

City Labor Negotiations

September 27, 2011



Labor Law in California Public Sectors

- Meyers Milias Brown Act (MMBA, (Gov. Code 3500)
- S.B. 739 (placing MMB agencies under PERB for covered employees)



State Policy

- Stability in labor/management relationship
- Fairness through bilateral decision-making regarding wages, hours and working conditions
- Providing peaceful mechanism for resolving differences



State Policy

- Facilitating understanding and acceptance by elected representatives, management, labor unions and employees
- Giving both sides the right to use economic weapons consistent with good faith



Right to Representation

- Right of public agency employees to join and be represented by an employee organization, which must have as one of its primary purposes the representation of employees in their relations with public agencies
- Right to form, join and participate in activities of employee organizations of their own choosing



Right to Representation

- Right to refuse to join in or participate in activities of employee organizations
- Right to self-representation
- Agency shop: as a condition of employment, employees may be required to join or to pay fees to employee organizations that have been certified as exclusive representatives of employees



Public Agencies

- Duty to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations
- May not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of rights



Supervisory, Management, Professional and Confidential Employees

- Entitled to representation without regard to their position in the organizational hierarchy
- Professional employees are entitled to be represented separately from non – professional employees by a professional employee organization.



Preview of Alameda EERR Rules

CONFIDENTIAL EMPLOYEE – means an employee who acts in a confidential capacity to persons who formulate, determine or effectuate policies or decisions of City management in the field of employer-employee relations.



Preview of Alameda EERR Rules

- MUNICIPAL EMPLOYEE RELATIONS OFFICER – The City Manager is hereby designated as the Municipal Employee Relations Officer who shall be the City’s principal representative in all matters of employer-employee relations, With authority to meet and confer in good faith on matters within the scope of representation including wages, hours and other terms and conditions of employment.



Definition of Terms

- Union
 - Employee Association
 - Association
 - Bargaining Representative
 - Guild
 - Professional Association



How Is A Union Formed?

- Unrepresented employees (or employees represented by another union) file a petition showing interest in a union or a change in union representation
 - Employer must recognize union if “cards” signed by 50% +1 of employees in the unit.
- An “election” is held
 - If 30% or more of unit signs cards for another union



What is a Bargaining Unit?

- A group of employees with a clear and identifiable community of interests that the employer feels is appropriate for collective bargaining
- A bargaining unit is represented by a single union



What is a Bargaining Unit?

- Examples would be
 - law enforcement professionals
 - blue-collar workers
 - clerical and administrative employees
 - management employees
 - confidential employees
 - professional employees



Alameda Bargaining Units

- Alameda City Employees Association (ACEA)
- Alameda Fire Management Association (AFMA)
- Alameda Police Management Association (APMA)
- Alameda Police Officers Association (APOA)
- Alameda Police Officers Association, Non-Sworn (PANS)
- International Association of Firefighters, Local 689 (IAFF)
- International Brotherhood of Electrical Workers, Local 1245 (IBEW)
- Management and Confidential Employees Association (MCEA)



Preview of Alameda EERR Rules

APPROPRIATE UNIT – means a unit where there is a community of interest among such employees. Units may be established on any craft, functional, departmental or other basis so as to assure to employees the fullest freedom in exercising the rights set forth in the EERR.



Preview of Alameda EERR Rules

MAJORITY REPRESENTATIVE – means an employee organization, or its duly authorized representative, that has been granted formal recognition by the Municipal Employee Relations Officer as representing the majority of employees in an appropriate unit.



Preview of Alameda EERR Rules

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.



UNDERSTANDING THE DUTY TO BARGAIN



Definition of Terms

- There is no legal or practical distinctions between bargaining, negotiating, conferring, or meeting and conferring
- Meet and discuss or meet and consult are the same but have a *totally different* meaning than those in the first bullet
- MOU is the same as collective bargaining agreement (CBA) or labor contract



Duty to Bargain Pointer

- Even if employer action falls within management rights, there may be the obligation to meet and confer over the *impacts* of the action
- Example:
 - Employee layoffs
 - Change in office location
 - Increasing employee qualifications



Typical Events that Trigger A Duty To Bargain

- Approaching the end of the contract term for an MOU
- To implement a new policy or rule
- To revise an existing policy or rule
- To change a past practice



Terms

- Closed Contract
 - A closed contract is one in that has not expired
 - Generally cannot make changes to terms absent mutual agreement
- Open Contract
 - One which is up for renegotiations
 - All items in the contract are up for negotiations
- “Evergreen” language



Subjects of Bargaining

- Mandatory (Within Scope of Bargaining)
 - Matters that are primarily related to wages, hours, and other terms and conditions of employment
- Permissive
 - Subjects which are management rights, those things related to “...the merits, necessity, or organization of any service....”
- Illegal



Mandatory Subjects of Bargaining

- You must negotiate to the point of impasse
- Refusal or failure to do so is an unfair practice
- Examples:
 - Wages
 - Health benefits
 - Work schedules (within the timeframes set by the employer)



Mandatory Subjects of Bargaining

- Examples:
 - Retirement benefits
 - Transfer of work from one bargaining unit to another
 - Contracting out work currently performed by bargaining unit members to save money



Unilateral Change Prohibition

- Cannot make a unilateral change on a mandatory subject of bargaining without giving union notice and an opportunity to bargain before taking unilateral action.



Permissive Subjects of Bargaining

- You can negotiate if you wish but **CAUTION** is advised
- Insisting on taking an permissive subject of bargaining to impasse is an unfair practice
- Examples:
 - Services to be provided
 - Hours of operation



Permissive Subjects of Bargaining

- Examples:
 - Building locations
 - Change in building locations
 - Decision to layoff employees
 - Job duties and responsibilities
 - Employee qualifications
 - Staffing levels
 - Work methods



Illegal Subjects of Bargaining

- Subject that the parties cannot negotiate
- Examples:
 - Negotiations on whether state or federal laws will be applied
 - Relinquishing employee rights under State Workers' Compensation laws
 - Waiver of Medicare tax payment on part of employer and employee
 - An MOU provision that required an employee to do something illegal



LEGAL FRAMEWORK



Key Features

- PERB
- Employee definition varies by statute
- Unfair labor practice protection – adjudication not prosecution
- Exclusive representation
- Scope of representation



MMBA

3504. Scope of representation

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.



MMBA – Unique Features

- Coverage
- Applicability of local rules
- Alameda's ERR
 - Representation issues
 - Impasse procedures



Unfair Practices Under MMBA

- Discrimination/reprisals because of “exercise of rights”
- Bad Faith Bargaining
 - Per se violations
 - Totality of circumstances



Unfair Practices Under MMBA

- Per se
 - Unilateral change
 - Refusal to provide information
 - Insistence on permissive subjects
 - Refusal to execute agreement
- Refusal to allow a reasonable number of employees reasonable time off with pay to participate in bargaining



Unfair Practices Under MMBA

- Totality of circumstances bad faith bargaining
 - Surface bargaining
 - Regressive bargaining
 - Delays in bargaining
 - Lack of authority



Consequences Of Committing An Unfair Practice

- Complaint filed with Public Employment Relations Board (PERB)
- Investigations
- Settlement Conferences
- Hearings
- Decisions
- Appeals
- **Reversal of management action, often with monetary damages**



MMBA “Emergency” Exceptions

3504.5. Notice of proposed act relating to matters within scope of representation; meeting; emergencies

(a) Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.

(b) In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation.



Police and Fire MOU Emergency Provisions

- Section 7 - Advance Notice

“In cases of emergency when the City Council determines that an ordinance, rule, resolution or regulation must be adopted immediately without prior notice or meeting with the Union, the City shall provide such notice and opportunity to meet at the earliest practical time following the adoption of such ordinance, rule, resolution or regulation.”



Police and Fire MOUs

Section 8 - City Rights

- The rights of the City include, but are not limited to, the exclusive right to determine the mission of its constituent departments, commissions and boards; set standards of service; determine the procedures and standards of selection for employment and promotion; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and to exercise complete control and discretion over its organization and the technology of performing its work.



STAGES OF NEGOTIATIONS



Sequence of Events

Overview

- Prior to expiration of MOU, Employer or Bargaining Unit notifies the other of desire to negotiate successor MOU
- Public may comment on desired changes to MOU
- Employer and Bargaining Unit meet to discuss ground rules for negotiations
- Exchange of opening proposals between Employer and Bargaining Unit



Sequence of Events

Overview

- Negotiations of opening proposals with presentation of counterproposals
- Closed sessions with City Council for direction on proposals
- Tentative agreements reached on various proposals
- Membership votes on new MOU
- City Council deliberates in open session on new MOU



Opening Steps

- Notify the union of your intent to reopen
- Plan timing of exchange of proposals



Ground Rules

- Size of negotiations teams
- Released time rules
- Advance notification to affected managers
- Operational needs that prevent release on a given day



Ground Rules

- Frequency, duration and location of negotiations
- Timeliness
- Processes for requesting and providing information
- Confidentiality
- Release of information



Opening Stage

- Clarification, questions, refinement and explanations
- Discuss interests
- Provide information requested



Middle Stage

- Discuss interests and options
- Counter-proposals
- Tentative agreements on proposals
- Package proposals



Closing Stage

- Refine interests and options
- Final packages
 - Agreement in part is contingent on agreement on the whole



Addressing Bad Faith Conduct

- Surface bargaining and regressive bargaining
- Premature declaration of impasse
- Failure to provide information
- Bypassing and direct dealing
- Delay



Communicating With the Bargaining Unit

- It is normally *lawful* for the public employer to communicate with members of the bargaining unit about the subjects under negotiation, as long as:
 - no ground rules prohibit such communication;
 - the communication does not “*bypass*” the union team, does not reflect “*direct dealing*,” and does not “*undermine*” the team.



Communicating With the Bargaining Unit

- ***Bypassing*** and ***direct dealing*** occur when the employer makes offers to employees which were not made to the union at the table
- ***Undermining*** occurs when the employer mischaracterizes the union's position in negotiations or engages in disparagement of the union's team



PAST PRACTICE



Past Practice Comes Into Play

- When rules governing matters are **not included** in the written labor contract
- To indicate proper interpretation of **ambiguous** contract language
- To support allegations that the clear language of the **written contract has been changed** by mutual agreement



Conditions Needed For A Past Practice to Be Binding

- Unequivocal
- Clearly enunciated and acted upon
- Readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties
- Must relate to a mandatory subject of bargaining (wages, hours, or conditions of employment)



Rule of Thumb

- Lax enforcement of policies or labor contract provisions with “clear and specific” language can be changed by giving **advanced notice** to the union of intent to change the practice
 - Union has the ability to request to negotiate impact
 - Follow impasse process if needed
 - Then implement the change



Rule of Thumb

- Past practices that result from ambiguous MOU language may not be able to be change until successor MOU negotiations
 - Most MOUs have a “no modifications” or “zipper” clauses which preclude making changes to the terms of the negotiated agreement during the term of the agreement without mutual consent.
 - It depends on how many “teeth” are in the zipper clause!



IMPASSE PROCEDURE & UNILATERAL IMPLEMENTATION



Impasse

- An impasse is reached when the parties, bargaining in good faith, are unable to reach agreement on the terms of the collective bargaining agreement.
- Impasse procedures in California public sector are defined by local rules.



Mediation

- Best description of Henry Kissinger engaging in shuttle diplomacy in the Middle East during the Nixon and Ford administrations.
- A third party mediator works with the parties to try to find common ground and to assist the parties in resolving their impasse.



Mediation

- The mediator's powers of persuasion are the most powerful tool
- Mediation is non-binding and no power to make a final and binding resolution of the impasse.
- Frequently used in California public sector



Interest Arbitration

- City Charter Article XXVII
- For Fire Department employee disputes
- No standards; limited to economics only
- Third party neutral conducts a hearing
- Issues a decision binding on the parties
- Less than 20 California public employers use this as the impasse resolution process



Unilateral Implementation

- Under MMBA a public employer may unilaterally implement its last, best, and final offer if certain conditions are met
- Conditions
 - Meeting and confer in good faith
 - Reached an impasse
 - Impasse procedures have been exhausted
 - Not required to proceed to interest arbitration
 - Cannot implement a MOU



Unilateral Implementation

- Other pointers:
 - Once an impasse is reached, the duty to negotiate in good faith becomes the duty to participate in good faith in the impasse procedures
 - Employee organization has the right each year to meet and confer on matters within the scope of representation



Unilateral Implementation

- What is being implemented is a change in the status quo, NOT a contract
- The entire last best offer (LBO) must be implemented; can't implement selectively
 - EXCEPTION: matters requiring mutual agreement (e.g., term) and waivers of statutory rights (e.g., the right to bargain)
- After implementation, there's still a duty to bargain over prospective changes or if there's a material change in circumstance



Strikes and Work Stoppages

- Public employee strikes are not illegal in California with the exception of Fire Fighters, Police, and strikes that pose a substantial and imminent threat to public health and/or safety
- An injunction can be issued to stop or delay an illegal strike
 - Question: Who seeks/issues the injunction?

