LBAEE

May 2024 News

ELECTIONS – RESULTS

LBAEE recently held elections for some of its Governing Board positions, here are the results:

PRESIDENT:

HENRY CORZO
Department: Harbor
Bureau/ Division: Engineering - Project Controls
Classification: Senior Scheduler
Years with the City: 13 years
AEE previous involvement: Vice President - 2023

TREASURER:

CHRIS SANATAR
Department: Harbor
Bureau/ Division: Engineering - Survey
Classification: Surveyor
Years with the City: 13 years
AEE previous involvement: Appointed Treasurer since 2023

GROUP B (Utilities & Energy Resources):

GIANCARLO MORAL
Department: Long Beach Utilities
Bureau/ Division: Engineering and Construction
Classification: Mechanical Engineer
Years with the City: 12 years
AEE previous involvement: Appointed Group B Director since 2023

GROUP D (Harbor):

JORGE CASTILLO
Department: Harbor
Bureau/ Division: Engineering - Engineering Design
Classification: Civil Engineering Associate
Years with the City: 18 years 5 months
AEE previous involvement: Group D Director -2010

We give thanks to our previous president JASON RODRIGUEZ for his leadership during the last 8 years advocating for wages, rights and benefits for the engineering employees throughout the city.

What is the Purpose of an Employee Organization

It goes without saying the last 15 years have been challenging for California public sector workers. In 2009, a global financial crisis began wreaking havoc on public agency budgets. Public employee compensation was a topic of reform, both statewide and at the local level. Employees were laid off, furloughed, had hours reduced, took wage cuts, and were forced to pay a greater share of medical and retirement costs. Unions filed lawsuits, especially over cuts to retiree medical insurance, and some municipalities filed for bankruptcy. Pensions were a subject in the 2010 gubernatorial election and led to Governor Jerry Brown signing into law the Public Employees' Pension Reform Act of 2013.

During this time period, public employees experienced a declining standard of living. When employees finally were able to negotiate some pay and benefit increases after a half-dozen years of concession bargaining, the increases were barely noticeable, with inflation at historic lows. In 2018, public employees suffered another crisis when the U.S. Supreme Court overturned 40 years of legal precedent by invalidating state laws that mandated workers pay service fees to the union that represents them, making it harder for public employee unions to secure the necessary funds to provide quality representation in collective bargaining. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. The pandemic created an even more disruptive work environment for public employees as they were now charged with keeping public services running during a global shutdown. In May 2022, inflation reached a peak of nearly 10% year-over-year, an increase not seen since the late 1970s and early 1980s. After a wave of retirements, most agencies learned that they were severely short staffed. Unlike during the recession, however, agencies were finding it much more difficult to recruit and retain enough employees to effectively deliver vital public services. Amidst all these changes, it's fair to consider how public employees can help push for improvements. This month we look more closely at the purpose of an employee organization and the role it can play in furthering the interests of public sector workers.

State Law – The starting place for public sector workers in California are the state bargaining laws, which for most local government employees, means the Meyers-Milias-Brown Act (MMBA) (Gov't Code §3500). In 1968, the MMBA became law, extending to California local government employees representation rights like those in the private

sector under the National Labor Relations Act (NLRA). The MMBA refers to unions as "employee organizations." (Gov't Code §3501). A "recognized employee organization" is "an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency." (Gov't Code §3501(b)). Legally, there is no distinction between a "union" and "employee organization." An employee organization has the same rights under the law as a union. Public employees have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. (Gov't Code §3502). Recognized employee organizations have the right to represent their members in their employment relations with public agencies. (Gov't Code §3503). The scope of representation includes "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." (Gov't Code §3504).

Federal law governing private sector employees, such as Section 7 of the NLRA, protects the right "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." California labor relations statutes do not explicitly include a separate right to engage in "concerted activities" but they are interpreted to include such protections. (*See, e.g., Fresno County In-Home Supportive Services Public Authority* (2015) PERB Dec. No. 2418-M; *Modesto City Schools* (1983) PERB Dec. No. 291).

Collective Bargaining – Practically speaking, the primary role of an employee organization is to bargain a labor contract, or Memorandum of Understanding (MOU), for the bargaining unit it represents. The MOU memorializes your rights under the law and any unique agreements reached between your employee organization and your agency that affect wages, benefits, and working conditions. It is a document that evolves over time. Each round of bargaining, the parties revise existing provisions, add new ones, and remove any outdated language. It takes a lot of time, patience, and expertise to negotiate a good MOU. Before bargaining even begins, the employee organization will typically distribute surveys and hold membership meetings to identify what improvements the members want to see in any new MOU. The employee organization leaders will also review the current MOU for potential changes, and perhaps any pertinent personnel rules or employment policies, prior to drafting and finalizing an initial bargaining proposal package. Once bargaining sessions begin, the employee organization will review the agency's finances, typically during an initial meeting with management, and provide any requests for information that are relevant to bargaining.

It takes months of regular meetings, often two to four hours per session, to successfully negotiate an agreement. Each side begins with their initial proposals, and by the end of negotiations, the parties have a document that reflects a total tentative agreement between both sides. This can be a summary document, or a red-lined MOU. The tentative agreement is then taken back to the membership for ratification and then to the agency's elected officials for ratification. The governing body of the agency, typically a city council, must vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. (Gov't Code §3505.1). Once ratified, the new terms are then implemented.

Sometimes, progress can stall or even reach an impasse. Typically, this occurs over economic differences – for example, how large the negotiated wage increases should be. During this time, the terms of the existing MOU will remain in full force and effect – even if the MOU expires – until the parties exhaust the bargaining process up to and including any impasse procedures. Only the prohibition against strikes (no-strike clause) and provisions that have built-in "sunset" clauses or specific dates (like for an annual holiday closure) expire with the MOU expiration date. If the parties do not reach agreement, the parties may agree to appoint a mediator before declaring impasse. (Gov't Code §3505.2).

If the parties do reach an impasse, the employee organization may file for a fact-finding panel under state law. (Gov't Code §3505.4). The three-person panel includes one neutral chairperson, one advocate for the agency, and one advocate for the employee organization. The panel holds a hearing and issues an advisory recommendation to settle any disputed issues. The recommendation is guided by eight factors, which include the financial ability of the agency to pay for what the employee organization is requesting, a comparison with similar pay and benefits at other agencies, and the consumer price index (commonly known as the cost of living). If the advisory recommendation does not resolve the impasse, or the agency decides not to implement the advisory recommendation, the agency can, after holding a public hearing regarding the impasse, implement its last, best, and final offer. (Gov't Code §3505.7). However, the agency cannot deprive an employee organization of the right to negotiate annually over matters within the scope of representation.

Mid-Term Subjects of Bargaining – The MOU is a binding contract. It is a legally enforceable document. The agency cannot change the terms of the MOU without your employee organization's agreement. Keep in mind that, although the agency cannot unilaterally change the terms of your union contract mid-term, the agency still may have to bargain with your employee organization during the MOU term. One example is for

re-opener provisions. Some MOUs may provide for "limited re-openers" that allow for either party to renegotiate over a particular topic covered by the MOU. The agency is subject to the same legal obligation to bargain in good faith up to and including any impasse procedures, such as fact-finding, for these re-opener negotiations. The agency may also be subject to "effects-based" bargaining. This may happen if there are changes in the law that affect terms and conditions of employment. This happened with COVID-19 health orders and vaccine mandates. It also may arise where the agency decides to lay off staff or contract out bargaining unit work. Even if the MOU has a layoff clause or a contracting out clause that allows management to do so, the law may still impose an obligation on the agency to bargain over the negotiable effects of their decision. This may include, for example, how any work gets redistributed to other workers.

A very common mid-term bargaining obligation is where the agency proposes changes to terms and conditions of employment that are not memorialized in the MOU. This often includes things like changes to job descriptions, personnel rules or policies, past practices, work rules, work schedules, and classification or compensation studies. The agency is required by law to provide the employee organization with notice and an opportunity to bargain prior to making the change. If the employee organization elects to meet and confer, the change cannot be implemented until the parties reach an agreement or exhaust the impasse process. The ability to go to fact-finding over mid-term subjects of bargaining (like a job description) gives the employee organization some real leverage in getting management to make changes the employee organization might propose.

Contract Enforcement – The employee organization's role is not limited to bargaining. It plays a vital role in monitoring and enforcing the negotiated agreement. This is referred to as contract administration or contract enforcement. It does no good to negotiate an MOU if management is not held to their end of the bargain. For violations of the express terms of the MOU, the employee organization can file a grievance pursuant to the negotiated grievance procedure. That is typically the best place to start. Often the grievance procedure provides for an initial step to try and resolve the matter. Many cases are resolved this way, informally, by the employee organization bringing the issue to management's attention. If management disputes whether a violation occurred, the employee organization can then file a formal grievance and advance the grievance through the top step of the grievance procedure. In many agencies, the grievance procedure ends either at arbitration – which is an outside labor relations expert rendering a decision after a formal hearing – or a meeting with the city manager or general manager.

The employee organization might also consider filing an unfair labor practice charge with the state Public Employment Relations Board (PERB). Many violations of the express terms of the MOU are also "unilateral changes" – *i.e.*, a violation of the agency's obligation to bargain over changes to terms and conditions of employment with the employee organization. If the violation does not constitute a grievance as defined by your grievance procedure, but still constitutes a unilateral change, PERB may be the exclusive remedy. PERB can order the agency to rescind the change and make any affected employees whole for the violation. Navigating the PERB process can take time and is not typically an immediate fix, but an employee organization can consider PERB as an option if the employee organization's bargaining rights are violated.

Member Services – Another role employee organizations play is to represent individual members on matters affecting their terms and conditions of employment. There are several areas where employee organization assistance is particularly important. First, if you are the subject of an employer investigation into potential misconduct, or where you are asked to participate in an investigatory meeting with your employer where your answers to questions could reasonably lead to discipline. In those instances, you have a "Weingarten" right to a union representative. This flows from a U.S. Supreme Court case under the National Labor Relations Act. (*NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251). Your employer does not have to inform you of this right. You must make an explicit request for union representation before or during the interview. You cannot be punished for making this request. Your employer must give you time to consult privately with your representative outside the presence of your employer. Even if you do not initially request a representative, you may request one in the middle of the interview if you realize the interview is turning towards discipline.

Second, if you receive disciplinary paperwork, you should contact your employee organization for help. You can be assigned a representative to review your paperwork, discuss the allegations and penalty with you, and strategize as to how best to put on your defense to the employer. Unless you are "at-will" or a probationary employee, you probably have a protected property interest in continued employment. (*Skelly v. State Personnel Board* (1975) 15 Cal. 3d 194). Your agency cannot deprive you of this interest without giving you certain procedural safeguards, known as "Skelly rights." At a minimum, this includes notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline. (15 Cal. 3d at 212). For major discipline (terminations, demotions, and suspensions greater than five days), this also includes a post-deprivation evidentiary hearing where the agency must prove that it

is more likely than not that the alleged misconduct occurred, and that the penalty is appropriate. Depending on your local rules, this hearing may be before an arbitrator, a Civil Service Commission, a Personnel Commission, or the city manager or designee.

Third, if you have an individual grievance, contact your employee organization before you file a grievance. A grievance is a written complaint filed with and against your employer for their alleged violation of your MOU. A representative can discuss your potential grievance with you, identify the best arguments, and draft and file the grievance for you. A grievance should identify the specific violation and requested remedy. In some agencies, a specific grievance form is used. The representative can also represent you at each step of the grievance procedure. State labor relations statutes, such as the MMBA, provide an expansive right to union representation in all matters of employer-employee relations. Your right to representation under state bargaining law and your grievance procedure likely allows for representation at each level of the grievance process.

Fourth, if you have a disability that affects your ability to perform the essential functions of your job, you have the right to be reasonably accommodated under the Americans with Disabilities Act (ADA) and the Fair Employment & Housing Act (FEHA). Agencies often send a letter to employees out on disability inviting them to an interactive process meeting. This is the first step the agency must take to medically separate you from employment. Contact your employee organization for assistance if you ever receive one of these letters. It is a good idea to do this *before* you contact HR or your employer and even before you send them your doctor's note, if possible. The interactive process is fraught with perils, and each situation presents different challenges. No two cases are the same. This is primarily due to two factors. One, your job duties are often different from your co-workers, even if you are in the same job classification. Two, even if your job's essential functions are identical to someone else's, your specific medical condition and job restrictions are probably unique to your case. Your representation can help you understand your specific situation and what is achievable. They can also help you identify your priorities, including returning to your regular job, accepting a reassignment, requesting medical leave, retiring, or negotiating a separation agreement.

Fifth, if you have questions about your rights under the MOU, and need advice, contact your representative. Common examples include: when you are expecting a child and you want to know your rights to take leave; if you are doing the work of a higher classification and you want to know whether you should file a grievance or apply for the promotion; and if you are denied the right to a negotiated benefit – like a paid time off request – and you want to know what recourse you might have.

Organizing Activities – The employee organization can also help with internal organizing. When your employee organization initially formed, this included filing for and obtaining formal recognition. But it does not end there. Some employee organizations meet quarterly. Most employee organizations are required to hold membership meetings at least once annually. These meetings might include food, raffles, or other social festivities. Membership meetings are great opportunities to build solidarity with your colleagues and strengthen your organization. During bargaining – especially if the parties are at impasse – the employee organization might help organize informational pickets. This may include attending city council or board meetings as aggrieved employees to speak directly to the elected officials in support of better pay, benefits, and working conditions. Finally, the employee organization may assist in organizing support for a local sales tax increase or ballot measure, or to meet with candidates for the agency's elected office.

Local Control – Independent public employee organizations in California have a long history. Some associations date back to the early 1970's shortly after the MMBA was signed into law. Many public employees continue to prefer to be represented by smaller independent associations as they provide professional services with autonomy at the local level and typically a more reasonable dues structure.

Conclusion – As the last 15 years illustrates, public employees are not immune from the broader forces at work in society. However, belonging to an effective employee organization can help make a difference in protecting and advancing the standard of living and working conditions of its members.

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.

3.5% - CPI for All Urban Consumers (CPI-U) Nationally

3.6% - CPI-U for the West Region

4.0% - CPI-U for the Los Angeles Area

2.4% - CPI-U for San Francisco Bay Area (from February)

4.3% - CPI-U for the Riverside Area

3.6% - 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: I fell at work recently. The floor was mopped and there was no signage. I reported the injury to my employer and they opened a workers compensation claim. I am currently on-the-job, not off work. I have six physical therapy appointments I need to schedule for the injury and the medical office is closed during my off-duty hours. It takes about an hour to drive there one-way, so I cannot go on my lunch break. My employer said workers compensation does not reimburse for workers compensation follow up appointments (medical or therapy) and that I must use my own accrued time for the appointments. Is that true? That simply doesn't sound right to me. If I do not go to physical therapy because I do not want to use my own time, will that come back to bite me if the pain or inflammation comes back later?

Answer: Your employer is correct. Workers' compensation does not require reimbursement for the work hours that you miss while attending follow-up appointments. In most instances, the

injured worker is off work completely, so scheduling and pay is not an issue. However, when the worker returns to work, or never takes leave, it can be challenging to manage the follow up appointments. Ordinarily, you would need to use your own leave time if the appointments are scheduled during your regular work hours. Check your MOU, however. Some contracts have language that allow you to attend the appointment as part of your regular workday (on agency time), for example, if the appointment is scheduled at the beginning or end of the shift, or around the normal lunch period.

Your health is of utmost importance and besides any impacts to your health, a failure to attend these appointments could negatively impact your workers' compensation claim. Also, be sure to keep track of your mileage, and timely submit it to the claim's administrator. Although you might not be paid for time attending appointments, you should be reimbursed for mileage.

Question: What are the rules on the agency hiring retired annuitants? Management wants to hire a retired annuitant for one of the positions represented by our employee organization. Can this be a consultant, or does it have to be an employee? Is there a limitation on how long a retired annuitant can fill one of our positions?

Answer: If the work belongs to the bargaining unit, it cannot be removed from the bargaining unit or assigned to an independent contractor or consultant, unless the agency notifies the Association in advance and goes through the meet and confer process. The employee organization can object to the use of non-bargaining unit labor to perform bargaining unit work. This includes annuitants. The employee organization can also propose a time limit on how long the work can be assigned outside of the bargaining unit.

There are two types of retired annuitant employment – "extra help" and interim "vacant position" employment. Extra help positions must be of limited duration or needed during an emergency to prevent the stoppage of public business. Although the work assignment can last more than one fiscal year, the employment should terminate when the limited-duration work is completed. Extra help work also must be a specific retired annuitant position, not a regular staff position. Extra help work is limited to 960 hours in a fiscal year (July 1

through June 30). The agency must enroll and report hours to CalPERS.

A retired annuitant may be appointed to an interim position during active recruitment for a permanent replacement for the vacant position (i.e. "vacant position" employment). These appointments are valid only for the duration of the recruitment, and the same conditions as extra help appointments (*e.g.*, limited to 960 hours) must be met.

It is possible for a retired annuitant to serve as a consultant rather than employee if they meet the test for being an "independent contractor" under state law. A bill passed in 2019, AB 5, makes it harder to satisfy this test, however. Also, if CalPERS later determines the consultant is an employee, CalPERS may terminate the consultant's retirement. If an employment relationship exists, the employment is subject to the same retired annuitant restrictions even if the employment agreement claims to be for an independent contractor. If the work is the same or similar to work performed by an active employee of that employer, an employer-employee relationship exists, and the employment is subject to the same retired annuitant restrictions.

Question: How much notice does the employer have to give for overtime assignments? If management does not give enough advance notice, can I refuse to work overtime? I have childcare obligations and cannot stay late after my shift. We have a new Director. He is not very respectful of our personal time. I am concerned he will insist that I stay late to finish work projects. I want to be prepared if he does. What do I tell him?

Answer: In general, comply with any work directive you receive from your management to avoid potential discipline for insubordination. However, if you have childcare obligations, and your boss asks you to stay late, tell him you are unable to do so on such short notice due to your obligations as a caregiver. You can also suggest coming in early or staying late another day to meet the work need, as long as you have enough advance notice to make the necessary childcare arrangements.

Unfortunately, there are no state or federal laws that require employers to provide a certain amount of notice to employees to work overtime. However, check your MOU. It may have language that requires reasonable advance notice for planned overtime assignments. In general, the employer does not have to

give advance notice for an emergency. Contact professional staff if you believe that your employer is not giving you the required amount of notice under the MOU. You should also confirm that you will receive the appropriate overtime rate of pay for the additional work. If your MOU is silent on the amount of advance notice that is required, let your employee organization leaders know. A specific timeframe can be proposed in the next round of MOU negotiations.

Question: I have been off work dealing with a serious medical condition. My doctor gave me a note that releases me back to duty with certain restrictions. The doctor identified in the work release what my employer must do to accommodate my condition. My employer is proposing alternatives like more medical leave or reassignment rather than complying with my doctor's proposed accommodation. Is my employer required to provide the accommodation my doctor tells them to? Or do they get to decide what accommodation to give?

Answer: Under the Federal Americans with Disabilities Act (ADA) and California's Fair Employment & Housing Act (FEHA), the employer must engage in the interactive process in good faith to identify any reasonable accommodations that will allow you to perform the job's essential functions. Your employer must also reasonably accommodate you unless doing so would pose an undue hardship, meaning significant difficulty or expense. Your employer is not obligated to provide the exact accommodation identified by your doctor if the accommodation your employer provides is reasonable. In other words, if there is more than one accommodation that is reasonable, your employer can choose which one to provide.

If your doctor's note includes restrictions, reach out to your professional staff right away for help. During the interactive process, you, your representative, and your employer should work together to identify which accommodations are reasonable. Be prepared to discuss any restrictions you have, without disclosing your condition. Also be prepared to discuss your job duties and what, if any, tasks you cannot do because of the work restrictions. If you cannot return to your current job, more medical leave, or reassignment to a vacant position for which you qualify, should be explored.