Labor Negotiations, Impasse Procedures and Factfinding After AB 646

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A Summary of Factfinding Under the Meyer-Milias-Brown Act

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Governor Brown signed AB 646 on October 9, 2011 amending the Meyers-Milias-Brown Act to require factfinding as a means of resolving an impasse in labor negotiations under certain circumstances. The law exempts charter cities and counties from the factfinding procedures if they have impasse procedures which include a process for binding arbitration.

AB 646 repeals prior Government Code section 3505.4, which permitted unilateral implementation of an agency’s last, best and final offer following exhaustion of whatever “applicable” impasse procedures an agency had adopted. The law enacts a new Section 3505.4, requiring factfinding if a mediator is unable to effect a settlement within 30 days of the mediator’s appointment and the union requests factfinding.

AB 646 also adds Government Code section 3505.7 which provides in pertinent part that after “any applicable mediation and factfinding procedures have been exhausted . . . 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 . . .”

The catch is that existing Government Code section 3505.2 remains unchanged and does not require an agency to agree to mediation. That raises the very important question of whether an agency can avoid factfinding altogether if it refuses to agree to mediation. If factfinding only kicks in after an unsuccessful mediation, and an agency does not have to agree to mediation, it is arguable whether factfinding is really required.

The Public Employment Relations Board (“PERB”) has answered that question for at least the first half of 2012. On December 8, 2011, PERB adopted an Emergency Regulatory Action governing in-part MMBA factfinding which went into effect January 1, 2012 and which expire on June 30, 2012. The Emergency Regulatory Action adds Section 32802 and Section 32804 to Title 8 of the California Code of Regulations.
Section 32802 provides that a union may require factfinding following an impasse in negotiations under two circumstances. First, a union may request factfinding no sooner than 30 days and no later than 45 days after appointment of a mediator to resolve the impasse. Second, a union may request factfinding within 30 days of either party providing the other with a written declaration of impasse and the parties do not use mediation. Section 32802 goes on to require that a request for factfinding be filed in the “appropriate regional office” of PERB and served on the other party to the negotiation.

A factfinding panel includes three members. The union and the agency each select a panel member. Section 32804 provides that PERB will submit a list of seven potential neutral factfinders to the parties within five working days after it determines that a union has submitted a valid request for factfinding. The third neutral panelist may be selected by the parties, or if they are unable to choose the neutral, shall be selected by PERB. Within 10 days of its appointment, the factfinding panel will meet with the parties and may make inquiries and investigations, and hold hearings. The parties equally bear the costs of the chairperson, and each party bears the costs, if any, of their appointed panel member.

**Practice Pointer:** The MMBA permits agencies to adopt labor relations rules which govern, among other subjects, labor negotiation impasses. Some agencies include mandatory mediation, others make it optional and still others do not address mediation at all. It may make sense to amend labor relations rules once the law surrounding factfinding becomes more settled either through PERB adoption of permanent regulations and/or legislative amendment of AB646. Amending labor relations rules might enable an agency to integrate the factfinding process into its existing impasse procedure.

Creating or amending labor relations rules falls outside the scope of negotiable wages, hours, terms and conditions of employment and is therefore not subject to “meet and confer” under the MMBA. However, it has long been understood that changes to labor relations rules are subject to “meet and consult”. We contend that this means that public entities must uses the same basic good faith meeting process to discuss amendments to labor relations rules, but an impasse is not subject to any impasse process and/or factfinding. There are unions who disagree with this position.

Ultimately, the three member panel will likely hold a hearing. The hearing process is likely to be similar to the binding interest arbitration process used by a handful of charter agencies around the State. The major difference is that the factfinding panel has no authority to make a final, binding ruling to resolve the negotiation impasse. The panel will instead issue an advisory recommendation to the governing body of the agency. The panel must reach its findings and recommendations based on eight 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 to employees performing similar services in comparable public agencies
6. The cost of living
7. The overall compensation presently received by the employees
8. Any other facts which are normally or traditionally taken into consideration in making the findings and recommendations

Each party will be required to provide documentary and testimonial evidence to support these factors.

**Practice Pointer:** Public agencies should consider these eight factors even before negotiations begin. The introduction of factfinding puts a greater emphasis on planning for negotiations. Gathering information and then presenting it during the bargaining process may help foster a negotiated agreement. Failing agreement, the parties will be better equipped to move through the factfinding hearing process more quickly because they will have understood the underlying facts from early in the bargaining process.

The factfinding process brings a new dimension to MMBA bargaining and therefore raises numerous questions. Here, we have assembled the major questions (and answers) that are important to understanding how the process will work.

1. **Does the Neutral Chairperson effectively make all the decisions since the Agency panel member and the Union panel member usually cancel each other's votes?**

   Generally the Neutral does make the decision but the ‘partisan’ members typically have the chance to influence the neutral (e.g. in a panel closed session). Also they can provide a communication link between the Neutral and the party they represent.

2. **How does the panel rule on motions and evidentiary issues during the hearing?**

   The Neutral generally has overall authority to run the hearing, so he/she usually makes such rulings with little involvement from the partisan panel members.

3. **Does the Neutral Chair have the authority to decide whether an issue is properly before the factfinding panel?**

   In most situations, the Neutral will decide if a matter is an issue to be addressed in the factfinding. If it is a purely legal issue, then judicial review is possible, either before or after the Neutral’s ruling. For example, management might insist that an issue raised by the union falls outside the scope of negotiations because it is a management right. The Neutral might make a ruling on this issue subject to subsequent appeal by the aggrieved Party.

4. **Can the Neutral Chair mediate issues during the hearing?**
Yes, but Neutrals vary in the degree to which they mediate. Also the parties may invite mediation depending on how they wish to use the process. Mediation may occur less often in factfinding than it does in interest arbitration. In the latter there is a final binding decision that selects one party’s final position without the possibility of compromising between the respective positions. Neutrals often try to mediate a resolution somewhere in between the parties’ positions. In factfinding there is no binding decision and the ultimate recommendation can be a compromise between the parties’ positions, so the Neutral can fashion his/her own compromise without having to mediate one.

5. **Can the Neutral Chair “exclude witnesses” from the hearing?**

Under the general authority to control a hearing, a Neutral could exclude witnesses but they only do so if one party requests exclusion and there is a compelling reason to do so. Often Neutrals want witnesses to hear each other to expedite the later testimony.

6. **Can the Neutral Chair order reluctant witnesses to attend the hearing?**

The “panel” can issue subpoenas to compel attendance, although in reality it is the Neutral who does so. Enforcement of a subpoena where a reluctant witness does not obey the subpoena requires a separate court proceeding.

7. **Does the Agency panel member have the opportunity to influence the Neutral Chair before he/she decides?**

Yes, but the extent of that opportunity depends on how the Neutral chooses to involve the partisan members. Some Neutrals invite multiple closed session discussions of the entire panel, but some simply decide and only invite written concurrences or dissents.

8. **What is the working relationship between the Agency panel member and the Agency presenter before, during and after the hearing?**

Before the hearing, they should discuss strategy. During, they should discuss how to present specific issues, witnesses and how it seems the Neutral is viewing the Agency’s case. After the hearing, they should collaborate on the final agency positions to submit to the Neutral. Although this may seem like it creates a conflict of interest for the Agency’s penal member or constitutes an ex parte communication by the Agency’s presenter, these are not issues in factfinding. All concerned understand that each party’s appointed panel member is part of its advocacy team and therefore may speak with the party’s presenter.
9. **If the Neutral Chair runs the hearing, what does the Agency panel member do during the hearing?**

The Agency panel member should listen and assess the Agency’s case, including how the case appears to the Neutral. The Agency member should work with the Agency presenter to revise strategy as needed.

10. **Does the Agency panel member get to ask questions of witnesses?**

Typically yes, but the Neutral will decide whether the partisan members ask their questions before or after the Neutral asks his/her questions. Some Neutrals will rein in harsh cross examination by partisan members.

11. **What does the Agency panel member do if he/she disagrees with a ruling or decision by the Neutral Chair?**

During the hearing, the Agency or Union panel member can ask for a caucus of the panel and those requests are typically granted. Then he/she can try to persuade the Neutral. As the panel is putting together its recommendations, the Agency panel member’s ability to assert the Agency position will depend on the willingness of the Neutral to include the partisan members in his/her deliberations. Ultimately, either partisan panel member can draft a concurring or dissenting opinion to accompany the Neutral’s recommendations.

12. **Can the Agency and Union panel members settle individual issues and thereby remove them from the factfinding?**

Yes, and most neutrals will encourage such voluntary settlement discussions.

13. **Can the Agency or Union panel members testify at the hearing?**

Some neutrals have allowed such testimony, but it is completely incongruous to have a panel member testify to the panel on which he/she is sitting. Agencies should be very cautious about selecting a panel member who might need to testify, since many neutrals will not permit it. Notice, however, that there is a distinction between a party’s panel member acting as an advocate and acting as a witness. Although allowing a panel member to be a material witness is discouraged, it is understood that the panel member is an advocate for the party which assigned him or her to the panel. Consultation with the party’s advocate is therefore generally acceptable while testimony as a witness generally is not.
14. **Does the Agency presenter put on the Agency case before or after the Union's case?**

   Typically issues are addressed individually with the party seeking a change in the status quo going first on that issue. The process is not like trial where a plaintiff has the burden of proof and presents its entire case first.

15. **Does the Agency presenter have to disclose the names of witnesses before the hearing?**

   Normally there is no requirement for disclosure of the names of witnesses in advance but many neutrals will require disclosure of experts. Often neutrals will encourage joint meetings between experts to expedite their testimony.

16. **What is the role of the Agency negotiating team members at the hearing, if any?**

   If the factfinding is a closed hearing there is an initial question about the team attending. Typically the teams from both sides will attend. At the hearing team members may testify on subjects like negotiating history, prior contracts, past practices and the like. They can also serve as a resource for their respective sides.

17. **Can the Agency representatives request a “caucus” during the hearing?**

   Yes, and such caucuses are common, although the final say lies with the Neutral. Most neutrals accommodate reasonable requests by the parties.

18. **Do neutrals function like arbitrators in that they decide disputed issues by giving some to one side and some to the other?**

   In interest arbitration, where a final binding decision is made on each issue, there may be a tendency to award each side something. In factfinding, such allocating – sometimes called ‘splitting the baby’ – may also occur by a Neutral compromising within a given issue by recommending something between the positions of the parties that effectively gives something to each side.

19. **Can an elected official from the Agency….**

   a. attend the hearing?
   b. serve as the Agency panel member?
   c. serve as the Union panel member?
   d. testify as a witness?

   The answer is probably Yes to each of these questions. However, an elected official’s
involvement in any of these ways – even mere attendance – poses a series of problems for the Agency. These include perceptions of favoritism, excessive authority beyond that of a single member of the legislative body and possible distrust of the management representatives presenting the Agency case.
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