

PUBLIC MEETING MINUTES

November 14, 2013

PUBLIC EMPLOYMENT RELATIONS BOARD
1031 18th Street
Sacramento, CA 95811

Chair Martinez called the meeting to order at 2:00 p.m.

Members Present

Anita I. Martinez, Chair
A. Eugene Huguenin, Member
Priscilla S. Winslow, Member
Eric R. Banks, Member

Staff Present

Suzanne Murphy, General Counsel
Shawn Cloughesy, Chief Administrative Law Judge

Call to Order

After establishing that a quorum had been reached, Chair Martinez called the meeting to order for a return to the open session of the October 10, 2013, Public Meeting. She reported that the Board met in continuous closed session to deliberate the pending cases on the Board's docket, pending requests for injunctive relief, pending litigation and personnel matters, as appropriate.

Motion: Motion by Member Huguenin and seconded by Member Winslow, to close the October 10, 2013, Public Meeting.

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

Chair Martinez adjourned the October 10, 2013 Public Meeting. She then opened and called to order the November 14, 2013 Public Meeting.

Comments from Public Participants

Joshua Adams, Attorney, Rothner, Seagull and Greenstone, representing United Domestic Workers, AFSCME Local 3930, appeared before the Board in support of the proposed regulations under the In-Home Supportive Services Employer-Employee Relations Act (IHSSEERA) and asked that the regulations be adopted as presented.

Kerriane Steele, Attorney, Weinberg, Roger & Rosenfeld, representing the SEIU State Council, appeared before the Board to weigh in on two items that were discussed in the Advisory Committee Meeting earlier today. The first was with regard to the IHSSEERA

regulations, and the second with regard to strike notice in the public sector relating to healthcare facilities.

Ms. Steele first added support to the regulations regarding IHSSEERA as proposed by PERB stating that “a lot of thought was put into them and that they will be relatively easy for practitioners to apply.” There was one item that had been raised as a point of concern by the California Department of Human Resources (CalHR) regarding the definition of an unfair practice and what would constitute an unfair practice by either an exclusive representative or an employer. In the regulations, PERB proposed to include subsection (g) in section 32610 and subsection (e) in section 32611, and there is also a related section 32602(a), stated Ms. Steele. Those sections define unfair practices as including any other violation of IHSSEERA or any rule or regulation adopted pursuant to Government Code section 11035. Ms. Steele mentioned the letter by PERB dated November 13, 2013, which explained the reason that the subsections were added to the definition of an unfair practice and urged support for the arguments raised in that letter. She stated that under section 11035(a)(4), the Statewide Authority would have the right to adopt reasonable rules and regulations with regard to a number of matters necessary to carry out the purposes of this title. As this section allowed the Statewide Authority that broad right, PERB should also have the broad right to remedy violations of IHSSEERA and any violations of rules and regulations that the Statewide Authority may adopt. Ms. Steele added that it would be appropriate to borrow a similar kind of “catch-all” definition of unfair practice as currently exists in MMBA regulations. The local government employer, specifically in section 3507 under the MMBA, does have the right to adopt broad reasonable rules and regulations. There is the similarity, stated Ms. Steele. If the Statewide Authority is concerned about the “catch-all” definition that PERB is proposing, “it can control for that. The Statewide Authority can choose not to adopt any or many reasonable rules or regulations. ... Government Code section 110035(a) says the Statewide Authority may adopt reasonable rules and regulations, it’s not obligated to.” From the perspective of a practitioner representing unions, Ms. Steele stated:

“It may be *in* the Statewide Authority’s best interest to have unfair practices defined in a way to include violations of IHSSEERA, and any rules and regulations the Statewide Authority adopted because the alternative is that we as plaintiffs may have to go to Superior Court and initiate a writ of mandate to enforce our rights. That is very expensive for all parties involved, really it’s a headache. We like to have your agency, the expert regarding these issues, decide them as opposed to the Superior Court Judge deciding them. These are arguments in favor of your broader definition of an unfair practice that either an exclusive representative can commit or the employer can commit. We encourage you to adopt the proposed regulations. As has already been mentioned this morning, if the work under your proposed regulations, that you are adopting on an emergency basis, we realize it’s really not working for us, we can always come back to you before you adopt them as non-emergency regulations to try and work out the kinks.”

The next subject Ms. Steele wanted to bring to the Board related to notice of a strike in the public sector, specifically, in a healthcare facility. She stated that SEIU locals currently do, in some instances, provide advance notice of a strike in a healthcare setting, including ten days advance notice. Such notice has been decided on a case-by-case basis (1) in conjunction with the membership, and (2) the needs of the patients and the patient’s families. Decisions regarding advance notice have worked well from the union’s perspective, stated Ms. Steele. In

the public sector, there is no requirement for advance notice of a strike; not in statute or in regulation. Ms. Steele stated that, unfortunately, what has happened is that PERB has in the past applied what she termed an “underground regulation” that required or expected such ten-day advance written notice. The union does not agree that a requirement for advance notice is legitimate, based in statute or in regulation, and is therefore “very hesitant to support a proposed regulation that would legitimize this prior practice of the Agency applying an underground regulation.”

Member Winslow inquired if Ms. Steele’s reference to an underground regulation was written somewhere.

Ms. Steele responded that is “precisely the problem: it’s not written down.” That is what has happened in past years, and to some extent currently, there is a strong expectation that exclusive representatives are to provide ten days advance written notice of a strike in a healthcare setting. She stated her belief that “when the exclusive representative may not do so, or does not do so, that is the General Counsel’s Office impetus to go to court and seek injunctive relief on that basis.”

Member Winslow inquired about whether that had ever been done and Ms. Steele responded that there was a case in 2008 involving AFSCME, Local 3299, where a temporary restraining order was granted, in part, on the basis of inadequate notice. Member Winslow wanted to know if that was language by the court or PERB. Ms. Steele stated that it was language drafted by PERB’s General Counsel and signed by the judge.

In recent years, stated Ms. Steele, the practice had changed and she wanted to give PERB’s Office of the General Counsel “credit for being very thoughtful about . . . injunctive relief requests from employers.” From her experience “employers come in asking for way too much in terms of which classifications should be considered essential. . . . They want everyone to be enjoined from striking, perhaps even people who are not scheduled to work that day. [This] forces the General Counsel’s Office to have to actually drill down, figure out who may truly be essential, what is the staffing pattern, how well have the employers done to obtain replacement services (I am a labor lawyer, scab services), and what alternatives are then provided by other medical centers to fulfill the needs of the patients.” Ms. Steele stated her understanding that PERB requires time “to figure that out.” On a case-by-case basis, SEIU locals are providing PERB with advance notice. Such notice is provided in the form of a strike authorization vote or a strike notice to the employer. “PERB also does a great job of following the news. PERB is aware of what’s happening. They often know when an injunctive relief request is coming their way and then sometimes PERB will encourage the parties to get together to talk about who is truly essential. And, sometimes, again on a case-by-case basis, we decide it may be worthwhile to sit down together with the employer . . . to talk about who is or is not going to work during the strike.” The union “will almost never stipulate that anyone’s essential” and the union’s belief is that the *County Sanitation* decision was “applied too expansively.” However, the union might agree that certain employees will work on the day of the strike, on a case-by-case determination, stated Ms. Steele. This is what the unions are comfortable with, believe that it works well, but also “understands that there are employers who may not approach these things reasonably.”

Ms. Steele stated the union’s appreciation that, as an example, the “University of California since at least 2005 has systematically tried to roll back, I might even say, attack the right of

University of California employees to strike” and an understanding of the “immense challenge for our brothers and sisters in AFSCME. . . . We just cannot endorse a regulation that would legitimize what we consider to be an underground regulation of the past.” There is also concern, expressed Ms. Steele, that this dialogue might open the possibility for employers or constituents to suggest that “this should apply to everyone in the public sector, which would, of course, completely undermine the *County Sanitation* case [and] that just cannot happen.” Ms. Steele stated that this is SEIU’s position at this time and the union would remain willing to engage in dialogue regarding this matter.

Member Banks wanted to know if the union rejected wholly the ten-day notice or would it be willing to talk about a lesser amount of time. He also wanted to know if there was some middle ground regarding this issue between Ms. Steele’s comments and the proposal by Ari Krantz at the Advisory Committee Meeting held earlier this morning.

Ms. Steele responded that the middle ground the union proposed, as earlier stated, would be advance notice on a case-by-case basis, and that the union was rejecting the idea of a regulation that required (1) ten days advance notice, or (2) any lesser notice as well. What happens as a practice depends on the circumstances, stated Ms. Steele, with advance notice given on occasion as appropriate “and then [the union would] engage with the employer, really more directly with PERB, as to who may or may not work during the strike. And, in some instances, it may not be appropriate to have that kind of conversation. It absolutely depends.”

Member Winslow asked if in the private sector ten-day notice was given under section 8(g) of the National Labor Relations Act. Ms. Steele responded that was correct, as “the statute was clear.”

Member Winslow stated her understanding of this and asked a follow-up question. Acknowledging Ms. Steele’s years of experience in the private sector and not having had any herself, Member Winslow inquired about whether with 10-day notice there is no question about who was essential and who was not.

Ms. Steele responded that is correct and stated that she understood and respected Mr. Krantz’s and his clients’ position that “in the private sector, you give the notice and then there is no essential employee doctrine at all.” (Member Winslow agreed.) Ms. Steele continued: “That seems to be working OK. We understand that. But in the public sector there has not been an advance notice requirement. Instead what PERB has done, what judges have done, is applied the *County Sanitation* standard.”

Member Winslow continued: “My question is then, why don’t you think that the notice requirement, along the lines that AFSCME and Ari Krantz’s clients have proposed, would be in your benefit? We wouldn’t have to be embroiled in this back and forth about who is essential and who is not and then potentially losing your argument with respect to some employees.”

Ms. Steele stated that it is not to the benefit of the public sector because every situation is different. She added:

“A 10-day notice that is something that the Legislature decided on the federal level and we can’t change that at this point. But, here, 10-day notice is a cookie-cutter amount of

notice that will apply to situations for which it might not be fitting. And, so notice should be determined on a case-by-case basis. There are many instances in which notices should not be required at all. Frankly, I think that in the University of California setting, for example, in 2005 the University of California created a strike preparation plan, a very very thick binder as I understand it, they had a well-oiled machine for how to run their operation during a strike and the General Counsel's Office, I understand, takes that kind of fact into account. How well prepared is the employer to withstand a strike. And so it's a very fact specific inquiry. It should not turn on the measure of notice given, because every situation is different."

Member Huguenin mentioned the written comments PERB received from Ari Krantz regarding this matter and asked that Ms. Steele submit the position just discussed in writing to the Board.

Jennifer Garten, Representative, CalHR, appeared next before the Board. She stated that CalHR had submitted a written comment and she wanted to reiterate a couple of points from that correspondence. Ms. Garten stated that CalHR was in agreement with all of the emergency regulations except for those regarding whether or not an unfair practice can result from a violation of a rule adopted by the Statewide Authority, specifically proposed Regulations 32610(g), 32611(e), and 32602(a). While IHSSEERA tracks the MMBA in many respects, it diverges in a significant aspect, commented Ms. Garten. While the MMBA has a provision under section 3507 which lists all the different areas that a local agency can adopt rules, there is a separate section, 3509, which specifically states that "any violation of a rule adopted by the local shall be processed as an unfair." Ms. Garten stated that under IHSSEERA there is no comparable section 3509.

"The only thing in IHSSEERA addressing the rules is that the Statewide Authority can adopt various rules and that enforcement or adoption of a rule that would violate IHSSEERA can be processed as an unfair. There is nothing within the statute that permits a violation of a reasonable rule being processed as an unfair. In that respect, it is more similar to the Dills Act, which also has where the State employer can adopt rules, and there is no corresponding section of the Dills Act where a violation of one of those rules can be an unfair and that's mirrored in PERB's current regulations, where there is no unfair specified for a violation of the rule. And, we think it is significant that the Legislature chose to make this change from the MMBA and it demonstrates that in this regard, they wanted to depart from the MMBA and not follow it."

Member Winslow asked Ms. Garten whether CalHR would prefer to appear before PERB or in court.

Ms. Garten responded that she understood the pros and cons of both and that in individual situations she could make specific arguments why appearance before either would be best. She stated a concern that if a regulation were adopted outside the scope of the statute, CalHR would not want to be before PERB and then have it found to be an invalid process because it was outside scope, and that would take even more time.

Chair Martinez stated that the Board would now consider a proposal for the adoption of emergency regulations pursuant to the provisions of Senate Bill 1036 under which the Board was given responsibility for the administration and enforcement of IHSSEERA. The duties imposed on PERB require amendments to existing PERB regulations as well as the adoption of

a new Chapter 10 in order to fully implement PERB's jurisdiction under that Act. Pursuant to Government Code section 11035.5, the proposed emergency regulations are deemed necessary to address this emergency. If authorized by the Board, stated Chair Martinez, the proposed emergency regulation package would be transmitted directly to the Secretary of State for filing and transmitted to the Office of Administrative Law (OAL) for the purpose of updating the California Code of Regulations. Upon filing with the Secretary of State, the proposed emergency regulations would become effective immediately for a period of up to 180 days. Within that 180-day period, PERB would then proceed with a regular certificate of compliance rulemaking action including a public comment period. The emergency regulations would remain in effect during the regular certificate of compliance rulemaking action. She asked PERB's General Counsel to comment regarding the staff proposal with regard to this emergency rulemaking.

General Counsel Suzanne Murphy summarized information discussed at today's Advisory Committee Meeting, as well as reflected in the Notice of Proposed Emergency Regulatory Action for IHSSEERA that had been posted on the PERB website since November 4. Within that Notice, the public was provided five working days to comment on the proposed emergency regulations, which began on Monday, November 4, and ended at the close of business the following Tuesday, November 12. PERB also included a finding of emergency in this package that explained both the process, and the specific provisions of the regulations being amended and/or added. Ms. Murphy generally described the proposed text, stating that most of the provisions were based on existing PERB regulations implementing the MMBA, the statute under which the In-Home Supportive Service (IHSS) providers and their employers, whether a public authority or the county, as well as individual recipients of IHSS, had been operating since 1992 (approximately 20 years). She stated that the emergency regulatory language was modeled on standard general PERB authority sections which most PERB constituents have seen before, and the existing MMBA regulations tailored to some extent to adjust for the specific differences between IHSSEERA and the MMBA.

Ms. Murphy stated that a new Chapter 10 would be added to the PERB regulations to implement IHSSEERA, and would include provisions that are not common to those under PERB's regulations for the MMBA or other six statutes PERB administers. As PERB regulations are structured, explained Ms. Murphy, there are general provisions, unfair practice provisions, and representation provisions. Under each statute there are then subsets of regulations that define operations specific to that statute, which will under the pending emergency rulemaking proposal now include provisions specific to IHSSEERA.

Ms. Murphy stated that the definition section of the regulations had provisions about what or who is an "employer" and an "employee" in the IHSSEERA context. As discussed at the Advisory Committee Meeting this morning, in the eight demonstration counties which are currently covered by IHSSEERA, approximately 400,000 employees provide in-home supportive services, with approximately 75 percent of those providing such services to their own family members. Recipients of services are primarily elderly and disabled people, and low income people who qualify for Medicare and Medi-Cal benefits. Ms. Murphy stated that it was a very unusual, very dispersed workforce and that one of the key definitions in the IHSSEERA statute was that of the employer. With regard to the regulations, PERB attempted to be very clear with the working group of interested parties convened in late October, as well as those in attendance earlier this morning at the Advisory Committee meeting, that the Agency is only dealing with the labor relations piece of IHSSEERA. The "employer," for the

purposes of these regulations and collective bargaining, will be the Statewide Authority, which is defined by statute and would include representatives (1) from within relevant State agencies, the Directors of Healthcare Services, Social Services and Finance, and (2) two additional Governor's appointees. CalHR, represented here today by Ms. Garten, would be the employer's representative for purposes of collective bargaining. Employee organizations are already well-defined as they currently exist within every county in the State; that is, there is a represented unit of county IHSS or public authority IHSS employees, all of whom are represented in county-wide units. Ms. Murphy stated as another key component of IHSSEERA is that the only appropriate bargaining unit for purposes of that statute, as opposed to all the other statutes PERB administers, is a county-wide unit with just one classification. In the 58 counties, all of these units are currently represented either by an SEIU affiliate, an AFSCME affiliate, or what are termed as CUHW locals, in which basically all IHSS providers are represented. Those existing representation relationships would continue, explained Ms. Murphy, unless changed sometime before the statute takes effect.

Ms. Murphy continued to explain that there were two general categories of provisions tailored to the IHSSEERA context: (1) representation procedures; and (2) unfair practice procedures.

- (1) Under representation procedures, because of the fact that the only appropriate unit is a county-wide unit, the Agency tied IHSSEERA into its standard certification, recognition, decertification, and amendment of certification procedures that have long existed in PERB regulations for representation cases. The Agency did not include any reference to IHSSEERA in the existing severance or unit modification procedures because currently there was no leeway to adjust units under the statute. Until such time as the statute is amended, the units are clearly and rigidly defined. Only county-wide units, containing one single classification are permitted.
- (2) A key point in the provisions regarding unfair practices, besides the fact that they closely track the MMBA in terms of the types of conduct (whether by employers or employees) that would constitute unfair practices and incorporate much of the same language from the MMBA regulations and interpretative matter that has developed under those provisions, the Board will also have an opportunity to decide whether there are differences between the IHSSEERA context and the MMBA context as unfair practice cases are brought forward. Ms. Murphy added that PERB had for some time now had the unfair practice jurisdiction over IHSS workers, therefore a lot of the standard MMBA unfair practice case law has already been invoked in a handful of cases that the Board had decided since 1992. The biggest difference for present purposes, stated Ms. Murphy, is that IHSSEERA, for the first time, has a "dual employer" concept under which the Statewide Authority is the employer for the purposes of collective bargaining, but, for purposes of hiring, firing and supervision, the individual recipient of IHSS is also considered an employer. That is, the recipient of services has complete discretion to hire, fire and supervise the worker who works very intimately with the recipient in their home. There is nothing in the statute, at this point, that could constitute an unfair practice brought against the employer (individual recipient of services).

There were two key challenges, as discussed at the Advisory Committee meeting earlier today, with this new “hybrid” model of employment—i.e., a hybrid between the public and private sector:

- (1) The recipient is a private party and the Statewide Authority is a public entity, but both are considered employers; and
- (2) There is no workplace, other than the individual recipient’s home.

Considered minor in some respects, stated Ms. Murphy, but important in a system of collective bargaining in the public sector, is the problem of getting notice to these 400,000 employees if there should be a recognition petition filed with PERB. The Agency had to tailor and invent new notice posting rules. The Statewide Authority would be given the option of mailing, e-mailing or using any other form of notice—including a website or private accounts within an internet-based system where individual employees have access to information about their employment—reasonably calculated to ensure that the greatest number of employees would receive notice.

The one other major point, earlier referred to by Ms. Garten, was whether allegations of a violation of IHSSEERA itself, or a rule or regulation adopted by the Statewide Authority under its rulemaking authority, which they have, but have not yet exercised under IHSSEERA, would be treated and processed as an unfair practice. Again, stated Ms. Murphy, the Agency prepared a written response (which it posted on the PERB website and made part of the record at today’s Public Meeting, together with the comment letter from CalHR as the only comment and response that the Agency has thus far had to deal with in the rulemaking process) in which it explained PERB’s reasoning for including and proposing to the Board for approval provisions stating that violations of the statute and/or violations of any rule adopted by the Statewide Authority could form the basis of and would be processed as an unfair practice charge.

As stated previously, the regulations in the rulemaking package regarding IHSSEERA being considered today are similar to regulations implementing other PERB statutes and that PERB has promulgated and enforced, except for the “hybrid” employment context and other challenges already mentioned, and those that may emerge when the statute is fully effective, which is currently anticipated to be in April 2014. It could be many months, explained Ms. Murphy, for some counties (such as Los Angeles County with approximately 200,000 IHSS recipients and workers, where there are a special set of challenges) to get everyone enrolled in a managed care plan, which is an underpinning of this entire coordinated care initiative. It is anticipated that it may take Los Angeles County two years beyond the time that most of the other counties will be able to meet their enrollment requirements and become subject to the Statewide Authority. In particular, San Mateo and Orange Counties are both prepared to enroll as quickly as possible, within the first month which, again, could be as soon as April 2014. Consequently, by the end of April 2014 there may be at least two counties, and eventually the other six, that would be subject to the Statewide Authority system.

Member Huguenin wanted to further explore the issue of the rules and regulations that the Statewide Authority might adopt under IHSSEERA. That authority relates to rules and regulations to implement a system of collective bargaining and representation as contemplated in this statute, but not necessarily rules and regulations governing other aspects to which the Statewide Authority might be subjected. Pursuant to Government Code section 3507, the

MMBA grants the authority to adopt rules and regulations which implement a system of collective negotiations in the statute created by the Legislature. As I understand it, stated Member Huguenin, the complaint by the Statewide Authority is that “somehow PERB is going to be involved in construing rules and regulations which don’t have anything to do with collective bargaining that they might adopt. But, since their whole existence seems to be for the purpose of administering the collective bargaining system that this statute contemplates, I’m having trouble conceiving of a whole different set of rules or regulations like safety or other things that they might get involved in adopting.” Member Huguenin analogized that even if the Statewide Authority unilaterally adopted safety regulations that impacted providers, there should be an ability to complain to the Labor Board. He asked why the Statewide Authority would have a complaint about PERB’s involvement with a violation of rules and regulations which were “designed to establish a collective bargaining system established in the statute, as in the case of the MMBA, which, of course, leaves a whole bunch of stuff up to local employers.” He wanted further clarification regarding this matter.

Ms. Murphy responded that, as stated by CalHR, the MMBA and IHSSEERA were different. The MMBA, as it currently exists, was designed to separate the authority over labor relations between PERB and the local entities, leaving representation matters largely to the local entities to administer under reasonable local rules they could adopt, enforce, and interpret in that context. Under IHSSEERA, there will not be that same allocation of responsibility, authority, and power over representation matters.

Under section 11035(a), there are three enumerated categories of rules and regulations the Statewide Authority is authorized to adopt: (1) the registration of employee organizations; (2) the determination of the status of organizations and associations as employee organizations or bona fide associations; and (3) identification of the officers and representatives who officially represent employee organizations and bona fide associations. Ms. Murphy continued, however, that rules of these types could start to spill over into disputes about the fundamentals of labor relations and the collective bargaining process. For example, under the first and second categories, issues might arise as to whether an organization is appropriate to be an exclusive representative, and how it gained that status. Also, some of these items also start to spill over into internal union matters. Ms. Murphy believed that the Statewide Authority and CalHR would need to be careful about how rules are framed for these matters. She stated that she foresees a potential for overlap between the MMBA and IHSSEERA in these three enumerated categories of rules, but that, most importantly, each of these statutes contain a “catch-all” for rules about any other matters that are necessary to carry out the purposes of the statute. While the MMBA has many more specifically enumerated types of local rules that may be adopted for labor relations purposes, the MMBA and IHSSEERA have exactly the same “catch-all” language that MMBA employers have used to adopt rules. The Statewide Authority would also have this broad authority to enact rules as the employer and a role to play in administering a collective bargaining system and resolving labor relations disputes. It is different than the MMBA, but there is potential for it to be quite similar in many ways as well, stated Ms. Murphy. As pointed out by Ms. Steele, the Statewide Authority, as the employer of IHSS providers is going to have a great deal of leeway on the types of rules it adopts, what those rules are, how reasonable they are, and how they are going to be enforced and interpreted statewide in the IHSSEERA context. Ms. Garten is also right, stated Ms. Murphy, that the collective bargaining regime contemplated by IHSSEERA bears certain similarities to the Dills Act as well. There is a State-level employer with large bargaining units, here county-level bargaining units, but still many large units that are effectively State

employees for some purposes—“a weird hybrid.” It is a brave new world and we just have to do our best to interpret the statute and figure how we expect it to play out and be enforced and administered in a way that promotes good labor relations between the employer and these workers.

Member Huguenin stated his better understanding, having heard the general categories of regulations which may be adopted under the statute. All deal with concepts of labor relations, stated Member Huguenin, such as “who the representative is, who the representative’s representatives are, that kind of stuff.” PERB is the arm of the State that has that responsibility, and the Statewide Authority, he stated as his opinion, is the arm of the State that has responsibility as the employer, held to the concepts that are found and to be enforced in statute. Member Huguenin stated that he found the proposed regulation to be appropriate.

Member Winslow wanted to know whether the difference, as stated by Ms. Garten, between the MMBA and the IHSSEERA statute was basically that in MMBA section 3509, which specifically authorizes rule violations to be considered unfair practices, was missing from IHSSEERA. She asked for assurance that PERB had the authority to have a regulation, which stated that the Agency had jurisdiction and authority to pass a rule that the Statewide Authority’s rule violations can be considered an unfair practice.

Ms. Murphy acknowledged that difference between the MMBA and IHSSEERA, but stated her belief that PERB does have such authority, because the Legislature enacted IHSSEERA in light of the body of law and experience under the MMBA, under which the employers and employees who are now subject to IHSSEERA have been working together for some time now. That specific part of section 3509 was added to the MMBA years ago and was in place for a substantial period of time when the Legislature enacted IHSSEERA. There is no reason to believe that the Legislature did not intend IHSSEERA to be interpreted and implemented similar to the MMBA, just as the MMBA has been interpreted in light of EERA, and vice versa, and all of the statutes the Board administers are interpreted in light of the National Labor Relations Act and other substantively similar statutes that are related and not in conflict. “Such that I think that the Board has the ability, the authority to interpret IHSSEERA as including those types of unfair practices that are enumerated in the MMBA, but not excluded in IHSSEERA either,” answered Ms. Murphy.

Member Winslow then asked about the broadness of the statutory authority under IHSSEERA given to the Agency to write regulations.

Ms. Murphy responded that such statutory authority under IHSSEERA is similar to EERA section 3541.3(g), the provision giving the Board broad rulemaking authority to adopt regulations as to any matters that are necessary to effectuate the purposes and policies of the statute. PERB’s letter, mentioned earlier, stated the statutory authority for PERB’s existing rulemaking authority and the rulemaking authority specifically under IHSSEERA itself. Government Code section 110015 specifically gives the Board the same broad power to adopt rules as it has under EERA, and section 11035(a)(4) and (d) brings the Board’s rulemaking authority under IHSSEERA parallel to the broad rulemaking authority it has under all of its statutes.

Chair Martinez called for further comment from the public with PERB's General Counsel having concluded her presentation of the emergency rulemaking package. Hearing none, the rulemaking package was submitted for consideration by the Board.

Motion: Motion by Member Huguenin and seconded by Member Banks to transmit the emergency regulation package regarding the IHSSEERA to (1) the Secretary of State for filing, and (2) OAL for the purpose of updating the California Code of Regulations.

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

Member Winslow announced that she had retained Russell Naymark as her Legal Advisor. Mr. Naymark came to PERB with 15 years' experience representing unions in both the private and public sector.

General Discussion

Chair Martinez announced that there being no further business, it would be appropriate to recess the meeting to continuous closed session and that the Board would meet in continuous closed session each business day beginning immediately upon the recess of the open portion of this meeting through December 12, 2013, when the Board will reconvene in Room 103, Headquarters Office of the Public Employment Relations Board. The purpose of these closed sessions will be to deliberate on cases listed on the Board's Docket (Gov. Code, sec. 11126(c)(3)), personnel (Gov. Code, sec. 11126(a)), pending litigation (Gov. Code, sec. 11126(e)(1)), and any pending requests for injunctive relief (Gov. Code, sec. 11126(e)(2)(c)).

Motion: Motion by Member Huguenin and seconded by Member Banks to recess the meeting to continuous closed session.

Ayes: Martinez, Huguenin, Winslow, and Banks.

Motion Adopted – 4 to 0.

Respectfully submitted,

Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

Anita I. Martinez, Chair