Late last week a PERB Regional Attorney dismissed an unfair practice charge against Governor Schwarzenegger. The charge alleged that the State unilaterally implemented a three-day-per-month furlough. Although we do not normally feature dismissals in CALPELRA Alerts, this case has current potential implications for both MMBA and SEERA jurisdictions.

Over the last year, the Governor issued several Executive Orders declaring a fiscal emergency, and ordered the implementation of a furlough for employees in the Internal Union of Operating Engineers, Unit 12 (IUOE). The Department of Personnel Administration (DPA) provided IUOE with notice of the emergency and offered to negotiate the effects of the furlough implementation. But because of the timing of the financial emergency, the DPA implemented the furlough before the negotiations were initiated.

IUOE claimed that the DPA was required to negotiate over the furlough before implementing it, and filed a charge of unlawful unilateral action with PERB. The DPA argued that the state collective bargaining statute, SEERA (the Dills Act), allows the Governor to take unilateral action during an emergency. The DPA specifically cited Section 3516.5, which reads in part:

“In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials . . . shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.”
Nearly identical emergency language is included in the MMBA\textsuperscript{3} (local agencies), but is not included in the EERA\textsuperscript{4} (schools), the HEERA\textsuperscript{5} (state universities), or the Trial Courts Acts.\textsuperscript{6}

Because IUOE failed to allege any facts regarding the invalidity of the Governor’s emergency declaration, the Regional Attorney dismissed the charge of unlawful unilateral adoption for failure to state a prima facie case.

**Implications**

Although this dismissal is based on a technical element, we note the following significant implications:

*First, the Regional Attorney relied on the Governor’s official Declaration of Emergency to allow the immediate implementation of the furlough, pending further negotiations under the SEERA and the MMBA.*

IUOE will likely appeal the decision to the full PERB. Until then we cannot cite this decision as precedent. But we can anticipate how PERB might allow an agency operating under a bona fide emergency declaration to unilaterally implement mandatory subjects of bargaining before completing negotiations. For example, the PERB Regional Attorney relied on the County of Sonoma Court of Appeal decision,\textsuperscript{7} stating that the union must prove that the emergency declaration is invalid before PERB will consider the unilateral action unlawful. This places a substantial burden on the union.

*Second, the Regional Attorney determined that the Governor’s furlough plan was a mandatory subject of bargaining (reduction of hours), and that normally the employer must bargain in good faith through impasse before implementation.*

This Regional Attorney decision, if adopted by PERB, will create a substantial exception to the basic rule that an employer must bargain in good faith before making a unilateral change in a mandatory subject. Such an exception will be important in dealing with bona fide emergency timelines in bargaining relating to expenditure reductions that most agencies are undertaking.

*Third, MMBA jurisdictions should note that the emergency declaration must be a bona fide emergency.*

In this instance, the need for immediate action was detailed in two Executive Orders. The Governor cited the $43 billion deficit and the immediate cash crisis that would preclude payment of State obligations, including payroll and other emergency services. A looming budget deficit by itself would probably not constitute an emergency.
Finally, this law will be developed over the next several years.

During this great recession, we expect PERB and the courts to process many similar cases. There are a number of other unfair practice charges and court cases challenging all facets of the Governor’s furlough program. And we expect other agencies to generate cases relating to the implementation of expenditure reductions. Before all those cases are decided, we can only provide a broad definition of the legal constraints, and so must be cautious in our approach. PERB and the courts will narrowly craft any exceptions to the duty to bargain.

CALPELRA Academy 6
And This Topic

The topic of unilateral adoptions, and when the obligation to negotiate may be suspended or waived, is a key element of CALPELRA’s newest Labor Relations Academy, Academy 6, “Bargaining Your Way Through Economic Crisis.” We’re still accepting registrations for the San Diego Academy 6 on Friday, February 5. More details are available on our Web site, including registration information.

7 Sonoma County Organization Employees v. County of Sonoma (1991) 1 Cal.App.4th 267, 1 Cal.Rptr.2nd 850.
Current Academy Schedule

January 29, 2010
Labor Relations Academy 6
Bargaining Your Way Through Economic Crisis
CarrAmerica Conference Center
Pleasanton, California

February 5, 2010
Labor Relations Academy 6
Bargaining Your Way Through Economic Crisis
Embassy Suites San Diego Bay-Downtown
San Diego, California

February 19, 2010
Labor Relations Academy 5
PERB Unfair Practice Charges
Centre at Sycamore Plaza
Lakewood, California

March 5, 2010
Labor Relations Academy 5
PERB Unfair Practice Charges
CALPELRA Offices (Exponent Building)
Menlo Park, California

March 19, 2010
Labor Relations Academy 3
The Negotiations Process
CALPELRA Offices (Exponent Building)
Menlo Park, California

Learn more about all of CALPELRA’s Academies and register on-line at CALPELRA’s Web site.