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2013 MAY 13 AM 11:33

May 10, 2013

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Jonathan Levy, Regional Attorney
Public Employment Relations Board
1031 18th Street
Sacramento, CA 95811

Re: Notice of Proposed Rulemaking: MMBA Factfinding Sufficiency Determination Appeals

Dear Mr. Levy:

I am writing to comment on the Notice of Proposed Rulemaking: MMBA Factfinding Sufficiency Determination Appeals issued by the Public Employment Relations Board (PERB). Currently, PERB Regulation 32380, subdivision (d), provides that a decision by a Board agent regarding the sufficiency of a request for factfinding under the MMBA is not subject to appeal. The proposed regulatory change would eliminate this provision, thereby making such determinations appealable to the Board. According to the Initial Statement of Reasons, the reason for this change is to allow the Board the opportunity to develop a body of precedent to guide stakeholders in this area.

I write to urge the Board to consider the alternative of promulgating specific regulations to address the areas of uncertainty instead of leaving these areas to the development of Board precedent. My objection to allowing appeals in order to develop Board precedent is the time and uncertainty involved with such a process. First, in terms of time, I believe it is safe to assume that such a process would take many years. This is because the Board would have to wait for specific issues to arise and then tackle them one by one. Even though these cases would be expedited, I think it's safe to assume that each case could still take over a year to fully complete even under an expedited schedule.

Second, allowing an appeal of a factfinding sufficiency determination creates tremendous uncertainty for the employer. This is because if the employer proceeds to implement its last, best and final offer, it risks potentially having to return to the status quo ante months or more than a year later if the union is successful in its appeal. Yet at the same time, in this economic environment few employers are in a position to wait for the PERB process to be completed before proceeding.



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One alternative to waiting for Board precedent is for the Board to promulgate regulations addressing the key areas of concern in determinations on the sufficiency of factfinding. The benefit of this approach is that it will be faster than waiting for Board precedent. Indeed, such a process could be completed in several months. Moreover, with the assistance of stakeholders such regulations could cover multiple areas of concern instead of addressing issues piecemeal through precedent.

The benefit of this approach is illustrated by the Board's experience dealing with impasse determinations under the Education Employment Relations Act (EERA) and the Higher Education Employer-Employee Relations Act (HEERA). According to the Initial Statement of Reasons, PERB initially allowed for the appeal of impasse determinations but subsequently eliminated that right once a body of precedent was developed. However, that process took a long time. For example, consider that EERA was enacted in 1976 while HEERA was enacted in 1979. PERB regulation 32380, subsection (c)—which eliminated appeals of impasse determinations—took effect on January 28, 1989. Thus, it took over a decade for the Board to develop the requisite amount of precedent before it felt comfortable making impasse determinations non-appealable. In terms of cases dealing with impasse determinations, according to PERB's website, there were six precedential board decisions issued between 1978 and 1988, plus one decision on reconsideration.¹ Thus, on average there was one decision every 1.5 years on the issue of impasse determinations for about a decade.

I believe the experience under EERA and HEERA with impasse determinations actually supports the idea of promulgating regulations to deal with areas of uncertainty in factfinding determinations instead of waiting for Board precedent. Both avenues will accomplish the same goal but the regulatory route will accomplish it much faster. The regulatory route also allows for the full involvement of PERB's stakeholders.

In conclusion, I want to thank the Board Members of PERB and its staff for the time and effort spent drafting these proposed regulations. I hope you will find my comment on proposed PERB Regulation 32380 helpful.

Sincerely,

Timothy G. Yeung

TGY:mw

¹ These cases can be found under topic index 900.02000 - Declaration/Determination of Impasse, on PERB's website.