STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF CONTRA COSTA, Employer, and AFSCME LOCAL 2700, Exclusive Representative.	Case No. SF-IM-126-M Administrative Appeal PERB Order No. Ad-410-M April 16, 2014

Appearances: Meyers, Nave, Riback, Silver & Wilson by Edward L. Kreisberg and Jesse J. Lad, Attorneys, for County of Contra Costa; Beeson, Tayer & Bodine by Adrian J. Barnes, Attorney, for AFSCME Local 2700.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by the County of Contra Costa (County) from an administrative determination (attached) by the Office of the General Counsel pursuant to PERB Regulation 32802.[1] In that determination, the Office of the General Counsel approved AFSCME Local 2700's (AFSCME) request that the parties' bargaining differences be submitted to a factfinding panel. The parties' bargaining dispute involved a single unresolved issue that remained after they had reached agreement on all other issues related to the creation of a new classification, legal clerk. The remaining dispute concerned the level of salary to be paid to the new classification.

[1] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Office of the General Counsel determined that the factfinding procedures prescribed in the Meyers-Milias-Brown Act (MMBA) section 3505.4[2] and its implementing regulation, PERB Regulation 32802(a)(2),[3] were applicable to this dispute and directed the parties to select their respective panel member. From this determination the County appeals, pursuant to PERB Regulation 32360.

For reasons discussed herein, we affirm the Office of the General Counsel's determination and hold that the factfinding procedures added to the MMBA by Assembly Bill No. 646 (Statutes 2011, ch. 680) (AB 646), passed in 2011, and codified at MMBA

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[2] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code unless otherwise noted. MMBA section 3505.4 establishes a non-binding factfinding procedure for resolving post-impasse bargaining disputes that may be invoked by the representative employee organization after mediation efforts, if available, have failed to produce a settlement.

[3] PERB Regulation 32802 provides, in pertinent part:

> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
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> (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator . . .
>
> (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.
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> (b) A request for factfinding must be filed with the appropriate regional office; . . .
>
> (c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirement of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.

sections 3505.4 through 3505.7, apply to any bargaining impasse over negotiable terms and conditions of employment, and not only to impasses over new or successor memoranda of understanding (MOU).

PROCEDURAL HISTORY

After having negotiated over the creation of a legal clerk classification and reached agreement on all issues except for the rate of pay for employees in the classification, the parties declared impasse in early September 2013. On September 25, 2013, AFSCME filed a request for factfinding with the Office of the General Counsel pursuant to MMBA section 3505.4.

The County opposed AFSCME's request and urged the Office of the General Counsel to deny it, asserting that the request was insufficient to meet the statutory requirements for factfinding. The County provided extensive written argument that factfinding was applicable only to bargaining disputes arising after negotiation for an MOU, and not to single issue bargaining disputes. AFSCME filed a timely response, disputing the County's arguments and asserting that if the Legislature intended to limit factfinding under the MMBA, it would have clearly said so, rather than using more comprehensive words, such as "dispute" and "differences" in referring to what is subject to factfinding.

On October 2, 2013, the Office of the General Counsel informed the parties by e-mail that AFSCME's request was approved. This determination was memorialized on October 4, 2013, in the form of an administrative determination.

After being granted extensions of time, the County filed a timely appeal of the administrative determination on October 28, 2013, and AFSCME filed a timely response on November 21, 2013.

ADMINISTRATIVE DETERMINATION

In explaining its reasons for approving AFSCME's request, the Office of the General Counsel first noted that the bargaining obligation under the MMBA extends to all matters relating to wages, hours, and other terms and conditions of employment, and that this duty requires the employer to refrain from making unilateral changes until the parties have bargained to an agreement or impasse and complied with any applicable post-impasse resolution procedures. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1083-1084.) AB 646 imposed new obligations on employers, but also provided a "more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose" their last, best and final offer (LBFO). (Admin. Determination, p. 6.)

The administrative determination noted that although the MMBA does not define the term "impasse," PERB has held that the definition of impasse under the Educational Employment Relations Act (EERA)[4] is the appropriate standard under the MMBA as well. The definition of "impasse" does not limit the types of "disputes" or "differences" to just those arising during negotiations for a new or successor collective bargaining agreement (CBA) or MOU.

Additionally, the administrative determination noted that decisions of the courts, PERB and National Labor Relations Board have made clear that collective bargaining is a continuing process that is not restricted to one comprehensive agreement or one single period of bargaining. (*Conley v. Gibson* (1957) 355 U.S. 41, 46). The parties' bargaining obligation encompasses meeting and conferring with respect to wages, hours, and other terms and

[4] EERA is codified at Government Code section 3540 et seq.

conditions of employment, as well as proposed changes in negotiable terms and conditions of employment that may arise during the term of an MOU.

Turning next to the language in the MMBA, the Office of the General Counsel concluded that when construed as a whole, the MMBA does not limit the applicability of its factfinding provisions solely to disputes arising during negotiations for an MOU. MMBA section 3505.4 uses the term "differences" and "dispute," without limitation to disputes arising during negotiations over the MOU. Likewise, in MMBA section 3505.5, which authorizes the factfinding panel to make findings of fact and recommend terms of settlement, there is no language limiting the parties' "dispute" to one arising during negotiations for an MOU or to any other type of negotiations. The Office of the General Counsel noted that if the Legislature intended to limit the types of disputes that could be submitted to factfinding, it could have explicitly done so.

The Office of the General Counsel concluded that from a policy perspective, the County's position would undermine the intent of AB 646, which was to "prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency's goals and agenda." (Admin. Determination, p. 9.) If factfinding applies only to disputes arising during negotiations over an MOU, employers could essentially avoid factfinding by splintering negotiations over terms and conditions of employment into single, mid-term bargaining sessions.

Finally, the Office of the General Counsel noted that PERB has applied the statutory impasse procedures under EERA and the Higher Education Employer-Employee Relations Act (HEERA)[5] to single-subject and effects bargaining disputes, citing *Moreno Valley Unified School District* (1982) PERB Decision No. 206, *Redwoods Community College District* (1996)

[5] HEERA is codified at Government Code section 3560 et seq.

PERB Decision No. 1141 (*Redwoods CCD*), and *California State University* (1990) PERB Decision No. 799-H. As PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to disputes arising during negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper.

The Office of the General Counsel summarily rejected the County's assertion that AB 646 violates the California Constitution. Factfinding, unlike binding arbitration for resolution of impasses, is an advisory procedure and therefore does not interfere with the County's constitutional authority to set wages. Nor does AB 646 delegate to a private party any of the County's powers. It therefore does not violate the state constitution.

COUNTY'S APPEAL

The County interposes both procedural and substantive objections to the administrative determination. As an initial matter, it claims that PERB lacks jurisdiction to consider the issue in this case–whether AB 646 applies to a single issue bargaining dispute–because the matter should be determined only through an unfair practice proceeding, rather than by appeal of an "advisory" opinion of the Office of the General Counsel. According to the County, MMBA section 3509, which grants PERB jurisdiction over enforcement of the MMBA, "explicitly provides that alleged violations of the MMBA shall be processed as unfair labor practice charges." (County's Appeal, p. 6.) Therefore, reasons the County, PERB may not bypass the unfair practice process and issue an advisory opinion "regarding whether or not a local public agency has failed to comply with what a union might choose to allege is a required impasse resolution procedure." (*Ibid.*) Depriving the County of an unfair practice hearing deprives it of due process, the argument continues.

The County asserts, "the only factfinding action that PERB is empowered to take pursuant to Section 3505.4(a) is to appoint a panel chair for a factfinding panel." PERB does not have the authority to make a legal determination on the merits of an employer's failure to comply with the factfinding requirements of AB 646 outside of the unfair practice process. (County's Appeal, p. 8.) In response to a factfinding request, PERB is limited to determining whether the request was timely, or whether the request included a statement that the parties were unable to reach a settlement, according to the County. The Board would be free to adjudicate the larger issue–whether factfinding applies to all bargaining disputes–were AFSCME to file an unfair practice charge, which would be subject to a full administrative hearing and ultimate appeal to the Board itself. (County's Appeal, p. 14.)

Next, the County asserts that PERB is bound by a recent decision in *County of Riverside v. Public Employment Relations Board,* (2013) Case No. RIC 1305661 (*County of Riverside*), issued by the superior court in Riverside County. In that case, the court agreed with the employer and found that in passing AB 646, the Legislature intended factfinding under the MMBA to be available only to address bargaining disputes over a new or successor MOU. The superior court enjoined PERB from appointing a factfinding panel in any bargaining dispute arising under the MMBA other than in MOU negotiations, and further required PERB to dismiss any pending factfinding requests involving disputes over single issue bargaining or the negotiations over the effects of a management decision.

In the County's view, the administrative determination, issued a few weeks after the superior court's decision in the *County of Riverside* case, violated the court's order, and PERB should now vacate the determination. The County also asserts that the doctrines of collateral estoppel and res judicata bar PERB from re-litigating the issues that were determined by the

superior court. Thus, PERB is precluded from "holding that the County must go to factfinding on the instant dispute." (County's Appeal, p. 12.)

In its third procedural argument, the County contends that PERB's neutrality has been compromised because the Office of the General Counsel issued the administrative determination while concurrently representing PERB as a defendant in the *County of Riverside* superior court litigation involving the same issue that is the subject of this appeal. According to the County, "basic notions of due process and appearances of neutrality preclude the same person or office from both advocating a position with a neutral decision-making Board and at the same time turning around and serving as the Board's legal advisor on the identical issue." (County's Appeal, p. 13.)

Regarding the merits of this controversy, the County asserts that the legislative history and statutory interpretation of AB 646 "lead to the conclusion that AB 646 factfinding procedures apply only to negotiations for a new MOU." (County's Appeal, p. 14.) Because the factfinding provisions of MMBA sections 3505.4 through 3505.7 immediately follow the MMBA sections that relate to MOU negotiations, factfinding therefore can only apply to MOU negotiations, according to the County.

In the County's view, MMBA section 3505.7 provides further proof that factfinding applies only to MOU negotiations. That section allows the public agency to implement its LBFO after completing impasse resolution procedures, but it may not implement an MOU. MMBA section 3505.7 also provides that after the imposition of the LBFO, the employee organization retains its right to meet and confer on all matters within the scope of representation annually before adoption of the agency's budget. According to the County, this annual right to negotiate applies only in the context of successor MOUs.

Further argued by the County, a factfinding panel must take into consideration the eight factors enumerated in MMBA section 3505.4(d), which refer to components of an MOU and only make sense "in the context of collective bargaining." (County's Appeal, p. 18.) For example, the factfinding panel is directed to consider and weigh the financial ability of the public agency; comparability of wage, hour and other conditions of employment between the relevant bargaining unit employees and other similarly situated employees of comparable public agencies; cost-of-living information; and overall employee compensation. According to the County, these factors "are only relevant when evaluating the interplay of economic and other proposals made in negotiations for a comprehensive successor collective bargaining agreement." (County's Appeal, p. 18.)

Next, the County argues that AB 646's exemption from factfinding for those jurisdictions that already use binding arbitration to resolve bargaining impasses (MMBA, § 3505.5(e)), provides further support for its position. According to the County, this exemption exists because binding arbitration provides a procedure for resolving MOU disputes. AB 646's goal of providing a "mandatory and uniform impasse procedure" would not be served if factfinding procedures were to apply to issues other than MOU negotiations, according to the County.

The County also objects to the administrative determination's reliance on PERB decisions under EERA, noting that there are significant differences between EERA and the MMBA. In particular, the County seeks to distinguish *Redwoods CCD, supra,* PERB Decision No. 1141, a case arising under EERA, because, according to the County, the legislative intent of AB 646 was to enhance the effectiveness of the collective bargaining process, whereas the purpose of EERA's factfinding provisions was to avoid strikes.

Finally, the County reiterates its claim that AB 646 unconstitutionally interferes with the County's right to manage its finances and determine compensation for its employees.

DISCUSSION

We first address the County's claim that the Board itself is without jurisdiction to consider the merits of this case, and then address other procedural objections raised by the County. We then turn to the merits of the case, first considering the purpose of factfinding in other statutes administered by PERB that include factfinding, and then explaining the differences between those statutes and the MMBA. Ultimately, this case requires us to discern the Legislature's intent in passing AB 646, thereby introducing factfinding into the MMBA as a procedure for resolving bargaining impasses. Did the Legislature intend to simply import and replicate the factfinding process and procedures from EERA and HEERA into the MMBA, or did it intend, as the County urges, to provide a much more limited procedure that applies only when the parties are at impasse in their negotiations over a new or successor comprehensive agreement? As we explain further, we conclude that in passing AB 646, the Legislature intended to import to the MMBA the factfinding processes of EERA and HEERA. Factfinding is a final step in the bargaining process. It is intended to facilitate agreement between the parties on any and all negotiable terms and conditions of employment, and is therefore not to be artificially restricted only to disputes arising during negotiations over a comprehensive MOU for a set duration.

I. PROCEDURAL ISSUES

A. Jurisdiction

After having urged the Office of the General Counsel to consider its arguments on the merits, i.e., that the factfinding procedures of the MMBA do not apply to single-issue bargaining disputes or any other disputes outside negotiations for a new or successor MOU, the

County now claims that the Board itself does not have authority to consider these arguments. We disagree. Both statutory and regulatory authority describe PERB's role in administering the provisions of AB 646.

Factfinding under the MMBA is triggered when a recognized employee organization files a request that the parties' "differences" be submitted to a factfinding panel. (MMBA, § 3505.4(a).) The request must be filed with the appropriate regional office of PERB, accompanied by proof of service and a statement that the parties have been unable to effect a settlement, and the request must be filed within certain time frames described in PERB Regulation 32802.[6]

Within five working days from when the request is filed, a PERB Board agent must notify the parties whether the request satisfies the requirements described above. If the request is not timely, no further action shall be taken by PERB. However, "if the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days." (PERB Reg. 32802(c).) Implicitly contained within the authority to determine whether the request is sufficient is the jurisdiction to assess whether the request is properly before the Board, i.e., whether the conditions precedent to a valid request for factfinding exist. Just as courts have jurisdiction to determine the scope of their jurisdiction, PERB necessarily has jurisdiction to determine whether the provisions of MMBA section 3505.4 apply to a particular factfinding request. (*SN Sands Corp. v. City and County of San Francisco* (2008) 167 Cal.App.4th 185, 192; *United States v. Superior Court* (1941) 19 Cal.2d 189, 195.)

[6] PERB is authorized to adopt regulations and to issue decisions implementing and interpreting the MMBA. (MMBA, § 3509(a); EERA, § 3541.3.)

After consideration of the County's and AFSCME's arguments on the merits, the Office of the General Counsel concluded that the factfinding procedures set forth in MMBA section 3505.4 et seq., are applicable to this dispute, and that the other requirements of PERB Regulation 32802 have been met.

An appeal may be taken (and therefore considered by the Board itself) from an administrative decision made by a Board agent (PERB Regs. 32350 and 32360.) The administrative determination issued by the Office of the General Counsel in this case is an administrative decision within the meaning of PERB Regulation 32350(b), which requires that it contain a statement of the issues, fact, law and rationale used in reaching the determination. This administrative determination is not a refusal to issue a complaint, a dismissal of an unfair practice charge, or a proposed decision following a formal hearing, all of which are excluded from the definition of "administrative decision" under PERB Regulation 32350(a). The County's appeal of the administrative determination is therefore properly before the Board itself pursuant to PERB Regulation 32360.[7]

The County is incorrect in its claim that PERB may only consider the issue in this case in the context of an unfair practice determination. It states: "The question of whether the County has violated any MMBA factfinding requirements should be determined through the unfair practice process, and PERB's Board only has jurisdiction to consider this issue via an appeal of an Administrative Law Judge's (ALJ) decision on an unfair labor practice concerning this issue." (County's Appeal, p. 5.) The flaw in this argument is that the County has not been accused of violating any MMBA factfinding requirements. The Office of the General Counsel

[7] PERB Regulation 32380 lists administrative decisions that are not appealable. Prior to October 1, 2013, the list included determinations regarding factfinding requests made pursuant to PERB Regulation 32802.

did not determine that the County had violated any part of the MMBA. It simply ordered the parties to select its panel member, and from that order, the County appeals.[8]

The County also argues that the administrative determination is an "advisory legal decision" because it "bypasses" the unfair practice process. As explained above, the administrative determination is not an "advisory" opinion. It resolved a controversy that was squarely placed before the Office of the General Counsel when the County claimed that factfinding did not apply to the bargaining dispute over which AFSCME requested factfinding.

B. Effect of Superior Court Decision in the *County of Riverside* Case

PERB appealed the court's decision in *County of Riverside*, which has the effect of staying the effectiveness of the superior court's decision until the case is finally determined by the appellate courts.[9] (Code Civil Proc., § 916; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189-190; *Private Investors v. Homestake Mining Co.* (1936) 11 Cal.App.2d 488 [writ of mandate stayed on appeal].) Thus, PERB is presently not bound by the superior court's order.

The County also asserts that the doctrines of res judicata and collateral estoppel bar PERB "through its General Counsel's Office now or in subsequent litigation from re-litigating issues that were already determined in prior court actions." (County Appeal, pp. 11-12.) How this applies to the Board's administrative determination of the County's appeal (as opposed to a re-litigation of a previously determined claim) we need not unravel, for it is well-settled in

[8] It is entirely possible that the same legal question we are presented with in this case could come before the Board as an unfair practice case if an employer were to unilaterally implements its LBFO without having participated in factfinding when it was allegedly obligated to do so. However, unfair practice litigation is not the only manner in which PERB is authorized to administer the MMBA. (MMBA, § 3509; EERA, § 3541.3.)

[9] The County's petition to the court of appeal for the fourth district for a writ of supersede as seeking to lift the automatic stay of the superior court's order was summarily denied on January 14, 2014.

California that neither res judicata nor collateral estoppel apply until and unless the judgment is final. (*Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 606; 7 Witkin Calif. Procedure, 5th ed. (2008) Judgment, § 364.) Because an appeal of the superior court's decision is pending, there is no final decision in the *County of Riverside* litigation yet.

C. Conflict of Interest Between the Board Itself and the Office of the General Counsel

The County claims that the Board itself cannot be neutral in this controversy because the Office of the General Counsel took a position in the *County of Riverside* litigation that is adverse to the County's position in this case and issued the administrative determination at issue here, which coincides with the Office of the General Counsel's defense in the *County of Riverside* litigation. This argument ignores the statutory role of the Office of the General Counsel and misapprehends how the Office of the General Counsel and the Board itself function.

MMBA section 3509(a), which moved enforcement of the MMBA from the courts to PERB, provides that "[t]he powers and duties of the board described in Section 3541.3 shall also apply, as appropriate, to this chapter." Included in the powers and duties enumerated in EERA section 3541.3 is the power to adopt rules and regulations to carry out the provisions and effectuate the purposes and policies of the MMBA and other statutes PERB administers, and to take "any other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of" the statutes it administers. (EERA, § 3541.3(g) and (n).) Like most public agencies, PERB operates through its employees who are delegated the authority to carry out the statutory functions of the agency.[10] (EERA, § 3543.1(k).)

[10] PERB regulations make the distinction between "the Board itself," meaning the appointed members and "the Board," which means either the appointed Board or any Board agent. (PERB Regs. 32020 and 32030.)

The General Counsel, appointed pursuant to EERA section 3541(f), has broad responsibility to "assist the board in the performance of its functions." In addition, the General Counsel is specifically authorized to represent PERB in "any litigation or other matter pending in a court of law to which the board is a party or in which it is otherwise interested." (EERA, § 3541(g).) When PERB is sued over an administrative decision made in the course of administering MMBA section 3505.4, it is completely within PERB's authority and duty to defend itself in that litigation, through its General Counsel.

The Office of the General Counsel has other duties in addition to representing the agency in litigation. The General Counsel supervises PERB's regional attorneys who investigate and process unfair practice charges to determine whether they should be dismissed or whether PERB should issue a complaint based on the charge. Regional attorneys also investigate and process petitions for representation, decertification, and unit modifications, and a variety of other issues concerning the identity of the exclusive representative. PERB Regulation 32793 authorizes PERB to determine if parties who request the appointment of a mediator pursuant to EERA or HEERA are truly at impasse. These determinations are made by the Board's agents, the regional attorneys in the Office of the General Counsel. And PERB Regulation 32802, which sets forth the procedure for initiating the factfinding process under the MMBA, requires the factfinding request to be filed with the appropriate regional office, where a member of the Office of the General Counsel staff will determine if the request satisfies the requirements of the regulation.

The Board itself serves mainly as an appellate body, deciding appeals taken from proposed decisions after a formal hearing before an administrative law judge (ALJ), dismissals of unfair practice charges, administrative determinations, as in this case, and rulings on motions and interlocutory orders. The County is incorrect in its assertion that the General

Counsel advises PERB in this endeavor. It is the legal advisor, appointed by the Governor for each Member of the Board, that provides legal guidance to Board Members regarding cases under the Board's consideration, not the General Counsel. (EERA, § 3541(h).) Thus, the web of conflict between the Office of the General Counsel and the Board itself presumed by the County simply does not exist.[11]

Because the Office of the General Counsel has no role in advising the Board itself in its appellate function regarding cases pending before the Board, there is nothing improper about the Office of the General Counsel representing PERB in the Riverside County litigation seeking to halt PERB's administration of MMBA section 3505.4. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731.) See also, *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 10 (*San Diego*), where the state Supreme Court rejected a similar argument, i.e., that PERB could not direct its general counsel to seek injunctive relief against an unfair practice without compromising the Board's neutrality in the subsequent consideration of the merits of the unfair practice case. The Court noted in

[11] The fallacy of the County's argument is further underscored by the role of the Office of the General Counsel in unfair practice charge processing. Pursuant to PERB Regulation 32620, a regional attorney in the Office of the General Counsel investigates unfair practice charges and either issues a complaint or dismisses the charge if it fails to state a prima facie case. Dismissals are appealable to the Board itself. (PERB Reg. 32635.) If the County's claim regarding a conflict of interest were correct, the Board would not be able to exercise its appellate function to review dismissals of unfair practice charges. Yet, EERA section 3541.5 explicitly vests in the Board the duty to devise and promulgate procedures for deciding unfair practice cases. Since the inception of the agency, PERB has delegated to the Office of the General Counsel the authority to investigate unfair practice charges initially, subject to the Board's appellate review.

We also note that the County's conflict of interest argument is belied by its invitation and assertion that this matter only be adjudicated as an unfair practice case. The Board itself would be in the exact position it is now in deciding the unfair practice appeal, which originates when the Office of the General Counsel dismisses a charge, or when, after a complaint issues, an ALJ hears the case and issues a proposed decision.

San Diego, that EERA section 3541.3(i) gives PERB prosecutorial power, e.g., to investigate unfair practice charges and alleged violations of EERA and to take any action as the Board deems necessary to effectuate the policies of EERA. The fact that EERA section 3541(f) provides for a General Counsel who is to "assist the board in the performance of its functions under this chapter" indicated to the Court that the Board could delegate its prosecutorial functions to its General Counsel. While we are not here concerned with an unfair practice, the principle remains the same. There is nothing improper about the General Counsel defending PERB in litigation, even if the same issues are subsequently presented to the Board itself by appeals of administrative determinations. Indeed, the statute prescribes this. EERA section 3543.1(g) specifically authorizes PERB's General Counsel to represent the Board in "any litigation or other matter pending in a court of law to which the board is a party . . . ."

II. AB 646: MMBA AND THE ROLE OF FACTFINDING IN CALIFORNIA LABOR RELATIONS

A. Background

The MMBA, passed in 1968, was the first true collective bargaining law passed in California for public employees.[12] Its purpose, articulated in MMBA section 3500, is to "promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment." An additional purpose is to improve employer-employee relations within various public agencies by "providing a uniform basis for recognizing the right of employees to join organizations of their own choice and be represented by those organizations

[12] Earlier statutes such as the George M. Brown Act (Stats. 1961, ch. 1964, § 1) and the Winton Act (Stats. 1965, ch. 2041, § 2) did not provide for collective bargaining as commonly conceived because they did not require the employer to recognize a single exclusive representative of employees, and did not place on either the employer or employees a duty to negotiate in good faith. (See *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 176.) Nor did either of these statues provide for written, binding agreements after the conclusion of meeting and conferring.

in their employment relationships with public agencies." Prior to the passage of AB 646 in 2011, the MMBA had no provision for factfinding, and mediation was either voluntary or dictated by local rule or regulation.

Although the statutes enacted after the MMBA (notably EERA and HEERA) prescribed more elaborate procedures for resolving bargaining impasses, including factfinding, the MMBA recognized the utility of impasse resolution procedures even before the passage of AB 646. MMBA section 3505, defining "meet and confer in good faith" states, in relevant part:

> The process [of meeting and conferring in good faith] should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

1. Factfinding Under EERA and HEERA

In 1975, the Legislature passed Senate Bill No. 160, (Stats. 1975, ch. 961) (SB 160), creating the Educational Employment Relations Board (later re-named the Public Employment Relations Board) and enacting EERA. The purposes of EERA are very similar to those of the MMBA: "to promote the improvement of personnel management and employer-employee relations within the public school systems . . . by providing a uniform basis for recognizing the right of . . . employees to join organizations of their own choice, to be represented by the organizations in their . . . employment relationships with public school employers." (EERA, § 3540.)[13]

[13] HEERA, the other statute under PERB's jurisdiction that contains a factfinding process, states its purpose slightly differently, exhibiting deference to academic freedom, the constitutional status of the Regents of the University of California, etc. HEERA section 3560(a) declares the state's fundamental interest in the development of harmonious and cooperative labor relations between higher education employers and their employees. Subsection (e) of 3560 further states that it is the intent of HEERA to accomplish its purpose by providing a uniform basis for recognizing the

From its initial draft and throughout amendments made to the bill, SB 160 contained the impasse procedures provisions that now appear in EERA section 3548.[14] Under those provisions, either a public school employer or the exclusive bargaining representative may declare that "an impasse has been reached . . . in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable." The Board appoints a mediator if it determines that an impasse exists. (EERA, § 3548.)

If the mediator is unable to effect a settlement of the dispute, and declares that factfinding is "appropriate to the resolution of the impasse," either party may request that their differences be submitted to a factfinding panel. (EERA, § 3548.1.) Each party designates its appointee to the panel and PERB selects a chairperson.

The factfinding panel then conducts an investigation and may hold a hearing, or "take any other steps as it may deem appropriate." EERA section 3548.2(b) directs the factfinders to "consider, weigh, and be guided by all the following criteria:"

> (1) State and federal laws that are applicable to the employer.
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> (2) Stipulations of the parties.
>
> (3) The interests and welfare of the public and the financial ability of the public school employer.
>
> (4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding

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right of employees to designate representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select an exclusive representative for the purpose of meeting and conferring.

[14] In fact, earlier unsuccessful bills to enact collective bargaining for all public sector employees contained similar provisions for factfinding after mediation. See SB 400 (Moscone), which was vetoed in 1974.

> proceeding with the wages, hours and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.
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> (5) The consumer price index for goods and services, commonly known as the cost of living.
>
> (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.
>
> (7) Any other facts, not confined to those specified in paragraphs (1) through (6), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

The purpose of these impasse resolution procedures was to provide an orderly method for assisting the parties in reaching agreement over bargaining disputes. Factfinding was seen as an alternative to binding arbitration for impasse resolution, which is not provided for in EERA. In addition, "The impasse procedures almost certainly were included in EERA for the purpose of heading off strikes. [Citation omitted.] Since they assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith and thus an unfair practice under section 3543.6, subdivision (d)." (*San Diego, supra,* 24 Cal.3d 1, 8-9.)[15] In short, impasse resolution procedures under EERA were conceived as an instrument for bringing labor peace by assisting parties in reaching agreement in negotiations.

[15] PERB cases decided after *San Diego, supra,* 24 Cal.3d 1 established that a strike occurring before the completion of impasse procedures, including factfinding, creates a rebuttable presumption that the striking employee organization violates its duty to bargain in good faith or to participate in the impasse resolution procedures in good faith. (*Fresno Unified School District* (1982) PERB Decision No. 208; *Sacramento City Unified School District* (1987) PERB Order No. IR-49.)

HEERA contains impasse procedures very similar to those in EERA. (HEERA, § 3590 et seq.) Either party may declare "that an impasse has been reached between the parties in negotiations over matters within the scope of representation." (HEERA, § 3590.) If the Board determines that an impasse exists, it appoints a mediator who shall attempt "to persuade the parties to resolve their differences and effect a mutually acceptable memorandum of understanding." (HEERA, § 3590.) If the mediator is unable to effect settlement "of the controversy" and declares that factfinding is appropriate, either party may request that their differences be submitted to a three-person factfinding panel, consisting of one member appointed by each party and the chairperson appointed by the Board.

The factfinding panel meets with the parties and considers their respective positions and makes additional inquiries and investigations as it deems appropriate. If the dispute is not settled within 30 days, the factfinding panel makes findings of fact and recommends "terms of settlement," which are advisory. Unlike under EERA and the MMBA, the HEERA factfinding panel is not instructed to consider any particular factors in making its recommendations for settlement.

2. The Scope of Impasse Resolution Procedures Under EERA and HEERA

EERA section 3548 provides that either party may invoke impasse resolution procedures by declaring that "an impasse has been reached . . . in negotiations over the matters within the scope of representation." HEERA contains the same language at HEERA section 3590. Under both statutes, after PERB determines that an impasse exists, a mediator is appointed to assist the parties in "resolving the controversy," and to attempt to "effect a

mutually acceptable agreement."[16] If the mediator is unsuccessful in settling "the controversy," the parties' "differences" are submitted to a factfinding panel. (EERA, § 3548.1; HEERA, § 3591.) If the "dispute" is not settled through the factfinding investigation, the panel shall recommend "terms of settlement." (EERA, § 3548.3; HEERA, § 3593(a).)

Thus, the plain language of EERA and HEERA extends factfinding to negotiations over all matters within the scope of representation. By using such terms as "differences," "controversy" and "dispute," the Legislature avoided limiting EERA's and HEERA's impasse resolution procedures only to negotiations over new or successor collective bargaining agreements. On the contrary, the language used in other parts of EERA and HEERA points in the opposite direction. "Impasse" "means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating" where future meetings would be futile. (EERA, § 3540.1(f), emphasis added.)[17] "Impasse" is not confined to intractable disputes over only a particular type of agreement, such as a single CBA or successor MOU.

EERA also defines "Meeting and negotiating" expansively. It means "meeting, conferring, negotiating and discussing . . . in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached . . . ." (EERA, § 3540.1(h).)[18] Agreement on

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[16] HEERA is phrased slightly differently. The mediator is to "persuade the parties to resolve their differences and effect a mutually acceptable memorandum of understanding." (HEERA, § 3590.)

[17] HEERA defines "Impasse" as "a point in meeting and conferring at which [the parties'] differences in position are such that further meetings would be futile." (HEERA, § 3562(j).)

[18] HEERA's definition of "Meet and confer" more closely replicates that of the MMBA. Under HEERA the parties have a mutual obligation "to meet at reasonable times and to confer in good faith with respect to matters within the scope of

matters within the scope of representation include not only complete CBAs, but settlements of disputes over a myriad of terms and conditions of employment, because the duty to bargain is not limited only to negotiations that result in written CBAs.

It is beyond dispute that the duty to bargain is an ongoing obligation on the part of both parties that does not necessarily end once a CBA is finalized. (*National Labor Relations Bd. v. Jacobs Mfg. Co.* (2d. Cir. 1952) 196 F. 2d 680 [duty to bargain continues during the term of a CBA, unless the duty is discharged or waived].) PERB has followed this rule. (*Placentia Unified School District* (1986) PERB Decision No. 595; *State of California (Department of Forestry and Fire Protection)* (1993) PERB Decision No. 999-S.)

The duty to bargain in good faith applies to any matter within the scope of representation and is not confined to negotiations that result in a comprehensive MOU for a certain duration. Thus, an employer must refrain from making unilateral changes in negotiable terms and conditions of employment unless and until it has bargained in good faith with the exclusive representative. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51; *San Mateo County Community College District* (1979) PERB Decision No. 94.) This prohibition against unilateral changes extends through the completion of any impasse procedures. (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 32-33 (*Modesto*); *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900; *Moreno Valley Unified School District* (1982) PERB Decision No. 206 (*Moreno Valley*).)

The duty to bargain also includes the duty to negotiate over the implementation and foreseeable effects of managerial decisions not otherwise subject to the process of collective bargaining, such as layoffs, staffing levels, employee background checks, additional

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representation and to endeavor to reach agreement on matters within the scope of representation. This process shall include adequate time for the resolution of impasses. If agreement is reached . . . [the parties] shall jointly prepare a written memorandum of understanding . . . ." (HEERA, § 3562(m).)

educational programs, etc. (*International Assn. of Fire Fighters, Local 188 v. Public Employment Relations Bd. (City of Richmond)* (2011) 51 Cal.4th 259, 277 (*International Assn. of Fire Fighters*); *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223; *County of Santa Clara* (2013) PERB Decision No. 2321-M; *Sutter County In-Home Supportive Services Public Authority* (2007) PERB Decision No. 1900-M; *Trustees of the California State University* (2012) PERB Decision No. 2287-H; *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623 (*Claremont*).) Likewise, parties have an obligation to bargain over particular subjects contained in a written agreement when they have mutually agreed to re-open negotiations on those subjects during the term of that agreement, commonly concerning wages and benefits, and over any mandatory subject not covered in the CBA or not waived by a zipper clause or management rights clause.

Under EERA, the end product of such negotiations is a "written document incorporating any agreements reached," if either party requests a written document. (EERA, § 3540.1(h).) HEERA requires the parties to "jointly prepare a written memorandum of understanding" after reaching agreement on matters within the scope of representation. (HEERA, § 3562(m).) Under the MMBA, an MOU is the end product of meeting and conferring on matters within the scope of representation if a tentative agreement is adopted by the governing body of the public agency. (MMBA, § 3505.1.) In other words, an "MOU" signifies a written agreement on any matter within the scope of representation. It can address a single subject, the effects of a decision within the managerial prerogative, mid-term negotiations, or side letters of agreement, etc. MOUs are the manifestation of the parties' agreement on any negotiable subject. Contrary to the County's implication, the term "MOU" is not limited to a document that results from negotiations for a comprehensive agreement of a set duration. All negotiations are negotiations "for an MOU."

As shown, the duty to bargain in good faith extends well beyond the duty to bargain for a comprehensive MOU for a set duration, and that duty includes good faith participation in the impasse resolution procedures. Given that there is no language in EERA or HEERA that limits impasse resolution procedures only to negotiations for a comprehensive contract, it follows that factfinding, at least under EERA and HEERA, applies to all bargaining disputes concerning matters within the scope of representation.

PERB has held as much throughout its administration of EERA section 3548 et seq., and under HEERA section 3590. In *Moreno Valley, supra,* PERB Decision No. 206, pp. 4-5, the Board explained:

> The assumption of unilateral control over the employment relationship prior to exhaustion of the impasse procedures frustrates the EERA's purpose of achieving mutual agreement in exactly the same ways that such conduct frustrates that purpose when it occurs at an earlier point. [Citation omitted.] The impasse procedures of EERA contemplate a continuation of the bilateral negotiations process . . . . For the reasons set forth in San Mateo Community College District [(1979) PERB Decision No. 94], we find that following a declaration of impasse, a unilateral change regarding a subject within the scope of negotiations prior to exhaustion of the impasse procedure is, absent a valid affirmative defense, per se an unfair practice.

The Board's decision in *Moreno Valley, supra,* PERB Decision No. 206 was affirmed by the court of appeal in *Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191 (*Moreno v. PERB*). The court explained: "Since 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process, . . . we think the Board reasonably determined that the considerations warranting per se treatment of unilateral changes at the negotiation stage also warranted per se treatment of such changes prior to the exhaustion of the statutory impasse procedure." (*Moreno v. PERB*, p. 200.) The court also affirmed PERB's holding that the District was

obligated to exhaust impasse resolution procedures prior to eliminating certain positions, a decision over which the employer had to negotiate only the effects thereof. Thus, factfinding under EERA applies to a wide variety of bargaining disputes, including issues presented by effects bargaining.

Redwoods CCD, supra, PERB Decision No. 1141, also evidences PERB's consistent interpretation that EERA's factfinding procedures apply without limitation to bargaining disputes, whether arising in the context of negotiations over a comprehensive agreement or otherwise. In that case, the parties' CBA regarding work hours permitted the employer to seek voluntary adjustments of work schedules. If there was no voluntary agreement on such adjustments, the CBA provided for negotiations between the employer and employee organization. If negotiations proved futile, the CBA provided for private mediation, and if that was not successful, "the dispute shall not be submitted to a fact-finding panel under the provisions of the Educational Employment Relations Act." (*Redwoods CCD,* ALJ Proposed Dec., p. 6). The parties negotiated over the employer's proposal to rotate security officers' shifts but did not reach agreement. Private mediation was also unsuccessful, and the employer implemented its proposed change. The employee organization filed an unfair practice charge alleging that the employer had failed to participate in the impasse procedure in good faith in violation of EERA section 3543.5(e). The issue before PERB was whether the parties could legally waive the impasse resolution procedure established by EERA. The Board held that factfinding may not be waived because it was intended as a public benefit. Implicit in this holding is that factfinding was found to apply to a single-subject dispute—shift rotation.

The County objects to the Office of the General Counsel's reliance on *Redwoods CCD, supra,* PERB Decision No. 1141, to support its administrative determination, but we find the case relevant to demonstrate how PERB interprets the factfinding process under EERA.

A review of factfinding reports issued by panels appointed to resolve EERA and HEERA bargaining disputes reveals that PERB has consistently appointed mediators and factfinding panels pursuant to EERA section 3548 and HEERA section 3590 to assist the parties in resolving a variety of disputes, not merely those involving the negotiations of new or successor collective bargaining agreements. These include the effects of layoffs (*Natomas Unified School District* (2012) FF-663; *Stockton Unified School District* (2012) FF-661), and single issue disputes such as health and welfare benefits (*Santa Monica Community College District* (2011) FF-653; *Wasco Union High School District* (2011) FF-644), work-year calendar (*San Miguel Joint Union School District* (2011) FF-650), application of a salary formula (*California State University* (2010) FF-634-H), binding arbitration (*Chico Unified School District* (2008) FF-623), and fee waiver (*California State University* (2007) FF-613). Factfinding panels have also been appointed to resolve bargaining disputes arising in re-opener negotiations (*Palmdale School District* (2013) FF-691; *Ramona Unified School District* (2013) FF-688; *Alameda Unified School District* (2012) FF-665; *Red Bluff Union Elementary School District* (2011) FF-658; *California State University* (2011) FF-654; *Lodi Unified School District* (2010) FF-645; *San Carlos School District* (2010) FF-638; *Hayward Unified School District* (2007) FF-612; *University of California* (2008) FF-624).[19]

[19] The reports of factfinding panels appointed pursuant to EERA and HEERA are available at PERB's website, www.perb.ca.gov. The reports are part of PERB's official files, of which we take administrative notice. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 23; *Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 4.) The vast majority of factfinding reports concern impasses reached by parties who were negotiating for successor agreements.

B. MMBA Factfinding

1. The Plain Language of AB 646

We turn now to the language of MMBA section 3505.4 et seq., to consider the differences between that statute and EERA and HEERA to determine whether those differences mandate a different interpretation of the scope of MMBA factfinding, bearing in mind that our ultimate task is to discern the Legislature's intent in passing AB 646.

AB 646 added to the MMBA sections 3505.4 through 3505.7, which permit an employee organization to request that the parties' "differences" over bargaining be submitted to a factfinding panel after mediation, if utilized, was unsuccessful. The factfinding panel is empowered to hold hearings and investigations and ultimately make findings and recommendations to resolve the bargaining dispute. The panel's recommendations are not binding on either party, and the public agency is free to implement its LBFO after holding a public hearing on the impasse.

There are salient differences between the impasse resolution procedures prescribed by EERA and HEERA on the one hand, and those contained in the MMBA. Under the latter statute, mediation is either subject to local rule or regulation, or completely voluntary with the parties. (MMBA, § 3505.2.) PERB has no role in appointing a mediator under the MMBA and no role in determining at this stage whether an impasse exists. Likewise, a mediator, if utilized by the parties under the MMBA, has no role in determining that factfinding is appropriate to resolving the dispute. Instead, factfinding may be invoked under the MMBA only by the employee organization within certain timeframes after the completion of mediation, if it was utilized, or after a written declaration of impasse by either party. (MMBA, § 3505.4.) As under the EERA and HEERA, the Board selects the chairperson of the MMBA

factfinding panel, or the parties may mutually agree upon a chair in lieu of the person selected by the Board. (MMBA, § 3505.4.)

The MMBA borrows from EERA section 3548.2(b) in directing the factfinding panel to "consider, weigh and be guided by all the following criteria." (MMBA, § 3505.4(d).) These criteria, set forth *infra* at pages 42-43, are identical, except that an MMBA factfinding panel must consider local rules, regulations, and ordinances in addition to state and federal laws that are applicable to the employer.

The factfinding panel recommendation for terms of settlement under all three statutes is advisory only, and is to be submitted to the parties privately before the public employer is required to make it public. (MMBA, § 3505.5(a); EERA, § 3548.3(a); HEERA, § 3593(a).)

The cost of the panel chairperson is equally divided between the parties under the MMBA. (MMBA, § 3505.5(b) and (c).) EERA and HEERA require the Board to pay for the chairperson selected by the Board. (EERA, § 3548.3(b); HEERA, § 3593(b).)

The MMBA recognizes that some charter cities, charter counties, or a charter city and county may provide in their charter a provision for binding arbitration if an impasse has been reached between the parties. The provisions of MMBA section 3505.4 do not apply to such charter entities "with regard to its negotiations with a bargaining unit to which the impasse procedure applies." (MMBA, § 3505.5(e).) There is no similar provision for binding arbitration in either EERA or HEERA to resolve bargaining impasses.

MMBA section 3505.7 permits the public agency subject to the factfinding procedures to implement its LBFO no earlier than ten days after the factfinding panel's written findings of fact and recommended terms of settlement have been submitted to the parties and after the public agency has held a public hearing regarding the impasse. This codifies PERB decisions under EERA and HEERA holding that an employer may not implement its LBFO until after

impasse resolution procedures have been exhausted. (*Rowland Unified School District* (1994) PERB Decision No. 1053; *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S.)

MMBA section 3505.7 additionally clarifies the status of an imposed LBFO. The public agency may implement its LBFO after the exhaustion of impasse resolution procedures, but it may not implement an MOU. Further, "[t]he unilateral implementation of a public agency's last, best and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law." This language is not replicated in EERA or HEERA.

The County points to three differences between EERA and the MMBA that it claims justify a narrow interpretation of AB 646. First, EERA applies to schools and colleges, and the MMBA applies to municipalities and local governmental subdivisions of the state. Second, the MMBA permits local employers to adopt their own local rules governing employment relations, including resolution of impasses. And third, EERA has a "complicated" scope of bargaining, which specifically enumerates certain terms and conditions of employment and identifies circumstances in which the Education Code applies if the parties fail to reach agreement. The scope of bargaining under the MMBA, in contrast, requires bargaining on wages, hours and terms and conditions of employment. (County Appeal, p. 20-21.) While the County identifies these differences between the statutory schemes, it fails to explain why they require a radically different interpretation of the factfinding provisions contained in the MMBA. Nor do we believe the differences we identified above require, or even suggest, that MMBA factfinding applies only to comprehensive MOU negotiations.

At the time AB 646 was passed, the law regarding impasse resolution was well-established. The Legislature is presumed to have known that PERB applied existing impasse resolution procedures to single-issue bargaining disputes, mid-term contract negotiations disputes, and effects bargaining disputes. (*Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1018; *Cooper v. Unemployment Ins. Appeals Bd.* (1981) 118 Cal.App.3d 166, 170.) Likewise, the Legislature is presumed to have knowledge of judicial decisions describing the scope of the duty to meet and confer in good faith, namely that the duty covers more than simply the duty to meet and confer over the terms of an MOU. (See *Claremont, supra,* 39 Cal.4th 623 [the duty to bargain attaches to proposed changes in wages, hours and other terms and conditions of employment]; *International Assn. of Fire Fighters, supra,* 51 Cal.4th 259 [duty to meet and confer on the effect of management decisions which are themselves within the prerogative of management to make].) (*Peters v. Superior Court* (2000) 79 Cal.App.4th 845, 850 (*Peters*).)

It is onto this statutory and regulatory landscape that the Legislature added the requirements of AB 646. The question before us then is whether, in passing AB 646, the Legislature intended to eschew PERB's earlier construction and application of impasse resolution procedures under EERA and HEERA and to create a much-constrained factfinding procedure applicable only to MOU negotiations.

In interpreting statutes, we are guided by the rules of statutory construction which seek to ascertain the intent of the Legislature so as to effectuate the purpose of the law by giving a reasonable and common sense interpretation consistent with the apparent purpose of the statute. Significance should be given, if possible, to every word, phrase and sentence of the statute, and effort must be made to harmonize the various parts of the enactment in the context of the statutory framework as a whole. We must take into account the harms to be remedied

and the history of legislation on the same subject, public policy and consistent administrative construction. (*DeYoung v. City of San Diego* (1983) 147 Cal.App.3d 11, 18; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.) As noted in *Medical Board v. Superior Court* (2001) 88 Cal.App.4th 1001, 1016: "One 'elementary rule' of statutory construction is that statutes in pari materia—that is, statutes relating to the same subject matter—should be construed together." With these principles in mind, we turn to the task of ascertaining the Legislature's intent in passing AB 646.

Under all three statutes discussed here, the purpose of impasse resolution, whether mandatory or voluntary, is to bring resolution to bargaining disputes with the assistance of a neutral third party to mediate, persuade, or suggest terms of settlement. Impasse resolution procedures represent a legislative policy choice that favors negotiations above unilateral action by either party and seeks to provide a structured "cooling off" period. During this period, all avenues to a peaceful settlement of bargaining disputes can be explored as each party presents the factfinding panel with information, and the panel in turn makes findings of fact and suggests terms to settle the dispute.

The MMBA replicates EERA and HEERA in its description of the matters to which factfinding applies as "differences" and "disputes." (MMBA, §§ 3505.4(a) and 3505.6(a).)[20] No statute by its plain terms limits impasse resolution procedures to negotiations for collective bargaining agreements or comprehensive MOUs for a set duration. Yet the Legislature could have easily inserted such a limitation if that is what it intended. We find that the plain meaning of AB 646 is unambiguous. Therefore there is no need to resort to the legislative

[20] The MMBA defines "Mediation," the precursor to factfinding, as an effort by a third party "to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment." (MMBA, § 3501(e).)

history of AB 646 to discern the Legislature's intent. (*Peters, supra,* 79 Cal.App.4th 845; *Diamond Mutlimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047.)

2. Legislative History of AB 646

Even if we were to consider the legislative history of AB 646, it supports our construction of the statutory scheme. The County correctly notes that prior to the passage AB 646, local agencies had discretion to determine whether to adopt any impasse procedures or none at all. It is undeniable that one of the purposes of AB 646 was to provide for a uniform procedure for impasse resolution. A review of legislative committee reports that accompanied AB 646 through both houses of the Legislature shows that lawmakers believed that creating impasse procedures was likely to increase the effectiveness of the collective bargaining process by assuring that all avenues to agreement are fully explored before bargaining is declared unsuccessful.

Throughout AB 646's journey through the Assembly, committee reports replicate a quotation from its author, Assemblywoman Toni Atkins (Assemblywoman Atkins), on which the County relies heavily: "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed." (Assem. Com. on Public Employees, Retirement and Social Security, Rep. on AB 646 [2010-2011 Reg. Sess.] March 23, 2011 [proposed amendment].) Far from being conclusive, this statement indicates that impasse resolution would assist the parties in reaching agreement on MOUs. That does not imply an intent to limit impasse resolution procedures only to negotiations for a comprehensive MOU. That Assemblywoman Atkins did not provide a complete listing of all possible bargaining disputes in this sentence does not evince a legislative intent that factfinding would apply only to bargaining disputes over comprehensive MOUs. As we explained earlier, the term "MOU"

refers to any written agreement on negotiable terms and conditions of employment adopted by the parties. It is not only a contract covering a *comprehensive* set of employment terms and conditions for a set term.

Moreover, Assemblywoman Atkins' statement cannot be relied on for legislative history because it does not necessarily represent the intent of other members of the Legislature who voted to support the bill. (*In Re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589-590; *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701; *Ross v. Ragingwire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 931.)

The summary prepared by the Assembly Committee on Public Employees, Retirement and Social Security for the May 4, 2011 hearing on AB 646 echoes Assemblywoman Atkins' comment: "SUMMARY: Establishes additional processes, including mediation and facfinding, that local public employers and employee organizations may engage in if they are unable to reach a collective bargaining agreement." (Assem. Com. on Public Employees, Retirement and Social Security, Rep. on AB 646 [2010-2011 Reg. Sess.] May 4, 2011 [Note: Date is the date of committee hearing.].) Significantly, the Assembly Public Employment, Retirement and Social Security Committee's summary changed by the third reading in the Assembly on the May 27, 2011 amended bill. Summarizing the amended bill, the committee report reads: "SUMMARY: Allows local public employee organizations to request fact-finding if a mediator is unable to reach a settlement within 30 days of appointment." (AB 646, 3d reading, as amended May 27, 2011.) (Emphasis added.) While the committee report also includes Assemblywoman Atkins' quote regarding the lack of a requirement for impasse resolution procedures where efforts to negotiate a collective bargaining agreement fail, it also includes the following observation from Assemblywoman Atkins: "The creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process,

by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful." (*Ibid.*, emphasis added.) As discussed earlier, the "collective bargaining process" encompasses all labor negotiations, not simply negotiations for a comprehensive MOU.

By the time AB 646 reached the Senate, committee reports describing its purpose and effect described it as a bill that would allow local public employee organizations to request factfinding "if a mediator is unable to effect a settlement of a labor dispute." (Emphasis added.) (Sen. Com. on Public Employment & Retirement, Rep. on AB 646 [2010-2011 Reg. Sess.] as amended June 22, 2011.) The analysis by the Senate Rules Committee prepared for the third reading summarizes the bill using the same term, "labor dispute." (Sen. Rules Com. Off. of Sen. Floor Analyses, 3d reading analysis of AB 646 [2010-2011 Reg. Sess.] as amended June 22, 2011.)

A review of the several versions of the bill itself is instructive. The Legislative Counsel's Digest of the first version of AB 646, introduced on February 16, 2011 reads, in pertinent part:

> The Meyers-Milias-Brown Act contains various provisions that govern collective bargaining of local represented employees . . . . The act requires the governing body of a public agency to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized organizations. . . . if the representatives of the public agency and the employee organization fail to reach an agreement, they may mutually agree on the appointment of a mediator . . . . If the parties reach an impasse . . . the public agency may unilaterally implement its last, best and final offer.
>
> This bill would . . . . provide that if the parties fail to reach an agreement either party may request that the board appoint a mediator, and would require the board, if it determines that an impasse exists, to appoint a mediator . . . .

> This bill would authorize either party to request that the matter be submitted to a factfinding panel if the mediator is unable to effect settlement of the controversy . . . . [¶] . . . if the dispute is not settled within 30 days, the factfinding panel [is required] to make findings of fact and recommend terms of settlement."

(Emphasis added.)[21]

Nothing in this summary confines impasse procedures to a single type of MOU. It begins with a description of existing law, referring to the duty to meet and confer in good faith generally on wages, hours and terms and conditions of employment. If the parties fail to reach "an agreement," they may request mediation. Since "an agreement" (as opposed to the term, "memorandum of understanding") refers to the conclusion of negotiations on any matter to which the duty to meet and confer attaches, this phrase in the Legislative Counsel's Digest signifies that mediation applies not only to comprehensive MOU negotiations, but to negotiations in general.

The use of the terms "matter," "controversy" and "dispute," as opposed to the more limited "MOU" or "collective bargaining agreement" (a term used in EERA and HEERA), lends further weight to the notion that the Legislature did not intend for the factfinding procedures of AB 646 to be limited to only negotiations for a comprehensive MOU.[22] Instead, AB 646 intended to import the EERA/HEERA model, slightly modified to accommodate some

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[21] Digests of bills prepared by the Legislative Counsel, like statements in legislative committee reports, may be relied on to determine legislative intent when those statements are in accord with a reasonable interpretation of the statute. (*Maben v. Superior Court* (1967) 255 Cal.App.2d 708, 713.)

[22] See *Retail Clerks International Association, Locals Unions Nos. 128 and 633 v. Lion Dry Goods* (1962) 369 U.S. 17, 25, relying on the assumption that Congress was well-aware of the meaning of the term "collective bargaining agreements" as opposed to "contracts" when it passed section 301(a) of the Labor Management Relations Act (29 USC, § 185) giving federal courts jurisdiction over suits for violations of contracts between an employer and labor organization.

of the unique aspects of the MMBA (such as binding arbitration to resolve impasses in some jurisdictions). Use of these terms, i.e., "matter," "controversy," and "dispute," did not change when AB 646 was amended on May 5, 2011, to authorize only an employee organization to request factfinding. The Legislative Counsel continued to use the all-inclusive terms "controversy," "matter," and "dispute," rather than "MOU," in referring to what may be submitted to a factfinding panel. (AB 646, as amended in Assembly, May 5, 2011, County Ex. Q.) These terms remain unchanged by the time the bill was signed into law on October 9, 2011.

The legislative history of AB 646, when considered as a whole, supports our construction of the statute.

3. Harmonizing the Statutory Scheme

As additional support for its appeal, the County asserts that because AB 646 was inserted into the section of the MMBA specifically dealing with MOU negotiations, and immediately follows those sections concerning MOU negotiations, the scope of AB 646 must therefore be limited to negotiations for new or successor comprehensive MOUs. The County reads too much into the statute's architecture.

MMBA section 3505 establishes in its first paragraph the duty of a public agency to meet and confer in good faith with employee representatives regarding wages, hours and other terms and conditions of employment. It must also "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (MMBA, § 3505.) Nothing in this paragraph limits the meet and confer duty to new or successor comprehensive MOUs. The duty applies prior to the public agency determining policy or course of action, and is limited only by the

appropriate subject matter of negotiations, i.e., wages, hours, and terms and conditions of employment.

The second paragraph of section 3505 defines "meet and confer." We do not read this definition to limit the duty only to negotiations that produce a comprehensive MOU. It reads, in pertinent part:

> "Meet and confer" means that a public agency . . . and representatives of recognized employee organizations, shall . . . meet and confer promptly upon request . . . and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year.

As discussed previously, the duty to meet and confer in good faith applies not only to negotiations for a new or successor comprehensive MOUs, but to mid-term negotiations, proposed changes the public agency seeks to make in negotiable subjects, and bargaining over the effects of decisions within managerial prerogative.

The term "memorandum of understanding" is not used in MMBA section 3505. It does appear in the text of MMBA section 3505.1, which requires a public agency to submit a tentative agreement to its governing body for approval. If the tentative agreement is adopted, "the parties shall jointly prepare a written memorandum of understanding." In light of well-settled case law regarding the continuous nature of the duty to meet and confer on all negotiable terms and conditions of employment, we do not read this section to limit the type of MOU to comprehensive agreements. Instead, MMBA section 3505.1 establishes the procedure for approving an MOU after the parties reach a tentative agreement on whatever subject they bargained about. The proximity of MMBA sections 3505 through 3505.1 does not imply any limitation on section 3505's definition of "meet and confer."

MMBA section 3505.2 authorizes voluntary mediation if the parties fail to reach agreement. This section does not mention an MOU or otherwise limit mediation to efforts only to disputes in certain types of negotiations. Nor does this section refer to a "tentative agreement" unlike MMBA section 3505.1. The more inclusive term "reach agreement," as used in MMBA section 3505.2 implies that mediation applies in a variety of bargaining contexts, not merely negotiations for new or successor comprehensive MOUs.[23]

MMBA section 3505.3 provides employer-paid released time for a reasonable number of employee organization representatives when they are "formally meeting and conferring with" the employer on matters within the scope of representation.

The factfinding provisions of AB 646 appear in MMBA sections 3505.4 through 3505.7, immediately following the provision for released time, and after the provision for voluntary mediation. The County is simply not correct when it claims the factfinding provisions "immediately follow the MMBA sections that relate to MOU negotiations." (County's Appeal, p. 17.)[24] The factfinding provisions are in the same general section of the MMBA that prescribe the duty to meet and confer in good faith on all matters within the scope of bargaining. Indeed, there are only two sections in this portion of the MMBA sections 3505 through 3505.7, that specifically mention MOUs, and those are sections 3505.1 and 3505.7. It is logical for the Legislature to have codified AB 646 within this part of the MMBA because

[23] The definition of "Mediation" in MMBA section 3501(e) supports this conclusion, as it refers to "dispute regarding wages, hours and other terms and conditions of employment." "Mediation" is not confined to negotiations for a comprehensive MOU.

[24] The County also mistakenly quotes MMBA section 3505.4(a) thusly: "If the mediator is unable to effect settlement of the controversy . . . ." This language appeared in an earlier version of section 3505.4. That section was amended by Statutes 2012, ch. 314. The version applicable to this case arising in 2013 begins: "The employee organization may request that the parties' differences be submitted to a factfinding panel . . . following the appointment . . . of a mediator . . . ."

the leading provision, MMBA section 3505, establishes the duty to meet and confer in good faith, and subsequent provisions prescribe certain procedures concerning bargaining. We do not find that the codification of AB 646 within that part of the MMBA that describes bargaining generally indicates the Legislature's intent to confine factfinding only to comprehensive MOU negotiations, especially where other subsections of MMBA section 3505 do not limit negotiations only to such comprehensive agreements.

The County contends that because factfinding follows from failed attempts at mediation, and mediation applies only to comprehensive MOU negotiations, factfinding also must apply only to MOU negotiations. We reject this argument because, as discussed above, nothing in MMBA section 3505.2 limits mediation only to comprehensive MOU negotiations.

Next, the County claims that the language of MMBA section 3505.7, prohibiting a public agency from implementing an MOU after exhausting impasse resolution procedures, shows that factfinding can only apply to MOUs. As noted above, the term "MOU" refers to any written agreement on negotiable terms and conditions of employment adopted by the parties, not solely to a contract covering a comprehensive set of terms and conditions for a set duration. Even if the County were correct that the term "MOU" implied a comprehensive MOU, the County's argument ignores the history of this section, which in fact preceded AB 646. These provisions were added to the MMBA in 2000, eleven years before the passage of AB 646. (Statutes 2000, ch. 316, AB 852 (AB 1852).) In its original form, the main provisions of what is now section 3505.7 appeared in MMBA section 3505.4 and were deemed necessary to overturn the court of appeals decision in *Cathedral City Public Safety Management Assn. v. City of Cathedral City* (*Cathedral City*) (1999, Docket No. E022719. Review den. and opn. ordered non-published 9/15/99 S080447.) That decision held that a public employer could impose an MOU after impasse (as opposed to terms and conditions of

employment), thereby depriving the representative employee organization of the right to bargain during the term imposed by the MOU. The Legislature passed AB 1852 in 2000 to correct this decision which had permitted a public employer to effectively deny employees' statutory right to bargain by imposing long-term agreements upon impasse.[25] See *City of Santa Rosa* (2013) PERB Decision No. 2308-M for a discussion of the legislative history of AB 1852.

When AB 646 was added to the MMBA, the language discussed above was moved from former MMBA section 3505.4 into the newly created section 3505.7. The concept embodied in current MMBA section 3505.7, i.e., that an employer may not impose an MOU, and that imposition does not deprive the employee organization of the right to meet and confer each year on matters within the scope of representation prior to the adoption of a budget or as otherwise required by law, was not new with the passage of AB 646, contrary to the County's contention. We therefore reject the County's argument that the language of MMBA section 3505.7 suggests that factfinding applies only to comprehensive MOU negotiations under the MMBA.

The change AB 646 made in MMBA section 3505.7 merely prohibits imposition of the employer's LBFO until "any applicable mediation and factfinding procedures have been exhausted" and until the public agency has held a public hearing regarding the impasse. Previously, the employer was permitted to impose its LBFO after exhaustion of any mediation, if mediation was agreed to or required by local rules. With the addition of factfinding, the

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[25] Several years before *Cathedral City,* PERB recognized that an employer may not impose a collective bargaining agreement at the conclusion of impasse resolution procedures, but may impose only terms and conditions of employment, since unilaterally imposing a duration clause would illegally limit the right to bargain. (*Rowland Unified School District* (1994) PERB Decision No. 1053; see also, *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S.)

change in MMBA section 3505.7 simply clarifies that the employer must now wait until this new impasse resolution procedure is exhausted before it may implement its LBFO. The fact that MMBA section 3505.7 forbids the employer from imposing an MOU when and if it implements its LBFO does not mean that factfinding is limited to negotiations for a comprehensive MOU. Facfinding surely applies to this type of negotiation, but MMBA section 3505.7 does not mean that factfinding applies only to comprehensive MOU negotiations.

By the same token, the fact that MMBA section 3505.7 reserves to the employee organization the right to meet and confer on matters within the scope of representation each year prior to the adoption of a budget, even if the employer has imposed its LBFO, does not mean that factfinding is limited to comprehensive MOU negotiations, contrary to the County's claim. This provision was part of the 2000 legislation and was necessary to correct the *Cathedral City* decision. Thus, the language of a prior bill that had nothing to do with factfinding cannot be relied on to inform the interpretation of AB 646 or limit its application.

The County also points to the eight criteria the factfinding panel is to consider in arriving at its findings and recommendations, urging that these factors only make sense in the context of negotiations for a complete MOU. MMBA section 3505.4(d) provides:

> In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
>
> (1) State and federal laws that are applicable to the employer.
>
> (2) Local rules, regulations, or ordinances.
>
> (3) Stipulations of the parties.
>
> (4) The interests and welfare of the public and the financial ability of the public agency.

> (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
>
> (6) The consumer price index for goods and services, commonly known as the cost of living.
>
> (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.
>
> (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

These are virtually the same criteria that EERA directs factfinders to "consider, weigh and be guided by."[26] Despite EERA's inclusion of these criteria, it is well-established that EERA factfinding applies to single-issue disputes, mid-term negotiations, and effects bargaining. That these criteria also appear in the MMBA supports our conclusion that the Legislature did not intend AB 646 to be applied differently than factfinding applies under EERA. These criteria have been instructive to resolving bargaining disputes involving single issues, since common sense and the way that factfinding panels actually work does not require that each of the criteria be considered in every bargaining dispute.

There are some disputes, such as whether binding arbitration should be the last step in a grievance process, that are not sensibly resolved by considering the consumer price index, or comparable compensation of other employees. On the other hand, arriving at recommendations regarding binding arbitration might require evidence described in MMBA

[26] Both EERA and the MMBA direct factfinding panels to be guided by all of these criteria.

section 3505.4(d)(5), the comparable "conditions of employment," or the all-inclusive criteria in subsection (7), which factfinding panels have read to include basic notions of fairness. The same could be said about negotiations over the effects of layoffs, which may raise both economic and non-economic issues. Bargaining disputes over health and welfare benefits would likely require the factfinding panel to assess the "financial ability" of the public agency and wage/benefit comparisons with similarly situated employees. Less obvious in such a dispute is the relevance of state and federal laws.

As discussed above, at page 27, such topics as binding arbitration and the effects of layoff are stand-alone, single subject bargaining disputes to which the factfinding process has been applied under EERA and HEERA. The fact that factfinding panels are directed to consider several different criteria does not imply that all criteria are relevant in all disputes, thereby negating the County's argument that the listing of criteria evidences a legislative intent to limit factfinding to comprehensive MOU negotiations.

As previously stated, AB 646 recognized that some charter cities and counties provide for binding arbitration as a means for resolving bargaining impasses, and in those instances, the factfinding process will not apply. (MMBA, § 3505.5(e).)[27] The County asserts that this accommodation to local rules further shows the legislative intent to limit factfinding only to negotiations for a comprehensive MOU. The County's argument assumes that the scope of binding arbitration under local rules is coterminous with the scope of factfinding under

[27] MMBA section 3505.5(e) provides, in pertinent part:

> A charter city, [or a] charter county . . . with a charter that has a procedure that applies if impasse has been reached . . . and the procedure includes . . . a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

AB 646. It is noted that the text of subsection (e) does not limit the types of disputes subject to binding arbitration. It refers only to "impasse," which, as seen in the definition in EERA section 3540.1(f), uses the terms "dispute" and "differences," placing no limitation on the type of negotiation that may reach impasse.[28] It is true that this exemption contained in MMBA section 3505.5(e) exists because where an impasse is subject to a binding arbitration process, it need not also be subject to a factfinding process. Binding arbitration, after all, resolves a bargaining dispute with finality, negating the need for any additional advisory factfinding and recommendation process. It does not follow, however, that factfinding is therefore limited only to impasses over negotiations for a comprehensive MOU. The applicability of factfinding and the scope of factfinding are two, wholly distinct issues.

The County takes issue with what it characterizes as the Office of the General Counsel's reliance on an EERA decision, *Redwoods CCD, supra,* PERB Decision No. 1141 in support of the determination that MMBA factfinding applies to single issue bargaining disputes. This decision should not be relied on, according to the County, because it arose under EERA and it was premised on the notion that EERA impasse procedures were intended to head off strikes, whereas AB 646 was intended to improve the effectiveness of the collective bargaining process. According to the County, the "MMBA factfinding process thus was clearly for the benefit of the exclusive representatives . . . to provide them with an additional procedural step for impasses in MOU negotiations—not for the public." (County's Appeal, p. 22.) We explained earlier that *Redwoods CCD* is appropriate precedent for the Board to rely on in interpreting AB 646, even though it arose under EERA. We address here the County's contention that factfinding in EERA serves a different purpose than that intended by AB 646.

[28] PERB has applied EERA's definition of "impasse" to cases arising under the MMBA. (*City & County of San Francisco* (2009) PERB Decision No. 2041-M.)

Factfinding is considered to be an effective tool to improve labor relations because it can facilitate mutual agreement by assisting reasoned decision-making after relevant facts are presented. Under EERA, the process may avert strikes by convincing the parties to reach agreement. It may postpone both strikes and unilateral impositions under EERA because neither party may legally use its weapon of last resort until the factfinding procedure is complete.[29] The overall purpose served by EERA's impasse resolution procedure is to assure labor peace by institutionalizing the assistance of a neutral and credible process when the parties have reached an impasse in whatever negotiations they are engaged in. As the Board stated in *Modesto, supra,* PERB Decision No. 291, p. 36:

> The impasse procedure of EERA contemplates a continuation of the bargaining process with the aid of neutral third parties. [Citation omitted.] Mediation is an instrument designed to advance the parties' efforts to reach agreement; factfinding is a second such tool required by the law when mediation fails to bring about agreement. . . . [T]he factfinder's recommendations are a crucial element in the legislative process structured to bring about peacefully negotiated agreements.

The same purpose—assuring labor peace—is served by AB 646, whether it averts or postpones strikes, or postpones imposition of LBFOs, or promotes "full communication between public employers and their employees by providing a reasonable method of resolving disputes." (MMBA, § 3500(a).) The purpose of factfinding under all three statutes that provide for the procedure is the same, and that purpose is not served by reading AB 646 so narrowly as the County urges us to do.

The County cites certain differences between the EERA and MMBA factfinding provisions, such as the fact that MMBA permits local employers to adopt their own rules and regulations governing employment relations, while EERA does not. The scope of bargaining

[29] We agree with the County that the purpose of AB 646 was probably not to head off strikes, because unlike under EERA, only the employee organization may invoke factfinding.

under EERA is more "complicated" than that under the MMBA, the County argues, because it enumerates subjects of bargaining and identifies circumstances in which the Education Code applies if the parties do not reach agreement. Under the MMBA the parties are to split the costs of factfinding, but under EERA, PERB pays for the neutral panel member, according to the County. We note these differences, but the County fails to explain, and we are unable to discern, why or how these differences support the view that MMBA factfinding is a radically constricted procedure, compared to that prescribed by EERA.[30]

C. The Constitutionality of AB 646

The County claims that AB 646 violates Article XI, sections 1 and 11 of the California Constitution because factfinding is an "almost identical" process to the binding arbitration process that was rejected in *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278 (*Riverside v. Superior Ct.*). PERB is constitutionally prohibited from declaring any of the statutes it administers unconstitutional. (*Regents of Univ. of California v. Public Employment Relations Bd.* (1983) 139 Cal.App.3d 1037, 1042; Calif. Constitution, Art. III, § 3.5.) We have nevertheless recently explained our view on the scope and limitation of the Supreme Court's

[30] The County also cites to public testimony of former PERB Division Chief Chisholm (Chisholm) at a public meeting of PERB on June 13, 2013, explaining the rationale for proposed changes in MMBA regulations pertaining to the appealability of a board agent's determination regarding factfinding requests. The County quotes Chisholm as stating that "'the distinction' between MMBA and EERA, 'warrants treating these requests differently than the Board treats other impasse determinations.'" (County's Appeal, p, 21, fn. 9.) To the extent the County relies on this quote for its view that factfinding is limited to MOU negotiations, it misconstrues the context of Chisholm's comments. He was explaining why the Board should adopt a regulation that would permit the parties to appeal a Board agent's determination regarding the appropriateness, timeliness, and procedural sufficiency of a factfinding request. Under EERA and HEERA, Board agent decisions as to whether the parties are actually at impasse are not reviewable by the Board itself. Because the MMBA factfinding procedures were new, Chisholm recommended a rule change to allow the Board itself "to apply its expertise and develop case law and precedence [sic] that can then guide future determinations by Board agents and serves to inform the parties as what to expect." (County's Appeal, Ex. J., p. 9.) Nothing in Chisholm's comments suggest an interpretation of AB 646 that would limit it to MOU negotiations.

ruling in *Riverside v. Superior Ct.* in our own *County of Riverside* (2014) PERB Decision No. 2360, pp. 25-28. Nothing in AB 646 interferes with the ultimate decision-making authority of public agencies to determine wages or manage its finances. As the County well knows, it is not compelled to adopt the recommendations of the factfinding panel. Like negotiations, the factfinding process requires the parties to engage in a procedure with no particular outcome mandated. This is quite unlike the binding interest arbitration that was rejected by the Supreme Court in *Riverside v. Superior Ct.*.

CONCLUSION

The Legislature enacted AB 646 to bring to the MMBA a further procedure for resolving bargaining impasses, factfinding after mediation. This procedure has been part of the public sector bargaining landscape under EERA and HEERA since the mid-1970s and has been applied by PERB to a variety of bargaining disputes, not simply impasses over successor or new comprehensive agreements. It is completely within the purpose of the MMBA to import the range of bargaining disputes recognized under EERA and HEERA as appropriate to factfinding, given that one of the purposes of the MMBA is to provide a "reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment." (MMBA, § 3500.) These disputes may take many forms—single-issue disputes over the wages to be paid a new classification, re-opener negotiations, effects of layoff or effects of other management decisions, in addition to disputes over the terms of a comprehensive MOU. Based on application of the rules of statutory construction, we conclude that the Legislature did not intend that MMBA factfinding be cabined to a narrow classification of bargaining disputes, especially given that single-issue disputes, e.g., proposed reductions in health or pension benefits, may engender as much labor-management conflict as negotiations for new or

successor comprehensive MOUs. For these reasons, we affirm the administrative determination.

ORDER

The administrative determination of the Office of the General Counsel that the factfinding procedures set forth in the Meyers-Milias-Brown Act (MMBA) section 3505.4 et seq., are applicable to the dispute in this case is hereby AFFIRMED. AFSCME Local 2700's request for factfinding satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802(a)(2) and the matter is REMANDED to the Office of the General Counsel for further processing pursuant to PERB Regulation 32804.

Chair Martinez and Members Huguenin and Banks joined in this Decision.

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Re: *County of Contra Costa and AFSCME Local 2700*
Case No. SF-IM-126-M
Administrative Determination

Dear Interested Parties:

On September 25, 2013, AFSCME Local 2700 (AFSCME or Union) filed a request for factfinding (Request) with the Public Employment Relations Board (PERB or Board) pursuant to section 3505.4 of the Meyers-Milias-Brown Act (MMBA) and PERB Regulation 32802.[1] AFSCME asserts that the County of Contra Costa (County) and Union have been unable to effect a settlement in their current negotiations. AFSCME's Request describes the "type of dispute" as follows:

> The parties have spent considerable time negotiating over the creation of a Legal Clerk Classification. They have reached agreement on all issues except for the issue of whether employees in the Legal Clerk Classification should receive additional compensation.

The County sent the Union a written notice of impasse with respect to these negotiations on September 3, 2013.

[1] The MMBA is codified at Government Code section 3500 et seq. All further statutory references are to the Government Code unless otherwise noted. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the MMBA and PERB Regulations may be found at www.perb.ca.gov.

Procedural Background

After AFSCME filed its Request, the County was given an opportunity to state its position. On October 1, 2013, the County verbally informed the undersigned Board agent that it would be opposing the Request, and would be filing a written statement to that effect. By letter dated October 2, 2013, the County opposed AFSCME's Request and asserted that the Request was insufficient to meet the statutory requirements for factfinding. The County requested that PERB deny the Request. Subsequently, AFSCME filed a letter disputing the County's position statement.

Later on October 2, 2013, PERB approved AFSCME's Request and informed the parties in an e-mail message that the determination would be memorialized in writing.

Discussion

A. The County's Position

The County explains that the parties have resolved all issues related to the creation of this new classification, with the exception of wages. The Memorandum of Understanding (MOU) between the parties expired on June 30, 2013 and the parties are currently in negotiations for a successor MOU. The County implicitly acknowledges that the negotiations regarding the Legal Clerk Classification were separate and distinct from successor MOU negotiations.

The County asserts that a "single" issue—such as the one asserted by AFSCME—is not subject to the MMBA factfinding provisions, since it is not negotiations for a new or successor collective bargaining agreement (CBA) or MOU. In support of its position, the County relies on several comments made by the author of Assembly Bill (AB) 646[2] and recites the following:

> The author of AB 646, Assembly Member Toni Atkins (D-San Diego) indicated the following purpose for AB 646:
>
> > Although the MMBA requires employers and employees to bargain in good faith, some municipalities and **agencies** choose not to adhere to this principle and instead attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. (Emphasis added.)
>
> Similarly, the State Assembly Floor analysis dated September 1, 2011 at Page 3 states:

[2] AB 646 (Statutes 2011, Chapter 680), is codified at Government Code sections 3505.4, 3505.5 and 3505.7.

> According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in **impasse procedures where efforts to negotiate a collective bargaining agreement have failed. [...]** the creation of mandatory impasse procedures is likely to increase the effectiveness of **the collective bargaining process,** by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. [...] (Emphases added.)

Further, the County also relies upon the last sentence set forth in MMBA section 3505.7[3] and asserts as follows:

> It is apparent from the language of the statute and the legislative history that AB 646 is intended to slow the process of the implementation of last, best, and final offers by public employers. In fact, the statute institutes what is basically advisory interest arbitration to bring the parties to a negotiated resolution as opposed to an implemented one. The pause in bargaining created by AB 646 is intended to allow the parties additional time when negotiation for a collective bargaining agreement fails. The purpose is not served by applying AB 646 to each and every dispute that arises between the parties.
>
> The level of disruption in the ordinary course of labor relations that would follow a decision by PERB to apply AB 646 to all issues for which a meet and confer obligation attaches, is staggering. Neither PERB, the parties, nor the fact-finding community have the resources to apply AB 646 to all disputes. The purpose for this legislation is clearly stated, it was not intended to create a logjam of fact-finding activity to distract from ongoing negotiation for successor MOUs. PERB has the opportunity and responsibility to administratively prevent this paralysis of ongoing labor relations activity.

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[3] Section 3505.7 states in part:

> After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. (Emphasis added.)

B. AFSCME's Position

AFSCME disputes the County's position that the factfinding provisions under the MMBA are intended solely to be used when impasse is reached for a new or successor CBA/MOU. AFSCME asserts that the Legislature clearly intended for the MMBA factfinding provisions to apply to "single" issues, as well as to negotiations for an entire agreement. AFSCME argues that the definition of the terms "dispute" and "differences" as referenced in sections 3505.4 and 3505.5,[4] demonstrate that the Legislature had each and every impasse dispute in mind when drafting this legislation.

AFSCME asserts, in its response to the County's opposition, as follows:

> The County argues that because section 3505.7 provides that an employer may not, after exhausting fact-finding procedures, implement an MOU, this means that the fact-finding procedures of the MMBA must be limited to negotiations for an MOU. This simply doesn't follow. Some disputes that proceed to fact-finding under the MMBA will, of course, involve negotiations over an MOU, and section 3505.7 merely makes clear that after fact-finding in such cases the employer may not implement an MOU. Had the legislature intended to limit factfinding to cases involving negotiations over an MOU surely it would have said so in sections 3505.4 or 3505.5, or elsewhere in

[4] Section 3505.4 provides:

> If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.... (Emphasis added.)

Section 3505.5, subdivision (a) provides in part:

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

the statute, rather than, as the County claims, by leaving a cryptic mark of its intent in section 3505.7. Because the statutory provisions clearly do not limit the utilization of the MMBA's factfinding procedures to instances in which parties have reached impasse in their negotiations for an MOU, PERB need not consider the legislative history of AB 646 or the County's public policy arguments.

C. MMBA Factfinding Is the Final Step in an Orderly Process Designed to Resolve Any Impasse That Arises From Negotiations Over Matters Within the Scope of Representation

Essentially, the County contends that the factfinding requirements under the MMBA apply only to impasses stemming from negotiations for a new or successor CBA/MOU, and do not apply to impasses resulting from isolated or single issue bargaining or from any other types of negotiations. In support of its position, the County quotes portions of the legislative history of AB 646 that reference the fact that under AB 646, the parties may engage in factfinding if they are unable to reach a "collective bargaining agreement."

1. The MMBA's Meet and Confer Obligations in General

The duty to meet and confer in good faith "means that the parties must genuinely seek to reach agreement, but the MMBA does not require that an agreement result in every instance, and it recognizes that a public employer has the ultimate power to reject employee proposals on any particular issue." (*International Assoc. of Fire Fighters, Local 188, AFL-CIO v. City of Richmond* (2011) 51 Cal.4th 259, 271 [*City of Richmond*].) The duty to meet and confer in good faith extends to all matters within the scope of representation, which is defined as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment," but does not include "consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (§ 3504.) "'The duty to bargain requires the public agency to refrain from making unilateral changes in employees' wages and working conditions until the employer and employee association have bargained to impasse ....'" (*Coachella Valley Mosquito & Vector Control Dist. v. PERB* (2005) 35 Cal.4th 1072, 1083-1084, quoting *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 537.)

2. The MMBA Factfinding Provisions Adopted by the Legislature Under AB 646

In 2011, the Legislature for the first time established a structured impasse procedure, applicable statewide, for the MMBA, by enacting factfinding provisions pursuant to AB 646.[5]

[5] The legislative history does not evidence the Legislature's intent to provide that negotiations for a new or successor CBA/MOU are the *only* types of disputes that can be submitted to factfinding. If the Legislature had wanted to exclude factfinding for all disputes other than for a CBA/MOU, it could have expressly included a provision to that effect, but failed to do so. Moreover, generally, the statements of the author of legislation are not determinative of legislative intent as there is no guarantee that others in the Legislature shared

The statute provided that only unions could invoke the MMBA's factfinding provisions. While AB 646 imposed new obligations on MMBA employers, it also provided them with a more orderly and expeditious process for resolving impasse disputes, with enhanced certainty as to when—i.e., upon completion of the statutorily mandated factfinding procedures—they could impose their "last, best, and final offer" on the subject of the parties' negotiations. (§ 3505.7.) Also in 2011, PERB promulgated regulations for administering the MMBA factfinding process. (Cal. Code Regs., tit. 8, §§ 32802, 32804.)

In 2012, the Legislature amended Government Code section 3504.5, pursuant to Assembly Bill 1606 (Statutes 2012, Chapter 314, effective January 1, 2013), in part to expressly codify the procedures PERB had adopted by regulation to implement AB 646. The Legislature deemed the 2012 amendments as technical and clarifying of existing law. (*Ibid.*)

Previously PERB Regulation 32802, subdivision (e), prohibited an appeal of a determination of the sufficiency of a factfinding request. Effective October 1, 2013, PERB's regulations have been modified to delete subdivision (e), and now permit an appeal by either party to the Board itself of a factfinding determination.

It is also noted that although the use of PERB's form, titled "MMBA Factfinding Request" is not required, the form, under Type of Dispute, lists as examples all of the following: "initial contract, successor contract, reopeners, effects of layoff, other."

3. PERB's Interpretation of the Term "Impasse"

Where the parties are not required to and have not engaged the services of a mediator, the MMBA factfinding provisions may be invoked by an exclusive representative only after one party provides the other with a written declaration of *impasse*. (§ 3505.4 ["an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse"].)

Although the MMBA uses the term "impasse," it does not define that term, unlike other statutes within PERB's jurisdiction. For instance, the Educational Employment Relations Act (§ 3540 et seq. [EERA]) defines "impasse" to mean "the parties to a *dispute* over matters within the scope of representation have reached a point in meeting and negotiating at which their *differences* in positions are so substantial or prolonged that future meetings would be futile." (§ 3540.1, subd. (f), emphasis added.)[6] Thus, PERB has held that an impasse in bargaining exists where the "parties have considered each other's proposals and

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the same view. (*San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 863.)

[6] Similarly, under the Higher Education Employer-Employee Relations Act (§ 3560 et seq. [HEERA]), impasse is defined to mean that "the parties have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile." (§ 3562, subd. (j).)

counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order No. Ad-124.)

Given the longstanding acceptance of the concept of impasse as a term of art central to labor relations, the Board has held that the definition of impasse under EERA, as interpreted by PERB, is the appropriate standard under the MMBA as well. (*Fire Fighters Union* v. *City of Vallejo* (1974) 12 Cal.3d 608 [*Fire Fighters Union*]; *City & County of San Francisco* (2009) PERB Decision No. 2041-M.) The definition of impasse does not limit the types of "disputes" or "differences" that the parties may have to just those for a new or successor CBA/MOU. In fact, nowhere in the statutory or decisional law definitions of impasse do the terms "agreement" or "collective bargaining" appear.

4. The Courts, PERB and NLRB's Interpretation of the Terms "Collective Bargaining" and "Collective Bargaining Agreement"

As noted previously, the County asserts that the Legislature's use of the term "collective bargaining" means that the public agency and the exclusive representative are negotiating a complete new or successor CBA/MOU that governs all of the employees' terms and conditions of employment. In other words, the County appears to assert that collective bargaining only occurs during a certain period of time, culminating in some type of comprehensive master agreement that ideally addresses all wages, hours, and other terms and conditions of employment, with the term of such agreement set for one or more years. As the County would have it, only if the parties cannot reach agreement on this "master" CBA/MOU, may the Union invoke the MMBA's factfinding procedures for assistance.

PERB and NLRB decisions have made clear, however, that collective bargaining is a *continuing process* that is not restricted to one comprehensive agreement or one single period of bargaining. California's public sector collective bargaining statutes are largely modeled after the federal National Labor Relations Act (NLRA) (29 U.S.C. § 151, et seq.). (*Long Beach Community College District* (2003) PERB Decision No. 1564; *City of San Jose* (2010) PERB Decision No. 2141-M.) Accordingly, when interpreting the MMBA, courts and PERB have appropriately taken guidance from the express language of the NLRA, as well as from cases interpreting the NLRA. (*Fire Fighters Union*, *supra*, 12 Cal.3d at pp. 615-617.) For instance, the Supreme Court has noted that the phrase in the MMBA's meet and confer requirement regarding "wages, hours, and other terms and conditions of employment" was taken directly from section 8(d) of the NLRA concerning the "the obligation to bargain collectively," which states in relevant part:

> For the purposes of this section, to ***bargain collectively*** is the performance of the mutual obligation of the employer and the representative of the employees to ***meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder***, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not

> compel either party to agree to a proposal or require the making of a concession. . .

(29 U.S.C. § 158(d), emphasis added, *Fire Fighters Union*, *supra*, at p. 617.)

As the express language of the NLRA makes clear, the obligation to bargain collectively is not just limited to the "negotiation of an agreement." Rather, such an obligation also encompasses meeting with respect to any wages, hours, and other terms and conditions of employment, as well as concerning questions or disputes that may arise within the agreement. In the words of the United States Supreme Court:

> Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract.

(*Conley v. Gibson* (1957) 355 U.S. 41, 46, overruled in part on other grounds; see also, *National Labor Relations Board v. Acme Indus. Co.* (1967) 385 U.S. 432, 435-436.)

More importantly, courts have described a "collective bargaining agreement" as "the framework within which the process of collective bargaining may be carried on." (*J.I. Case Co. v. National Labor Relations Board* (7th Cir. 1958) 253 F.2d 149, 153.) In *Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, the California Supreme Court observed that a collective bargaining agreement '"is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate .... It calls into being a new common law - the common law of the particular industry.'" (*Id.* at p. 177, quoting *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574, 578 [*Warrior & Gulf Co.*].)

5. The MMBA Does Not Expressly Limit Factfinding Solely to Impasses Over Negotiations for a CBA/MOU

The MMBA, when construed as a whole, simply does not limit the applicability of its factfinding provisions solely to disputes arising from negotiations for a CBA/MOU. Section 3505.4, provides that an "employee organization may request that the parties' differences be submitted to a factfinding panel" following mediation, or if the "dispute" is not submitted to mediation, then the employee organization may request that the parties "differences be submitted to a factfinding panel...." (§ 3505.4, subd. (a).) There is no language in the statute that limits the types of "differences" or "disputes" that may be submitted to a factfinding panel.

As added by AB 646, moreover, section 3505.5 provides that if the "dispute" is not settled within a set time, the factfinding panel "shall make findings of fact and recommended terms of settlement, which shall be advisory only." (§ 3505.5, subd. (a).) Again, there is no language in that statute limiting the parties' "dispute," which can be submitted to a factfinding panel, to negotiations for an MOU, or any other "type" of negotiations. Section 3505.7 further provides that after any applicable impasse procedures have been exhausted, and written findings of fact

and recommended terms of settlement have been submitted to the parties and made public, a public agency may implement its last, best, and final offer, but is not permitted to implement a MOU. (§ 3505.7.)

Thus, once an employee organization requests the parties' "differences" be submitted to factfinding, and the procedural aspects of the factfinding sections are met, then participation in factfinding is mandatory. The plain language of the factfinding sections does not distinguish or limit the types of disputes that arise in collective bargaining negotiations that may be submitted to factfinding. If the Legislature intended to limit the types of disputes or differences that could be submitted to a factfinding panel only to those arising during negotiations for a CBA or MOU, it could have done so explicitly. It did not. Accordingly, when the MMBA's statutory scheme is viewed as a whole, the County's interpretation of the factfinding provisions as applying only to negotiations for an CBA/MOU is simply not a correct interpretation of the statute.

Finally, it is well settled that public employers who are subject to the MMBA and other collective bargaining statutes administered by PERB may not make a unilateral change in a negotiable subject until all applicable impasse procedures have been exhausted, as impasse procedures are part of the collective bargaining process. (*Moreno Valley Unified School District v. PERB* (1983) 142 Cal.App.3d 191, 199-200 [*Moreno Valley*]; *Temple City Unified School District* (1990) PERB Decision No. 841, p. 11; see also § 3506.5, subd. (e).) According to the County's interpretation that MMBA factfinding applies only to impasse over negotiations for a complete CBA or MOU, this would necessarily mean that single employment issues would be excluded from the statutory impasse procedures, and would thus allow the public agency to impose its will on employees if the parties cannot reach agreement. Unlike "main table" negotiations for a new or successor CBA/MOU, employers often have control over the timing of "single" subjects, such as layoffs or the creation of a new position. If PERB were to accept the County's position that only new or successor CBAs/MOUs are subject to factfinding, an employer could splinter subjects within the scope of representation into multiple "single" issues, in order to intentionally avoid factfinding.

This interpretation is contrary to the intent of AB 646, which was enacted to prevent public agencies from rushing through the motions of the meet-and-confer process to unilaterally impose the agency's goals and agenda before exhausting available impasse procedures. Moreover, the County's claim that the MMBA does not authorize factfinding other than for negotiations for a CBA/MOU cannot be squared with the MMBA's stated purposes "to promote full communication between public employers and employees," and "to improve personnel management and employer-employee relations." (§ 3500.) Allowing the County to take unilateral action concerning the parties' employment relationship without exhausting the MMBA's impasse procedures simply because the parties' dispute does not arise during negotiations for a CBA/MOU, does not further, but would rather frustrate, the MMBA's purpose of promoting full communications between the parties and improving employer-employee relations.

6. PERB Has Interpreted Statutory Impasse Procedures Under EERA and HEERA to Apply to a Wide Variety of Collective Bargaining Negotiations, and Not Just Those for a CBA/MOU

The County's assertion that MMBA factfinding provisions are limited only to those negotiations for a CBA/MOU that reach impasse is contrary to the language and judicial interpretation of factfinding provisions found in the other collective bargaining statutes that PERB administers. As discussed above, it is well settled that statutes should be construed in harmony with other statutes on the same general subject. (*Farrell*, 41 Cal.3d at p. 665) Moreover, when interpreting the MMBA, PERB appropriately takes guidance from cases interpreting not only the NLRA, but also other collective bargaining statutes that PERB administers with provisions similar to those of the MMBA. (*Fire Fighters Union*, *supra*, 12 Cal.3d 608.)

EERA and HEERA contain provisions governing impasse resolution that are similar, though not identical, to the those in the MMBA. (Compare §§ 3548-3548.8 [EERA], with §§ 3590-3594 [HEERA], and §§ 3505.4-3505.7 [MMBA].) Under long-standing case law, PERB and the courts have interpreted the impasse provisions under EERA and HEERA as applying to negotiations other than just those for an MOU or CBA. Under this body of related law, to which our Supreme Court has directed the courts to look for reliable guidance when they are called upon to interpret the latter statute (*City of San Jose*, *supra*, 49 Cal.4th at pp. 605-607 & fn. 3), it is clear that public employers are prohibited from making a unilateral change on a matter subject to *impacts* and *effects* bargaining until all applicable impasse procedures have been exhausted.

For example, in *Moreno Valley Unified School District* (1982) PERB Decision No. 206, the Board upheld a hearing officer's determination that, among other things, the District violated section 3543.5, subdivision (e), by failing to participate in impasse procedures in good faith, and by making unilateral changes prior to the exhaustion of the statutory impasse procedures under EERA, as to proposals to eliminate teaching and staff positions. (*Id.* at pp. 1-2, 11-12.) The District subsequently filed a writ of mandate challenging the Board's decision. In *Moreno Valley*, *supra*, 142 Cal.App.3d 191, the Court of Appeal upheld PERB's determination that the school district committed an unfair labor practice under EERA by unilaterally implementing changes in employment conditions before exhausting statutory impasse procedures, including failing to participate in good faith in impasse procedures regarding the "effects" of the school district's decision to eliminate certain teaching and staff positions. (*Id.* at pp. 200, 202-205.) The court stated that "[s]ince 'impasse' under EERA's statutory scheme denotes a continuation of the labor management dispute resolution process . . . the Board reasonably interpreted the statute in finding a per se violation of the statutory duty of employers to participate in good faith in the impasse procedures." (*Id.* at p. 200.)

In *Redwoods Community College District* (1996) PERB Decision No. 1141 (*Redwoods*), the Board determined that EERA's statutory impasse procedures applied to the parties' negotiations over hours of security officers, which were conducted *separate and apart* from the parties' negotiations for a successor MOU. In that regard, the parties negotiated a contract provision covering workweeks and work schedules, which provided for negotiations between the employer and the employee representative regarding any change in hours. (*Ibid.*) That

provision further stated that if negotiations were unsuccessful, the parties would submit the dispute to mediation. (*Ibid.*) The provision also stated that the dispute "shall not be submitted to a fact-finding panel under the provisions of the [EERA]." (*Ibid.*) The Board held that the parties could not waive EERA's statutory impasse procedures, ***noting that until the impasse procedures are completed, the employer may not make a unilateral change in a negotiable subject.*** (*Ibid.*; see also, *California State University* (1990) PERB Decision No. 799-H [a HEERA case, where the parties participated in mediation and factfinding concerning negotiations over increased parking fees].)

Thus, as PERB has properly interpreted and applied the impasse procedures under EERA and HEERA to negotiations other than just those for an MOU, PERB's similar interpretation regarding impasse procedures under the MMBA is also proper, and should be applied to factfinding requests made under sections 3505.4, 3505.5 and 3505.7.

7. The MMBA Factfinding Provisions Do Not Raise a Constitutional Issue

To the extent the County may be suggesting that the MMBA factfinding is an unconstitutional imposition on local agencies, there is no legal authority to support such a claim. MMBA factfinding, as an *advisory* method of post-impasse dispute resolution, does not delegate or deprive the County of its constitutional authority to set terms and conditions of employment and, as such, MMBA factfinding clearly passes constitutional muster. Because MMBA factfinding does not impair or delegate to a private party any of the County's powers, it does not suffer any constitutional infirmity. (*County of Sonoma v. Sonoma County Law Enforcement Assn.* (2009) 173 Cal.App.4th 322 [*Sonoma*]; *County of Riverside v. Riverside Sheriffs' Assn.* (2003) 30 Cal.4th 278 [*Riverside*].) While the decisions in *Riverside* and *Sonoma* eradicated the ability of unions to compel an MMBA employer to participate in ***binding*** interest arbitration after negotiations have reached impasse, the decisions make clear that an impasse resolution method that leaves intact a County's constitutional right to set terms and conditions of employment is a lawful method of impasse resolution. (*Ibid.*)

Determination

Applying the precedent discussed above, PERB concludes that the factfinding procedures set forth in MMBA section 3505.4 et seq. are applicable under the particular facts of this case.

Given the specific facts of this case, PERB determines that AFSCME's Request satisfies the requirements of MMBA section 3505.4 and PERB Regulation 32802, subdivision (a)(2). Therefore, AFSCME's Request will be processed by PERB.

Next Steps

Each party must select its factfinding panel member and notify this office in writing of his/her name, title, address and telephone number no later than October 11, 2013.[7] Service and proof of service are required.

[7] This deadline, and any other referenced, may be extended by mutual agreement of the parties.

The résumés of seven factfinders, drawn from the PERB Panel of Neutrals, are being provided to the parties via electronic mail.[8] The parties may mutually agree upon one of the seven, or may select any person they choose, whether included on the PERB Panel of Neutrals or not. In no case, however, will the Board be responsible for the costs of the chairperson.

If the parties select a chair, the parties should confirm the availability of the neutral, *prior* to informing PERB of the selection.

Unless the parties notify PERB, on or before October 11, 2013, that they have mutually agreed upon a person to chair their factfinding panel, PERB will appoint one of these seven individuals to serve as chairperson.

Right to Appeal

Pursuant to PERB Regulations, the County may file an appeal directly with the Board itself and can request an expedited review of this administrative determination. (Cal. Code Regs., tit. 8, §§ 32147, subd. (a), 32350, 32360, 32802, 61060.) An appeal must be filed with the Board itself within 10 days following the date of service of this determination. (Cal. Code Regs., tit. 8, § 32360, subd. (b).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board. (*Ibid.*)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If the County appeals this determination, the Union may file with the Board an original and five copies of a statement in opposition within 10 calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32375.)

[8] The seven neutrals whose résumés are being provided are Robert M. Hirsch, Carol Vendrillo, Barry Winograd, Paul Roose, David Weinberg, Katherine Thomson, and Christopher Burdick.

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Sincerely,

Wendi L. Ross
Deputy General Counsel