

## PUBLIC MEETING MINUTES

April 14, 2016

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

Chair Martinez called the meeting to order at 10:00 a.m.

### Members Present

Anita I. Martinez, Chair  
Priscilla S. Winslow, Member  
Eric R. Banks, Member  
Mark C. Gregersen, Member

### Staff Present

J. Felix De La Torre, General Counsel  
Shawn Cloughesy, Chief Administrative Law Judge  
Mary Ann Aguayo, Chief Administrative Officer  
Loretta van der Pol, Division Chief, State Mediation & Conciliation Service

### 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 February 11, 2016, 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.

Chair Martinez read into the record the decisions that issued since the open session in February. Those were PERB Decision Nos. 2461a-M, 2470-M, 2471-M, 2472-M, 2473-H, 2474, 2475, 2476-M, 2477-M, and 2478-M, and Order Nos. Ad-432-H, Ad-433-M and Ad-434-H. There were two Requests for Injunctive Relief (IR Request) filed as follows: No. 695 (*Cornelius Oluseyi Ogunsalu v. San Diego Unified School District*), the request was denied, and No. 696 (*California Attorneys in State Employment (CASE) v. California Unemployment Insurance Appeals Board*), the request was denied. Chair Martinez announced that a document containing a listing of the aforementioned decisions was available at the meeting and that the decisions were available on PERB's website.

**Motion:** Motion by Member Winslow and seconded by Member Gregersen, to close the February 11, 2016, Public Meeting.

**Ayes:** Martinez, Winslow, Banks, and Gregersen.

**Motion Adopted – 4 to 0.**

Chair Martinez adjourned the February 11, 2016, Public Meeting. She then opened and called to order the April 14, 2016, Public Meeting.

## Minutes

**Motion:** Motion by Member Banks and seconded by Member Gregersen that the Board adopt the minutes for the February 11, 2016 Public Meeting.

**Ayes:** Martinez, Winslow, Banks, and Gregersen.

**Motion Adopted – 4 to 0.**

## Comments from Public Participants

None.

## Staff Reports

The following staff reports were received with the caveat that any matter requiring action by the Board and not included as an item in today's agenda would be scheduled for consideration at a subsequent meeting.

### A. Division of Administration

Ms. Aguayo gave the report regarding the Division of Administration as follows:

Fiscal. Regarding the budget Ms. Aguayo stated that in the current fiscal year (2015-2016) PERB was solvent and projected to have a small salary savings of approximately \$100,000. Those funds would be redirected to PERB's most critical needs (such as issues that have been deferred or need to be urgently addressed).

For fiscal year 2016-2017, PERB has two active budget change proposals (BCPs) in legislative budget subcommittees: (1) in the Assembly Budget Subcommittee the proposals were heard and continued (no resulting vote); and (2) in the Senate Budget Subcommittee a hearing is tentatively scheduled for April 22. Ms. Aguayo stated that it is anticipated that the funding will be approved but the allocation of the funding would most likely be revised since everyone is now aware of the fact that PERB has been operating under a budget deficit.

Ms. Aguayo reported that regarding fiscal year 2017-2018, budget concepts for upcoming BCPs are due to the California Labor Workforce and Development Agency on Monday. PERB was assessing what matters will be addressed. In previous years, stated Ms. Aguayo, those matters included structural deficits and the continued workload issues. Currently, possible matters to address could also include establishment of a training program, salaries for mediators and the reclassification project, and deficiencies in staffing and technology.

With a heavy workload in the Accounting Department, PERB continues to struggle with Fi\$Cal conversion requirements. To allow additional time to address more of the requirements, PERB is recruiting a temporary part-time accounting position. Although scheduled to roll-out with Fi\$Cal in 2017-2018, PERB has been required to attend all conversions for the 2016-2017 roll-out (training for the two groups is being held together).

Additional recruitments under way:

1. Legal Analyst (Office of the General Counsel)—no successful candidates in the first round, strategized recruitment and currently advertising position.
2. Staff Services Manager I (Division of Administration)—position has been filled and the new hire starts on April 19.

PERB has six vacancies remaining: two Appointed positions and one Administrative Assistant II (Board Offices); two Attorneys (Office of the General Counsel); and one Staff Analyst (Division of Administration).

As a temporary solution to assist with workload, Ms. Aguayo reported that the Division of Administration has a robust intern program. Currently the Division has four interns (two share time) who are all scheduled to leave this spring and in replacement three interns would be recruited.

Information Technology. PERB's webpage is complete, being tested and planned to be operational in May.

Facilities. The move for PERB's Glendale Office is off schedule. With the third search completed six sites had been visited: five in Pasadena and one in Glendale. All locations appeared viable, but Ms. Aguayo had been informed by the Department of General Services that finding locations in Glendale is very problematic where the demand was higher. There appeared to be a lot of availability in the Pasadena area, but once negotiations start many lessors fail to be interested in State tenants due to complex processes including compliance with the Americans with Disabilities Act and a new seismic standard for buildings occupied by State agencies. Adding to the complexities are the reviews required from the State Fire Marshall's Office. Currently that review process is 12 weeks. Ms. Aguayo added that at this time she is unaware of any definite timeline for the relocation of PERB's Glendale Office.

PERB Board Members had questions and expressed concerns regarding the move to which Ms. Aguayo responded. The discussion held included: information regarding specific sites in the search; PERB's lease and timelines regarding relocation; the delay in the State Fire Marshall's Office; a possible delay caused by staffing and workload at the Department of General Services (who it was reported recently underwent a "scathing" audit); and the State's bidding processes and requirements regarding relocations.

In conclusion of Ms. Aguayo's report for the Division of Administration, Chair Martinez asked for further information regarding the status of the BCPs in the Assembly Budget Subcommittee. Ms. Aguayo stated that with her recent inquiry at the Department of Finance on this matter, there was nothing scheduled on the item but that at some near point, a vote would need to take place.

## B. Office of General Counsel

General Counsel J. Felix De La Torre gave the report for the Office of the General Counsel (GC Office) for the months of February and March 2016. He stated that the monthly activity and litigation reports were distributed to the Board offices for review. He highlighted significant activity since the Board's regular Public Meeting on February 11, 2016.

Mr. De La Torre then reported on activities during the past two months (February and March 2016) stating that a total of 97 new unfair practice charges of all types were filed (a slight decrease of 11 charges over the prior two-month period [108→97]). During the most recent two-month period, the GC Office completed 178 case investigations (an increase over the prior two-month period where 160 case investigations were completed [160→178]). Also during that time period, 48 complaints were issued, and 33 charges dismissed (compared to 52 complaints and 19 dismissals). Mr. De La Torre noted that case processing times in the GC Office increased from a two-month average of 137 days in December and January, to a 151-day average in February and March.

Mr. De La Torre continued reporting that the number of litigation matters completed by the GC Office decreased slightly to 11 in February and March (compared to 14 litigation matters completed in December and January). The number of factfinding requests remained the same; in February and March there were 9 requests for factfinding (in the prior two months there were also 9 requests). The number of representation petitions increased to 24 petitions in February and March (compared to 20 petitions in December and January).

As noted by the Chair, in the past two months there were two requests for injunctive relief as follows: I.R. Request No. 695 (*Cornelius Oluseyi Ogunsalu v. San Diego Unified School District*), request denied; and I.R. Request No. 696 (*California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) v. State of California, Unemployment Insurance Appeals Board*), request denied.

Since the regular Public Meeting in February:

- In terms of court litigation, two new matters were filed by or against PERB.
  1. *United Teachers Los Angeles v. PERB; Kennon B. Raines et al.*, Second Appellate District, Division One, Case No. B271267 (PERB Decision No. 2475 [Unfair Practice Charge No. LA-CO-1394-E]), filed March 30, 2016.
  2. *PERB v. Bellflower Unified School District; California School Employees Association, Chapter 32*, Los Angeles Superior Court, Case No. BS161585 (PERB Decisions Nos. 2385 and 2455 [Unfair Practice Charge Nos. LA-CE-5508-E and LA-CE-5784-E]), filed April 1, 2106. This is the first enforcement action ever filed by PERB. PERB in this matter is effectively seeking that the district comply with its orders.
- There was one final case determination during this two-month period. In March, the California Supreme Court denied review in *Liu v. PERB; CSU*, California Supreme Court Case No. S232516, Court of Appeal, First Appellate District, Case No. A145123 (PERB

Decisions Nos. 2408-H and 2391aH [Unfair Practice Charge Nos. SF-CE-1009-H and SF-CE-995-H]).

- Regarding closed litigation, the GC Office dismissed a complaint in *PERB v. SEIU Local 1021; County of Sonoma*, Contra Costa Sup. Ct. Case No. SCV 258038; IR Request No. 690 [PERB Unfair Practice Charge No. SF-CO-375-M]—complaint filed in an IR Request related to a strike. The parties resolved the issues related to the contract and requested withdrawal of the complaint to which PERB complied.

Legislation/Rulemaking. For informational purposes and inquires by the Legislature, the GC Office monitors legislation that concern the labor relations statutes under PERB jurisdiction. Mr. De La Torre reported on four bills of particular interest:

- Senate Bill 950 (Nielsen) — This bill would enact the Excluded Employee Arbitration Act to permit an excluded employee who has filed a grievance with California Department of Human Resources, or an employee organization that represents that employee, to request arbitration of the grievance if specified conditions are met. This legislation would impact the State Mediation and Conciliation Service (SMCS) where use of its arbitrator lists to request panels may be used by the parties.

Mr. De La Torre added that the bill was amended to remove the reference to “or an employee organization that represents that employee.” At a prior Public Meeting, there was a question by the PERB Board as to who this legislation actually intended as the representative for excluded employees. Because excluded employees are not represented, stated Mr. De La Torre, any reference to an “employee organization” was necessarily removed from the bill.

- AB 1727 (Gonzalez) — This bill extends collective bargaining rights to independent contractors of a “hosting platform.” The bill covers companies like Uber, which would be required to meet and negotiate in good faith with the representatives of the independent contractors over specified working conditions. The bill further delegates a number of new duties on SMCS such as the investigation of unfair practice charges and the pursuit of injunctive relief from a superior court when appropriate.
- AB 2662 (Patterson) — This bill requires PERB to “complete and publish the results of a decertification election” within 90 days after the determination that the petitioner has demonstrated 30 percent support. This bill has now been assigned to the Assembly Public Employees, Retirement, and Social Security.

Mr. De La Torre reported that this bill is currently drafted to apply only to the Educational Employment Relations Act (EERA) and has not amended any of the other statutes under PERB’s jurisdiction. He stated that it is also unclear as to how this bill would interplay with challenges and objections as that is the main reason there are delays in decertification petitions.

- AB 2754 (Grove) — This bill requires all public employee unions to undergo an election every two years to maintain their status as bargaining representative. This bill, however, does not amend any of the PERB statutes that it seems intended to supersede.

This bill has now been assigned to the Assembly Public Employees, Retirement, and Social Security.

Member Winslow inquired regarding AB 1727. She wanted to know if the legislation made provisions for the possibility of a determination by the department with jurisdiction over Uber that drivers were in fact employees and not independent contractors.

Mr. De La Torre replied that such employees would possibly be subject to National Labor Relations Board jurisdiction. Member Winslow then stated that the bill is obviously broader than Uber. Mr. De La Torre agreed adding that the analysis for independent contractors was fact driven. Noting that Uber was not a good entity to use in this description as they most likely have consistent policies and therefore all drivers would fall under the same findings, but that potentially certain platforms could be independent contractors whereas others could be employees.

Chair Martinez asked whether the legislation regarding AB 2754 applied to all statutes under PERB jurisdiction or only EERA.

Mr. De La Torre responded that, at this point, because of the way the bill is written it appeared to apply to all entities under PERB jurisdiction. The bill also raised issues, added Mr. De La Torre, regarding who would conduct the election and how many additional staff PERB would need to monitor the thousands of public sector employers who would then, every two years, be required to have an election.

Member Winslow asked about recent victories in litigation matters. Mr. De La Torre responded that matters are usually reported upon final adjudication or on cases that are dismissed. Although not yet final, victories which are significant include: *County of Riverside* and *San Diego Housing Commission*—both currently under the appeals period; and *County of San Bernardino*—summary denial of petition issued by the Court, a petition for review was filed in the Supreme Court and PERB's answer is due next week.

Member Banks stated that he “was able to see [the GC Office] team in action in *San Diego Housing Commission* and they did an amazing job and I want to extend my gratitude one more time publically to [the GC Office] staff and to [Mr. De La Torre] for the work you have done.” Mr. De La Torre stated, “it all goes to the staff, they work extremely hard and they do a fantastic job, so its kudos well earned.”

There was no rulemaking activity.

#### D. Division of Administrative Law

Chief Administrative Law Judge Shawn Cloughesy reported on the activities in the Division of Administrative Law and stated that the Administrative Law Judge report had been distributed to Board offices for review. He reported on the highlights as follows:

- The date set for formal hearing from the date of the informal settlement conference is within four months in all three offices (Sacramento, Oakland and Glendale). As a tradition, due to ALJ vacations and fiscal year end proposed decision writing, there

are a smaller number of cases scheduled for formal hearing in June. This may also account for the extended scheduling of cases (within four months rather than three).

- The assignment of cases is at an all-time high (approximately the same as last year).
- The number of days of formal hearing is high (compared with a similar high over a five year period). A slight drop is anticipated in the number of formal hearings completed, but the days of formal hearing will stay approximate to the high number that has been consistent for a number of years.
- The number of proposed decisions issued has increased slightly from the prior year.
- The ratio of exceptions to proposed decisions has increased to 45 percent (previously reported to be 39).

Mr. Cloughesy stated that the Division continues to carry a heavy caseload.

#### E. State Mediation and Conciliation Service

Division Chief Loretta van der Pol gave the report for the State Mediation and Conciliation Service (SMCS) for February and March 2016. She stated that the report had been distributed to the Board offices for review and that the Division continued with a very reasonable pace of new cases received and of cases closed. The spring caseload has been slower than told to anticipate where advocates, approximately one month ago, informed SMCS to expect a flood of impasses which did not materialize.

#### Case Processing

Ms. van der Pol reported that in February the Division opened 49 cases and closed 75, and in March opened 47 and closed 53.

Regarding elections/representation cases Ms. van der Pol reported:

- February: 13 active cases (11 decertification, 1 representation, and 1 agency shop). There were 9 cases concluded of which 3 where SMCS withdrew services due to the inability to effect a consent agreement.
- March: 9 active cases (7 decertification, 1 representation, and 1 agency shop). There were 4 cases concluded of which 1 where SMCS withdrew services due to the inability to effect a consent agreement.

Ms. van der Pol added that since the SMCS report distributed the timeline for the Fresno County election, which is in the process of being re-ran, was modified. The date to mail out ballots changed to May 18 (from April 27), and date to count ballots is scheduled for June 20, which should conclude the election. She stated that she had no information regarding the reason the timeline was extended, but that it was part of the recent consent agreement.

As also noted in the report distributed is an unusual case for SMCS, a decertification effort in a Public Utility Commission (PUC) transit district. This case was initially a petition check for a showing of interest. Because PERB does not have jurisdiction over the PUC there is not a lot of experience with these cases, not even within SMCS. PUC cases handled by SMCS usually involve disputes, but very rarely an election. SMCS has a broad role under the PUC regulations. Ms. van der Pol stated that she researched and issued determinations regarding the handling of objections. In the PUC matter, the incumbent union was successfully decertified, but had filed objections. The period of exceptions is running and in approximately 10 days that period will have lapsed. A final determination is expected at that time.

#### Personnel Administration

SMCS has a number of mediators on mandatory leave, one mediator on extended leave of absence and another retiring August 1 (although on leave the whole month of July). Currently, Ms. van der Pol is pleased to carry a full caseload.

CPS HR Consulting, a quasi-State agency, has provided a rough draft of new classification specifications and a salary comparison. The Division is in the process of editing the specifications to a manageable size and no discussions have been held regarding the salary findings.

#### Program Administration

During the month of February, SMCS received a total of \$1,425.00 for administration of the arbitrators' panel and payments received for chargeable work totaled \$3,392.50. In March, those amounts totaled \$925.00 and \$6,526.25, respectively. At any time, the Division has approximately six Conflict Resolution in the Workplace (CRW) cases active.

Chair Martinez inquired about the four mediation cases which withdrew due to the inability to effect a consent agreement. She asked whether it was because mediators were not available for the parties timelines or if it was due to the parties disputes. Ms. van der Pol responded that the withdrawals were caused by disputes between the parties.

Chair Martinez then asked in these cases who would ultimately run the elections. Ms. van der Pol responded that if the parties did not file a charge at PERB, a private mediator could be hired. Ms. van der Pol observed that the cases were most likely not yet completed, and at some point the parties after resolving issues, would generally return to SMCS. She added that SMCS mediators would work overtime to meet the parties timelines.

**Motion:** Motion by Member Gregersen and seconded by Member Banks that the Division of Administration, Office of the General Counsel including Legislative/Rulemaking, Division of Administrative Law, and SMCS reports be accepted and filed.

**Ayes:** Martinez, Winslow, Banks, and Gregersen.

**Motion Adopted – 4 to 0.**

## Old Business

None.

## New Business

The Board considered the adoption of four policies/programs. Ms. Aguayo provided details as follows:

- Illness and Injury Prevention Program. Annual review required. Most notable change to this program's requirements is refreshing the training to assist PERB managers, or anyone that supervises, to provide training to their staff.
- Privacy/Privacy Web Posting. Statutory mandate. Brings PERB into compliance (there are two versions, an internal version for staff and a version for posting on PERB's Web page).

Member Winslow stated that as this policy applies to PERB employees that it might also apply to persons where PERB collects information. She wanted to know how this policy interacts with the California Public Records Act (CPRA).

Mr. De La Torre responded that the policy would function similar to other confidential or private information. Where there is an exclusion in the CPRA regarding information gathered, it cannot be released. PERB's required Privacy Policy is to provide notice that certain private/personal information is collected as part of its processes. Information is introduced through unfair practice charges, and some private/personal information is received inadvertently. Such information is redacted from any outgoing documents (whether administrative records or requests under the CPRA).

Mr. De La Torre stated that when handling a case, the GC Office routinely scours documents verifying that no portion would be excluded under the CPRA. He noted a bankruptcy case he thought as interesting where there is a rule which requires that a box be checked by the filing individual verifying that all information considered private, confidential, and not necessary to the resolution of the case (such as social security number or a health issue) is redacted. Thus, the Bankruptcy Court has put the burden on the party submitting the documents to verify it contains no such private/personal information, something PERB might consider initiating in the future.

Ms. Aguayo noted that, through a State Personnel Board audit in fall and winter 2015, PERB had been found out of compliance regarding the following two policies.

- Upward Mobility Plan. It is a statutory requirement that PERB have an upward mobility plan for employees statutorily defined as low paid. It was found that PERB had three such employees. PERB informed the State Personnel Board that regular interactions were held with the employees to assist with their career development and advancement potential. SPB informed PERB that a plan was also required to be place where supervisors of identified employees provided assistance assuring the employee's full understanding of opportunities available and all requirements.

- Disability Advisory Committee. PERB is in process of establishing this committee and carrying out its statutory mandate.

In answer to Member Winslow’s inquiry regarding a Disability Advisory Committee at PERB, Ms. Aguayo stated that a plan was currently being formed and coordinated by an assigned PERB staff for the expedient establishment of this committee. The committee is required to be comprised of individuals with a disability, or anyone interested in such matters. Pursuant to an annual survey conducted for individuals with a disability, at 14 or 18 percent PERB was above the State required ratio. PERB is required to report to SPB regarding status.

**Motion:** Motion by Member Gregersen and seconded by Member Winslow that the Injury & Illness Prevention Program, the Privacy/Privacy Web Posting, Upward Mobility Plan, and Disability Advisory Committee policies be adopted and filed.

**Ayes:** Martinez, Winslow, Banks, and Gregersen.

**Motion Adopted – 4 to 0.**

**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 June 9, 2016, 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 Banks and seconded by Member Gregersen to recess the meeting to continuous closed session.

**Ayes:** Martinez, Winslow, Banks, and Gregersen.

**Motion Adopted – 4 to 0.**

Respectfully submitted,

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Regina Keith, Administrative Assistant

APPROVED AT THE PUBLIC MEETING OF:

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Priscilla S. Winslow, Board Member