LBAEE

April 2021 News

Congratulations to the newly elected Board Members. Below is a list of everyone who is currently on your AEE Board. You can always email your AEE board at lbaee@lbaee.org

Executive Board

President Jason Rodriguez
Vice President Zoe Schumacher
Executive Assistant Jacob Banfield
Treasurer Jose Ibarra

Board of Directors

Group A: Building and Safety Tai Vu
Group B: Energy Resources Will Stevenson
Group C: Public Works/Airport Dillon 'Donahue
Group D: Harbor/PAB Jorge Castillo
Group E: CM/Survey Juan Arias
Group F: Fire & Code Enforcement John Martin

Please see attached Furlough Suspension side letter between AEE and the City. The last furlough will be this coming Friday 4/16.

Volunteer Needed

We are looking for someone to help us with our website. If you are interested please contact Jason Rodriguez jason.rodriguez@lbaee.org for the specifics.

LBAEE T-shirts

We are ordering LBAEE Tee-Shirts, only $5.00 each. Please place your order with juan.arias@polb.com

GYMPASS – DISCOVER YOUR APPETITE FOR FITNESS!

Staying safe and healthy during this critical time, while maintaining an active lifestyle is more challenging than it's ever been. Gympass, the City's new fitness and wellness benefit, provides access to thousands of gyms, studios, on-demand and virtual wellness opportunities under a single membership, including a number of wellness-focused Apps designed with you in mind.

Sign up for your membership and enroll in your 7-day free trial, simply by downloading the Gympass app on your smart phone. Memberships start at $9.99 a month.

The Scope of Bargaining: What Exactly Does "Terms and Conditions of Employment" Mean?

A primary objective of public employee organizations in California is to negotiate and enforce a good labor contract – or Memorandum of Understanding (MOU) – with their public agency employer through collective bargaining. The employee organization, or "association," negotiates with the agency's management team in hopes of reaching a tentative agreement that association members and the agency's elected officials can both ratify. So, what exactly are the subject matters open for negotiation? Under the Meyers-Milias-Brown Act ("MMBA"), Gov't Code §3500(a), bargainable subjects include "wages, hours, and other terms and conditions of employment." Section 3504 likewise defines the "scope of representation" as "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment."

Section 3505 says public agencies "shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of [the] recognized employee organizations." This includes fully considering any presentations made by the employee organization on behalf of its members "prior to arriving at a

determination of policy or course of action." It further defines "meet and confer in good faith" as the "mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." This includes "adequate time" to resolve an impasse.

The phrase "wages, hours, and other terms and conditions of employment" is liberally construed consistent with federal precedent (the National Labor Relations Act) which the MMBA was modeled after. A liberal construction also reflects the MMBA's stated purpose "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes." Gov't Code §3500(a).

The terms "wages" and "hours" are relatively straightforward. "Wages" includes:

- Annual cost of living adjustments ("COLAs"),
- Deferred compensation,
- Equity adjustments or "Y-Rating" pursuant to a compensation study,
- The overall salary range or number of steps for each job classification,
- The terms for advancement within the range (step increases),
- The timing and method of payment (bi-weekly direct deposit),
- Performance-based pay (merit pay),
- Longevity pay,
- Severance pay,
- Reimbursements (parking, mileage, tuition),
- Allowances (uniforms, boots, tools, auto, phone),
- One-time cash payments or bonuses, and
- Certification pays, and other specialty pays (like higher-class pay).

"Hours" includes:

- The hours of work on particular days (start and end time of shifts),
- Distribution of workdays in a week,
- Days worked per year,
- Shift schedules (day, swing, and graveyard),
- The amount of notice required for any changes to work schedules,
- Meal or rest periods,

- Paid leave (holidays, vacation, sick leave, jury duty, and witness leave, *etc*.),
- How the workweek, pay periods, or pay dates are defined,
- Time clocks and sign-out policies,
- Alternative work schedules (like the 9/80 or 4/10),
- Telecommuting policies,
- Conditions for how overtime is paid, or after-hours work is assigned, and
- Policies that establish core business hours.

Most public employees and employers know these are negotiable subjects. But what about "terms and conditions of employment?" Believe it or not, there have been a lot of lawsuits over this phrase. There is no master list, but in general, it includes benefits (*e.g.*, medical insurance, fringe benefits, and retirement benefits for active employees), as well as rules or policies directly affecting the working relationship, including:

- Job descriptions,
- Probationary periods,
- Attendance or misconduct policies,
- Discipline and grievance procedures,
- Layoff and seniority policies,
- Standby and on-call policies,
- Rules concerning promotions, vacancies, transfers, and reassignment,
- Social media, Internet, and computer use or loan policies,
- Mandatory drug and alcohol testing,
- Anti-harassment, discrimination, retaliation, and bullying policies,
- Workplace safety policies,
- Dress code policies,
- Wellness policies, and
- Organizational rights, such as release time, dues deduction, and use of facilities.

In fact, your MOU and personnel rules probably have provisions covering many of these topics. Both documents are subject to negotiation. But what about other less-obvious matters? Might they also be bargainable? You might have heard the term "management right" thrown around as justification for why a particular subject is non-negotiable. That is partially true. Certain decisions are up to management's discretion. But management may use that term in situations where your Association *might* have the right to negotiate. The California Supreme Court has set forth three categories of managerial decisions:

1. Decisions that have only an indirect and attenuated impact on the employment relationship and thus are not mandatory subjects of bargaining, such as advertising, product design, and financing.

2. Decisions directly defining the employment relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls, which are always mandatory subjects of bargaining.

3. Decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve a change in the scope and direction of the enterprise or, in other words, the employer's retained freedom to manage its affairs unrelated to employment.

Int'l Assn of Fire-Fighters v. PERB (2011) 51 Cal. 4th 259, 272-273. Managerial decisions in the third category are negotiable only if the benefit for labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of agency business. *County of Orange* (2018) PERB Decision No. 2594-M, at 18. Put differently, these managerial decisions are negotiable "only if the employer's need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question." *Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 637. This is not exactly a bright-line test. To confuse matters further, even when a subject or managerial decision itself is non-negotiable, management may still have to negotiate over the *effects* that decision might have on the terms and conditions of employment of bargaining unit employees. *See, e.g., First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666 (employer has a duty to bargain over the effects of its decision to eliminate bargaining unit work). This is called *effects-based* or *impact-based* bargaining. The scope of bargaining may be narrower than in the case of mandatory subjects. However, any negotiable effects are subject to the same meet and confer requirement outlined in Gov't Code §3505, including the application of any impasse procedures (such as fact-finding).

Let's look at some other examples. Although staffing levels are ordinarily a managerial decision, in some cases, it may be negotiable. For example, a minimum staffing requirement may be negotiable if it addresses workload and safety concerns and not how best to provide public services. *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal. 3d 608. The starting salary for a new job classification is negotiable. Although personnel commissions and civil service commissions have the right to set the salary for a new job class, the agency must still bargain over it with the employee organization. Their initial

determination cannot be a basis for unilaterally implementing a starting salary without negotiations. *Antioch Unified School District* (1985) PERB Dec. No. 515, p. 15.

Furloughs may also be negotiable. In *City of Long Beach* (2012) PERB Decision No. 2296-M, at 23, the Public Employment Relations Board (PERB) said furloughs are within the scope of bargaining where the city's motivation for implementing them is for labor cost savings and not the quality, nature or level of service provided to the public. Installing surveillance cameras, GPS, facial recognition, or other technology is negotiable. If the motivation for installing it is to protect public property, only the effects of the decision are negotiable (such as whether and how it might be used in relation to evaluating or disciplining employees). However, if the intent is primarily to track employee performance, then the decision itself is also negotiable. *San Bernardino Community College District* (2018) PERB Decision No. 2599, pp. 8-14.

Changes to job classifications are often negotiable. This includes eliminating a classification and transferring duties to a new or existing classification. *City of Sacramento* (2013) PERB Decision No. 2351-M, pp 18-19. Transferring existing duties between classifications is also negotiable regardless of whether it is to an existing or new classification. *Desert Sands Unified School District* (2001) PERB Decision No. 1468, pp 3-4. Reclassifying or retitling an existing classification is negotiable. *Alum Rock Union Elementary School District* (1983) PERB Dec. No. 322, p 18. However, creating a new classification to perform tasks not previously performed, or abolishing a classification because it is no longer needed, is not negotiable. *City of Alhambra* (2010) PERB Dec No. 2139-M, pp 15-16. In that case, only the effects of such a decision (like the job title, bargaining unit, duties, qualifications, and pay of the new classification) are negotiable.

More recently, the California Supreme Court held that a proposed charter amendment pursued through a ballot initiative was negotiable because, if passed, it could alter mandatory subjects of bargaining. *Boling v. Public Employment Relations Board* (2018) 5 Cal.5th 898. The Court said that the fact that the policy change was through a citizens' ballot initiative did not relieve the city from bargaining with its employee organizations because the city's bargaining agent (the Mayor) openly supported the proposed policy initiative. In such cases, the Court said the city must bargain *before* the matter is officially placed on the ballot and approved by voters. Similarly, in 2018, PERB held that an ordinance intending to provide for Civic Openness in Negotiations (COIN) was negotiable because it touched on negotiation procedures typically discussed when bargaining over ground rules. *County of Orange* (2018) PERB Decision No. 2594-M.

Conclusion: Just because something is negotiable does not always mean it is worth negotiating over, and just because management says a decision is a management right does not always mean that you cannot negotiate over the impacts. When in doubt, let your Association officers know so they can help decide how best to address the issue.

News Release - CPI Increases!

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.

1.7% - CPI for All Urban Consumers (CPI-U) Nationally

1.6% - CPI-U for the West Region

1.0% - CPI-U for the Los Angeles Area

1.6% - CPI-U for San Francisco Bay Area

2.2% - CPI-U for the Riverside Area (from January)

1.7% - CPI-U for San Diego Area (from January)

Federal Government Approves New Pandemic Relief Funding

On March 11, 2021, President Joseph R. Biden signed into law H.R. 1319, the American Rescue Plan Act (ARPA) of 2021. The $1.9 trillion bill will provide $350 billion in funding for state and local governments, with California receiving approximately $42 billion. Out of that figure, $16 billion will be headed to local governments with $7 billion going directly to cities. The bill lowers the population threshold eligibility to 50,000 residents for direct payments to cities, so special districts and cities with a population less than 50,000 will have to request their funding through the state. Fifty percent of the funds must be distributed within sixty days, and one hundred percent must be distributed within one year of the bill's enactment. The bill expands allowable costs to include replenishing lost revenue (which the CARES Act prohibited). State and local governments can also use the funds to cover a wide array of costs incurred through December 31, 2024 including: (1) aid to households, small businesses, nonprofits, or impacted industries like tourism, hospitality, and travel; (2) funding government services that were curtailed because of a decrease in tax revenue caused by the pandemic; and (3) making necessary investments

in water, sewer, or broadband infrastructure. The bill explicitly prohibits state and local governments from spending their funding on pensions, offsetting revenue resulting from any future tax cuts, or delaying already planned tax increases. The bill also sends $50 billion to the FEMA Disaster Relief Fund to reimburse state and local governments for their ongoing costs of dealing with the effects of COVID-19. The funding remains available through 2025. In January, President Biden had authorized FEMA to use this fund to cover costs for activities such as vaccination efforts, providing PPE for critical public sector employees, and disinfecting public facilities. This additional cash infusion comes at a critical time as the economy appears poised to rebound after the winter COVID-19 surge.

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 <u>you</u> have a specific problem, talk to your professional staff.

Question: I received a jury duty summons to appear in January. I changed or postponed it until March when it was more convenient to attend. After I received the new summons for March, I notified my manager. She said I would not be able to attend that week due to my coworker being on vacation and she is out of the office. She asked me to change it to a later date. I explained to her that I postponed it once already and was not able to again. She said the next time I receive a jury duty summons I MUST notify her first prior to rescheduling, and it will be based on the convenience of the Department not mine. Does she have that right?

Answer: Reporting for jury duty is an important civic responsibility in our country's democratic process and is not contingent on whether it is *convenient* for your Department or manager. As part of California's workplace leave laws – and probably also in your labor contract – your employer must allow you unpaid leave for jury duty service. It is illegal for your agency to threaten, intimidate or retaliate against you for participating in jury duty or to prevent you from serving.

The law does not require that you notify your employer if you postpone your summons, nor does it require that your employer agree to any postponement. But check your MOU or jury duty policy. It may require that you provide reasonable advance notice of the need for leave, or it may require that you provide notice of the summons and the

scheduled dates. Be sure to follow that policy, including any rules about giving notice to your employer. If you follow those rules, and your manager denies you leave for jury duty, or directs you to postpone it, contact your HR Manager immediately. If that does not resolve it, call your professional staff.

Question: I have been offered a promotion into a Management Analyst position, which is in a different employee organization. If I accept the promotion, will I lose my medical retirement benefit that I have already earned? I have been employed for 19 years under Classic PERS, all with the same Agency. When I asked HR, they said that because the Management Analyst position belongs to a different employee organization, I will not get the medical retirement benefit. Instead, I will get a 401(a) plan. Is that correct? It does not seem fair to me.

Answer: Unlike your pension, which is largely set by state law, your retiree medical benefits are typically governed by what your labor contract says. Many MOUs have language that provides benefits only to people who retire while covered by that MOU. For the most part, the MOU that was in effect and that covered your position at the time you retired is the one that controls your right to retiree medical benefits. If you accept the promotion, it sounds like that would be the MOU for the new Association with the 401(a) plan, not your current Association with the traditional retiree medical benefit. If so, HR may be correct that, once you promote, you forfeit your right to the retiree medical benefit in your current MOU. It might not be possible to promote *and* keep your current benefit. If maintaining your current benefit is important to you, you might consider declining the promotion.

There might be an argument that you can promote *and* keep your old benefits, but the key will be what your current MOU language says, and whether it provides for vesting. It is possible the language allows you to vest in the benefit, and still promote to a new Association while keeping what you have vested in. If that is the case, the language might say something like you keep what you vested in, but do not accrue any further benefit after you promote. That might mean your current benefit is frozen at the level you vested in when you promote, which is then paid out when you retire. Contact professional staff if you need help interpreting your current MOU language.

Question: My wife was in the hospital with COVID. She is getting better but still needs serious medical care at home. I am working on getting an FMLA form on file and plan to use my own sick leave for now. The Agency had been allowing me to telework, but they said they are no longer going to allow it. They say they are too short staffed with others

out on quarantine, they need people on-site. Although I also had COVID, I have now been medically cleared to return to work based on the number of days with no symptoms. I had heard that my Agency extended the COVID leave through March. My question is, can I use the COVID leave to stay at home to care for my wife? What are my options?

Answer: That depends on your Agency's COVID leave policy and the dates you request for leave. Under the Family First Coronavirus Response Act (FFCRA), which expired on December 31, 2020, you were entitled to up to 80 hours of paid leave if (1) directed to quarantine due to COVID or (2) you experience COVID symptoms and are seeking a medical diagnosis. You are eligible for up to 2/3 of your pay (up to 80-hours) while caring for an individual who meets either of the criteria above. If the dates you request are for *after* your wife was discharged from the hospital, while at home recovering from COVID, and while she was no longer seeking a medical diagnosis or under a quarantine order, you are not eligible under the FFCRA.

You say that your Agency extended the COVID leave through March. But it is not clear what the policy provides for. Effective January 1, 2021, many agencies issued COVID leave policies with terms that are different than the FFCRA. Since the terms of the FFCRA no longer apply, you need to see what terms apply under the policy that your Agency issued. For example, some eliminated the family care provision altogether. So, review your Agency's COVID policy in detail.

If it adopts the qualifying reasons exactly as spelled out in the FFCRA, you might be eligible for dates where you cared for your wife while she was experiencing symptoms and seeking a diagnosis, but not for dates once she was discharged. This assumes you have not used the original 80 hours, and the dates you request are prior to March 31. The State also just passed a new COVID leave law – SB 95 – which is retroactive to January 1, 2021, but it includes the same language as the FFCRA (*i.e.*, directed to quarantine or experiencing COVID symptoms and seeking a medical diagnosis). So, if you do not qualify under the FFCRA, you probably will not qualify under SB 95.

You do have other options. Your wife's medical situation sounds like it is a "serious medical condition" under the California Family Rights Act and the Federal Family Medical Leave Act, which allow up to 12 weeks of job-protected unpaid leave for which you likely can use your accrued leave so that you are paid. You can also use up to one-half of your annual sick leave accrual under the state Kin-Care law to care for your wife.

Question: Does the Agency have to follow progressive discipline? I drive an Agency vehicle for work. I have a long

tenure of safe driving and no discipline in my file. I was just given a written reprimand for a very minor incident involving the vehicle. Basically, I scratched the truck. We have never received write-ups for dings like this in the past. Can they bypass verbal warnings and go straight to write-ups? Do they have to notify us or our employee organization about it before they can issue discipline? I feel blindsided. I would like to appeal.

Answer: The disciplinary procedure in either your MOU or the personnel rules probably does not require that your Agency start at the lowest level of discipline for an initial infraction. It likely lets them exercise discretion about the proper penalty for any misconduct.

Progressive discipline generally means starting with the lowest level of discipline that is appropriate for the specific violation at issue. But some forms of misconduct – *e.g.*, showing up at work drunk, stealing, lying, *etc.* – are serious enough to warrant termination even for the first incident. What this means is that yes, the Agency can bypass a verbal warning and go straight to more severe penalties, including a written reprimand.

State law does not require that you have the right to appeal "minor" discipline, which includes both verbal and written reprimands, so your options to challenge this might be limited. It is possible your MOU or personnel rules provide you the opportunity to appeal minor discipline. If so, follow that procedure. If it does not, you should still be able to write a rebuttal and request to have it put in your personnel file attached to the reprimand. That way, anyone who might read the reprimand in the future will get the whole story, including how minor of an incident this was.

Ordinarily, the Agency does not need to notify the employee organization before issuing discipline. In most instances, management is simply applying the policy that was already negotiated. If it is a very minor vehicle incident, it could be that management just wants to document it and nothing will ever come of it. But contact your professional staff, who can review your rebuttal, as well as your discipline procedure, and advise you as to how best to proceed.

Question: I recently worked a 13 ½ hour day due to the combination of both my regular shift and an emergency call-out after hours. I believe I am entitled to double-time for the extra 1 ½ hour because I worked over 12 hours in a single day. I spoke to my Manager about it, and he referred me to Human Resources. I spoke to HR and they said my paycheck was correct. They said I was paid overtime (1 ½ times my regular rate of pay) for all the hours worked over 40 in the work week. They said I am not eligible for double-time for

hours worked over 12 in a workday. They referred me to my employee organization. What can I do to get the higher rate for the extra 1 ½ hour? Don't they have to pay me double-time?

Answer: The California Labor Code provides that an employee shall receive double-time for all hours worked over 12 in a workday. However, that labor code provision does not apply to public agencies. It is possible your MOU or personnel rules allow for double-time after 12 hours. There is also the possibility that your MOU or personnel rules provide for a special pay for after-hours callouts. Be sure to check both of those documents to see what applies.

Otherwise, what HR told you is probably correct. So long as you were paid overtime at 1 ½ times your regular rate of pay for hours worked over 40 in a workweek, there is no violation of law. If that is the case, there is nothing you can do to get the higher rate for the 1 ½ hour. But contact your professional staff, who can review your MOU and personnel rules to be sure. You can also contact your employee organization and request that this item be proposed in the next round of MOU bargaining.