



THE PUBLIC SECTOR

Praying to a lesser higher authority

by Jonathan Holtzman

Sitting in Temple on Yom Kippur, I was contemplating the tension between local governments' struggle to maintain services and the important struggle of public workers to maintain their standards of living, pensions, and health benefits. I resolved to write a column discussing the difference between "off with their heads" Tea Partyism and reasoned reform. But as luck would have it, as I was sitting in Temple, the governor was signing Assembly Bill (AB) 646, legislation that requires all local public agencies to engage in mandatory fact-finding before unilaterally imposing a last best offer. Gee, couldn't I have maintained my post-Temple neutrality for even 24 hours?

I'd like to say that fact-finding is a good thing for public agencies. It will certainly require that they have a detailed understanding of their problems, the costs involved, the savings of their proposals, their pension and other postemployment benefits obligations, and comparability. Bargaining based on facts is better for everyone. In an era when we are asking so much of public employees in terms of concessions, shouldn't employers be required to educate, to prove, to focus?

While mandatory fact-finding may further those goals, it's exactly what local government didn't need in this era of shrinking budgets. Here's why:

- Fact-finding requires tremendous resources, including money for expert testimony and (potentially) lawyers. Some larger jurisdictions may be able to muster those resources internally, but as HR budgets are often the first to be cut, even those resources will need to be augmented.
- Fact-finding is slow. As it is, we often struggle to complete bargaining in time for the beginning of the next fiscal year. AB 646 adds time to that process: 30 days for mediation (probably), five days to identify partisan panel members, five more days for the Public Employment Relations Board to appoint the chair, and then 10 more days to convene the panel — that's 50 days of additional process before we even get started! And don't believe the timelines in the bill. Almost every public agency will be looking to have its contracts in place on or around July 1, meaning mediators and fact-finders will be at a premium. It will be gridlock. To the extent that employers

are seeking concessions, fact-finding is bound to mean delays in achieving savings and therefore more layoffs.

- Fact-finding is a wildcard, and labor agreements are harder to reach when there is uncertainty. Although the local agency is free to ignore the fact-finding decision, the mere hope of vindication is bound to cause fewer settlements. Why settle now if we are bound to get some support from a fact-finder? Why settle now if we can delay the pain?
- Fact-finding, as my colleague Tim Yeung has written, is "not just about determining 'facts' like the cost-of-living, comparable market salaries, or historical salary data." The fact-finder is required to make recommendations. Like arbitration, fact-finding is bound to lead to many split-the-baby decisions.

Aside from issues with fact-finding generally, this particular bill is clearly designed to make it harder for public agencies to address their fiscal problems. For example, the "criteria" fact-finders are required to apply under the state legislation are the same pathetically ambiguous criteria public agencies with interest in arbitration have worked hard to change. Only one of the eight criteria addresses either the public interest or the financial condition of the agency. The arbitrator shall "consider, weigh and be guided by . . . the interests and welfare of the public and the financial ability of the public agency." This single compound criterion is the sole mention of a local agency's ability to pay — which should be the *sine qua non* of any decision. Most of the remaining criteria relate to comparability, a circular concept that has led to leapfrogging compensation in agencies that lack the resources to pay for it.

As for the "public interest" criterion, I think it's always good to put some mention of it in a measure that requires the fact-finder to balance public services and employee compensation, but at the very least, I'd like to see it get its own sentence.

As it turns out, I should have been praying to a *lesser* higher authority.

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