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December 7, 2011

Delivered Via Electronic Mail

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Re: PERB's Implementation of AB 646

Dear Ms. Murphy and Mr. Chisholm:

We appreciate the opportunity to provide input on PERB's proposal of emergency regulations relating to recently enacted Assembly Bill 646 ("AB 646"). To date, PERB has solicited comments regarding its proposed emergency regulations; however, the firm of Carroll, Burdick & McDonough, by its recent electronic submission to PERB dated November 28, 2011, has attempted to expand the scope of the discussion to include debate on the actual application of AB 646.

Carroll, Burdick & McDonough asserts, without any reference to the actual language or legislative intent applicable to AB 626, that AB 646 subjects to mandatory fact-finding all impasse situations, and not just those resulting from negotiations over memoranda of understanding. However, this interpretation not only is contrary to the plain language of the MMBA, but would contravene the clear and expressed intent of the legislature as well as the author of AB 646, Assembly Member Atkins.

First, the new impasse procedures established under AB 646—sections 3505.4, 3505.5 and 3505.7—relate specifically to the preceding sections of the MMBA regarding to the selection of a mediator to resolve impasses over *memoranda of understanding*. Sections 3505.1 and 3505.2 of the MMBA provide as follows:

3505.1. If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall **jointly prepare a written memorandum of such understanding**, which shall not be binding, and present it to the governing body or its statutory representative for determination.

3505.2. If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. [...]

[Emphasis added.]

Section 3505.4 now provides that if the parties have agreed to mediation pursuant to 3505.2, then if the mediator is unable to resolve that controversy, fact-finding may be requested. Thus, the language of Section 3505.4 is concerned with reaching a memorandum of understanding, *not* fact-finding over matters

which do not involve the negotiation of a memorandum of understanding, such as "*Seal Beach*" bargaining (see *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach* (1984) 36 Cal. 3d 591), or minor changes in working conditions such as the location of a union bulletin board.

Moreover, neither the author of AB 646 nor the legislature intended the legislation to apply in situations other than impasses over memoranda of understanding. Please see the following relevant excerpt from the State Senate Rules Committee analysis dated August 29, 2011 at page 5:

According to the author, "Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer **when negotiations for collective bargaining agreements fail**. [...]" [Emphasis added.]

Likewise, see the State Assembly Floor analysis dated September 1, 2011 at page 3:

According to the author, "Currently, there is no requirement that public agency employers and employee organizations engage in **impasse procedures where efforts to negotiate a collective bargaining agreement have failed**. [...] The creation of mandatory impasse procedures is likely to increase the effectiveness of **the collective bargaining process**, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful. [...]" [Emphasis added.]

(Both legislative analyses can be accessed on the Official California Legislative Information website at http://www.leginfo.ca.gov/cgi-bin/post?query=ab_646&sess=CUR&house=B&author=atkins.)

In addition to the language of the MMBA, and the legislative intent cited above, common sense calls for an interpretation of AB 646 that does not burden the parties with the lengthy proceedings and costs of a three-person fact-finding panel to preside over the small and lower-profile issues that arise outside the negotiation of collective bargaining agreements. Were it otherwise, the interpretation requested by Carroll, Burdick & McDonough would lead to an absurd result, wherein a municipality would be forced into lengthy, multiple and potentially simultaneous fact-finding panels occurring between a public entity and its employee organizations with respect to various routine issues that arise throughout the year. The result would be gridlock on a scale never envisioned by the legislature. PERB should not accept the invitation to endorse such a burdensome scenario.

We strongly urge PERB to add language to the proposed regulations making clear that AB 646 does not apply in circumstances other than impasses reached following negotiations over successor memoranda of understanding.

Respectfully submitted,



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Human Resources Director