The Facts of Fact Finding

Prior to the amendments to the Meyers-Milias-Brown Act (MMBA), effective January 1, 2012, mediation and fact-finding were optional by mutual party agreement. The change, Assembly Bill Number 646, requires a new mandatory impasse process that includes the ability for the employee organization to request that a fact-finding panel review the differences and submit an advisory report. The fact-finding panel consists of a union member, a management member, and a neutral chairperson appointed by the Public Relations Employment Board (PERB) – typically someone with interest arbitration or fact-finding experience.¹

What is Fact Finding?

Fact-finding is the use of an impartial expert (or group) selected by the parties, by the agency, or by an individual with the authority to appoint a fact-finder, in order to determine what the “facts” are in a dispute.² The fact-finding process under AB 646 is very similar to that under the Educational Employment Relations Act (EERA) and the Higher Education Employer-Employee Relations Act (HEERA). Since enactment, the bill has been modified with the passing of Assembly Bill No. 1606, providing resolution to parts of the time frame process for both the agency and union. Finally, the fact-finding process can be both formal and informal, depending upon the fact finder’s and parties’ preference.

PERB’s Role in the Fact-Finding Process

The Public Employment Relations Board (PERB) is a quasi-judicial administrative agency charged with administering the collective bargaining statutes covering employees of California’s public schools, colleges, and universities, employees of the State of California, employees of California public agencies (cities, counties, and special districts), trial court employees and


supervisory employees of the Los Angeles Metropolitan Transportation Authority.³ PERB has three major responsibilities in the fact-finding process. First, PERB must insure that statutory timelines are either enforced or waived. Second, under current law, PERB appoints a neutral chairperson for the fact-finding panel and contracts with that person for his/her costs, unless the parties select and agree to pay the chairperson. Third, PERB is responsible for maintaining a panel of qualified, acceptable, unbiased persons from which the parties may select a chairperson.⁴

**Selecting Fact-Finding Panel**
The new legislation also includes a three person panel, the neutral chair and an individual from the agency and one from the union or association. The individual from the agency should be knowledgeable of the negotiations and have the ability to provide input to the neutral chair. However, the selection process situation may become complex. Consideration should be given before beginning negotiations as to who will participate in the bargaining process. Prior to the fact-finding mandate, Kern County generally had two people at the table representing the County: the lead negotiator and an assistant. However, under the new legislation, one of those individuals may need to carry out the role of representing the agency as a member of the fact-finding panel. As such, this individual would not be available to be called as a witness in the hearing. Kern is carefully monitoring this process and may alter the structure of its negotiating team prior to the next round of negotiations.

Once the selection process for the neutral is complete PERB requires both parties to file with PERB the names, addresses and telephone numbers of relevant individuals. In addition, a list of issues must be submitted either jointly or individually.⁵

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³ http://www.perb.ca.gov/
⁴ PERB Impasse Procedures http://www.perb.ca.gov/about/useperb.asp
⁵ PERB Impasse Procedures http://www.perb.ca.gov/about/useperb.asp
The panel is presented with the facts and evidence that will be used to determine the recommended terms of settlement. AB 646 requires the fact-finding panel to evaluate the parties’ positions using the following specific criteria: 6

1. State and federal laws that are applicable to the employer.
2. Local rules, regulation, or ordinances.
4. The interests and welfare of the public and financial ability of the public agency.
5. Comparison of the wages, hours, and conditions of employment of the employees involved in the fact-finding 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, other excused time, insurance, 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 finding and recommendations.

Although this information is what is required, based upon Kern County’s experience, it is imperative that the employer also provide additional pertinent information, specifically financial, that supports its proposal. For example, in the fall of 2011, during Kern’s Memorandum of Understanding (MOU) negotiations with Kern County Fire Fighter Union (KCFFU) impasse was reached. The County had previously declared a fiscal emergency and KCFFU rejected the financial claims. Kern’s Employer-Employee Relations Resolution (EERA) provides for fact-finding to assist with reaching resolution. During the fact-finding proceedings

6 Govt. Code §3505.4(d)
the County provided detailed financial information that included expenditure reductions, layoff
data, costs/loss in services, and the long-term effects of increasing pension costs. Other
supporting documents included the County’s long-term cost analysis of the union’s proposal.
For example, the Fire Department received a SAFER grant totaling $9 million. $4.5 million was
allotted to fiscal year 2010-2011 to cover firefighter positions and the same for the other $4.5
million in fiscal year 2011-2012. The grant obligated the County to maintain the same
firefighter staffing levels for the two years of the grant and for one year after. KCFFU request
for salary increases did not take into consideration the cost of maintaining these firefighters for
fiscal year 2012-2013 nor did it consider the long-term pension costs. As a result, the County
presented to the fact-finder the estimated long-term costs of maintaining these positions as
well as the loss of services that would be required County wide to keep these firefighters on
payroll and continue with the raises.

**Effect of Fact-Finding**
The most significant change to the fact-finding process is the longer period of time involved.
Agencies that previously were not involved in fact finding will now be faced with an extended
negotiations process due to the inclusion of fact-finding. Once an association requests fact-
finding a new clock begins. Prior to AB 1606, approved by the Governor on September 14,
2012, the time frame process was loose and provided room for possible stalling tactics. Kern
County has had extensive experience with this issue and until the passing of AB 1606 has not
been able to find resolution.

Assembly Bill 1606, chapter 314 states: The employee organization may request that the
parties’ differences be submitted to a fact-finding panel not sooner than 30 days, but not more
than 45 days, following the appointment or selection of a mediator pursuant to the parties’
agreement to mediate or a mediation process required by a public agencies local rules. If the
dispute was not submitted to mediation, an employee organization may request that the
parties’ differences be submitted to a fact-finding panel not later than 30 days following the
date that either party provided the other with a written notice of a declaration of impasse.
With five days of receipt of the written request, each party must select a person to serve as its member of the fact-finding panel. The Public Employment Relations Board must, within five days after the selection of panel members by the parties, select a chairperson of the fact-finding panel. Within five days after the board selects a chairperson of the fact-finding panel, the parties may mutually agree upon a person to serve as a chairperson in lieu of the person selected by the board.  

Prior to AB 1606, Kern County’s experienced one case that took five months after declaring impasse to complete fact-finding. In another, from the time of the hearing, allowing for additional briefs, to the receipt of the fact-finder report took 90 days. In yet another case this process exceeded 140 days. Although AB 1606 addressed the maximum number of days within which fact-finding must be requested it does not address the issue of time in regards to receiving the fact-finders report.

**Fact-Finders Report**

After the hearing some fact-finders may allow for additional briefing that will further extend the time frame. Kern generally anticipates 30 additional days for submission of additional briefing materials and 45-60 days from that date to expect to receive the fact-finding report.

Kern County completed four fact-finding hearings with four separate associations prior to year end 2011. The County’s proposals and positions were identical with each association. Each fact-finding hearing was completed with different fact-finders who each reached different conclusions. Each report spilt on the issues and there was no consensus between reports. In relation to the previous example with KCFFU, the fact-finder supported the County’s fiscal status by recommending the members begin contributions to health benefits and retirement and accept a lower retirement tier for new hires that would decrease the County’s retirement contribution liability over the long term. However, the fact-finder also stated the association members should be given a salary increase.

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7 California Assembly Bill No. 1606, Chapter 314, approved by the Governor September 14, 2012.
Kern County Experience with Meet and Confer

Since AB 646 was enacted, Kern has held several meet and confer sessions jointly with all 14 employee associations. In one instance, the associations disagreed with the County’s position and requested fact-finding. It is our understanding that the County cannot compel all 14 associations to conduct fact-finding jointly. It is also likely that each association will have different interests in bargaining and therefore present different issues to the fact-finder. The County suggested the use of one fact-finder to hear all cases over different days. All associations rejected this suggestion.

Based upon our experience in the past two years with four different fact-finders and their reports, even if all parties presented similar issues during 14 fact-finding sessions, the outcomes will likely vary. Since the fact-finder under AB 646 can make recommendations and does not have the binding authority, the process may become a non-productive, costly disaster. As such, it may be in the best interest of the County to pursue an approach wherein all associations jointly follow the impasse procedure. At this time the County is working on a proposal to explain the cost implications for each association of participating in fact-finding individually as compared with a less costly joint approach in hope of persuading the associations to present their cases jointly. Although Kern has four large associations, some associations have fewer than 50 members and the cost of fact-finding may not be feasible for these smaller groups. If the associations reject this proposal the County will try again at some future time when it might have a better chance of being accepted.

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