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Navigating the Murky Waters of Employee Notice Requirements Under the Brown Act's Personnel Exception

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The Ralph M. Brown Act, which took effect in 1953, generally requires that local legislative bodies conduct their business in sessions open to the public. However, there are limited exceptions to that requirement.

The exception for personnel matters allows a local body to meet in closed session to discuss hiring, retention, and dismissal of public employees. It extends to an employee the right to request that complaints or charges against him or her be heard by the legislative body in open rather than closed session. Unfortunately, the statute and cases interpreting it are unclear on exactly what triggers the local body's duty to give the employee notice of this right. This presents a serious problem for public employers, particularly in light of the severe consequences imposed by the Brown Act if the employer gets it wrong.

Before instituting litigation to invalidate an action based on alleged violation of the act, the act requires that a local body be given written notice of the alleged violation and an opportunity to "cure" it. These provisions do not apply, however, when an employer fails to give an employee proper notice that charges or complaints against him or her will be heard in closed session. In those cases, the act voids *any* action the local body takes against the employee based on those complaints or charges. When the subject of a closed session under the personnel exception is a high-ranking management employee, this result can be particularly problematic.

This article reviews the statute and interpretive case law concerning the Brown Act's personnel exception and provides guidelines for public employers on when the exception requires notice to the affected employee.

Brown Act's Personnel Exception

As a general rule, the Brown Act requires local legislative bodies to deliberate and act during meetings that are open to the public.¹ The “personnel exception” to the act, however, identifies limited circumstances in which a local body may discuss personnel matters behind closed doors. Under this exception, a local body may hold a closed session “to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee.”²

The exception also allows a closed session “to hear complaints or charges brought against the employee by another person or employee.”³ However, before a body may conduct a closed session, it must give the employee against whom the complaints or charges are made “written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session.”⁴ The notice must be delivered personally or by mail at least 24 hours before the closed session is to begin.⁵ If the employee is not notified, any action the body takes against him or her based on the complaints or charges heard in the closed session is “null and void.”⁶

By allowing closed session discussion of personnel matters, the exception serves two purposes. First, it allows a local body to engage in a candid discussion.⁷ Second, it protects employees from public embarrassment.⁸ Conversely, the notice requirement creates an opportunity for an accused employee to publicly clear his or her name by defending against specific allegations of misconduct.⁹ The personnel exception and the notice requirement thus constitute a “reasonable compromise” between the interests of the public employer and those of the employee.¹⁰

While the personnel exception was part of the original 1953 act, the notice requirement is a relatively recent addition. The legislature added the notice requirement in 1993 in an effort to curb perceived Brown Act abuses by local governments.¹¹ Five years later, the first Court of Appeal

decision interpreting the notice requirement was issued. Since then, the Supreme Court has not construed this provision, and only a handful of appellate court cases have addressed the issue. The central question in all of these cases is whether a particular action by a local legislative body constitutes a hearing on complaints or charges that triggers the notice requirement. This article examines cases where the court found no employee notice was required and cases where notice was compelled.

Evaluation of Performance and Deliberation Cases

The first Court of Appeal decision to address the personnel exception’s notice requirement was *Furtado v. Sierra Community College*.¹² Furtado was a contract librarian at the community college.¹³ After reviewing her performance, the faculty evaluation committee recommended against renewing her contract.¹⁴ Furtado submitted written objections to the committee report,¹⁵ and the college’s superintendent informed Furtado that the district board would discuss the report in closed session.¹⁶ The superintendent denied Furtado’s response for an open session because the board would not be hearing complaints or charges against her.¹⁷ The board met in closed session and voted not to renew Furtado’s contract.¹⁸ Furtado filed a writ of mandate claiming that the board violated the Brown Act by taking action in closed session to terminate her employment.¹⁹

Furtado first argued that the right to request an open session applied to *all* of the actions listed in Gov. Code Sec. 54957(b)(1): appointment, employment, evaluation of performance, discipline, dismissal, and hearing complaints or charges against an employee.²⁰ The court rejected this argument, reasoning that the disjunctive “or,” the word actually used to separate the first five actions from the phrase “hearing complaints or charges,” indicated that the language allowing an employee to request an open session applied only

The Furtado court ruled that the language allowing an employee to request an open session applies only to complaints or charges.

to complaints or charges.²¹ The court also noted that subsection (b)(2), which contains the notice requirement, refers only to complaints or charges, not to any of the other actions mentioned in (b)(1).²² Based on its statutory interpretation, the court concluded that the personnel exception allows an employee to request an open session only when the local body “is hearing complaints or charges against the employee.”²³ It follows that this is the only situation where the local body must give the employee notice.

The court also rejected Furtado’s argument that negative comments about her performance in the committee report constituted complaints or charges against her.²⁴ The court observed that “complaint” and “charge” both “connote an accusation, something which is ‘brought against’ an individual.”²⁵ A performance evaluation, the court reasoned, is not an accusation and thus cannot constitute a complaint or charge against the employee.²⁶

Two subsequent cases further examined performance evaluations and application of the personnel exception. In *Fischer v. Los Angeles Unified School Dist.*,²⁷ the employer elected not to renew the contracts of probationary teachers based on reports addressing their job performance.²⁸ Although the reports contained specific allegations of misconduct by the teachers, the court concluded that the district board did not hear complaints or charges when it decided not to renew the contracts because the teachers had an opportunity to respond to the allegations in prior administrative meetings.²⁹ In other words, while the board based its decision on the administrators’ conclusions after hearing the complaints, the board itself did not hear complaints or charges against the teachers.

In *Duval v. Board of Trustees*,³⁰ the court concluded that evaluation of performance includes not just a periodic, formal evaluation but also an informal review that “involves particular instances of job performance.”³¹ Unfortunately, because the notice requirement was not at issue in the case,

the court did not distinguish “particular instances of job performance” from complaints or charges against the employee.

The court in *Bollinger v. San Diego Civil Service Commission*³² dealt not with what constitutes complaints or charges but under what circumstances a local legislative body — rather than some other person or entity — is deemed to hear complaints or charges. The San Diego Police Department demoted Bollinger for misconduct.³³ Rather than hearing the appeal as a body, the Civil Service Commission appointed one of the commissioners, Robert Otilie, to act as hearing officer.³⁴ Otilie conducted a three-day public evidentiary hearing.³⁵ He then submitted to the commission a 22-page report that contained his findings of fact and his recommen-

dation that the discipline be upheld.³⁶ The commission’s written agenda stated that it would ratify the report in closed session, and the commission even notified Bollinger of the closed session by phone.³⁷ During closed session, the commission ratified Otilie’s findings of fact and recommendation to sustain the discipline.³⁸

Bollinger filed a writ of mandate alleging that the commission violated the Brown Act by not giving him written notice of his right to request an open session for discussion of Otilie’s report.³⁹ The commission conceded that the matter involved complaints or charges.⁴⁰ The court thus framed the issue before it as whether the commission *heard* the complaints or charges.⁴¹

The court first distinguished “hearing” from “deliberating.”

The former, the court observed, involves the presentation of evidence while the latter involves making a decision based on facts already found to be true.⁴² The hearing before Commissioner Otilie, where the police department presented evidence to which Bollinger had the opportunity to respond, constituted the hearing of complaints or charges.⁴³ The commission’s later ratification of Otilie’s findings and recommendation, said the court, was merely a deliberation on “whether the complaints or charges justified disciplinary

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action.”⁴⁴ Accordingly, the commission’s action in closed session fell into the category of considering discipline against an employee, which does not require notice of the employee’s right to request an open session.⁴⁵

Complaints or Charges Cases

A noticeable shift in the tide of Court of Appeal decisions on the notice requirement occurred with the ruling in *Bell v. Vista Unified School Dist.*⁴⁶ Bell was the head football coach at Rancho Buena Vista High School.⁴⁷ After Bell helped an Australian student immigrate to the United States to play football on his team, the California Interscholastic Federation, which regulates interscholastic competition, placed the high school on a one-year probation for recruiting violations.⁴⁸ The CIF also found that Bell had violated the federation’s undue influence rule and suggested that the district consider disciplinary action against him.⁴⁹

The district’s board of trustees met in closed session to discuss the team’s probation.⁵⁰ While the public meeting agenda included an item stating “public employee discipline/dismissal/release,” the board did not inform Bell that it intended to consider disciplinary action against him.⁵¹ During the meeting, two board members presented the CIF finding concerning Bell’s rule violation to the board,⁵² which then discussed the findings and voted to remove Bell permanently from his coaching position.⁵³

Bell filed suit in superior court, seeking mandamus and declaratory relief.⁵⁴ The court found that the board’s discussion of the CIF findings constituted hearing complaints or charges⁵⁵ and declared Bell’s removal from his coaching position null and void. The court also required the district to eliminate any mention of the removal from Bell’s personnel file, and enjoined the board from enforcing its removal decision.⁵⁶

The Court of Appeal affirmed the trial court’s decision. After reviewing the cases discussed above, the appellate court concluded that the CIF’s finding of undue influence constituted a complaint or charge against Bell because it was “an accusation — an indictment brought against him with potential disciplinary consequences.”⁵⁷ From this the court reasoned that, although the closed session began as a deliberation on how to respond to the CIF’s imposition of probation, the meeting *evolved* into a hearing on charges or complaints

against Bell once the board members presented the CIF undue influence finding.⁵⁸ Under these circumstances, the court observed, Bell was entitled to respond to the finding, especially since the focus of the CIF hearing at which Bell testified was not on his individual conduct but on the Australian student’s eligibility.⁵⁹

Accordingly, the court held that the board was required to give Bell 24 hours written notice that it would hear complaints or charges against him at the closed session.⁶⁰ Because the board failed to do so, the Court of Appeal affirmed the trial court’s order nullifying the board’s removal of Bell as head football coach.⁶¹

The next notice requirement case, *Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners*,⁶² presented the flipside of *Bollinger*. The housing authority terminated Morrison for providing confidential information to an unauthorized person.⁶³ When she appealed her termination to the board, it appointed a hearing officer to take evidence and make a recommendation on her dismissal.⁶⁴ The hearing officer found that Morrison did not intentionally disclose the confidential information but rather was negligent in giving it to a former housing authority employee.⁶⁵ Consequently, the hearing officer recommended a one-week suspension without pay.⁶⁶ Without giving notice to Morrison, the board met in closed session to discuss her discharge.⁶⁷ During the meeting, the board rejected the hearing officer’s factual findings and reviewed the record itself but made no final decision on Morrison’s termination.⁶⁸ Sub-

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sequently, the board affirmed Morrison's dismissal at an open session.⁶⁹

Just as in *Bollinger*, the Court of Appeal was required to determine whether the board heard complaints or charges against Morrison in closed session.⁷⁰ Like *Bollinger*, Morrison received an evidentiary hearing at which she had the opportunity to respond to the misconduct charge.⁷¹ However, the *Morrison* court found this initial administrative hearing did not constitute the hearing on complaints or charges because the board later rejected the hearing officer's factual findings and instead engaged in its own factfinding during the closed session meeting.⁷² The court viewed this as essentially the same as if the board had heard Morrison's appeal itself, rather than referring it to a hearing officer.⁷³ Because Morrison would have been entitled to notice had the board heard her appeal initially, the court concluded that she was entitled to notice under the existing circumstances.⁷⁴ Because the board failed to give Morrison the required notice, the court declared the board's decision to discharge her "null and void."⁷⁵

*Moreno v. City of King*⁷⁶ is the most recent decision to address the notice requirement. *Moreno* was the city's finance director.⁷⁷ The city council met in closed session to discuss *Moreno*'s employment contract without giving *Moreno* notice of the meeting.⁷⁸ During the meeting, the city manager presented a memorandum to the council detailing five alleged incidents of misconduct committed by *Moreno*.⁷⁹ Although the city manager's purpose in presenting the draft memorandum was to get the council's final approval before giving it to *Moreno*, council members discussed the accusations and then decided to terminate *Moreno*'s employment.⁸⁰ Relying on *Bell*, the court held that the council's discussion of the allegations in the city manager's memorandum constituted a hearing on complaints or charges.⁸¹ Because the council failed to notify *Moreno* of his right to have the allegations heard in open session, *Moreno*'s termination was null and void.⁸²

Despite their consistency in voiding the local body's action for failure to give notice, the Courts of Appeal in these three cases differed on the body's ability to cure the violation. The *Bell* court raised the possibility that a local body could cure a notice requirement violation. There, the board of trustees argued that because *Bell* asked the board to cure the Brown Act violation, he could not bring his writ action until expiration of the 30-day period for the board to act on the request under Gov. Code Sec. 54960.1(c)(2). The

court rejected this argument on the ground that the board could have cured the violation during this period and thus made *Bell*'s writ action moot.⁸³ But the *Bell* court proved to be alone in its view that the right to cure might apply in this situation.

In *Morrison*, the board of commissioners argued that Morrison was required to demand a cure before bringing her suit for mandamus. The court ruled that Gov. Code Sec. 54960.1, by its terms,⁸⁴ does not apply to employee notice violations. The court also observed that *Bell* "does not hold to the contrary" because "failure to demand defendant cure or correct its action was not at issue in *Bell*."⁸⁵ Similarly, the *Moreno* court stated that "[t]he cure provisions of section 54960.1 do not apply to a violation of section 54957."⁸⁶ Therefore, it appears clear that a local body may not cure a violation of the personnel exception's notice requirement. Instead, the statute mandates that the body's action be declared "null and void."⁸⁷

Guidelines for Public Employers

The paramount concern regarding the notice requirement is that the employee has an opportunity to respond publicly to accusations made against him or her. With this purpose in mind, the following guidelines for public employers may be drawn from cases interpreting the notice requirement.

The paramount concern regarding the notice requirement is that the employee has an opportunity to publicly respond.

■ **In evaluating employee performance in closed session, a local body may consider only specific incidents of misconduct to which the employee has had an opportunity to respond.**

According to *Duval*, a local body may consider specific instances of misconduct in evaluating an employee's performance without triggering the notice requirement.⁸⁸ In *Furtado*, the employee had previously responded in writing to negative comments in a written performance evaluation.⁸⁹ In *Fischer*, the probationary teachers previously had challenged allegations of misconduct against them in meetings with administrative personnel.⁹⁰ In both cases, the employees had the opportunity to tell their side of the story before the local body met in closed session to discuss discipline or dismissal. Therefore, provided the local body does not independently evaluate the specific instances of misconduct, it may consider them in evaluating an employee's performance without having to notify the employee of the closed session.

■ **Whenever a local body engages in independent factfinding with respect to charges or complaints, either directly through the presentation of evidence to the body or indirectly through review of an existing factual record, it must give the affected employee 24 hours written notice of the meeting.**

In situations where the employee serves at the pleasure of the appointing authority, like the financial director in *Moreno*, the local body is usually the only entity that hears the complaints or charges against the employee. Under these circumstances, it is clear that the local body must give the employee notice of the hearing. On the other hand, in the case of civil service employees, the local body rarely will be the first to hear the allegations of misconduct. Rather, the local body's review will follow a *Skelly* process during which the employee will have the opportunity to respond.⁹¹

Once the employee appeals to the local body, however, things get murkier. *Bollinger* says that a local body may meet in closed session to ratify the findings and recommendation of a hearing officer.⁹² *Morrison* says that a local body must give the employee notice before independently reviewing the record and rejecting the hearing officer's findings.⁹³ Between these extremes lies the situation where the local body reviews the record but decides to uphold the hearing officer's findings and disciplinary recommendation.

When viewed in light of *Morrison*, *Bollinger* appears limited to situations in which the local body merely "rubber stamps" the hearing officer's conclusions. In all other situations, it seems that the local body would have to do at least some independent analysis of the record before deciding whether to accept or reject the factual findings. Because under *Morrison* this could be seen as "factfinding" by the local body, it would be prudent for the local body to give the employee notice before it meets to discuss the hearing officer's report.

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■ **A local body must take great care that an appropriate closed session meeting does not evolve into a hearing on complaints or charges, such as by presentation of documents containing specific allegations of employee misconduct that have not been reviewed previously by a factfinder.**

As seen in *Bell* and *Moreno*, an otherwise proper closed session can instantly mutate into a hearing on complaints or charges with the introduction of specific allegations of misconduct by an employee.⁹⁴ This is not to say that any mention of misconduct must be banned from closed session. If the specific instances are contained in a performance evaluation or other report and the employee had the opportunity to respond to the allegations before the matter reached the local body, the instances may be considered by the body in determining what level of discipline to impose as long as the

body accepts the findings and conclusions reached below without question.

The notice problem arises when the accusations are made for the first time in closed session. In *Bell* and *Moreno*, the employee had no previous knowledge of the accusations.⁹⁵ By introducing and considering the allegations in closed session, the local body deprived the employee of the right to respond to the allegations before the body made its decision about discipline or termination. Thus, before presenting any specific allegations of misconduct to a local body, it should be established that the employee already has had an opportunity to respond in a prior proceeding. Otherwise, the local body risks having its closed session actions — and even those taken later in open session based on what took place in the closed session — declared null and void.

Conclusion

The core principle of personnel exception notice requirement cases is that the employee must have the opportunity to respond publicly to accusations of misconduct before the local body makes a decision to impose discipline. To that end, a local legislative body may not engage in factfinding about such accusations without providing the accused employee 24 hours notice. Notice is not required when a local body meets to evaluate an employee's performance based on already established facts that the local body accepts as true. Likewise, no notice is required when a local body deliberates over the proper discipline to impose based on an independent factfinder's report that the body accepts as true. The notice requirement is triggered, however, when the local body (1) reviews a factfinder's findings to decide whether to accept or reject them, or (2) evaluates specific allegations of misconduct itself.

Local bodies should be aware that, unlike violations of other Brown Act provisions, a violation of the notice requirement cannot be cured. Thus, it is imperative that the public employer correctly assess whether notice to an employee of a closed session is required. This is especially true in termination cases, where the local agency could face significant back pay exposure if a court voids the termination and reinstates the employee months, or even years, after the local body's action.

Accordingly, the local legislative body may wish to err on the side of caution and notify an employee whenever it is possible that the body may hear complaints or charges against the employee in closed session or that discipline may result from information first heard by the body in closed session. Only then can the public employer be reasonably assured that its action will not be rendered null and void under the Brown Act. *

1 Gov. Code Secs. 54950, 54953.

2 Gov. Code Sec. 54957(b)(1).

3 *Ibid.*

4 Gov. Code Sec. 54957(b)(2).

5 *Ibid.*

6 *Ibid.*

7 *San Diego Union v. City Council* (1983) 146 Cal.App.3d 947, 955.

8 *Ibid.*

9 *Furtado v. Sierra Community College* (1998) 68 Cal.App.4th 876, 882.

10 *Ibid.*

11 Sen. Rules Com., Office of Sen. Floor Analyses, Rep. on S.B. No. 36 (1993-1994 Reg. Sess.) Sept. 9, 1993, p. 5.

12 *Supra*, 68 Cal.App.4th 876.

13 *Id.* at 879.

14 *Ibid.*

15 *Ibid.* It is worth noting that, while it did not play a part in the court's analysis in this case, the fact that an employee had an opportunity to respond to complaints or charges *before* the local body considered them is an important factor in several of the later notice requirement cases.

16 *Ibid.*

17 *Id.* at 879-880.

18 *Id.* at 880.

19 *Ibid.*

20 *Id.* at 881.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 *Id.* at 882.

25 *Id.*, quoting (1995) 78 Ops. Cal. Atty. Gen. 218, 223.

26 *Ibid.*

27 (1990) 70 Cal.App.4th 87.

- 28 *Id.* at 92.
- 29 *Id.* at 100.
- 30 (2001) 93 Cal.App.4th 902, 151 CPER 39.
- 31 *Id.* at 909.
- 32 (1999) 71 Cal.App.4th 568, 136 CPER 35.
- 33 *Id.* at 571.
- 34 *Ibid.*
- 35 *Ibid.*
- 36 *Ibid.*
- 37 *Ibid.*
- 38 *Ibid.*
- 39 *Ibid.*
- 40 *Id.* at 574.
- 41 *Id.* at 575.
- 42 *Id.* at 574.
- 43 See *Id.* at 578.
- 44 *Id.* at 574.
- 45 *Id.* at 574-575. The court pointed out that S.B. 36, which added the notice requirement, originally required notice prior to holding a closed session “on the complaints or charges to consider disciplinary action or to consider dismissal.” The legislature later amended the bill to remove that language in favor of the language currently found in Gov. Code Sec. 54957(b)(1) that notice is required only when a local body will hear complaints or charges against the employee in closed session. From this amendment, the court concluded that the legislature did not intend for the notice requirement to apply when a local body is solely considering whether the complaints or charges justify disciplinary action. *Id.*
- 46 (2000) 82 Cal.App.4th 672.
- 47 *Id.* at 678.
- 48 *Id.* at 678-679.
- 49 *Id.* at 679.
- 50 *Ibid.*
- 51 *Ibid.*
- 52 *Id.* at 683.
- 53 *Id.* at 679.
- 54 *Id.* at 680.
- 55 *Ibid.*
- 56 *Ibid.*
- 57 *Id.* at 683.
- 58 *Ibid.*
- 59 *Ibid.*
- 60 *Ibid.*
- 61 *Id.* at 692.
- 62 (2003) 107 Cal.App.4th 860.
- 63 *Id.* at 865.
- 64 *Ibid.*
- 65 *Id.* at 866.
- 66 *Ibid.*
- 67 *Id.* at 871.
- 68 *Id.* at 876.
- 69 *Id.* at 871.
- 70 *Id.* at 872.
- 71 *Id.* at 865-866.
- 72 *Id.* at 874-875.
- 73 *Id.* at 874.
- 74 *Id.* at 874-875.
- 75 *Id.* at 876.
- 76 (2005) 127 Cal.App.4th 17.
- 77 *Id.* at 20.
- 78 *Id.* at 21.
- 79 *Id.* at 29.
- 80 *Id.* at 21, 29.
- 81 *Id.* at 29.
- 82 *Ibid.*
- 83 *Bell, supra*, 82 Cal.App.4th at 684-685.
- 84 Gov. Code Sec. 54960.1(a) provides: “The district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of Sections 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is null and void under this section. Nothing in this chapter shall be construed to prevent a legislative body from curing or correcting an action challenged pursuant to this section.” The personnel exception is conspicuously absent from the list of sections whose violations may be cured.
- 85 *Morrison, supra*, 107 Cal.App.4th at 876, fn. 37.
- 86 *Moreno, supra*, 127 Cal.App.4th at 29.
- 87 *Ibid.*
- 88 *Supra*, 93 Cal.App.4th at 909.
- 89 *Supra*, 68 Cal.App.4th at 879.
- 90 *Supra*, 70 Cal.App.4th at 100.
- 91 Under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, a permanent public employee is entitled to notice of the charges against him or her and an opportunity to respond to the charges before discipline is imposed.
- 92 *Supra*, 71 Cal.App.4th at 575.
- 93 *Supra*, 107 Cal.App.4th at 876.
- 94 *Supra*, 82 Cal.App.4th at 683; 127 Cal.App.4th at 29.
- 95 *Supra*, 82 Cal.App.4th at 679; 127 Cal.App.4th at 21.

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