



# **AB 646 Post Impasse Fact Finding in Collective Bargaining**

**Thursday, October 6, 2016 General Session; 4:15 – 5:30 p.m.**

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## **League of California Cities Annual Conference**

### **Post-Impasse Factfinding and Status of AB 646 Legal Challenges**

**October 5-7, 2016**

**Ed Zappia**

- I. Factfinding Procedure/Timing
- II. Substantive Factors of Factfinding
- III. Impacts on Bargaining and Meeting and Conferring/Planning for Bargaining in Light of Factfinding
- IV. Preparing for Factfinding
- V. Prevailing in Factfinding
- VI. Status of Challenges to Factfinding

## **I. Factfinding Procedure/Timing**

### **Meeting and Conferring over a Single Issue vs. Negotiating a New or Successor MOU**

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

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

**3505.4.** (a) An employee organization may request that the parties' differences be submitted to a factfinding panel

Not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.

Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel.

The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

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

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate.

The panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

## II. Factfinding Factors

**3505.4(d)** In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

- (1) State and federal laws that are applicable to the employer.
- (2) Local rules, regulations, or ordinances.
- (3) Stipulations of the parties.
- (4) The interests and welfare of the public and the financial ability of the public agency.
- (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
- (6) The consumer price index for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.
- (e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

### Conclusion of Factfinding Process

**3505.5.** (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only.

The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs shall be equally divided between the parties.

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

**3505.7.** After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding.

The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

**III. Impact on Negotiations and Meeting and Conferring / Planning for Bargaining in Light of Factfinding**

- a. Increase burden of preparation negotiations. Burden is completely on the agency.
- b. Identify key anticipated issues in upcoming negotiations.
- c. Prepare to justify agency's positions/proposals with costing, documents, salary information (internally and in surrounding communities), salary history, external factors.
- d. Have to "win" on key issues in bargaining. Prepare to be second-guessed, subject to scrutiny.
- e. Increase time to complete negotiations/number of sessions?
- f. Promote bad faith bargaining, since posturing for factfinder?
- g. Adversely impact good faith bargaining to finality?
- h. Increase impasses and/or threat of impasse?
- i. Note-taking mandatory/document trail/costing/fiscal impact mandatory.
- j. Written proposals, supported by evidence, mandatory.



#### IV. Preparing for Factfinding

- a. Comparable to preparing for trial.
- b. Gather documents/exhibits.
- c. Prepare briefs.
- d. Prepare witnesses.
- e. Justify each factfinding factor/proposal.
- f. Selection of factfinding panel representative.
- g. Formal or Informal?

**V. Prevailing in Factfinding**

- a. Clear, concise presentation, supported by documents/evidence.
- b. Presentation of agency history, goals.
- c. Agency proposals/LBFO supported by evidence, related to relevant factors.
- d. Agency proposal consistent with surrounding community standards re relevant factors.
- e. Union proposals not consistent with relevant factors.
- f. Rebut union proposals as unreasonable, not consistent with relevant factors, or not consistent with community standards.

## **VI. Current Status of Legal Challenges to Factfinding**

(County of Riverside v. PERB; San Diego Housing Commission v. PERB)

### **A. Summary of Challenges**

1. Single Issue
  - a. Contrary to language and intent
2. MOU-Constitutionality
  - a. Interferes with agency budget and compensation
  - b. Delays impasse/implementation
  - c. Delays budget
  - d. Contracts out to private body
3. Impact on Bargaining
  - a. Adverse, because not bargaining to finality
  - b. Not mutual

### **B. Superior Court Rulings**

- Superior Courts ruled in favor of the local entities, concluding that AB 646 did not apply to single issues being bargained during the term of a closed memorandum of understanding.
- In County of Riverside, the court also concluded that although it was a close call, AB 646 is constitutional because it did not “substantially interfere” with public entities’ exclusive right to manage and control their own budgets and employees’ compensation.
- PERB moved for dismissal under the anti-SLAPP statute alleging that its processing of the union’s demand for fact finding under AB 646 was protected activity as an “official proceeding” under the anti-SLAPP statute and thus, the lawsuit challenging that action was subject to dismissal.

- The superior Court denied PERB's anti-SLAPP motion, concluded that the motion was frivolous and awarded the County attorney's fees for defending the anti-SLAPP motion.
- PERB appealed the single issue rulings and the anti-SLAPP denial, and the County cross-appealed the ruling on constitutionality.

### **C. Court of Appeal Ruling**

- On March 30, 2016, in two separate opinions (*San Diego Housing Commission v. Public Employment Relations Bd.* (2016) 246 Cal. App. 4th 1; *County of Riverside v. Public Employment Relations Bd.* (2016) 246 Cal.App.4<sup>th</sup> 20), the Court of Appeal reversed the trial courts and essentially deferred to PERB's interpretation of AB 646 declaring PERB the expert on such matters.
- Thus, the Court of Appeal agreed with PERB that AB 646 does apply to single issues that arise during the pendency of a closed memorandum of understanding.
- The Court of Appeal also concluded that AB 646 is constitutional because the fact finding panel's recommendations do not result in a binding decision and entities have the option of rejecting the fact finding panel's recommendations.
- The Court of Appeal also concluded that PERB's anti-SLAPP motion should have been granted because the action being challenged (PERB's processing of the union's fact finding request) was an official proceeding protected by the statute.
- The case was remanded to the Superior Court for further proceedings consistent with the decisions.
- Petitions for review filed with the Supreme Court were denied.