

PUBLIC NOTICE
Regular Business Meeting Agenda
Public Employment Relations Board
August 31, 2017 ~ 10:00 a.m.

LOCATION: Public Employment Relations Board *
1031 18th Street, First Floor, Room 103, Sacramento, CA

1. Roll Call.
2. Public Comment. This is an opportunity for the public to address the Board on issues not scheduled on today's agenda. The Board cannot act on those items but may refer matters to staff for review and possible Board action at a future, publicly noticed meeting.
3. Unfinished/New Business.
 - A. **PERB Case Processing Efficiencies Initiative:** Presentation of the Administration Committee's recommendations for the PERB Case Processing Efficiencies Initiative including discussion and possible action by the Board.
 - B. **Public Employee Communication Chapter Of AB 119 (PECC):** Presentation of recommendations and options for implantation of PECC and discussion and possible action by the Board. See attached report.
4. Public Participation. Members of the public may address the Board. Regarding each issue scheduled on this agenda, the Board will hear brief presentation and may then vote to take action on any such issue(s).
5. Recess to Closed Session. The Board will meet in a continuous closed session each business day beginning immediately upon recess of the open portion of this meeting through October 12, 2017.

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)).

**This meeting is accessible to the physically disabled. A person who needs disability-related accommodations or modifications in order to participate in the meeting shall make a request no later than five working days before the meeting to the Board by contacting Ms. Regina Keith at 916.322.8226 or sending a written request to Ms. Keith at PERB, 1031 18th Street, Sacramento, California 95811. Requests for further information should also be directed via telephone or writing to Ms. Keith. Additional information is also available on the internet at www.perb.ca.gov.*

MEMORANDUM

DATE: August 21, 2017

TO: Mark C. Gregersen, Chair
Priscilla S. Winslow, Board Member
Eric R. Banks, Board Member

FROM: Division Managers

SUBJECT: Staff Report (August 31, 2017 Public Meeting)
Recommendations and Options for the Implementation of the
Public Employee Communication Chapter of Assembly Bill 119

Summary

On June 27, 2017, Governor Brown signed Assembly Bill 119 (AB 119) (Chapter 21, Statutes of 2017), a budget trailer bill, which became effective immediately. One of the chapters of AB 119, the Public Employee Communication Chapter (PECC), mandated that public employers: provide exclusive representatives with access to its new employee orientations; provide the exclusive representative with ten (10) days advance notice of a new employee orientation; and negotiate with the exclusive representative over the structure, time and manner of access to the new employee orientation which may conclude in compulsory interest arbitration. Additionally, the law requires that public employers provide exclusive representatives with the public and personal contact information of its newly-hired employees and all employees at designated intervals of time.

The PECC gave the Public Employment Relations Board (PERB) jurisdiction over violations of the PECC pursuant to PERB's power and duties as set forth in Government Code section 3541.3.

In the absence of the public employer and the exclusive representative mutually selecting a private arbitrator to conduct the compulsory interest arbitration proceedings, the PECC set forth a method through the State Mediation and Conciliation Service (SMCS) for the selection of a private arbitrator to conduct the interest arbitration proceedings. As an alternative to selecting an arbitrator through the SMCS, a City or County employer may request that PERB appoint an administrative law judge or other PERB employee to serve as the arbitrator. If the City or County employer requests that PERB appoint an employee to serve as the arbitrator, the City or County employer will pay for the "cost" of that arbitrator.

As a result of this newly enacted legislation, on August 10, 2017, the Board heard discussion as to the implementation and impact of the PECC upon the Board and its divisions. At the Public Meeting, the General Counsel discussed a summary of the new law and each of the division managers discussed the implementation and impact of the PECC upon each of the divisions.

At the end of the discussion, the Board passed a motion that the impacted divisions prepare recommendations and options as to the implementation of the PECC. The recommendations and options provided by the divisions are as follows:

Office of the General Counsel (OGC)

Violations of the PECC:

The principle role of the OGC will be to investigate charges alleging violations of the PECC. While the PECC does not specify a procedure for investigating, hearing, and deciding these cases, the Legislature is presumed to have known about PERB's existing unfair practice charge processing procedures as stated in PERB Regulation 32602.¹ Further, even though the PECC is an entirely new chapter (Chapter 11.5 of Division 4 of Title 1 of the Government Code), that is not within any of the applicable labor-relations acts, there is no legal reason why PERB cannot rely upon its existing charge processing procedures when investigating PECC charges. Specifically, the PECC provides the OGC with the general power to investigate charges alleging a violation. In particular, section 3555.5, subdivision (c)(1), states:

Except as provided in paragraph (2), the Public Employment Relations Board shall have jurisdiction over violations of this chapter. The powers and duties of the board described in *Section 3541.3 shall apply, as appropriate*, to this chapter. [Italics added.]

In relevant part, section 3541.3 of the Educational Employment Relations Act (Gov. Code, § 3540 et seq.) states that the Board has the power “[t]o investigate unfair practice charges or alleged violations *of this chapter*.” (Italics added.) Section 3541.3 falls under Chapter 10.7 and, therefore, the power to investigate “alleged violations of this chapter” does not apply to the PECC, which is under Chapter 11.5. But section 3541.3 authorizes the OGC to investigate “unfair practice charges” when filed under any labor-relations act within the Board’s jurisdiction. A charge alleging a violation of the PECC would qualify as an unfair practice charge under section 3541.3. While this section gives the OGC authority to investigate a charge alleging a PECC violation, the regulations that provide the comprehensive procedures do not presently reference the PECC and, therefore, should be modified in the future and these processes may be utilized until the regulatory changes occur.

¹ PERB Regulation 32602(a), provides:

Alleged violations of the EERA, Ralph C. Dills Act, HEERA, MMBA, TEERA, Article 3 of the Trial Court Act, the Court Interpreter Act and IHSSEERA, alleged violations of local rules adopted pursuant to the MMBA, Trial Court Act or Court Interpreter Act, and alleged violations of rules or regulations adopted by the Statewide Authority pursuant to IHSSEERA, shall be processed as unfair practice charges.

Options:

- (1) Use the current unfair practice procedures for investigating, hearing, and deciding PECC cases by directing the OGC to amend PERB Regulation 32602 to add the PECC;
- (2) Direct PERB's division managers to develop regulations that provide new procedures for the investigation, hearing, and deciding of charges alleging PECC violations; or
- (3) Direct the OGC to follow unfair practice charge procedures and later evaluate whether to continue using the current unfair practice procedures (by amending PERB Regulation 32602 to add the PECC) or whether different procedures are needed and thereafter develop new regulations for the PECC charges.

Recommendation: Option (1). The OGC will soon receive charges alleging violations of the PECC and will need to take immediate action. Using its current unfair practice charge procedures makes sense because it will cause the least confusion to our constituents, as they are familiar with those procedures, and it will be the most efficient to implement, as all PERB systems are presently set up under these procedures.

Division of Administrative Law

1. Violations of the PECC:

Recommendation: As the OGC recommends that it process violations of the PECC the same as any other unfair practice charge, then a full hearing on the alleged violations, according to the Administrative Adjudication Bill of Rights (AABR) pursuant to Government Code section 3541.3, subdivision (h), would be held. This alternative would cause less disruption to constituents as they would follow a process which they are familiar with and would also allow PERB more time to evaluate the process. At the end of six months or a year, the division can gather the historical evidence needed to determine the impact of such cases upon the division's workload.

Another Option: That PERB decide now as to the level of due process that PERB should afford an alleged violation hearing and prepare regulations describing the due process hearing.

2. Request from City or County for Appointment of Interest Arbitrator from PERB

Recommendation: To provide direction to PERB constituents, develop Frequently Asked Questions (FAQ's) for publication on the PERB website regarding the PECC's interest arbitration process for PERB-appointed employees. The FAQ's would provide direction/information to constituents regarding (1) who at PERB a City or County should direct its request that PERB appoint one of its employees as the arbitrator, (2) the timeframe the City or County should submit the request to PERB, and (3) the anticipated hourly/daily cost for the PERB-appointed arbitrator. (The FAQ's are attached to this memorandum.)

State Mediation and Conciliation Service

Recommendations:

- (1) Develop FAQ's for publication on the PERB website to provide direction to PERB constituents as to the requesting and selecting of private arbitrators for interest arbitration so that existing SMCS processes can be used for these purposes.
- (2) Develop an internal tracking system so that SMCS can make sure that statutory timeframes are kept, that private arbitrators are timely selected, and that PERB maintain an accurate history of the impact of this legislation on SMCS clerical workload.

Division of Administration

It is recommended that PERB maintain existing processes and not build anything beyond simple forms and excel tracking mechanisms. Impact to the Division of Administration can be negligible to significant. Accounting procedures for PERB arbitrators is small; however, execution of contracts with entities unfamiliar with state contract language can be cumbersome. For example, invoicing that may get lodged in the wrong office or at the bottom of someone's inbox may create a need for following the collections process. Some of our related accounting issues take weeks of staff time and sometimes even years to resolve.

PERB is also limited to reimbursements that can be credited to PERB. Collections beyond the reimbursement trigger another process and authorization required from the Department of Finance to avoid excess reimbursements to go to the general fund. Tracking and budgeting to spend reimbursements also becomes complex due to the varying amounts collected from year to year.

Recommendations:

- (1) Keep processing simple, unless a true workload materializes.
- (2) For in-house interest arbitration, provide information to parties regarding reimbursement in the FAQ's and link to boilerplate terms and conditions.
- (3) Develop boilerplate contract language, but only if workload materializes.
- (4) Adopt the Department of General Services Price Book rates.

FREQUENTLY ASKED QUESTIONS (FAQ'S)
(AB 119)

Requesting Interest Arbitration Over Access to New Employee Orientation Negotiations

Q. After beginning negotiations over the structure, time, and manner of the exclusive representative's access to new employee orientation, when may a public employer and/or the exclusive representative request interest arbitration over these issues if no agreement is reached?

A. The parties may mutually agree to submit their dispute to interest arbitration at any time or either party may unilaterally make a demand for interest arbitration if any dispute has not been resolved within the "negotiation period". The "negotiation period" is either the 45-day period after the first meeting of the parties or the 60 day period after the initial request to negotiate, whichever comes first. However, the arbitrator selection process must "commence not later than 14 days prior to the end of the negotiation period."

Q. Who may serve as an arbitrator?

A. The public employer and the exclusive representative may mutually select any individual to be an arbitrator. Additionally, the arbitrator may be selected from a list of seven arbitrators provided by PERB's Division of State Mediation and Conciliation Service (SMCS), or a City or County employer may request that PERB appoint an administrative law judge or other PERB employee to act as the arbitrator.

Q. How would the public employer or exclusive representative request a list of arbitrators provided by SMCS?

A. There are two ways by which requests for lists of arbitrators can be obtained from SMCS. The first way is to download and complete the form from the PERB website at: <https://www.perb.ca.gov/csmcs/HowToRequestPanel.aspx>. The second way is to submit the request in letter form and include the contact information for both parties, including e-mail addresses.

The form or letter may be submitted by e-mail or regular mail. If submitting the request by e-mail, the message should include that the payment by check is being sent through regular mail. Requests being submitted through regular mail should include a check(s) or money order for payment.

The e-mail address for SMCS is: smcsinfo@perb.ca.gov. The mailing address is: SMCS, PERB, 1031 18th Street, Sacramento, CA 95811. The main telephone number is: (916) 322-7638.

- Q. What is the fee for the list of seven arbitrators?
- A. The fee is \$50, payable by check or money order. The parties may split the fee and submit two checks in the amount of \$25 each. SMCS does not routinely provide invoices for the payments, but can invoice or provide an IRS Form W-9 if it is required for the internal accounting processes of the parties' organizations.
- Q. What information needs to be provided in the request for the list of arbitrators to be generated?
- A. The request, whether by form or letter, must specify "Interest Arbitration" and a request for a list of seven arbitrators' names. Given the strict timelines for these disputes, the lists will be provided to the requesting parties by e-mail, so e-mail addresses must be included with the contact information. The parties may request that copies also be provided by regular mail.
- Q. After the parties receive the list of arbitrators what must they do?
- A. The parties can either agree to their own selection procedure, or follow the procedure set forth in the statute—starting with a coin toss as to who begins striking names from the list, and then alternatively striking one name from the list until only one remains. Regardless of the selection method, the process must be completed within seven days of the receipt of the list and the parties should notify SMCS of the candidate selected.
- Q. Who will bear the cost of the arbitrator selected from the SMCS list or an arbitrator mutually agreed upon by the parties?
- A. The parties shall equally share the cost of the arbitrator.
- Q. How would a City or County employer request that PERB assign one of its administrative law judges or other employees to conduct and decide the interest arbitration?
- A. The City or County employer would, within five days of the exclusive representative's demand for interest arbitration, file a written request with PERB's Chief Administrative Law Judge pursuant to PERB Regulation 32135, 32090 or 32091, that it is requesting PERB to appoint one of its administrative law judges or other employees to preside over the interest arbitration. The City or County may file electronically at PERBe-file.ALJ@perb.ca.gov, or mail the request to: PERB, Chief Administrative Law Judge, 1031 18th Street, Sacramento, California 95811.
- Q. After the City or County employer requests that PERB appoint an administrative law judge or other employee to preside over the interest arbitration, what will happen next?
- A. Upon receipt of the request from the City or County, the Chief Administrative Law Judge will assign the hearing to a PERB administrative law judge or other employee within five days.

- Q. Who will pay the cost of the PERB administrative law judge or other employee to conduct and decide the interest arbitration?
- A. The cost of PERB conducting the arbitration shall solely be borne by the City or County making the request of assignment to PERB.
- Q. What is the cost to PERB in conducting the interest arbitration?
- A. PERB has adopted the rate set forth for an Administrative Law Judge in the Department of General Services Price Book for the Office of Administrative Hearings (<https://www.documents.dgs.ca.gov/ofs/PriceBook/PricebookCurrentVersion.pdf>). Additionally, for informational purposes, general terms and conditions for contracts with the State of California can be found at: <http://www.dgs.ca.gov/ols/Resources/StandardContractLanguage.aspx>.

Additional FAQ's Regarding PECC Charges

- Q. What if the employer has violated section(s) 3556, 3557, or 3558 of the PECC? Can I ask PERB to investigate this violation?
- A. Yes, PERB will process alleged violations of the PECC as unfair practice charges, using the investigation process contained in PERB Regulation. It is suggested that charging parties use the form provided by PERB tailored to PECC Charge allegations. Respondents to a PECC Charge alleging violations of section 3558 are encouraged to utilize a guided response form that will also be provided.
- Q. What information do I need to file a PECC charge with PERB?
- A. The Charging Party should be prepared to provide detailed information, including relevant dates, employee names and a detailed description of the nature of the violation.
- Q. What happens after a PECC Charge is filed?
- A. The Office of the General Counsel will schedule an initial conference call between the parties' representatives, so that the parties can discuss the issues raised in the charge and voluntary resolution of the case. If the matter is not resolved, the Office of the General Counsel will investigate the allegations and determine whether to issue a complaint or dismiss the charge.
- Q. What deadlines will apply to responding to a PECC Charge?
- A. When a PECC Charge is filed, the Office of the General Counsel will promptly notify the parties in writing of the deadlines for responding to a charge, and the date of the initial conference call. The Respondent's position statement typically will be due within two weeks of the filing of the charge. To speed the processing of these types of charges, parties are encouraged to use PERB's E-file system and to consent to electronic service.