

Introduction to Labor Relations for Elected Officials

League of California Cities 2021 Annual Conference | September 23, 2021

Presented By: Jack Hughes

LCW LIEBERT CASSIDY WHITMORE

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Today's Agenda

- California Labor Relations Laws
- Establishing Bargaining Units
- Selecting Employee Representatives
- The Labor Negotiation Process
 - Scope of Bargaining
 - Management Rights and Past Practice
- Communicating with Labor
- Impasse and Factfinding
- Grievances
- Unfair Labor Practice Charges

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Laws That Regulate California Labor Relations



California Labor Relations Law

- Meyers-Milias Brown Act (MMBA),
- The State Labor Code,
- Public Employment Relations Board (PERB)
 - Regulates:
 - City bargaining unit composition disputes
 - Union certification/decertification proceedings
 - Labor negotiation impasse fact-finding
 - Unfair Labor Practice Charges (ULP/UPC)
 - State mediation and conciliation services
- City Employer-Employee Relations Resolution (EERR)



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California Labor Relations Law

- What the laws intend to accomplish:
 - Provide rules for labor negotiations; and also
 - Promote communication between employers, employees and labor organizations;
 - Provide methods for resolving disputes between employers and labor organizations;
 - Provide rules for recognizing the rights of public employees to join organizations of their own choice, and to be represented by them.



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Establishing Bargaining Units



Establishing Bargaining Units

- Bargaining unit formation
 - MMBA gives cities (not labor organizations) authority to determine appropriate bargaining unit
 - Must only be reasonable, not perfect



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Establishing Bargaining Units

- Reasonable factors for unit formation:
 - Community of interest among employees
 - History of representation
 - General field of work
 - Law enforcement and professionals (i.e. Nurses) have a legal right to their own bargaining units
 - Desires of the employees
 - Avoid conflicts of interest among employees



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Establishing Bargaining Units

- Management and confidential employees:
 - May be designated by public agency
 - May be restricted from representing any employee organization
 - May be restricted from being included in rank and file units
 - May *not* use unfair practice process to circumvent the agency's union modification process



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Union Certification/Employee Representation



Bargaining Unit Representation

- Employees in bargaining units may select representatives:
 - A union
 - A labor relations consultant
 - A law firm
 - Self-representation within the unit
- The city's EERR likely defines the selection process



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Bargaining Unit Representation

- Employees often select their representative in an election:
 - Organizations must have 30% support to qualify for the election ballot
 - Certification issued if results conclusive and not timely objected
- PERB may cancel the election, and certify, if:
 - Only one organization qualifies to appear on the ballot
 - The one organization demonstrated proof of “majority support” in the appropriate unit



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Amendment of Certification

- PERB has jurisdiction over amendments to certification
- To amend certification, employee organization must show:
 - Substantial continuity of representation between the pre and post-affiliated union;
- Employees have the right to decertify a representative with some limitations.



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Representation Issues: Dos and Do Nots

- **DO:**
 - Review and follow local rules
 - Remain neutral
 - Refer membership questions to the labor organization
- **DO NOT:**
 - Take any action deterring employees from organizing
 - Take sides in workforce vs. union disputes



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Right to Representation

- Represented employees have a right to representation in matters pertaining to employer-employee relations, including:
 - Labor negotiations,
 - Grievance proceedings,
 - Disciplinary proceedings, and
 - Interactive process meetings, if requested.



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The Labor Negotiation Process



Meet and Confer Obligations

- Employers must meet and confer (negotiate) with labor regarding:
 - Matters within the “scope of representation”
 - New employee orientation access
 - Mass communications to employees regarding right to join or support union
 - *Impacts* of matters not within the scope
 - But only *consultation* concerning EERRs
 - *Something less than impasse process applies*



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Meet and Confer Obligations

- Obligation to meet and confer requires good faith:
 - Meeting promptly upon request
 - Open mindedness
 - For a reasonable period of time
 - Free exchange of relevant and necessary information, opinions and proposals
 - Endeavoring to reach agreement



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Meet and Confer Obligations

- What's not good faith?
 - Surface bargaining
 - Failing to give full consideration to presentations by other party
 - Conditional bargaining
 - Regressive bargaining absent change in economic circumstances
 - Failing to provide non-privileged information that is necessary and relevant



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Meet and Confer Obligations

- But, there is no obligation to:
 - Reach agreement
 - Make concessions



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Case Study

The union is seeking a 5% raise for all unit members over the next two years. Agency states that it will not consider any proposal that increases the total cost of the contract by more than 3% over same time period. Agency holds fast to the 3% limit despite various union proposals (including variations on salary increases, retirement contributions, and health benefits) during the negotiation.



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Case Study (continued)

By refusing to bend on the 3% threshold, has agency breached its duty to bargain in “good faith” in an effort to reach agreement?



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The Scope of Representation



The Scope of Representation

- The scope of bargaining includes:
 - Wages,
 - Hours,
 - Terms of employment, and
 - Working conditions.



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The Scope of Representation

- Examples of matters within the scope of bargaining:
 - Compensation
 - Health & retirement benefits
 - Hours of work, working days, overtime, leaves
 - Discipline procedures
 - Grievance procedures
 - Layoff procedures
 - Workload, job description/job duties
 - Drug testing

The Scope of Representation

- Don't forget about the MOU:
 - Contains the employer and employees' agreements regarding matters within the scope of bargaining (and other subjects if the employer so allowed)
 - May also define what parties have agreed to negotiate/not negotiate about
 - Likely outlines union rights and management rights

Case Study

Long-awaited federal regulations changed the annual compensation threshold levels for white collar exemptions. Some classifications in the agency's Management Employees Association are no longer considered "exempt" under federal law. Agency begins to pay them overtime for work in excess of 40 hours in a week. MEA employees demand to meet and confer about the change.

(Continued on next slide.)



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Case Study (continued)

Must the agency meet and confer?



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Management Rights



Management Rights

- Matters not subject to mandatory labor negotiations:
 - Management rights
 - Merits, necessity, or organization of services
 - Public policy
 - Emergencies



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Management Rights

- Examples of management rights:
 - Setting standards and level of service
 - Determining means and methods of operations
 - Hiring, promoting and retaining employees
 - Directing and managing the work of employees



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Management Rights

- Examples of management rights (continued)
 - Layoff for lack of work or funds
 - Determining the size of the workforce
 - Disciplining employees subject to due process
 - Evaluating performance
 - Determining the hours of operations
 - Establishing standards of productivity



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Is it a Management Right?

The city wants to establish new recruitment and hiring procedures.

Is this a management right?



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Is it a Management Right?

The city wants to change policies and procedures related to examinations, promotions and reemployment.

Is this a management right?



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What if it's a Close-Call?

- The *Claremont* Test applies
 1. Will the management action significantly and adversely affect bargaining unit wages, hours or working conditions?
 - If not, no duty to meet and confer; if yes . . .
 2. Does the significant and adverse effect arise from the implementation of a fundamental managerial or policy decision?
 - If not, meet and confer applies; if yes . . .
 3. Balancing test!



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Management Rights

- Even where the employer implements a decision within its rights, the impact of the decision may have to be negotiated



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Management Rights

- Impacts bargaining
 - Subject to full bargaining process, through impasse.
 - May be able to implement management right while bargaining over impacts if:
 - Implementation date is not arbitrary;
 - Notice of decision and date is sufficiently advanced to allow for meaningful negotiations prior to implementing; and
 - Negotiations in good faith continue after implementation, as to those subjects still at issue.



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Is it a Management Right?

The city, facing significant budget shortfalls, has decided to layoff 5 bargaining unit positions. It does not have any policy or MOU provisions on layoffs.

Can city implement the layoff prior to completing impacts bargaining process?



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Past Practice



What is a Past Practice?

- An ongoing, unwritten standard approach to administer recurring types of situations mutually and tacitly accepted by both labor and management
- Has the enforceability of a written rule
- Maybe subject to negotiation to change it



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How is a “Past Practice” Established?

The ingredients of a past practice are:

- Conduct that is followed or allowed which is *clear and consistent*
- Conduct that has occurred *repeatedly* over a long period of time
- Employees and supervisors have *knowledge* of the conduct

Is it an Enforceable Past Practice?

The agency discontinued paying time and one-half premium pay for Sunday work without meeting and conferring. The MOU was silent on whether there was an obligation to pay at this rate; but the agency has been paying this premium for many years.

Past practice?

Is it an Enforceable Past Practice?

Twist on the prior case – the agency has been paying time and a half for Sunday work, but the MOU stated Sunday should be paid at straight time pay unless employee otherwise worked in excess of 40 hours in the week at issue.

Can the agency enforce the MOU without meeting and conferring?



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Changing a *Negotiated* Past Practice

- Most past practices address subjects omitted from and/or details not addressed in labor agreements
 - Changes to these past practices must be negotiated after giving Labor notice
- Some past practices contradict clear, negotiated provisions in labor agreements
 - The agency does NOT have to negotiate to end these past practices
 - Provide written notice to labor organizations and the workforce that the agency is ending the past practice
 - Allow time for labor organization/workforce questions



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Communicating with Labor



Communicating with Labor

- It is common for labor unions or their supports to seek to communicate directly with elected officials about labor negotiations
- City Council members should careful to avoid:
 - “Direct Dealing”
 - Contradicting city bargaining team direction
 - Promising changes to current city bargaining proposals



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Communicating with Labor

- Suggestions if you communicate with labor about negotiations:
 - Listen, but say little to nothing
 - Report what you hear to the city's bargaining team in closed session:
 - You may have gained information they did not have
 - Your report could prevent confusion, miscommunication and/or impasse

Communicating with Labor

In closed session, the city council empowered the city's bargaining team to establish June 19 as a paid holiday for city employees in exchange for deleting a floating holiday. Councilmember Matthews believes the union should not have to give-up a floating holiday. The union feels the same way but was leaning in favor of accepting the city's compromise. Matthews and the union regularly speak about the city's bargaining proposals. Today, Matthews expressed to the union his frustration about the city's holiday proposal. The union abandons any thoughts about accepting the city's proposal in the hope that other members of the city council will change their minds if the union holds-out on the issue. After all, the union knows it has an advocate for its point-of-view in closed session.

What might be the consequences for the city of councilmember Matthews' communication with the union?

Impasse and Factfinding



Impasse and Factfinding

- “Impasse”:

When parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.



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Impasse and Factfinding

- PERB Factfinding
 - Method of impasse resolution
 - Under MMBA union must request it:
 - No later than 30 days following written impasse declaration, or
 - If parties go to impasse mediation, no sooner than 30 days, but no more than 45 days following the appointment or selection of mediator.



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Impasse and Factfinding

- What happens at factfinding?
 - Three party panel (at least one neutral)
 - Evaluates outstanding proposals
 - Considers comparable agencies' compensation
 - Considers employer financial condition
 - Considers inflation, turnover and other labor market information
 - Makes recommendation to parties to settle
 - If no settlement, findings become public



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Impasse and Factfinding

- Following factfinding recommendation:
 - Governing body may adopt factfinding panel recommendation with consent of the labor organization
 - May unilaterally implement “last, best and final” offer for one fiscal year after public hearing concerning the factfinding panel recommendation
 - Leave status quo, or
 - Break the impasse and return to the bargaining table



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Handling Employee/Union Grievances



Employee/Union Grievances

- A formal process for resolving employee disputes/complaints/“gripes”
- Typically defined by MOU
- Typically used when:
 - Employer violates MOU
 - Employer violates of agency rule/practice
 - Employee/union disputes the meaning or term of the MOU



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Employee/Union Grievances

- Grievance procedures provide:
 - Steps to appeal disputed action
 - Starts with the first-line supervisor and progresses through higher levels of management
 - Final step: neutral 3rd party decision making (depending on city procedure)



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Employee/Union Grievances

- Embrace grievances!
 - Grievance procedures can be an effective means to settle disputes
 - Allows parties to resolve disputes short of litigation before civil court or PERB
 - Employees must exhaust internal remedies first



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Unfair Labor Practice Charges



Unfair Labor Practice Charges

- What is an unfair labor practice?
 - A violation of the MMBA, or other employer-employee relations laws or
 - Violation of any rules or regulations adopted by the public agency in relation to representation matters, impasse procedures, access to employees, union communications, etc.
 - Six month statute of limitations

Unfair Labor Practice Charges

- Examples of unfair labor practices
 - Unilateral change
 - Refusing to meet and confer over matter within the scope of representation
 - Failing to meet and confer in good faith
 - Surface bargaining
 - Failing to respond to information requests
 - Interfering with union rights and obligations
 - Deterring or discouraging union membership

Unfair Labor Practice Charges

- What remedy applies?
 - PERB has broad authority
 - May require reinstatement of wrongfully terminated employee
 - May require posting of founded violation
 - May require employer to meet and confer
 - Other administrative remedies
 - *But not changing terms of a labor agreement*

Workshop Summary

- Be mindful of union rights
- Don't negotiate directly with employees
- Don't disparage union or union activity
- Don't make exceptions to MOUs
- Do meet and confer in good faith
- Do follow grievance timelines
- Do try to facilitate positive employer-employee relations!

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Thank You!

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