Governor Signs AB 646: Fact-Finding Becomes Mandatory Under MMBA

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Governor Brown has signed AB 646, amending the MMBA. The MMBA now establishes mandatory fact-finding for local agencies that have reached negotiations impasse if the union requests fact-finding. AB 646 requires fact-finding very similar to the procedures required for school employers under the EERA and for higher education employers under HEERA.¹

One legal commentator describes AB 646 as “probably the most significant change to any of California’s public sector labor relations acts since the days of Governor Davis.” Effective January 1, 2012, the amended MMBA will:

- Require the appointment of a three-person fact-finding panel, if a mediator is unable to resolve the differences within 30 days of appointment, and if the employee organization requests fact-finding.
- Require an appointed fact-finding panel to investigate, hold hearings, and issue findings of fact and recommendations covering the unresolved issues through the application of eight listed criteria, including most significantly: (1) comparability in wages with other public agencies; (2) the agency’s financial ability; and (3) the change in the Consumer Price Index, and local rules, regulations, or ordinances.
- Require the parties to share equally the costs of the process, including the expenses of the neutral chair of the fact-finding panel.

¹ Fact-finding is an advisory and non-binding form of interest arbitration. The local agency and the employee organization each appoint a panel member, and PERB appoints a neutral arbitrator as the chair of the fact-finding panel. To persuade the fact-finding panel that specific statutory criteria support their respective negotiation proposals, the local agency and the employee organization present testimony, documentary evidence, and arguments to the fact-finding panel. The fact-finding panel must consider specific criteria and recommend final contract terms and language based on the panel’s application of those criteria. You can read Fact-Finder Decisions on PERB’s Web site.

² Government Code Section 3540, et seq. and 3560, et seq.
• Provide the fact-finding panel’s recommendations as advisory to the negotiating parties.
• Allow the employer, after holding a public hearing, to unilaterally adopt its last, best, and final offer (LBFO) no earlier than 10 days after the fact-finding report is made public.

The fact-finding requirements do not apply to charter city or county bargaining units covered by binding interest arbitration.

**Preliminary Questions**

1. **Because the legislation does not alter the MMBA section on voluntary mediation, can a local agency avoid fact-finding and mediation if its local rules do not allow for mediation or if the agency opts not to proceed to mediation?**

Current MMBA Section 3505.2, which allows for mutual agreement for appointing a mediator, was left untouched, leaving open the question whether this new impasse procedure is voluntary. AB 646 inserts a section following Section 3505.2 stating, “[I]f the mediator is unable to effect settlement of the controversy within 30 days after … appointment, the employee organization may request the parties’ differences be submitted to a fact-finding panel.”

Local agencies may be able to argue that mediation requires mutual agreement under Government Code 3505.2, and without mutual agreement to appoint a mediator, an agency can avoid fact-finding. If fact-finding can be avoided, questions arise about whether the local agency will still be able to unilaterally adopt. AB 646 repealed former Government Code Section 3505.4, which authorized unilateral imposition of last, best, and final offers after exhaustion of applicable impasse procedures, and replaced it with Section 3505.7, allowing unilateral imposition “after any applicable mediation and fact-finding procedures have been exhausted, but no earlier than 10 days after the factfinders’ written findings of fact . . . have been submitted to the parties.” Unions likely will argue that unilateral imposition is now allowed only if the agency has completed fact-finding.

Unless the Legislature resolves the ambiguities created by AB 646 in the next legislative session, litigation around these issues will almost certainly ensue. PERB will likely issue some implementing regulations. Local agencies should consult legal counsel regarding the interaction of AB 646 with the agencies’ particular local rules.

2. **What happens if a union does not request fact-finding? Will a union’s decision not to request fact-finding preclude the agency from unilaterally implementing its last, best, and final offer?**

The legislation allows only the union, and not the employer, to request fact-finding. Under new Section 3505.7, unilateral adoption of a last, best, and final offer can only occur after
Any applicable mediation and fact-finding procedures are exhausted, and no earlier than 10 days after the submission of the fact-finding report. Unions may attempt to avoid or delay unilateral implementation by declining to request fact-finding.

Under the EERA and HEERA, unions often attempt to delay negotiations and impasse declaration to forestall the fact-finding procedures that must be completed before the employer can unilaterally implement a last, best, and final offer. With the addition of fact-finding to the MMBA, local agencies must plan negotiations more carefully to move the process along efficiently without committing unfair labor practices. The experience of school districts and higher education institutions under the EERA and HEERA provide useful guidance to MMBA agencies.

3. Who will fund the additional costs of mediation and fact-finding for the state and the local agencies?

Sections 3505.5(b) and (c) require that the union and employer share the expenses of the fact-finding chairperson. Section 3505.5(d) requires that, “other mutually incurred costs shall be borne equally by the public agency and the employee organization” and that the cost for the panel member selected by each party shall be paid by that party.

4. Will the costs of mediation and fact-finding be covered as a state mandated cost?

Although AB 646 was not “keyed” as a state mandated local program, prior decisions of the Commission on State Mandates indicate that the new requirements are likely to be deemed state mandated local programs for which local agencies can claim reimbursement.

5. When will this legislation become effective? Will it cover negotiations currently underway?

This legislation will become effective January 1, 2012, and will cover MMBA impasses after that date.

6. Will PERB be required to certify whether the parties are at impasse as PERB does under the EERA and HEERA, or will the MMBA negotiating parties still determine when they are at impasse?

Under the EERA and HEERA, either party can declare an impasse and PERB determines whether or not a true impasse exists. This allows the parties to know, in advance, whether they may proceed to mediation and fact-finding. Under the MMBA, there is no provision for PERB certifying the existence of impasse. An earlier version of AB 646 would have required PERB to certify impasses under the MMBA, but this requirement was eliminated before final passage. Consequently, MMBA agencies face the burden of ensuring that they have reached impasse in negotiations without the benefit of PERB certification. Impasse exists when “further negotiations would be futile.” If the MMBA parties do not agree upon
the existence of an impasse, then the matter is decided by PERB through a claim of bad faith bargaining, or premature impasse declaration. PERB’s decision will usually be made well after the completion of any mediation, fact-finding, and unilateral adoption, and if PERB determines that the parties were not at impasse, it may order that any unilateral imposition be invalidated to restore the status quo and allow completion of negotiations.

7. Should local agencies push to reach impasse and unilaterally adopt changes before the January 1, 2012, effective date of AB 646?

Local agencies that have been negotiating in good faith and are at or near impasse should work to complete negotiations and, if necessary, unilaterally impose their last, best, and final offers before the effective date of the changes made by AB 646. But local agencies must be careful to make sure that they are actually at impasse, and that they have met and conferred in good faith in reaching that impasse. If PERB determines that a local agency has prematurely declared impasse before negotiations have reached the point where further negotiations would be futile, it will find that the agency has committed an unfair labor practice, and will likely order the parties to continue negotiations under a restored status quo established by invalidating the unilateral imposition. Good legal counsel is essential when assessing your agency’s options.

Labor Relations Academy 9: The Road Ahead - New Impasse Issues

For cities, counties, and other jurisdictions subject to the MMBA, AB 646 may be the most significant change to any of California’s public sector labor relations acts since 2000. To help you implement AB 646, CALPELRA is offering the new Labor Relations Academy 9: The Road Ahead – New Impasse Issues – Impasse Declaration, Mediation, Fact-Finding, Post-Fact-Finding, Revival Of Negotiations, Unilateral Adoption. Registration is open now for Academy 9, offered on November 29, 2011, December 14, 2011, and January 31, 2012.