

PUBLIC MEETING MINUTES

December 8, 2011

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 10:00 a.m.

Members Present

Anita I. Martinez, Chair
Alice Dowdin Calvillo, Member
Sally M. McKeag, Member
A. Eugene Huguenin, Member (Excused)

Staff Present

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief, Office of General Counsel
Shawn Cloughesy, Chief Administrative Law Judge
Eileen Potter, Chief Administrative Officer

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the October 13, 2011 Public Meeting. She reported that the Board met in continuous closed session to deliberate on pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Chair Martinez read into the record the decisions that issued since the open session in October. Those were PERB Decision Nos. 2210-S, 2211-M, 2212, 2213, 2214-S, 2215-M, 2216-C, 2217-H, 2218, 2219, 2220, 2221, 2222-M, 2223, 2224, 2225-M, and JR-26, and PERB Order No. Ad-391-M. In Request for Injunctive Relief (IR Request) No. 607 (*SEIU United Healthcare Workers West v. El Camino Hospital District*), the request was denied, IR Request No. 608 (*SEIU Local 1021 v. County of Mendocino*) the request was denied, IR Request No. 609 (*SEIU United Healthcare Workers West v. El Camino Hospital District*) the request was denied, and in IR Request No. 610 (*SEIU Local 1021 v. Mendocino County Superior Court*), the request was denied. A document containing a listing of the aforementioned decisions was made available at the meeting. A list containing the decisions is available on PERB's website.

Motion: Motion by Member McKeag and seconded by Member Dowdin Calvillo, to close the October 13, 2011 Public Meeting.

Ayes: Martinez, McKeag and Dowdin Calvillo.

Motion Adopted – 3 to 0.

Without objection, Chair Martinez adjourned the October 13, 2011 Public Meeting. She then opened and called to order the December 8, 2011 Public Meeting. Member McKeag led in the Pledge of Allegiance to the Flag.

Minutes

Motion: Motion by Member Dowdin Calvillo and seconded by Member McKeag, that the Board adopt the minutes for the October 13, 2011 Public Meeting.

Ayes: Martinez, McKeag and Dowdin Calvillo.

Motion Adopted – 3 to 0.

Comments From Public Participants

None.

Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

a. Administrative Report

Chief Administrative Officer Eileen Potter stated that she had no items to report.

b. Legal Reports

Suzanne Murphy, General Counsel, reported that the monthly activity and litigation reports had been distributed to the Board for its review. From those reports Ms. Murphy recapped the following information since the Board's last Public Meeting in October. With respect to unfair practice charges during the months of October and November, 168 new cases were filed with the General Counsel's Office (unchanged from the prior two-month period); 209 case investigations were completed (an increase of 31 cases over the prior period); and a total of 42 informal settlement conferences were conducted by staff (a decrease of 6 cases from the prior period). As Chair Martinez mentioned earlier, since the October Public Meeting, Ms. Murphy reported on the disposition of the four IR Requests which were filed:

1. *SEIU United Healthcare Workers West v. El Camino Hospital District*, IR Request No. 607 (Charge No. SF-CE-891-M, filed October 20, 2011). Whether the Hospital violated the Meyers-Milias-Brown Act (MMBA) by processing and setting an election based on a decertification petition that was alleged not to have complied with local rules that prescribe the contents of a valid petition and the procedures for unit modifications. The request was denied on October 27; however, by direction of the Board, administrative proceedings on the above-referenced charge and complaint were expedited and the State Mediation and Conciliation Service (SMCS) was asked to stay the election, then scheduled for November 3, pending completion of the expedited PERB

administrative process. SMCS agreed to stay the election, a complaint promptly issued and an informal conference was scheduled for November 1. The matter did not settle and an expedited hearing was set for November 14. The proposed decision in this matter issued on November 21.

2. *SEIU Local 1021 v. County of Mendocino*, IR Request No. 608 (Charge No. SF-CE-834-M, filed October 28, 2011). Whether the County failed to bargain in good faith by renegeing on a tentative agreement that was reached with the assistance of an SMCS mediator and signed by both parties, by prematurely declaring impasse, and by failing to respond to certain requests for information. The request was denied on November 4. Cross-complaints on this charge and a related bad faith bargaining charge filed against the union issued on November 7. An informal settlement conference was scheduled for December 21.
3. *SEIU United Healthcare Workers West v. El Camino Hospital District*, IR Request No. 609 (Charge No. SF-CE-888-M, filed November 10, 2011). Whether the Hospital failed to meet and confer in good faith, unlawfully refused to provide information, violated the impasse procedures in the local rules, and unilaterally implemented a new health plan. The request was denied on November 17. The charge, and a number of related charges, are being processed in the normal rotation in the PERB General Counsel's Office.
4. *SEIU Local 1021 v. Mendocino County Superior Court*, IR Request No. 610 (Charge No. SA-CE-17-C, filed November 15, 2011). Whether the Court failed to meet and confer in good faith by: carrying out a retaliatory layoff of a Jury Services Coordinator and transferring bargaining work, failing or refusing to provide requested information, and various other acts of alleged surface bargaining or bad faith conduct. The request was denied on November 23, and the charge is being processed in General Counsel's Office normal rotation.

In terms of litigation relating to PERB since the October Public Meeting, one new case was filed in the Los Angeles County Superior Court, *Doe v. Deasy*. This litigation is related to charges that have been filed at PERB involving United Teachers Los Angeles (UTLA) and Associated Administrators of Los Angeles (AALA) versus the Los Angeles Unified School District (LAUSD), and also IR Request No. 599 which was filed in May 2011. In *Doe v. Deasy*, the plaintiffs (all but one of whom are named as "DOES") allege that they are students, parents, and taxpayers who reside within the boundaries of LAUSD. They raised a number of claims, including whether: (1) LAUSD, UTLA and AALA should be enjoined from negotiating or entering into any agreement, including a collective bargaining agreement, that does not require that teacher evaluations be tied to student performance on standardized tests as required by the Stull Act; and (2) the PERB administrative proceedings on any charges involving UTLA, AALA and LAUSD should be stayed. On November 1, the Superior Court denied the plaintiff's ex parte application for a temporary restraining order and ordered the parties to appear on November 21 for a trial setting conference. Prior to the conference, the plaintiffs amended their petition deleting UTLA, AALA and PERB as defendants; however, the trial court ordered that UTLA and AALA be added back into the petition as real parties in interest and ordered that PERB be allowed to intervene by stipulation of the parties if PERB decided to seek intervenor status. The hearing on the

amended petition for writ of mandate will be held on June 1, 2012, in Department 85 in the Los Angeles Superior Court.

Regarding case determinations during the time period since the last Public Meeting, PERB received no final court rulings.

Ms. Murphy announced that, for the first time in four years, the entire General Counsel staff met at the Sacramento Office. The November 29 staff meeting was followed by a full-day mediation training session by PERB alumni James Tamm. Mr. Tamm conducted the training at PERB on a pro bono basis.

General Counsel Murphy concluded her report by thanking PERB's Division Chief, Les Chisholm, for his exemplary work on the proposed emergency regulations to implement Assembly Bill 646 that the Board will consider today. She also commended Mr. Chisholm on the statesman-like manner in which he conducted two public meetings with PERB constituents on November 8 and 10 in Oakland and Glendale, respectively. Chair Martinez echoed Ms. Murphy's comments on behalf of the Board.

Chief Administrative Law Judge Shawn Cloughesy reported on the activities of the Division of Administrative Law and stated that the Administrative Law Judge (ALJ) report had been distributed to the Board for its review. Mr. Cloughesy reported on the highlights stating that as compared to the prior year, formal hearing days have increased by 41 percent, proposed decision issuance has increased by 83 percent, and case closures have increased by 71 percent. He stated the importance of the progress made in the scheduling time from informal conference to the date of formal hearing for cases in Sacramento is 3 months, Oakland is 3-1/2 months, and Glendale is 4-1/2 months. Mr. Cloughesy also thanked the General Counsel's Office for settling cases at informal conferences which helps with the ALJ caseload and the aforementioned progress made in scheduling hearings in a timely fashion.

c. Legislative Report

Les Chisholm, Division Chief, Office of the General Counsel, stated that the Legislature will reconvene in January and PERB will resume following any proposed legislation that might affect its jurisdiction.

With regard to legislation enacted this year, Mr. Chisholm reported there were items that may merit consideration for conforming or possible substantive regulatory changes, beyond the emergency regulations on the agenda for today's meeting as a result of Assembly Bill 646. At the November 29 PERB Advisory Committee meeting, discussion was held with interested parties about PERB conducting a review of existing regulations for possible changes resulting from recently enacted legislation. Specific recommendations for the Board regarding any such changes are targeted for sometime early in 2012.

Motion: Motion by Member McKeag and seconded by Member Dowdin Calvillo that the Legal (including General Counsel and Chief Administrative Law Judge), Administrative, and Legislative Reports be accepted and filed.

Ayes: Martinez, McKeag and Dowdin Calvillo.

Motion Adopted – 3 to 0.

Old Business

None.

New Business

The Board considered the staff proposal for the adoption of emergency regulations to implement the provisions of Assembly Bill 646 (Chapter 680, Statutes of 2011, effective January 1, 2012). If adopted by the Board, the emergency regulations and rulemaking package would be forwarded to the Office of Administrative Law (OAL) for review and approval pursuant to the Administrative Procedures Act.

Mr. Chisholm stated that AB 646 provides, for the first time, a mandatory impasse procedure under the MMBA, repealing and then re-adding section 3505.4 and adding new sections 3505.5 and 3505.7. Under the provisions of AB 646, factfinding may be requested by the exclusive representative, but not by the employer.

Mr. Chisholm provided background stating that PERB is to appoint the chairperson for the three-person factfinding panel, unless the parties mutually select their own chairperson. Additionally, the statute specifies that the parties would bear the costs of factfinding, including the cost of the chairperson, and PERB, while being involved in the role of appointing the chair, would not bear the cost of the chairperson; the criteria the factfinding panel would consider in hearing the dispute; that a report would issue with findings of fact and recommendations for settlement, if no settlement is reached during the factfinding process; that the factfinding report is to be made public 10 days after it is submitted to the parties; and that the employer may impose its last, best and final offer after any applicable mediation and factfinding procedures have been concluded, but not earlier than 10 days after the issuance of the factfinding report. Mr. Chisholm stated that the only specific exemption to the statute is with regard to charter cities and counties where there is a locally adopted process that ends in binding interest arbitration.

Mr. Chisholm then provided insight regarding the rulemaking process. He stated that PERB is requesting the emergency rulemaking at OAL to provide clarification and guidance to PERB constituents. With consideration of written comments received and various informal discussions, the agency was compelled to formulate a process which would address requests for factfinding under the new statute, as none existed. With those comments and discussions in mind, drafts prepared and circulated incorporated many of the ideas advanced by interested parties. The package prepared also allows PERB to fulfill its role and responsibility while being mindful only to recommend changes to its existing regulations or the adoption of new regulations that meet the authority, consistency, clarity, non-duplication and necessity standards that are enforced by OAL.

Mr. Chisholm reported on the specific revisions or additions to PERB regulations. He reported first on PERB's recommendation for conforming changes to existing regulations which were suggested by interested parties:

Section 32380. Deals with limitation on appeals of administrative determinations. Incorporates conforming change consistent with new section 32802.

Sections 32603 and 32604. Defines in PERB regulations the types of unfair practices by employers or by employee organizations, respectively. Amend to acknowledge the new MMBA impasse procedure.

Second, Mr. Chisholm reported on the following proposed sections:

Section 32802 identifies when, where and what information is required when filing a request for factfinding. Regarding when a request for factfinding may be made when the parties do not engage in mediation, this section provides that the request must be filed within 30 days from the date that either party declares impasse. Where mediation occurs, the request may not be filed during the first 30 days that the parties are attempting to resolve the dispute with the mediator's assistance, but not more than 45 days following the date the mediator was appointed or selected. The section sets forth that PERB has five working days to determine whether a request for factfinding meets the requirements of the MMBA and the term "working days" is defined within the text of the proposed regulation. The section states that factfinding related determinations made by Board agents are not appealable to the Board itself.

Mr. Chisholm acknowledged the comments and discussions held regarding whether factfinding may be requested where mediation has not occurred. PERB, having considered all aspects, including comments and discussions held, related statutes, and legislative history and intent, drafted a regulatory package that would provide certainty and predictability. Mr. Chisholm noted particular constituent interest regarding when lawful procession to implement a last, best and final offer can occur if the parties had not reached agreement.

Section 32804 specifies that where a request is sufficient, PERB would provide a list of seven names to the parties, which is intended to facilitate the parties' selection of a chairperson. If the parties are not able to agree, PERB would then appoint the chairperson for the dispute. This section also defines timeframes in which actions must be taken.

Mr. Chisholm presented the timelines should the Board authorize that this emergency regulatory package be submitted to OAL. He stated that notice would be provided to interested parties by mail and posting on the PERB website. The notice would include the finding of emergency and the proposed text itself. While no comment period is required following notice to interested parties, PERB must wait five working days before the emergency regulatory package can be submitted to OAL. Assuming notice tomorrow, PERB would submit the regulatory package to OAL on Monday, December 19. The anticipated timeline would be as follows:

- Notice, including mailing and posting on PERB website: December 9
- Submission of package to OAL: December 19
- Comments directly to OAL by interested parties: 5 calendar days (PERB can, but is not required to, respond to any comments provided to OAL.)

- OAL review and action: 10 calendar days

Mr. Chisholm stated that the above timetable allows the emergency regulations to be in place and effective as of January 1, 2012. The regulations would remain in effect for 180 days. PERB can request re-adoption of the emergency regulations twice, for 90 days each time, pending its completion of the regular rulemaking process.

The Board held discussion regarding OAL procedures and what action OAL might take should it have questions regarding any part of the emergency regulatory package submitted.

Mr. Chisholm continued that PERB is in the process of amending and updating its panel of neutrals applications, document forms and materials to reference factfinding under the MMBA and PERB's role in appointing chairpersons. He provided detail regarding the admission guidelines for persons interested in joining PERB's panel of neutrals.

Glenn Rothner, representing AFSCME Council 36, addressed the Board and had two items on which he wanted to comment. First, he complimented PERB and specifically Mr. Chisholm on the work put into the proposed regulations and the meetings held in that regard. He stated that he had attended the meeting at PERB's Glendale Office and thought it "proactive" and "well [ran]". Second, Mr. Rothner commented about factfinding in the absence of mediation. He stated that over the years he has had management representatives and lawyers give advice about "what's in the best interests of the union." Having represented unions for over 35 years, Mr. Rothner said he rarely gets and is happy to take the opportunity now "to tell management what I think is in their best interests." He stated that at the PERB meeting he attended, the unions agreed that factfinding should be required even when mediation is not required by law. He said that management representatives at the meeting either believed that factfinding should take place in the absence of mediation or wanted clarification from PERB. He stated that there was a distinct minority who viewed that there should be no factfinding in the absence of mediation. Mr. Rothner stated his belief that constituents wanted clarity and guidance from the PERB regulations and hoped that management would not litigate over this issue should the Board adopt the regulations as proposed.

Liberty Sanchez, representing LIUNA Locals 777 and 792, addressed the Board and concurred with the compliments on the processes undertaken by PERB in the preparation of the proposed emergency regulations. She expressed appreciation that "clearly all of the parties were listened to and particularly in response to labor concerns raised regarding when parties may seek factfinding where mediation is not part of the agreement." She stated her support for the adoption of the proposed regulations.

Member Dowdin Calvillo commented on concerns expressed by some constituents with regards to staff's recommendation that factfinding would be required in situations where mediation was not required under law. Specifically, she said she was not sure if the Board had authority to require factfinding in those situations given that AB 646 was silent in that regard but that she was willing to allow the language to move forward as staff proposed and allow OAL to make that determination. She also expressed that the authorization of employers to implement last, best and final offers, if a request for factfinding had not been made, was implicit and need not be stated as suggested by a few constituents.

Member McKeag inquired about a letter received from the City and County of San Francisco. She specifically wanted clarity about the part of the letter which stated:

“Carroll, Burdick & McDonough asserts, without any reference to the actual language or legislative intent . . . that AB 646 subjects to mandatory fact-finding all impasse situations, and not just those resulting from negotiations over memoranda of understanding. However, this interpretation not only is contrary to the plain language of the MMBA, but would contravene the clear and expressed intent of the legislature as well as the author of AB 646, Assembly Member Atkins.”

Mr. Chisholm responded that in the letter from Carroll Burdick, it was requested that PERB clarify that factfinding could be requested over any topic where the parties have an obligation to meet and confer, including in their view, the adoption of amendments of local rules pursuant to MMBA Section 3507. The City and County of San Francisco’s letter referenced this as “Seal Beach” type negotiations based on an earlier court case that interpreted that obligation. Ultimately, Mr. Chisholm concluded that this particular recommendation was not addressed, believing it did not meet the “why now” question which was the focus when preparing the emergency regulations. He stated that PERB would review the matter further and decide if it could be addressed in the regular rulemaking process or whether it was a matter that may well be decided through case law.

Member Dowdin Calvillo added that PERB was unique among State agencies in that as a quasi-judicial agency it has the ability to clarify its statutes and regulations through precedential decisions.

Motion: Motion by Member Dowdin Calvillo and seconded by Chair Martinez to forward the emergency rulemaking package to the Office of Administrative Law for review and approval.

Ayes: Martinez, McKeag and Dowdin Calvillo.

Motion Adopted – 3 to 0.

With her term coming to an end, Member McKeag addressed the Board. She provided some humorous memories regarding her confirmation hearing and tenure as a PERB Board Member. She continued, in a serious manner, expressing her appreciation for the challenges and learning experiences regarding labor law and the legal processes. Most importantly, Member McKeag stated that her experiences as a PERB Board Member has been life enhancing, giving her a different perspective of the world around her. She learned how important it is to keep an open mind and not to prejudge situations until you know all the facts. And, when you are making decisions that will ultimately impact people’s lives, you need to be extra thoughtful and diligent in your deliberations. She stated that it was a privilege and an honor to serve as a Board Member at PERB. She expressed her high regard and respect for the work accomplished in the labor community despite the difficult economic times by saying, “It is not easy to balance wants and needs in today’s realities.” She thanked her colleagues -- past and present -- for their collegiality, professional courtesy and for being such “doggone good people to work with.” She thanked the “PERB family” for their hard work, dedication, professionalism and, most important of all, their friendship. She specifically thanked her Legal Advisor, Greg Lyall, and Administrative Assistant, Irma Rosado, for putting up with her these past seven years. Member McKeag concluded by expressing her profound gratitude at having

the opportunity to work with her esteemed colleagues, Chair Anita Martinez, Alice Dowdin Cavillo, and Gene Huguenin; and with General Counsel Suzanne Murphy and her team; Chief Administrative Law Judge Shawn Cloughesy and his team of Administrative Law Judges, and Executive Officer Eileen Potter and her administrative team.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through February 9, 2012 when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member McKeag and seconded by Dowdin Calvillo to recess the meeting to continuous closed session.

Ayes: Martinez, McKeag and Dowdin Calvillo.

Motion Adopted – 3 to 0.

Respectfully submitted,

Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

Anita I. Martinez, Chair