rptr.2d 634, 636, 639]. Distinguished by, *Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171 [134 Cal.Rptr.3d 779].

[195] *Willis v. City of Garden Grove* (1979) 93 Cal.App.3d 208 [155 Cal.Rptr. 493].

[196] *International Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959 [129 Cal.Rptr. 68].

[197] *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55 [151 Cal.Rptr. 547].

[198] *City of Sacramento* (2013) PERB Dec. No. 2351-M [__ PERC ¶ __].

[199] *Indio Police Command Unit Association v. City of Indio* (2014) 230 Cal.App.4th 521 [178 Cal.Rptr.3d 530].

[200] *Alum Rock Union Elementary School District* (1983) PERB Dec. No. 322-E [7 PERC ¶ 14184].

[201] *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1 [108 Cal.Rptr. 625].

[202] *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].

[203] *Solano County Employees' Assn. v. County of Solano* (1982) 136 Cal.App.3d 256 [186 Cal.Rptr. 147].

[204] *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].

[205] *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 536 [280 Cal.Rptr. 206, 210].

[206] *Holliday v. City of Modesto* (1991) 229 Cal.App.3d 528, 536 [280 Cal.Rptr. 206, 210]. See, *Lanier v. City of Woodburn* (9th Cir. 2008) 518 F.3d 1147 [in which the Ninth Circuit held that suspicion-less, pre-employment drug testing, while not unconstitutional on its face, is unconstitutional as applied to a candidate for a library page position. While public employers may continue to require suspicion-less, pre-employment drug testing, the Lanier decision requires that employers demonstrate a "special need" to justify the testing, as applied to specific job classes. The Court held that a general policy for a drug-free workplace does not suffice as a special need. However, a "special need" may be present for a number of different types of positions, such as safety-sensitive positions, and positions that supervise children].

[207] *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55 [151 Cal.Rptr. 547].

[208] *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal.3d 591 [205 Cal.Rptr. 794].

[209] *County of Santa Clara [Santa Clara County Corr. Peace Officers' Ass'n]* (2010) PERB Dec. No. 2114-M [34 PERC ¶ 97]; *County of Santa Clara [Santa Clara County Registered Nurses Prof'l Ass'n]* (2010) PERB Dec. No. 2120-M [34 PERC ¶ 109].

[210] *Long Beach Police Officer Assn. v. City of Long Beach* (1984) 156 Cal.App.3d 996 [203 Cal.Rptr. 494].

[211] *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625 [83 Cal.Rptr.3d 494], as mod. (Oct. 6, 2008).

[212] *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 [165 Cal.Rptr. 908].

[213] *County of Riverside* (2003) PERB Dec. No. 1577-M [28 PERC ¶ 45].

[214] *Redwoods Community College District* (1996) PERB Dec. No. 1141-E [20 PERC ¶ 27048], citing *Los Angeles Community College District* (1982) PERB Dec. No. 252-E [6 PERC ¶ 13241]; *Amador Valley J. Union High School District* (1978) PERB Dec. No. 74-E [7 PERC ¶ 2192].

[215] *City of Los Angeles v. Superior Court of Los Angeles County* (2013) 56 Cal.4th 1086.

[216] *Marysville Joint Unified School District* (1983) PERB Dec. No. 314-E [7 PERC ¶ 14163].

[217] *Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651 [224 Cal.Rptr. 688].

[218] *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116 [119 Cal.Rptr. 182].

[219] *Rialto Police Benefit Ass'on. v. City of Rialto* (2007) 155 Cal.App.4th 1295 [66 Cal.Rptr.3d 714]; *City of Oakland v. United Public Employees* (1986) 179 Cal.App.3d 356 [224 Cal.Rptr. 523], review den. (Jul. 23, 1986).

[220] Gov. Code, § 3505.3.

[221] *Burbank Unified School Dist.* (1978) PERB Dec. No. 67-E [2 PERC ¶ 2173]; see also Gov. Code, § 3505.3.

[222] *Anaheim Union High School District* (1981) PERB Dec. No. 177-E [5 PERC ¶ 12148].

[223] 29 C.F.R. § 785.42.

[224] 29 C.F.R. § 785.42.

[225] U.S. Dept. Labor, Wage & Hour Div. Opinion Letter, 1989 WL 1595239 (August 2, 1989).

[226] *Florio v. City of Ontario* (2005) 130 Cal.App.4th 1462 [30 Cal.Rptr.3d 841], review den. (Oct. 26, 2005).

[227] *14 Penn Plaza LLC v. Pyett* (2009) 556 U.S. 247 [129 S.Ct. 1456]; See, *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 102 [99 Cal.Rptr.2d 745, 758] [requiring stringent procedural requirements under California law designed to provide employees with protections more analogous to those available to them in a court proceeding].

[228] Gov. Code, § 3505.1.

[229] *California Department of Personnel Administration* (1993) PERB Dec. No. 995-S [17 PERC ¶ 24091]; *Compton Community College District* (1989) PERB Dec. No. 728-E [13 PERC ¶ 20076]; *Stockton Unified School District* (1980) PERB Dec. No. 143-E [4 PERC ¶ 11189].

[230] See, *Muroc Unified School District* (1978) PERB Dec. No. 80-E [3 PERC ¶ 10004].

[231] See, *Marin Community. College District* (1995) PERB Dec. No. 1092-E [19 PERC ¶ 26070].

[232] See, *San Francisco Unified School District* (1983) PERB Dec. No. 317-E [7 PERC ¶ 14172]; *Clovis Unified School Dist.* (1978) PERB Dec. No. 61-E [2 PERC ¶ 2159]; *University of California* (1983) PERB Dec. No. 366-H [8 PERC ¶ 15007].

[233] *Muroc Unified School District* (1978) PERB Dec. No. 80-E [3 PERC ¶ 10004]; *Alhambra City and High School Districts* (1986) PERB Dec. No. 560-E [10 PERC ¶ 17046].

[234] *L.A. Unified School Dist.* (1988) PERB Dec. No. 659-E [12 PERC ¶ 19046]. (Cannot find/verify)

[235] *Rio Hondo Community College District* (1980) PERB Dec. No. 128-E [4 PERC ¶ 11089].

[236] *Muroc Unified School District* (1978) PERB Dec. No. 80-E [4 PERC ¶ 10004].

[237] *Marin Community College District* (1995) PERB Dec. No. 1092-E [19 PERC ¶ 26070].

[238] Gov. Code, § 3507, subd. (a).

[239] See, *State of California* (1998) PERB Dec. No. 1279-S [22 PERC ¶ 29148].

[240] See, *State of California* (1998) PERB Dec. No. 1279-S [22 PERC ¶ 29148].

[241] See, *In re Adtranz* (2000) 331 NRLB 291 [331 NLRB No. 40], vacated in part (2001) 253 F.3d 19 [the part of the case dealing with the employer's right to restrict use of e-mail was affirmed].

[242] See, *State of California* (1998) PERB Dec. No. 1279-S [22 PERC ¶ 29148].

[243] See, *State of California* (1998) PERB Dec. No. 1279-S [22 PERC ¶ 29148].

[244] *Purple Communications, Inc. v. Communications Workers of America, AFL-CIO* (2014) 361 NLRB No. 126 [2014 WL 6989135], overruling *The Guard Publishing Company* (2007) 351 NLRB 1110 [351 NLRB No. 70], opinion supplemented (2011) 357 NLRB No. 27.

[245] *The Guard Publishing Company* (2007) 351 NLRB 1110 [351 NLRB No. 70], opinion supplemented (2011) 357 NLRB No. 27.

[246] *Purple Communications, Inc. v. Communications Workers of America, AFL-CIO* (2014) 361 NLRB No. 126 [2014 WL 6989135], overruling *The Guard Publishing Company* (2007) 351 NLRB 1110 [351 NLRB No. 70], opinion supplemented (2011) 357 NLRB No. 27.

[247] See, *State of California* (1998) PERB Dec. No. 1279-S [22 PERC ¶ 29148].

[248] A more thorough examination of the interest-based bargaining process can be found in Fisher & Ury, *Getting to Yes, Negotiating Agreement Without Giving In* (1981).

[249] MMBA, Gov. Code § 3505.1.

[250] *Beverly Hills Firemen's Ass., Inc. v. City of Beverly Hills* (1981) 119 Cal.App.3d 620, 628 [174 Cal.Rptr. 178].

[251] *City of Lincoln* (2012) PERB Decision No. 2284-M [37 PERC ¶ 69].

[252] *City of Long Beach* (2012) PERB Decision No. 2296-M [37 PERC ¶ 130].

[253] EERA, Gov. Code, § 3540.1(f).

[254] 8 CCR § 32802(a)(2).

[255] *Davis City Employees Association* (2012) PERB Decision No. 2271-M [37 PERC ¶ 12].

[256] Gov. Code, §§ 3505.4, 3505.5.

[257] Gov. Code, § 3505.5, subd. (e).

[258] Gov. Code, § 3505.4, subd. (a).

[259] Gov. Code, § 3505.4(a).

[260] *County of Contra Costa* (2014) PERB No. Ad-410-M [38 PERC ¶ 154] and *County of Fresno* (2014) PERB No. Ad-414-M [39 PERC ¶ 8].

[261] *County of Riverside v. Public Employment Relations Board (SEIU Local 721)* (2016) 246 Cal.App.4th 20 [200 Cal.Rptr.3d 573] and *San Diego Housing Commission v. Public Employment Relations Board (SEIU Local 221)* (2016) 246 Cal.App.4th 1 [200 Cal.Rptr.3d 629].

[262] Gov. Code, § 3505.7.

[263] *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191 [191 Cal.Rptr. 60].

[264] *County of Riverside* (2014) PERB Dec. No. 2360-M [38 PERC ¶ 138].

[265] *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881 [186 Cal.Rptr. 634].

[266] *Sonoma County Law Enforcement Association v. County of Sonoma* (2010) PERB Dec. No. 2100-M [34 PERC ¶ 54]; *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900 [186 Cal.Rptr. 634].

[267] *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881 [186 Cal.Rptr. 634].

[268] *County of Tulare* (2015) PERB Dec. No. 2414-M [39 PERC ¶ 111], judicial appeal pending.

[269] *Sonoma County Law Enforcement Association v. County of Sonoma* (2010) PERB Dec. No. 2100-M [34 PERC ¶ 54].

[270] *Thornhill v. State of Alabama* (1940) 310 U.S. 88 [60 S.Ct. 736, 102]; *Thomas v. Collins* (1944) 323 U.S. 516, 532 [65 S.Ct. 315, 323]; *United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 912 [122 Cal.Rptr. 877, 883]; *Pittsburg Unified School Dist. v. California School Employees Assn. (*1985) 166

Cal.App.3d 875 [213 Cal.Rptr. 34], review den. (Jul. 8, 1985); State Bar of Cal., *Cal. Public Sector Labor Relations* (2007) ¶ 25.14.

271 *Mt. San Antonio Community College District* (1982) PERB Dec. No. 224-E [6 PERC ¶ 13163] [cited in State Bar of Cal., *Cal. Public Sector Labor Relations* (2007) ¶ 25.14].

272 *Thornhill v. State of Alabama* (1940) 310 U.S. 88, 101-103 [60 S.Ct. 736, 744-745]; *Thomas v. Collins* (1944) 323 U.S. 516, 532 [65 S.Ct. 315]; *United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 912 [122 Cal.Rptr. 877, 883]; *In re Berry* (1968) 68 Cal.2d 137, 152-155 [65 Cal.Rptr. 273, 283-285].

273 *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl* (1942) 315 U.S. 769, 773 [62 S.Ct. 816, 818]; *Schwartz-Torrance Inv. Corp. v. Bakery and Confectionery Workers' Union, Local No. 31* (1964) 61 Cal.2d 766, 770 [40 Cal.Rptr. 233, 235]; *Trustees of Cal. State Colleges v. Local 1352 S. State etc. Teachers* (1970) 13 Cal.App.3d 863 [92 Cal.Rptr. 134], disapproved of by *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 [declining to recognize common law prohibition against strikes, but not addressing picketing].

274 *Annenberg v. Southern Cal. Dist. Council of Laborers* (1974) 38 Cal.App.3d 637, 642 [113 Cal.Rptr. 519, 522] [cited in State Bar of Cal., *Cal. Public Sector Labor Relations* (2007) ¶ 25.11].

275 *Fresno Unified School District* (1982) PERB Dec. No. 208-E [6 PERC ¶ 13110].

276 *Fresno Unified School District* (1982) PERB Dec. No. 208-E [6 PERC ¶ 13110].

277 *Children's Hosp. Medical Center of Northern California v. California Nurses Ass'n.* (9th Cir. 2002) 283 F.3d 1188, 1192.

278 *Oxnard Harbor District* (2004) PERB Dec. No. 1580-M [28 PERC ¶ 56]; but see, *Regents of the University of California* (2004) PERB Dec. No. 1638-H [28 PERC ¶ 162].

279 *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 [214 Cal.Rptr. 424].

280 *County Sanitation Dist. No. 2 v. Los Angeles County Employees Assn.* (1985) 38 Cal.3d 564 [214 Cal.Rptr. 424].

281 Lab. Code, §§ 1961 & 1962.

282 *City of Santa Ana v. Santa Ana Police Benevolent Assn.* (1989) 207 Cal.App.3d 1568 [255 Cal.Rptr. 688].

283 *Fremont Unified School District* (1990) PERB Dec. No. IR-54-E [14 PERC ¶ 21107].

284 *International Brotherhood of Electrical Workers v. City of Gridley* (1983) 34 Cal.3d 191, 196-206 [193 Cal.Rptr. 518, 519-527]; *Los Angeles County Federation of Labor v. County of Los Angeles* (1984) 160 Cal.App.3d 905 [207 Cal.Rptr. 1].

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[305] *N.L.R.B. v. Mackay Radio & Telegraph Co.* (1938) 304 U.S. 333 [58 S.Ct. 904].

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[308] *Phelps Dodge Copper Products Corp. (Elizabeth, N.J.)* (1952) 101 NLRB 360 [101 NLRB No. 103]; *Elk Lumber Co*. (1950) 91 NLRB 333 [91 NLRB No. 60].

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