



RENNE SLOAN HOLTZMAN SAKAI LLP
Public Law Group™

Navigating the Mandatory Fact-Finding Process Under AB 646

A Public Law Group™ White Paper

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Revised November 2013

Renne Sloan Holtzman Sakai LLP, Public Law Group™, is dedicated to providing effective, innovative legal representation and policy advice to meet the distinctive needs of local governments and non-profit organizations. **The Public Law Group™** represents employers in all facets of labor relations. Our approach melds the decades of experience of labor lawyers and non-attorney professionals, all of whom have had leadership positions in labor relations and personnel for public agencies. We are not just advocates; we are also colleagues with and advisors to labor relations and personnel professionals and their in-house attorneys in connection with labor relations, PERB processes, discipline, and grievance/arbitrations. Our negotiators have wide-ranging experience in impasse resolution procedures, such as mediation, fact-finding and interest arbitration. Throughout negotiations and impasse resolution processes, our multi-disciplinary approach utilizes financial experts, operational experts, and, if necessary, effective public relations strategies to achieve workable settlements.

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I. INTRODUCTION

Signed by Governor Brown on October 9, 2011, AB 646 (Atkins) institutes a *mandatory impasse process* for negotiations conducted under the Meyers-Milias-Brown Act (MMBA).

Effective January 1, 2012, if a local public employer and its employee organization(s) are unable to reach agreement in negotiations, the employee organization (but not the employer) “may request that the parties’ differences be submitted to a factfinding panel.” The panel consists of a union member, a management member, and a neutral chairperson appointed by the Public Relations Employment Board (PERB) – typically someone with interest arbitration or fact-finding¹ experience. The fact-finding panel can ultimately make recommendations but does not have final and binding authority.

Some commentators have argued the statute will “fundamentally change” bargaining under the MMBA. However, many public entities, including all of California’s public schools, have managed collective bargaining under fact-finding for years. Careful planning and thoughtful execution will allow California’s local public entities to limit the impact the fact-finding process has on the ultimate outcome of negotiations. However, navigating through the process *does* impact the timing of negotiations, adding 85-100 days, typically more, to the process of reaching either agreement or the point at which an employer could unilaterally implement its last best offer if no agreement is reached.

In this updated white paper, we provide a summary of the terms of AB 646 and the changes it made to existing law, as well as clarifications enacted by AB 1606 effective January 1, 2013 and through PERB regulations. We then address how the fact-finding process works and provide suggestions for integrating fact-finding into an agency’s bargaining timeline. Because PERB’s fact-finding regulations will control your agency’s impasse resolution procedures unless you adopt local impasse rules, we suggest local rules you should consider to expedite and bring consistency to the fact-finding process. Finally, we make a few observations about how MMBA fact-finding has played out in its first two years.

II. HOW DID AB 646 CHANGE EXISTING LAW?

Before AB 646, the only impasse procedure outlined in the MMBA was an option for mediation by mutual agreement of the parties.² Local public agencies had the option to develop their own impasse resolution procedures through local rules adopted pursuant to Government Code section 3507, and local impasse procedures therefore vary widely. Many agencies’ local rules provide for mediation – either mandatory or by mutual agreement – some provide for fact-

¹ Although the Legislature uses the term “factfinding,” most commentators have used the term “fact-finding,” in accord with Webster’s Dictionary. We use the more accepted spelling in this white paper. That said, AB 646’s use of the term fact-finding is a bit of a misnomer because it calls for the fact-finding panel to make recommendations to resolve the labor dispute. As a result, many fact-finders have treated it as akin to advisory arbitration.

² Govt. Code § 3505.2.

finding – again, either mandatory or optional³ – and a handful of local charters provide for interest arbitration as a method for resolving disputes. These variations are examples of how local agencies over the years have exercised local control by deciding, after meeting and consulting with affected employee organizations, what impasse processes work best given local conditions and history.

AB 646 changes the landscape for public employers covered by the MMBA who do not already have binding interest arbitration.⁴ It imposes on local government a state law requirement for fact-finding upon impasse in any instance in which an employee organization requests it – regardless of the historic process that local agencies and employee organizations have agreed to and followed. It also appears to impose a new requirement that prior to implementation of a last, best, and final offer, the agency must “hold a public hearing regarding the impasse.”⁵

AB 646 borrows heavily from the fact-finding provisions of the Educational Employment Relations Act (EERA)⁶ and the Higher Education Employer-Employee Relations Act (HEERA)⁷ for both the procedural and substantive elements of the new fact-finding procedure,⁸ with three key differences:

- If the parties go to mediation, the timeline under the MMBA will be 30 days instead of EERA’s 15-day timeline;⁹
- Under the MMBA *only* employee organizations may request fact-finding, whereas under EERA and HEERA, the employer also has the right to request; and
- Under EERA and HEERA, PERB pays costs and expenses of the PERB-appointed panel chairperson, whereas under the MMBA those costs and expenses are shared equally by the parties.

³ We know of no local agency rules that require fact-finding without prior resort to mediation. This is, however, exactly what AB 646 literally requires.

⁴ Charter cities and counties that have binding interest arbitration are exempted from the new law. (Govt. Code § 3505.5)

⁵ Because there is no requirement that the public hearing regarding the impasse occur at any time prior to the implementation, we believe that the impasse hearing and implementation of the last, best, and final offer should occur at the same public meeting.

⁶ Govt. Code § 3540, et seq.

⁷ Govt. Code § 3560, et seq. The HEERA does not include any factors for the fact-finding panel to consider. The MMBA factors are borrowed from the EERA factors.

⁸ The Ralph C. Dills Act, which covers State employment, is now the only public sector labor relations act in California which does not mandate fact-finding.

⁹ Govt. Code §§ 3548 (EERA), and 3590 (HEERA).

III. LEGISLATIVE HISTORY

The early versions of AB 646 included mandatory mediation in addition to fact-finding, provided a 15-day timeline for mediation, and would have applied to all public employers covered by the MMBA. Early on in the amendment process, the bill's author indicated that all provisions related to mediation would be removed, "making no changes to existing law."¹⁰ Although mandatory mediation was removed from the final bill, in the event the parties do mediate, the timeline for mediation was extended from 15 days to 30 days.¹¹ In the final bill charter cities and counties that already provide interest arbitration were exempted from the fact-finding provision.

The author of AB 646, Assembly Member Toni Atkins (D-San Diego) provided the following rather insulting statement of purpose in support of the legislation:

Although the MMBA requires employers and employees to bargain in good faith, some municipalities and agencies choose not to adhere to this principle and instead, attempt to expedite an impasse in order to unilaterally impose their last, best, and final offer when negotiations for collective bargaining agreements fail. This creates an incentive for surface bargaining in which local governments rush through the motions of a meet-and-confer process to unilaterally meet the goal of the agency's management. Although some municipalities have elected to include local impasse rules and procedures, no standard requirement exists for using impasse procedures. This lack of uniformity causes confusion and uncertainty for workers. Fact-finding is an effective tool in labor relations because it can facilitate agreement through objective determinations that help the parties engage in productive discussions and reach reasonable decisions.¹²

Given this statement, it is no surprise that AB 646 was opposed by numerous city, county, and special district representatives, who protested, among other things, that it would impose significant increased costs on agencies for a process that will be triggered at the sole discretion of unions. Additionally, the opposition raised serious concerns that the bill would delay the conclusion of negotiations, inevitably create more adversarial relations rather than promote settlement, and undermine a local agency's authority to establish local rules for resolving impasse. Notwithstanding these concerns, Governor Brown signed AB 646 on October 9, 2011, without comment.

Early experience with fact-finding under the MMBA does suggest that fact-finding has been used for the purpose of delay in some instances, and that the temporal remoteness of the threat of

¹⁰ Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) May 3, 2011, p. 4.

¹¹ Assem. Amend. to Assem. Bill No. 646 (2011-2012 Reg. Sess.) May 27, 2011.

¹² Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 646 (2011-2012 Reg. Sess.) Aug. 29, 2011, p. 5.)

unilateral implementation has made it more difficult to wrap up some negotiations – especially where concessions are at issue. Substantively, results have varied greatly, and governing bodies' response to fact-finders' recommendations have similarly varied greatly.

IV. MEDIATION AND TIMING OF FACT-FINDING REQUESTS – AB 1606

As noted above, early versions of AB 646 included mandatory mediation language. Subsequent amendments removed that language and reinstated prior language providing for voluntary mediation. However, no change was made to the language of new section 3505.4(a), which immediately followed the voluntary mediation provision:

If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.

This vestigial reference to mediation preceding fact-finding created ambiguity and confusion. Some employers interpreted the language to mean that a union could request fact-finding only if the parties had engaged in mediation. Others were concerned that unions would have an unlimited time to request fact-finding if the parties did not mediate.

In its emergency regulations implementing AB 646 (which have since been approved as its final regulations), PERB resolved these interpretation issues by declaring that, when the dispute has not been submitted to mediation, a union has 30 days from the date either party presents a written declaration of impasse to request fact-finding. When drafting AB 1606, the Legislature modified the first sentence of section 3505.4(a) and added a second sentence that is almost identical to the PERB regulation. Section 3505.4(a) now reads, in relevant part:

The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.

AB 1606 also added a new subdivision (e) to section 3505.4: "The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived." Although the legislative history is silent, presumably this language was added to prevent an employer from conditioning its agreement to mediation (or some other voluntary impasse resolution procedure) on the union's agreement not to request fact-finding.

V. HOW FACT-FINDING WORKS

A. What is Fact-Finding?

The fact-finding process under AB 646 is very similar to that under the EERA and the HEERA. It is also similar to the interest arbitration procedures followed by a handful of California's charter cities and counties.¹³ While neither EERA nor HEERA provides explicit guidance on the conduct of the hearings, the parameters of fact-finding have been well-developed over the years.¹⁴ In general, the fact-finding panel hears evidence on the negotiations issues in dispute and provides findings and recommended terms for settlement. Under AB 646, hearings must start within 10 days of the chairperson's appointment by PERB. Once convened, the panel is to conduct an investigation and hold hearings, and may issue subpoenas for those purposes.

Because of the short statutory timelines, fact-finding is normally very informal, with evidence presented by only a handful of witnesses, exhibits and testimony being introduced with limited foundation, and without the need for a court reporter. A fact-finding hearing is typically structured as follows:

- In advance of the hearing, the parties will identify the issues in dispute to be presented to the panel;
- Position statements on all issues are submitted at the beginning of the process;
- Evidence regarding the employer's fiscal condition and comparability often is presented at the beginning of the process because such evidence frames the other issues;
- The parties then present their respective cases on each issue in dispute through the introduction of foundational evidence in support of proposals;
- After the hearing, post-hearing briefs or position statements may be submitted to support and summarize the parties' positions;
- Within 30 days after its appointment, the fact-finding panel must make findings of fact and recommend terms of settlement;
- The agency and union share the costs and expenses of the PERB-appointed panel chairperson (and pay their own separately-incurred costs associated with their panel member).

¹³ An understanding of the interest arbitration process can be extremely helpful to the management of a fact-finding case. (See Holtzman & Sloan, *Let's Make a Deal* (June 1, 2005) 2005-6 Bender's Cal. Labor & Employment Law Bulletin 6; but see Tenant, *Interest Arbitration: A Poor Substitute for a Strike* (Nov. 1, 2005), 2005-11 Bender's California Labor & Employment Law Bulletin 4.)

¹⁴ In 1987, PERB issued a "Fact-Finding Resource Manual." However, the manual is no longer available. Another valuable resource is the aptly titled "Interest Arbitration" by Will Aitchison. (Aitchison, *Interest Arbitration* (2d Ed, 2000).)

B. Fact-Finding Criteria

AB 646 requires the fact-finding panel to evaluate the parties' positions using the following specific criteria:¹⁵

- (1) State and federal laws that are applicable to the employer.
- (2) Local rules, regulations, or ordinances.
- (3) Stipulations of the parties.
- (4) The interests and welfare of the public and the financial ability of the public agency.
- (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the fact-finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
- (6) The consumer price index for goods and services, commonly known as the cost of living.
- (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, other excused time, insurance, pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
- (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Employers should prepare, as a key component of any fact-finding presentation, a financial report analyzing the financial condition of the employer and the impact of union proposals on the agency's ability to deliver public services. The criteria of the agency's financial ability and the public interest have a very substantial role to play in any fact-finding. The agency therefore must have a strong handle on its fiscal condition, with a view towards anticipated revenues and expenditures during the next several years. Taken together, the financial condition of the employer and the overall compensation of employees can be used to provide significant leverage for an agency's proposals.

Our experience has shown that comparability is sometimes afforded significant weight, meaning that local public agencies will now have to consider the expense and time required to manage a comparability study as part of the negotiations process.¹⁶ However, being under the average of the

¹⁵ Govt. Code § 3505.4(d).

¹⁶ Comparability is the key factor relied on by many arbitrators, and will likely carry great weight in a fact-finding process. (See *City of San Jose* (Cossack 2007) [awarding enhanced retirement benefit based on comparability]; *City of Modesto* (Brand 2002); *City of San Luis Obispo* (Goldberg 2008) [awarding 32.82% wage increases over three years].) Will Aitchison's treatise on interest arbitration dedicates four chapters, nearly a third of the book, to issues of comparability. (See Aitchison, *supra*, note 14, at pp. 31-120.)

mean of the market I not necessarily fatal. This can be offset to some extent by strong evidence showing the lack of recruitment or retention problem. In most published fact finding decisions under MMBA to date, the comparability criterion has to some extent washed out due to methodological disagreements between the parties and disagreement regarding the appropriate survey universe. In any event, employers can and should argue that comparability is only important to the extent the union can prove the government agency has the resources to afford the union's proposals.

The second factor, "Local rules, regulations, or ordinances," also provides a significant opportunity for local public agencies to adopt specific criteria for fact-finding and to establish rules or procedures for the fact-finding panel. In addition, other local regulations or ordinances that address pay policies, maintenance of reserves, and fiscal crisis management must also be considered by the panel and can be very valuable.

C. Findings and Recommendations – The Panel's Report

AB 646 does not specify the form of the report or how it is organized. For instance, it is not clear that the fact-finder must make findings on an issue-by-issue basis or that the fact-finder must choose between the proposals submitted by the parties. Indeed, because of its informal nature, testimony and evidence are normally presented without oath or transcription, making the recommendations less formal as compared to an interest arbitration decision. As a result, fact-finder reports, along with any dissents by the partisan panel members, are usually brief.

D. Post Fact-Finding: Agreement or Implementation

The public agency must make public the findings and recommendations within 10 days after their receipt. An employer may not unilaterally impose its last best offer until after holding a public hearing and no earlier than 10 days after receipt of the findings and recommendations (i.e., the same time the findings and recommendations must be made public).

VI. ADJUSTING NEGOTIATIONS STRATEGY IN LIGHT OF AB 646

A. Negotiations Preparation

In the current environment, many agencies have focused their bargaining preparation on making a strong financial case to support the need for concessions and long-term structural changes. While the financial condition of the agency will continue to remain a centerpiece of bargaining, going forward, negotiations preparation will need to be expanded, because a fact-finding panel will be required to apply the specific criteria noted above when evaluating proposals. Therefore, unions will argue that comparability should move from an important consideration for ensuring the ability to attract and retain talented employees to a key component of bargaining. Moreover, it will be important that the agency prepare a negotiating strategy around every aspect of the fact-finding criteria, including specific reference to the interest and welfare of the public and the financial ability of the employer. The need to prepare competent testimony to support proposals will increase the time and expense required for bargaining preparation. To meet the timelines required by their budgets, public agencies will need to begin bargaining preparation earlier.

B. Negotiations Timelines

A majority of public agencies hope to have new contracts in place by July 1 of each year and plan their negotiations schedule accordingly, including the time necessary for the public adoption process. The potential for fact-finding will now add at least 85-100 days to the timeline, assuming that fact-finders will be available to conduct hearings in the timeframe set forth by the statute. Availability of high-quality fact-finders willing to conduct fact-finding within the statutory timelines has become a significant challenge.

Fact-finding timeline example

Time after impasse before fact-finding must be requested	+30-45 days
Time for PERB to determine if fact-finding authorized	+5 working days ¹⁷
Panel member selection after PERB makes determination	+5 working days
Panel chairperson appointed by PERB	+5 working days
Time before hearing must begin	+10 days
Findings of fact and recommended terms of settlement issued (if no settlement and no agreed-upon extension, 30 days from appointment of chairperson)	+20 days
Earliest possible implementation date (assumes public hearing could be held same day)	+10 days
Total minimum additional time for full process	+85-100 days

Assuming a governing body has the opportunity to meet in open and closed session on the first and third Wednesday of each month, and recognizing that 85 days is an optimistic timeline, employers should conservatively plan on an additional 100 days, or about 14 weeks. Indeed, a review of published fact-finding decisions under the MMBA suggests four to five months is more typical. Here is what the negotiations timeline might look like for a June 30, 2014 expiration:

2014 hypothetical timeline

November 2013	Begin negotiations preparation, including developing support for financial case and conducting comparability study
Early January 2014	Begin negotiations

¹⁷ Because some of the statutory and regulatory deadlines are expressed in calendar days and others are expressed in work days, we have, for the sake of consistency, counted five work days as equivalent to seven calendar days for purposes of this time line.

March 7, 2014	Date by which parties should substantially complete good faith bargaining in order for the employer's team to request authority to declare impasse
March 14, 2014	Date by which parties should reach agreement or impasse (if including mediation)
March 14-April 14	Mediation
April 14-June 6	Fact-finding
June 20, 2014	Last day for governing body to adopt new MOU or implement LBFO for effective date of July 1

VII. LOCAL RULES RELATED TO FACT-FINDING

AB 646 does not abrogate the right of local public agencies to adopt rules and regulations for the administration of employer-employee relations, including rules involving impasse resolution procedures.¹⁸ Agencies have an opportunity to draft local rules to conform local agency impasse procedures to AB 646 and to establish specific timelines and procedures for negotiations, mediation, and fact-finding. Because MMBA sections 3505.4, 3505.5, and 3505.7 set fixed timelines once impasse has been declared, local rules cannot deviate from those timelines.¹⁹ However, a local agency may wish to adopt local rules to govern areas where both the statute and PERB regulations are silent. Of course, we recommend that you carefully consider your agency's needs and contact labor counsel before deciding on a course of action. Also, please remember that MMBA section 3507 requires that agencies provide unions notice and an opportunity to consult before adopting local impasse rules.²⁰

One area that local rules may address is the beginning and ending of negotiations. For example, local rules could specify that bargaining for a successor MOU shall start no later than a certain date before the MOU expires. Local rules could also specify that bargaining must end by a certain date to allow sufficient time for fact-finding to conclude before the agency adopts its annual budget.

Under MMBA section 3505.4(a), the clock starts running on a request for fact-finding on the day a party receives the other's written notice of impasse. Local rules could define what must be included in the written notice, such as a detailed statement of each party's position on all issues

¹⁸ Govt. Code § 3507.

¹⁹ The statutory timelines could be viewed as setting a minimum time for each event, thereby allowing a local agency to adopt local rules with longer timelines. However, it is highly unlikely a local rule with a timeline shorter than the statutory one would be found "reasonable."

²⁰ Although AB 646 does not specifically require the completion of fact-finding before an employer can adopt rules pursuant to section 3507, there remains some risk that PERB could require completion of fact-finding under section 3505.7. While we continue to believe that such a conclusion would be unconstitutional, it may be some time before the courts settle that issue.

in dispute. Such clarity would facilitate scheduling and presentation of evidence at the fact-finding hearing.

To make the fact-finding process move more quickly once a request has been made, local rules can require the parties to pre-designate the neutral panel chairperson and their own panel members ahead of time. In combination with a local rule fixing an end date for bargaining, such a rule would ensure that the panelists are available to start the fact-finding hearing within 10 days of selection as required by MMBA section 3505.4(c). If pre-designation is not desired, local rules could still require the parties to select a chair that is available to conduct the hearing within a certain time period after impasse, as well as establish how to proceed if no chair is available within that time.

Section 3505.4(d) sets out the eight criteria the fact-finding panel must consider. Local rules can be used to flesh out these criteria. For example:

- In assessing comparability, the fact-finding panel shall consider the wages and benefits paid by private employers as well as public employers.

Local rules may also cover procedural aspects of the hearing. The rules could set out a formal hearing procedure, with evidence presented through witness testimony and authenticated exhibits, or they could allow informal presentation by a single advocate for each party. Local rules could also specify what is to be presented at the hearing. For example:

- No later than the first meeting of the fact-finding panel, the Finance Director shall prepare a report on the employer's financial condition, including projections of revenues and expenditures going forward at least three (3) fiscal years.

And local rules could address whether the parties will submit pre-hearing statements, post-hearing briefs, or any other written materials to the panel. In general, pre-established procedural rules would prevent disagreements over hearing procedure after fact-finding is requested, and facilitate the parties' hearing preparation by letting each know in advance what materials will be required.

Another area ripe for local rules is the fact-finding report. Rules could require the report to include specific content or follow a particular format. For example:

- The fact-finding report must include specific consideration of the impacts of any recommendation which will result in an increased cost to the employer, including the impact of that additional expense on the ability of the employer to continue to provide services.
- To the extent the fact-finding panel makes findings and recommendations, those findings and recommendations shall be made on an issue-by-issue basis.
- The fact-finding panel shall limit its findings and recommendations to issues that fall within mandatory subjects of bargaining, unless the parties mutually agree, in writing, to submit issues that are non-mandatory subjects.

Finally, local agencies may consider including a provision in their local rules stating that the fact-finding procedures only apply as long as state law requires the parties to proceed to fact-finding (as currently required by Section 3505.4 and 3505.5).

VIII. LESSONS FROM THE FIRST TWO YEARS OF FACT-FINDING

In an attempt to spot any significant trends in the first two years of fact-finding, we reviewed twenty-six (26) fact-finding reports issued from May 2012 through October 2013.²¹ Although MMBA fact-finding is still in its infancy, and thus likely to develop over time, our survey did reveal a few noticeable tendencies at this point in time.

A. Procedure

- Timelines: Ten (10) reports addressed the statutory timelines for conducting the hearing and submitting the report. In seven (7) cases, the parties agreed to waive the timelines, in one (1) case the parties waived timelines for the hearing only, and in two (2) case the parties waived timelines for the report only.
- Presentation: Of the twelve (12) reports from which presentation format could be determined, six (6) used an informal, usually single advocate, format, while six (6) used a more formal witness testimony format.
- Length of hearing: Of the twenty-one (21) reports from which length of hearing could be determined, fifteen (15) lasted one day, three (3) lasted two days, one (1) lasted three days, and two (2) lasted five days.

B. Substance

- Statutory criteria: Although almost all quoted them, only three (3) of the twenty-six (26) reports explicitly addressed each of the eight statutory criteria. However, most of the remaining reports did address most or some of the criteria in their analysis or discuss.
- Most important criteria: external comparability twelve (12); agency's financial ability ten (10); internal comparability/equity eight (8).²²

²¹ Government Code § 3505.5(c) requires the panel chair to send a copy of the final report to PERB. However, it does not appear that this is being done, as our request to PERB earlier this year for all of the MMBA fact-finding reports submitted to date did not yield two in which our firm represented the public agency. Therefore, our sample universe is likely incomplete. Additionally, we excluded from our review four reports that provided little or no substantive discussion or analysis: one a tentative agreement the parties reached during the fact-finding process, two consisting of little more than the panel's recommendations, and another in which the panel chair adopted as his recommendation a tentative agreement reached by the parties during negotiations – which had been approved by the City Council but voted down by the union membership.

²² Some of the decisions featured two or more of these criteria.

- External comparability: While many of the panel chairs relied in some part on the parties' external comparability data, three declined to give it much weight on the basis that a party can manipulate the data to support its position and/or because the data presented was ineffective and unconvincing.
- Financial ability: Only two panel chairs interpreted this to mean the agency's ability to pay; the others interpreted it more broadly to include the agency's overall financial condition. In most of the cases, the agency could afford the union's salary and/or benefit demands but argued that agreeing to them would worsen the agency's financial condition. Panel chairs appear to be giving some credence to agency attempts to eliminate structural deficits and establish sustainable budgeting.
- Internal comparability/equity: Most panel chairs seem comfortable recommending concessions if they are similar to those agreed to by other employees in the agency.
- Recommendations: Generally, panel chairs, on an item-by-item basis, are recommending one party's proposal over the other. A few of the reports contain recommendations that are a compromise between the parties' proposals. And in three cases, the panel chair recommended a term neither party proposed: binding arbitration in one, a one-year contract in another, and a four-year contract in a third.
- Dissents: Among the twenty-six (26) reports, twelve (12) include a written dissent by the agency panel member, with five (5) of those twelve also including a written dissent by the employee organization's panel member.²³ In other reports, party panelists dissented in whole or on particular issues by simply checking a box marked "dissent."

IX. TEXT OF MMBA SECTIONS AMENDED/ADDED BY AB 646 AND AB 1606

3505.4.(a) The employee organization may request that the parties' differences be submitted to a factfinding panel not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

²³ One report included a dissent from only the union panel member.

- (b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.
- (c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.
- (d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
 - (1) State and federal laws that are applicable to the employer.
 - (2) Local rules, regulations, or ordinances.
 - (3) Stipulations of the parties.
 - (4) The interests and welfare of the public and the financial ability of the public agency.
 - (5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.
 - (6) The consumer price index for goods and services, commonly known as the cost of living.
 - (7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.
 - (8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.
- (e) The procedural right of an employee organization to request a factfinding panel cannot be expressly or voluntarily waived.

- 3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.
- (b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.
- (c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.
- (d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.
- (e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.
- 3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each

year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

X. TEXT OF PERB FACT-FINDING REGULATIONS

32802. Request for Factfinding Under the MMBA.

- (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
 - (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
 - (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.
- (b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.
- (c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.²⁴
- (d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are officially open for business.

²⁴ This subsection is inconsistent with MMBA section 3505.4(a) in that it adds five days to the process. Section 3505.4(a) says: "Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel." PERB's regulation, on the other hand, says that each party must select its panelist within five days after PERB determines the fact-finding request is "sufficient" under PERB regulations. In our experience, PERB follows the regulation, not the statute, so be sure to add five working days to your fact-finding timeline to account for this.