



This conclusion is widely shared by many PERB constituents, in both labor and management.<sup>1</sup> Indeed, while the Burke draft proposals suggest that only a court or the Legislature can have the final word on the meaning of the statute, the Burke draft proposals also suggest that PERB adopt regulations clarifying that an employee organization may request fact-finding following appointment of a mediator *or* following written notice of a declaration of impasse *or* following notice of a public hearing on impasse. (Burke proposals, §I).

We concur with §I of the Burke draft proposals. Indeed, §I of the Burke proposals makes more sense than either of the PERB drafts for proposed Regulation 32802. Both of the PERB draft proposals leave ambiguous whether an employee organization may request factfinding in those cases in which there is no mediation. Leaving that crucial issue ambiguous would render the regulations terribly uncertain and difficult to interpret, and would create a virtual certainty that numerous charges would be filed by many different parties, all pertaining to the same issue. If, by contrast, PERB adopts §I of the Burke draft proposals, then the parties will be clear as to PERB's position, and it would be up to any party disagreeing with that position to seek additional legislation or court intervention.

## II. Procedures for Appointing a Factfinding Panel Chairperson

The PERB draft proposals include three possible alternatives for the method of selecting a chairperson under proposed Regulation 32804 (b). Option Two is the best alternative. Pursuant to Option Two, the Board would submit seven names to the parties drawn from the agency's list of factfinders and the Board would thereafter designate by random selection one of those seven persons to serve as chair, unless the parties select one by alternate strikes or another methodology of their choice. This procedure is preferable for several reasons. First, it is transparent, unlike Option One, which does not provide any insight as to what methodology PERB would use. Moreover, Option Two allows PERB to retain control over the process, rather than involving a second agency as would be the case if Option Three were adopted. Given that PERB already appoints factfinders under HEERA and EERA, it makes abundant sense for the agency to take on an analogous role under the MMBA. Furthermore, by keeping control of the process, PERB will be able to address any obstacles that arise, such as an undersupply of appropriate chairpersons or questions that may arise regarding qualifications, fees, etc.

We encourage PERB to make the complete list of MMBA factfinders public on the PERB website or available to all PERB constituents upon request. This will help to facilitate mutual agreement in the greatest number of cases, even prior to the agency having to send the parties a list of seven potential chairpersons. We also encourage PERB to widely solicit applications for the list, particularly given the very different compensation arrangement provided for under AB 646 and the substantial experience that many interest arbitrators have gained in assisting employers and unions in education, transit, safety and other areas.

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<sup>1</sup> While it is certainly possible to construct the statute differently if one wanted to do so, there is no other construction that makes sense of the language used, legislative history, and drafters' intent.

### III. Public Hearing Regarding Impasse

We largely concur with §V of the Burke draft proposals, concerning impasse hearings. However, there should be two additions. First, for clarity, the word "including" should be replaced by the phrase "including but not limited to." Second, an additional sentence should be added as follows: "The public hearing shall be conducted pursuant to the applicable legal requirements, if any, that otherwise govern public meetings of the public agency's governing body."

### IV. Regulation 32603

We have one final recommendation, to make sure it is clear that violation of AB 646 constitutes an unfair practice. This last addition to the agency's regulations perhaps need not be included in the emergency regulations, since in the interim Regulation 32603(g) would surely be interpreted to include any violation of AB 646. However, for the sake of clarity, PERB should in due course amend Regulation 32603(e) as follows:

(e) Fail to exercise good faith while participating in any impasse procedure that is mutually agreed to by the parties, or that is required under this Chapter or by any local rule adopted pursuant to Government Code section 3507.

We appreciate your consideration of these comments and your attention to these important matters.

Very truly yours,

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