LBAEE
March 2024 News

CURRENT CIVIL SERVICE CHARTER

The City of Long Beach is currently proposing a charter amendment reforming Civil Service.
Here we will summarize what the **current** charter establishes so our members are familiar with the **existing** rules when comparing with any new proposals.

ARTICLE XI. - CIVIL SERVICE- EXISTING CHARTER
The Civil Service Commission shall be composed of five (5) residents of the City.

The powers and duties of the Civil Service Commission shall be:

a) Adopt and amend Civil Service Rules and Regulations, subject to the approval of the City Council.
b) Make independent investigations concerning the enforcement of this Article and the rules adopted.
c) Provide for the examination and certification for employment in the classified service.
d) Create classifications of employees in the classified service, subject to the power of the City Council to establish positions of employment.
e) Maintain eligible lists for classified positions, as needed.
f) Appoint an Executive Director to carry out the purposes of this Article and the policies of the Commission. The Executive Director shall execute this directive through the appointment and management of a professional staff.
g) Adjudicate appeals, subpoena and require the attendance of witnesses and the production of any documents pertinent to any Commission investigation or appeal, and to administer oaths to such witnesses.
h) Enforce and remedy violation of Commission rules.
i) Make final decisions in any matter properly brought before it, in the absence of action to the contrary by the City Council.

The Civil Service of the City is hereby divided into the unclassified and classified service (additional details).

No employee in the classified service shall be suspended, discharged or reduced in classification for disciplinary reasons until the employee has been presented with the reasons for such action specifically stated in writing. The employee shall have the right to appeal such action to the Commission in accordance with the procedures specified in its rules. The reasons for such action and any reply thereto by the employee, shall be filed in writing with the Commission.

No person in the employ of the City or seeking admission thereto, shall be appointed, reduced, or removed or in any way favored or discriminated against for any reason which is non-job related, except where the law compels or provides for such action.

Provision for preferences for Veterans and some spouses of Veterans (additional details).

Performance Improvement Plans

Performance Improvement Plans, better known as PIPs, are a performance management tool used by employers to improve employee work performance. Employers often use PIPs as a precursor to formal disciplinary actions, such as written reprimands, suspensions, demotions, and terminations. In many instances, PIPs are not considered formal discipline and are therefore not subject to the negotiated discipline procedure set forth in the Memorandum of Understanding (MOU) or Personnel Rules. However, anyone who has ever received a PIP will tell you it certainly feels like discipline. A PIP might even say that failure to satisfactorily complete the PIP may lead to disciplinary action up to, and including, termination. While PIPs often are a precursor to more serious discipline, such as termination, in other instances, employees satisfactorily complete the PIP, and no further action is taken. Still, PIPs are not something you as an employee want to receive. This month, we provide general advice about PIPs. If you receive a PIP, contact your employee organization or professional staff for help.

Are PIPs Subject to Bargaining? Although the employer has a management right to evaluate performance, in most cases, the process for doing so is a matter subject to bargaining between the employer and the employee organization. This means the employer must bargain with the employee organization before implementing a new process or changing an existing process. In many instances, rules have already been negotiated. There should be language in the MOU or personnel policy that sets forth the process. That is the process that will apply to you. The employee organization can help ensure that the employer follows that process. Any unnegotiated change to the existing process may be an unfair labor practice, which the employee organization can enforce by filing a claim with the Public Employment Relations Board (PERB).

In *City of Davis* (2016) PERB Dec. No. 2494-M at p. 30-31, PERB held that the City was required to meet and confer with the employee organization before issuing a PIP to a firefighter when it was the first time the fire department had issued a PIP. PERB found that the PIP was a new disciplinary tool and a change in the evaluation procedure. By unilaterally issuing the PIP without meeting and conferring on the use of PIPs as a

disciplinary tool, the City violated the Meyers-Milias-Brown Act (MMBA). In other words, the City could not use PIPs as a disciplinary tool without first bargaining with the union.

In many circumstances, an employer using PIPs is not a matter subject to bargaining. Most often, the employer has previously used PIPs as a performance management tool, and thus there is no unilateral change to terms and conditions of employment. In other instances, the employer admits that PIPs are not formal discipline, and it does not affect other terms and conditions of employment, like promotions or merit or step increases. In those situations, PIPs are not a very meaningful tool, other than to alert the employee that the employer is watching their performance more closely and is prepared to escalate to formal discipline if performance does not improve.

Although a PIP might say failure to satisfactorily complete the PIP may lead to disciplinary action up to, and including termination, the employer cannot terminate an employee at the end of the PIP if the supervisor or manager is unhappy with the lack of progress. Except for at-will or probationary employees, the employer must follow the negotiated discipline procedure if they intend to take more serious corrective action. The good news is that if PIPs are not a disciplinary tool, then the employer cannot use the PIP as a basis for further progressive discipline. The employer should start with a written reprimand and escalate through each of the negotiated disciplinary steps before terminating employment. The purpose of progressive discipline is to provide the employee with an opportunity to learn from prior mistakes and to take steps to improve job performance. Unlike other forms of misconduct (such as theft or violence) that do not always require progressive discipline, progressive discipline should be followed for performance issues.

Why Are PIPs Used? A PIP is typically given to document perceived performance deficiencies and to identify what corrective steps must be taken to improve performance. For example, a PIP should document when an employee is not meeting expectations. Expectations should have been communicated to the employee prior to the start of the PIP. Often, employees are not aware of the expectations. Management should give the employee notice of the deficiency, training, and the opportunity to improve. PIPs should not be punitive in nature. PIPs should provide a meaningful opportunity for an employee to learn and improve, with better communication and training.

PIPs are inherently *subjective*. They mostly reflect the views of the person, most often the immediate supervisor, who drafted the PIP. How accurate those views are can vary greatly. The less accurate, the less useful it is as a tool for improving job performance. Also, if the goal is to improve performance, the reality is that ongoing feedback in real time is more effective than issuing a PIP after the fact. This is one reason why employees often view PIPs as a means for management to create a paper trail to support an eventual termination decision, rather than as a tool for improving performance.

Regardless, PIPs should still be as objective as possible. This means the PIP should focus on specific examples that can be used to illustrate how something was handled and how it could have been handled differently – or better, at least in the supervisor's eyes. In some PIP forms, there is space for the supervisor to write in a specific example. Some of the most useful instructions are found in those written descriptions, and any discussion over it that might occur during the issuance of the PIP or while the PIP is in effect. You can ask that the PIP be revised to memorialize any specific examples.

PIPs can be issued at any time, but they are commonly given alongside an annual review that identifies performance deficiencies, or with formal discipline, like a suspension or demotion. When used, they tend to resemble something more serious than a negative performance review but less serious than formal discipline. They often consist of a specific period (*e.g.,* 30, 60, or 90 days) in which job performance is more closely observed and evaluated to see if the goals identified in the PIP have been met. These should be goals that were set and communicated prior to the PIP being issued. In some instances, a PIP may be extended.

What Happens at a PIP Meeting? PIPs are often given in a one-on-one meeting between the supervisor and the employee. A typical meeting starts with the supervisor providing the employee with a copy of the PIP, identifying the alleged shortcomings, and explaining what steps the employee should take to improve. Typically, there is no legal right to a union representative in these meetings if the purpose is simply for the supervisor to issue the PIP to the employee. In most cases, it is best for the employee simply to receive the PIP and decide how to respond to it later. But if you are questioned about your performance in a way that could reasonably lead to discipline (*e.g.*, potential misconduct), you should ask if your answers to these questions could lead to discipline. If the answer

is yes, you should request a union representative before answering. You may also be entitled to a union representative if the PIP is being considered a form of discipline.

Sometimes an employee is asked to sign and acknowledge receipt of the PIP. Signing does not mean you agree with the PIP, just that you received the PIP. If you do not agree with the contents of the PIP, you may write a rebuttal letter. If directed to do so, sign to acknowledge receipt, but feel free to include by your signature a short note such as "My signature is to acknowledge receipt of the PIP only." Then, consult with your association representative or professional staff to help you review your draft response before submitting it. There may be short timelines, so do not delay.

Responding to PIPs – Because PIPs are often a step towards discipline, it is especially important to ensure the facts are correct. If you are issued a PIP with inaccuracies, be sure to respond quickly. Check the MOU language or personnel rules to see if there is specific language on PIPs and ask your employee organization leaders right away if you need their help responding to a PIP. If a PIP is given with discipline, your employee organization or professional staff can help you respond to and appeal the discipline.

To provide a meaningful opportunity to improve job performance, PIPs should use SMART criteria. The acronym stands for Specific, Measurable, Achievable & Appropriate to the Job, Reasonable and/or Realistic, and Time Bound. For example, a PIP that says "improve communication skills" without further instruction or specifics is too vague and subjective to be meaningful. If a PIP is based on objective inaccuracies, you will want to correct any misinformation. If a PIP makes statements about your work that you do not feel are legitimate, consider asking your supervisor how the supervisor would perform the task or have handled the situation differently. Feel free to also ask your employee organization leaders or professional staff to review any written response you intend to submit before submitting it. They can help you with the tone and how to prioritize your best points.

Conclusion – It is common for workers to feel like PIPs are punitive and not a genuine effort to improve job performance. However, if you receive a PIP, in addition to taking the actions discussed above, do your best to satisfactorily complete the PIP so you do not ultimately find yourself receiving formal discipline.

News Release - CPI Data!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

3.1% - CPI for All Urban Consumers (CPI-U) Nationally

3.3% - CPI-U for the West Region

2.5% - CPI-U for the Los Angeles Area

2.6% - CPI-U for San Francisco Bay Area (from December)

2.9% - CPI-U for the Riverside Area

3.8% - CPI-U for San Diego Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: A former employee at my city who went to work for a nearby city told me he was just recruited for a position with my city that was not even open on the Human Resources website. Are they recruiting outside of normal guidelines? The former employee was contacted by a recruiting firm. The headhunter told him what work he would be assigned, what the benefits package would be, and did not say anything about having to apply. Is this a violation? I thought the city was required to post the position and applicants had to submit their materials. It does not seem right that a search firm can offer city jobs like that.

Answer: Most cities have recruitment protocols that they must follow. Recruitment procedures are typically found in a city's Municipal Code, Personnel Regulations, Hiring Policy, Civil Service Rules, or Memorandum of Understanding. Check the specific rules that are in place in your city to see if there has been any violation. The employee organization or any affected individual (for example, someone who could promote into the position) may be

able to file a grievance over the city's failure to follow the hiring rules.

The rules vary from agency to agency, but a common one includes posting an announcement that sets forth the recruitment process and any deadlines, the job description and qualifications, and the pay and benefits. Rules also typically allow for both internal and external candidates to apply, though some may require that they be opened for internal applicants first, or that internal applicants receive a preference (like a job interview if they meet the qualifications). Some rules may allow for an appointment without recruitment, so be sure to review your agency's rules to see what, if any, recruitment process the agency must follow.

There is nothing illegal about using a recruiting firm, or the recruiting firm sharing information from the posting. However, the headhunter should not be making job offers. At most, the headhunter should direct potential applicants to follow the application process identified in the job posting.

Regardless of what was promised by a recruiter, if an individual is applying for a position represented by an employee organization covered by an MOU, the city must follow the MOU and any negotiated job description, title, qualifications, pay, and benefits for the position. The employee organization can file an unfair labor practice claim if the city has unilaterally changed any of those terms.

There are also federal and state laws that must be followed regardless of whether the recruitment is handled in-house, or the city uses an outside agency to assist with recruiting. For example, civil rights laws forbid an employer from discriminating based upon protected factors like age, race, gender, religion, disability, *etc*. Beginning in January 2023, SB 1162 – The Pay Transparency Act – requires all California employers with fifteen or more employees to include a pay scale in the job posting, which is defined as the salary or hourly wage range that the employer expects to pay. Starting in January 2024, AB 2188 and SB 700 prevent employers from discriminating against most applicants for off-duty cannabis use and prohibits employers from requesting information from applicants about prior cannabis use, unless otherwise allowed by law.

Question: I have a question regarding on-call supervisory duties. Each division has a person who performs standby duties, and one person who is their on-

call supervisor. One exception is our Fleet Division. The Fleet Division does not receive many call outs. When we do, it's usually related to a bus or carpool vehicle. Because there are so few calls, this division only has one person who performs standby duties and does not have an on-call supervisor. On-call supervisors are typically the division crew leaders. For the Fleet Division, the crew leader performs standby duties, but as a first responder, not as a supervisor. The crew leader's job description says the employee performs after-hours emergency work and on-call supervisor duties on a rotating basis. The fleet tech I/II job description says they may perform after-hours emergency work and on-call duties on a rotating basis. The MOU has a higher benefit when performing supervisory on-call duties compared to first responder on-call duties. Should the crew leader get standby pay at the supervisor level? If not, should the fleet tech I/II's be taking on the responsibility as an on-call supervisor but only get standby pay at the first responder level?

Answer: The MOU language suggests that if anyone is performing on-call supervisory duties, they should get that level of standby pay. Furthermore, if anyone is performing first responder level on-call duties, they should get that level of standby pay.

There seems to be three different levels of work – (1) work that is supervisory; (2) work that must be done by a crew leader but is not supervisory; and (3) work that can be performed by a tech I or II. If the crew leader is acting as a supervisor (*e.g.* supervising others in after-hours work or performing higher-level after-hours work), the crew leader should be paid at the higher supervisory level.

The job descriptions merely identify whether it is a position that is or could be subject to on-call responsibilities. The MOU describes what the benefit is if the employee is on-call. So, if employees (either the crew leader or techs) are truly performing on-call duties at the supervisory level, then they should receive the higher amount for the supervisory level, regardless of title. If employees (either the crew leader or techs) are truly performing on-call duties at the first responder level, then they should receive the lower amount, regardless of title. If you are not receiving the proper level of standby pay based on the work performed, contact your professional staff or employee organization for further assistance.

Question: Is there anything in writing in our MOU on Donning and Doffing? Do employees have an allotted amount of time to put on their uniform while on the clock or do they have to be ready to go at their start time? Does the City have to pay for this time?

Answer: "Donning and doffing" refers to putting on (donning) and taking off (doffing) uniforms and protective gear or equipment. Donning and doffing pay – *i.e.*, pay for time spent changing in and out of uniforms – can be negotiated into an MOU. It is often found in police officer or firefighter MOUs. Beyond that, it is not common. Unless the MOU or the law says the time is compensable, the ordinary answer is that the city can require employees to be in work-ready condition at the start of their shift and any time spent changing into uniforms before the shift starts or after it concludes is not compensable.

Under the Fair Labor Standards Act (FLSA), changing clothes (such as uniform pants, shirts, and non-exceptional safety gear) is considered ordinary. Therefore, time spent putting them on and taking them off is typically not compensable, particularly if the clothing change is more for comfort and convenience. There are exceptions. For example, donning and doffing is compensable if the activity occurs after the employee engages in the first principal activity and before finishing the last principal activity as part of the continuous workday rule. Whether time is compensable can depend on an employer's established custom or practice. Donning and doffing of unique protective gear may be compensable.

In *IBP, Inc. v. Alvarez* (2005), the U.S. Supreme Court said donning and doffing the company's protective gear was "integral and indispensable" to the employees' work as a "principal activity." The time spent changing was therefore compensable. The case involved a poultry processing facility.

In *Sandifer v. U.S. Steel Corp.* (2014), employees working in a plant were awarded back-pay for time spent donning and doffing certain items of protective gear including a flame-retardant jacket, a snood, and work gloves, but time spent putting on safety glasses, earplugs and a respirator was not compensable. The Court has said that employers and employees may decide through collective bargaining whether to compensate for donning and doffing.

In *Integrity Staffing Solutions v. Busk* (2014), the Court said that time spent

going through security screenings was not compensable because screenings are not an intrinsic element of the work, and the employer could have eliminated the screenings altogether without impairing the ability of workers to do their work. The Court narrowed the phrase "integral and indispensable" to apply only if work activities are directly related to performing the job the employee was hired to do. The Court said an activity is integral and indispensable to principal activities, and thus, compensable under the FLSA, if it is an intrinsic element of those activities and one which the employee cannot dispense with in performing principal activities.

Courts may look at several factors, such as whether the clothing gear is mandatory or optional, whether employees are permitted to change at home or are required to change at work, and whether the clothing is necessary and integral to performing the employee's job duties.

You should review your MOU to see if donning and doffing is addressed. If you believe the time is compensable in your situation, and you are not being paid, contact your professional staff or employee organization for assistance.

Question: How much sick time can be used to attend to an ill parent? The old MOU said the max was ½ of our earned sick leave per calendar year which is 48 hrs. Reading the new MOU, it looks like there is no limit as to how much sick leave time one can use to attend to their ill parent. It says they "shall be entitled to use any accrued sick leave to attend to their ill or injured parent in accordance with the California Family Rights Act." Is that correct?

Answer: Under California's Kin Care law – Labor Code Section 233 – an employee can use up to one half of their accrued annual sick leave to care for a family member. Family member has the same meaning as defined under Labor Code Section 245.5, which includes a parent. It also includes a child, spouse, registered domestic partner, grandparent, grandchild, sibling, or a designated person, though an employee can be held to one designated person per 12-month period. Leave may be taken if your family member is sick, or you need to attend to their diagnosis, care, preventative treatment, or treatment of an existing health condition.

Employees often use sick leave to care for an ill parent. If you accrue 96 hours of sick leave per year, under Labor Code

Section 233, you are entitled to 48 hours of sick leave to care for an ill parent. However, Labor Code Section 233 sets a minimum amount, it does not set a cap. The MOU can be revised to provide a greater benefit, for example, using any accrued sick time to care for an ill parent.

It sounds like that may be what happened, but the last clause "in accordance with the California Family Rights Act" may limit that somewhat. Under CFRA, employees can take up to 12 weeks of job-protected leave to care for a parent with a serious health condition. The leave is *unpaid*, but sick leave may run concurrently with CFRA leave. If the care you provide for your ill parent qualifies for CFRA leave, the MOU language cannot limit you to only 48 hours of sick time. That could be why the language was clarified, so that it is not interpreted as limiting sick leave usage in those instances where CFRA applies.

Keep in mind, CFRA applies only where the parent has a "serious health condition," which typically means inpatient care or continuing treatment by a healthcare provider. Therefore, if the care that you provide is for a routine physical, or dental appointment, or due to the common cold, you might not qualify for CFRA leave because your ill parent does not have a serious health condition. But you do still qualify for Kin Care leave. In those cases, it could be possible that you are limited to 48 hours.