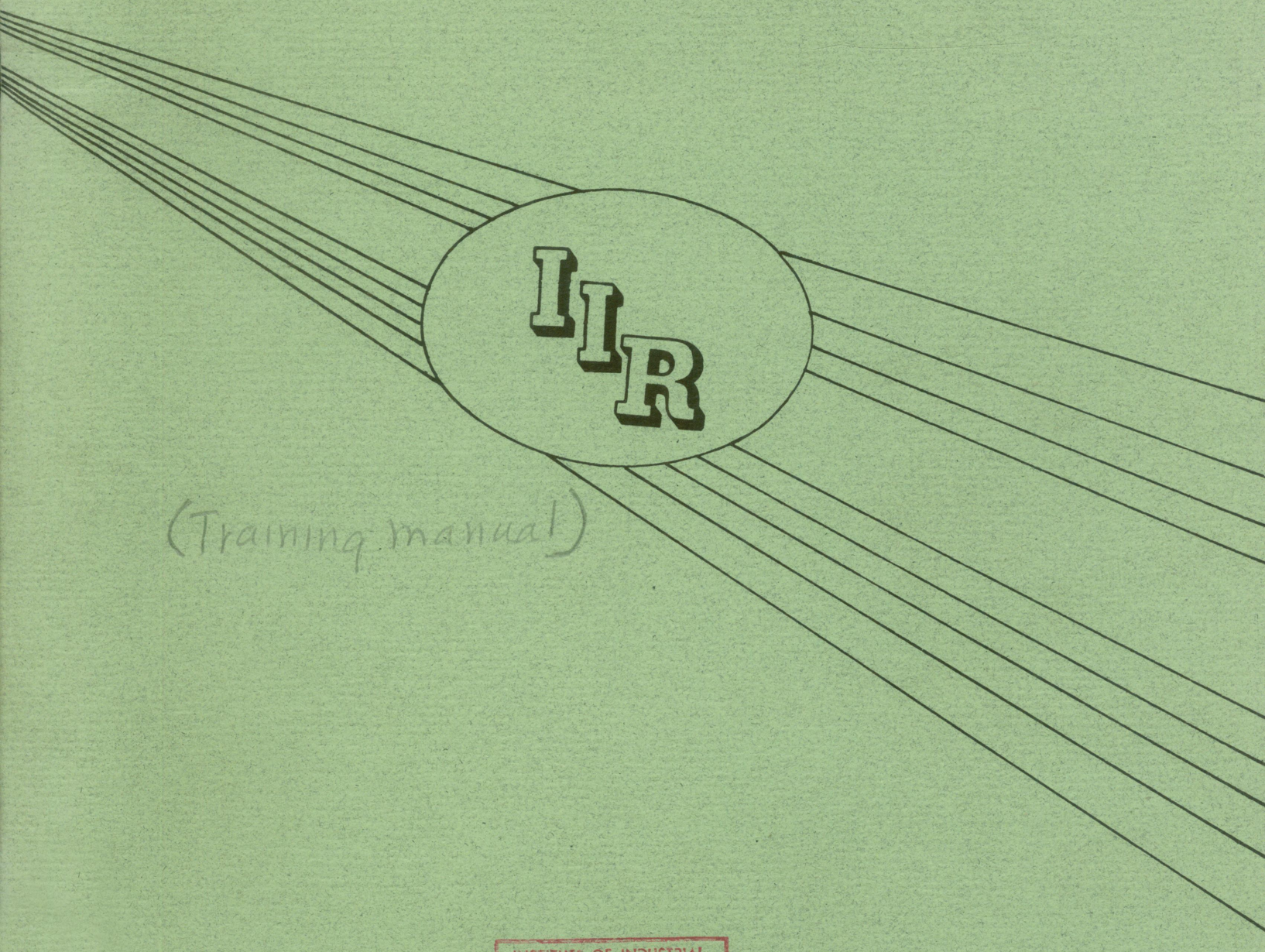
THE SCOPE OF BARGAINING IN CALIFORNIA PUBLIC SECTOR LABOR RELATIONS -- A FOCUS ON LEGAL INTERPRETATIONS



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FOREWORD

The Institute of Industrial Relations is happy to present this volume, the eighth in a series of training packages completed under the terms of a contract between the State of California and the University of California, Los Angeles. With funds provided to the State by the federal government, the State asked the Institutes at UCLA and Berkeley to assist in the training of state and local public managers and employees in the conduct of labor relations. A major portion of our role is to prepare and provide training materials. This module deals with the scope of bargaining in California public sector labor relations.

In the public as well as in the private sector the subject matter of collective bargaining or "scope of bargaining" is ever changing, while the basic substance of negotiations--remuneration, hours and the rules and policies governing the employment relationship--remains constant.

In the private sector, the National Labor Relations Act has partially set the parameters of collective bargaining by providing that issues concerning "wages, hours, and other terms and conditions of employment" be mandatory subjects of bargaining. Disagreements over whether items fall within the mandatory scope are decided by the administering agency established by the act, the National Labor Relations Board, or, occasionally, by the federal courts. Case law has designated prohibited subjects of bargaining, leaving a wide area of permissive subjects over which the parties may, but do not have to, bargain.

In the public sector the enabling collective bargaining labor relations laws have varied among jurisdictions. Differing laws, the notion of the special nature of the government-as-employer, and the relative newness of public sector bargaining have produced differing sets of bargaining issues for each jurisdiction. Constraints as well as needs peculiar to the public sector have shaped a scope that is somewhat different from that of the private sector.

California has not yet enacted a comprehensive public sector collective bargaining law. Employees of local jurisdictions are covered by the Meyers-Milias-Brown Act (MMBA), state employees by the George Brown Act, and public school district employees by the Educational Employment Relations Act (EERA). Public transit district employees are covered by a series of separate statutes. Of these laws, only the EERA establishes an administering agency. Disputes arising over the interpretation or application of the other laws must be decided by the courts.

Each new round of bargaining and each scope dispute decided by the courts or administering agency change the parameters of the scope of bargaining. To best represent their interests, both public employers and employee organizations should be fully aware of the latest interpretations of the applicable bargaining statutes. It is our hope that this manual containing selected articles, leading court decisions pertaining to scope of bargaining under California statutes, and an annotated index of subjects of bargaining will be useful to practitioners.

April, 1977

Professor Daniel J.B. Mitchell
Acting Director

TABLE OF CONTENTS

INTRODUCTION

THE SCOPE OF BARGAINING IN CALIFORNIA PUBLIC-SECTOR LABOR RELATIONS

A FOCUS ON LEGAL INTERPRETATIONS

Since the passage of the original George Brown Act in 1961, public sector labor relations in California have experienced a series of radical changes. While the 1961 Act provided little more than the right of public employees to join and be represented or not join and not be represented by a labor organization, the latest enacted statute, the 1976 Educational Employment Relations Act, established labor relations for school employees that are substantially built on the model of the National Labor Relations Act. In contrast to the Brown Act, the EERA provides for the exclusive recognition of employee organizations, binding contracts with the employer, agency shop agreements, and binding arbitration of grievances. The Act also provides for its administration by a full-time, three-member Board empowered to supervise recognition procedures, administer and enforce a system of fair labor practices. It also certifies impasses and assigns state funded fact-finders where mediation has failed to resolve interest disputes.

In addition to changes affecting school employees, public sector labor relations in California experienced another change of at least equal importance with the passage, in 1969, of the Meyers-Milias-Brown Act. Without an administering board and lacking many basic provisions of modern-day collective bargaining (no provision for dispute resolution, grievance arbitration, definitions of unfair practice, or union security),

there was little to indicate that it would trigger the effect it has had. Since its passage, literally hundreds of thousands of public employees have organized in unions and militant associations. Management of cities, counties, and special districts throughout the state have restructured their personnel relations to fit the changes of the bargaining process. As a result, local government labor and management have established labor relations often equal in sophistication to those found only in the private sector.

The advent of changes in public sector labor relations was soon followed by the litigation of disputes. In an adversary relationship such as labor relations, a large amount of litigation generated by these changes was to be expected. This problem was aggravated, however, by the absence of an administrative board prior to the passage of the EERA. Since most of the state's public employees work for agencies which still are not covered by such administrative procedures, litigation continues to build up. Indeed, the decisions which have emerged from such massive litigation have now become a body of law of growing and meaningful proportions.

As Professor Mitchell observes in the Foreword to this training manual, the study of a subject such as the scope of public sector bargaining is complicated by the fact that it is constantly changing. True in at-the-table bargaining, it is no less true of the legal aspects of the decisions which are the focus of this module. Accordingly it should be considered a working reference manual, which will require updating when new decisions are rendered by the state's judicial system. Efforts must be made to keep the manual current, given the rapidity of change in this field. Regular updating will maintain this module as a useful tool for the practitioner as well as the student of public sector labor relations.

A

TAB A

COURT INTERPRETATION OF SCOPE OF BARGAINING UNDER THE MEYERS-MILIAS-BROWN ACT

No single set of factors have had a greater impact upon California public sector labor relations than the decisions rendered by the state supreme and appellate courts in interpreting the Meyers-Milias-Brown Act. Giving meaning to an act which Professor Joseph Grodin has called "both sketchy and vague,"[1/] these rulings have defined the parameters of a collective bargaining process which in many jurisdictions has equaled the sophistication found previously only in the private sector. These decisions have also had important value as precedent for interpretations of similar provisions of statutes governing state employees and the newly adopted Educational Employment Relations Act, as well.[2/]

In stressing the importance of the various court decisions, it is significant also to note their limitations, as well as those of the act itself.

Courts, as they are wont to stress, interpret and do not legislate. As a result, in addition to arguable misinterpretations, the decisions will--or, as some would maintain, should--reflect imperfections which may or may not be evident in the statute itself. The corrections of such real or imagined failings are, however, beyond the reach and power of the courts. The fact that, since its passage, the Meyers-Milias-Brown Act (MMBA) has been under almost constant

legislative attack to repeal or amend its provisions is indicative of failings which at least some perceive to be in its basic fabric.

Likewise, it should be realized that it is the parties--labor and management--that create and breathe life into the issues of scope. The courts simply define what is lawful, as opposed to unlawful. By definition, therefore, the parties would be ill advised to restrict themselves in their bargaining to those points that have been "blessed" by judicial decision. If they had, the Meyers-Milias-Brown Act would be just as "sketchy and vague" today as it was when first enacted.

The Nature of Court Decisions

Whether the courts have liberally or conservatively interpreted the MMBA will vary according to the viewpoint of the observer, if not also with the decision in question. Perhaps the most important point, therefore, is what standards or precedents have the courts used in reaching these interpretations. It is from these latter considerations that we can draw guidance for the future.

First Indications

The first indication of the direction to be taken by the California Supreme Court with regard to MMBA was given in the case of *Social Workers Local 535 v. Alameda County.*[3/] Involving an employee's right of union representation when faced with a predisciplinary interview for union-related activity, the issue appears technically

marginal to the more substantive issues of scope. The significance for scope was immediately apparent, however, in the Court's application of federal labor law precedents to the case and the act, generally.

In his distinguished article, "California Public Employee Bargaining Revisited: The MMB in the Appellate Courts," Professor Grodin comments that the Supreme Court's decision in the social worker case "implies . . . a liberal and receptive attitude toward the effectuation of statutory purpose."[4/] He goes on to note that "it relies heavily on experience under the National Labor Relations Act" and it "suggests that in certain respects the scope of employee and organizational rights under the MMB may actually be broader than under the federal statutes."

For the reader's convenience, Professor Grodin's article appears in full in the appendix of this Tab. In the article he discusses various aspects of the MMBA and cases then pending appeal. In two cases which are related directly to the scope of bargaining under MMBA, Grodin took serious issue with the appellate court decisions. In both cases, the California Supreme Court was to reverse these lower court rulings. The two were: *Fire Fighters Union 1186 v. City of Vallejo*,[5/] and *Glendale City Employees Association v. City of Glendale*.[6/]

Implications of Vallejo

Technically the *Vallejo* case brought before the Supreme Court the question of the arbitrability of certain contract proposals under a

charter provision adopted by the city's voters. In addressing the case, however, the Court observed that the scope of bargaining of the charter provision "in large measure parallels that set out in the Meyers-Milias-Brown Act."

In specific terms, the problem the Court had to resolve was that of "reconciling the two vague, seemingly overlapping phrases of the statute: 'wages, hours and working conditions' . . . and 'merits, necessity of organization of any service.' " The former phrase, the Court indicated, "could encompass practically any conceivable bargaining proposal." The latter proposal, the Court remarked, "could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion."

As in the Alameda Social Worker Case, the Court sought to resolve the apparent quandary of the conflicting provisions by turning to the federal statutes. In so doing, it took notice of the city's objection to accepting private sector precedents. These objections were apparently outweighed, however, by the similarities of language between the MMBA and the NLRA. The Court said that "the adoption of legislation providing for public employment negotiation on wages, hours, and working conditions just as in the private sector demonstrates that the Legislature found public sector employment relations sufficiently similar to warrant similar bargaining provisions. We therefore conclude that the provisions of the National

Labor Relations Act and cases interpreting them may be referred to . . . in our interpretation of the scope of bargaining under the Vallejo charter."

With this statement the California Court clearly established the standard which would be used in evaluating scope questions in this and in future cases. While the immediate effect in *Vallejo* was to give greater breadth to the scope of arbitrable issues than that sought by the City, this use of NLRA precedents should not be taken as a denial of public management's right to unilaterally determine "the merits, necessity of organization: of government services. The Court simply stated that in acting on such matters management must demonstrate that the action will not impinge upon the wages, hours, or working conditions of the employee's involved. If it does, it is then subject to bargaining.

Binding Nature of Contracts

The Glendale case arose over the question of whether the city council was legally bound to fulfill the provisions of a salary provision within the memorandum of understanding entered into with the employee association. The section of the act at bench was Section 3505.1 It provides that "if agreement is reached by the representatives of the public agency and a recognized employee organization . . . they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination" (emphasis added).

After *Vallejo*, it is instructive to note that the Court did not simply refer to NLRA precedents in deciding the case. Rather, it looked first to the legislative intent of the Act and, in a surprise to many, to a not widely publicized precedent established under the "more limited" Brown Act, which had preceded the MMBA.[7/]

In reviewing the intent of the act, the Court said "the Legislature designed the act . . . for the purpose of resolving labor disputes. But a statute which encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede effective bargaining." The Court therefore concluded that "successful bargaining rests upon the sanctity and legal viability of the given word."

As previously indicated, the Court's search for the precedent of applying this legislative intent to public sector agreements led then to a 1970 appellate court decision involving the Brown Act. In that case, *East Bay Municipal Employee Union, SEIU v. County of Alameda*,[8/] the appellate court upheld a strike settlement which had been agreed to and adopted by the Board of Supervisors and which had guaranteed reinstatement to strikers without loss of benefits.

In his notice of this earlier case, Justice Tobriner stated in the Court's opinion that "if under the more limited provisions of the George Brown Act . . . the negotiation and agreement by such parties

are 'valid and binding,' we conclude a fortiori that the memorandum of understanding reached under the broader Meyers-Milias-Brown Act is indubitably binding."

While citing the East Bay Municipal Union case and other public and private precedents, the Court, unfortunately, does not in artful fashion resolve the apparent contradiction between its finding and the provisions of the act which states that a memorandum "shall not be binding." It does clarify this, however, by its definition of the effect which a governing body's "determination" has under Section 3505.1. In that regard the Court said that the non-binding agreement "became a valid and binding agreement upon approval by resolution of the council. That agreement, /once so ratified/ . . . is definitive, and admits of no discretion" (emphasis added).

New Issues Under Scope

As in the private sector, the decisions in key cases such as *Vallejo* and *Glendale* have not meant that all issues of scope were thereupon resolved. Subsequently, issues have arisen and have been decided in regard to such important scope issues as agency shop, the use of temporary employees, and management incentive pay. The question as to whether there was any substantive difference with regard to the act's requirements to "meet and confer" versus the requirement on some issues to engage in "Consultation in Good Faith" or simply to "meet" was decided in the 1976 appellate court decision in *Fire Fighters v. City of Pleasanton.*[9/]

The case which is perhaps most instructive of these later decisions is the agency shop case in *City of Hayward v. United Public Employees, Local 390, SEIU.*[10] While highly controversial, it graphically demonstrates that although the courts will consider legislative intent and various precedents, the express language of the act will be held paramount.

Agency shop, as in *Hayward*, refers to that form of union security where, as a condition of employment, nonunion members are required to pay a certain amount of money to cover the cost of representation. This amount is usually equivalent to the membership dues of the representing organization. The practice, in the words of the Assembly Advisory Committee on Public Employee Relations,[11] "is a logical out-growth of /the/ practice of according exlcusive bargaining rights /and obligations/ to the organization representing a majority of employees in an appropriate bargaining unit."[12]

In reversing the trial court, the appellate court did not fail to take note of the substance of the Advisory Committee's views, which were similar to those argued by the union. However, it ruled that "without common law collective bargaining rights, public employees enjoy only those rights specifically granted by statute." Allowing that legislative intent is fundamental to statutory interpretations, it observed that "when the Legislature has authorized union security devices, it has done so with explicit language."[13] In this connection, it added that while Section 3502 of the MMBA recognized the right of an employee to participate in a labor organization, it also "confers upon each employee the right not to join or participate." The court

concluded that "those rights cannot reasonably be reconciled with an agency shop provision."

The appellate court's decision in *Hayward* was upheld by the California Supreme Court through its refusal to hear the case on appeal. As a result, although agency shop agreements are permitted by statute in the EERA and under various transit district acts in the Public Utility Code, they are unlawful subjects of agreement under the MMBA.

Unresolved Issues of Scope

In the previously cited article, Professor Grodin comments on an apparent paradox contained in the preamble of the MMB. That is, while stating that one of the act's purposes is to provide "a uniform basis" for recognition and representation, Section 3500 then declares that nothing in the statute "shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies."

While some clarification has been rendered by court decisions since Grodin addressed this issue, it remains clouded as a number of cases are now in the appellate process. In one case, *Bagley v. Manhatten Beach*,[14/] the California Supreme Court has drawn a distinction between general law cities and charter cities with regard to the authority to arbitrate salaries.[15/] Should the remaining cases draw similar distinctions, it becomes clear that the MMBA will be severely weakened in providing a "uniform basis" for regulating public employee labor relations.

Authority of Local Charters

The extreme effect which some of these rulings could have is perhaps best seen in a decision in *Fire Fighters v. San Francisco,*[16/] which the Supreme Court has recently remanded to the appellate court for rehearing. The issue in the case involved the provision in a memorandum of understanding establishing binding arbitration of unresolved contract issues and grievances. In citing the city's charter as its "supreme law" and the absence of any express provisions in MMBA to the contrary, the Court ruled that the city's charter-created Fire Commission possessed "sole authority" in the formulation of rules and regulations affecting fire fighters. It therefore held that the delegation of this authority to an arbitrator in interest or grievance disputes was unlawful.

In remanding this decision to the appellate court, the Supreme Court stated that it was doing so in light of its recent Manhattan Beach decision. Unfortunately, on its surface that case appears to bear only on the very narrow issue of the arbitration of salary disputes in general law cities. It remains to be seen, therefore, in the appellate court's interpretation what these directions from the higher court signify.

Alternate Interpretations

One alternate interpretation to the remanded ruling in San Francisco is suggested by a superior court ruling in *Los Angeles County Employees Union v. Los Angeles County Civil Service Commission.*[17/]

In that case, which is also pending decision from the appellate court, the superior court held that while charter-granted authority of the Civil Service Commission may exempt County management from bargaining over civil service matters,[18] it does not exempt the Commission itself from such obligation. If this position is sustained in the higher courts, it would appear that the "sole authority" spoken to in San Francisco may be more conditioned by the bilateral bargaining process than maintained in the first opinion.

Where specific authority is not granted by charter to a governing body in a charter city, the appellate court has ruled as "invalid" any local rule or regulation which would be "in conflict with the declared purpose of the MMB Act." In this regard the court said in *Huntington Beach Police Officers Assn. v. City of Huntington Beach*[19] that "labor relations in the public sector are matters of statewide concern subject to state legislation in contravention of local regulation by chartered cities." This ruling, it should be noted, concurs with the findings with regard to general law jurisdictions as seen in *Fire Fighters Union Local 1974 v. City of Pleasanton.*

Comparisons of Scope in the Public and Private Sectors

Given the number and breadth of the court rulings reviewed above, the question now arises whether the scope of bargaining under the

MMBA is currently as comparable to the private sector as was held in *Vallejo*. If the answer is yes, can scope issues under MMBA be viewed as falling into the mandatory, permissive, and prohibited subject categories seen in the private sector in NLRA interpretations?

With the firm qualification that decisions such as the original ruling of the court in San Francisco force a reappraisal of this stand, it would appear that both questions can be answered affirmatively.

Differences of Degree, Not of Kind

With the exception of the *Hayward* agency shop ruling, the most significant and confirmed divergence which has developed between the MMBA and the NLRA model[20/] since *Vallejo* has been over impasse procedures and not over the basic question of what constitutes mandatory issues of negotiations. *Glendale* with the binding nature of contracts, *Pleasanton* with the full test of good faith negotiations being applied to all matters, and *Huntington Beach* with its explicit references to NLRA issues of scope have all served to confirm the Vallejo finding. As a result, one is tempted to say the differences between MMBA and the NLRA in regard to scope issues is one of degree and not of kind.

With regard to charter cities and counties, the remanded *San Francisco* case and the appealed *Los Angeles* civil service case will be critical tests of the MMBA. If the earlier decision in the former is reaffirmed and sustained by the California Supreme Court, then grievance arbitration

may be precluded in many charter jurisdictions. In the latter case, if the superior court's decision is overturned, then whole areas which are mandated issues of bargaining under the NLRA would be taken from the bargaining process and placed back under the purview of charter-created civil service commissions. Should this take place, then, for charter jurisdictions the differences between MMBA and the NLRA would not be in degree, but in kind.

Permissive Areas of Bargaining

Under the NLRA certain issues which would be in conflict with the act are viewed as prohibited areas of bargaining.

However, outside of these prohibited areas and, since the federal act deals with the private sector, what management agrees to with a union is generally viewed as its business. Therefore, if a private employer and a union choose to bargain over issues which are not mandated by the Act, they are free to do so: if it is not specifically precluded, it is not unlawful, but permissive.

Permissive areas of bargaining were first delineated in the now famous *NLRB v. Wooster Division Borg-Warnner* case. In speaking to the issue, the court noted that in addition to mandatory and prohibited subjects of bargaining, there was also an area of protected management and union prerogatives. With regard to these prerogatives the court reasoned that "...each party is free to bargain or not to bargain, and to agree or not to agree." It also held, how-

ever, that as these subjects were not mandated subjects of bargaining, neither party could insist on bargaining over such an issue to the point of impasse. To do so would be considered an unfair labor practice.

As *Manhattan Beach* and *San Francisco* demonstrate, the courts are not inclined to allow certain types of issues to be loosely played with in the public sector. It is important to note, however, that in these and other cases under the MMBA the only issues which have been held to be unlawful subjects of bargaining are those which have conflicted with other statutes or with charter provisions. The courts have not ruled, for example, on management voluntarily bargaining over the "merits, necessity or organization of any service." In this sense, just as in the private sector, there may be an area of bargaining under MMBA which is neither unlawful nor mandatory.

Conclusion

Many of the issues regarding the MMBA which were outstanding questions at the time when Professor Grodin's article first appeared in 1974 have now been settled. Comprising an impressive body of law, these decisions have given both character and color to much of that which was "both vague and sketchy." With respect to charter jurisdictions, however, the paradox which Grodin noted in the MMBA preamble still remains unresolved: Does MMBA provide a "uniform basis" for recognition and representation or shall it be considered

as not having superseded "charters, ordinances, and rules of local public agencies...which provide for other methods of administering employer-employee relations." (emphasis added)

As a result of this MMBA paradox, neither the parties nor the public knows if the Act or local civil service and personnel provisions prevail. As inconsistent as the present bargaining scene may be, the differences discussed here among *Vallejo, San Francisco* and *Los Angeles County* lead to greater confusion should the courts find that in the end the Meyers-Milias-Brown Act did not establish "a uniform basis" for regulating public sector labor relations.

FOOTNOTES

1. California Public Employees Bargaining Revisited: The MMB Act in the Appellate Courts, California Public Employee Relations, Institute of Industrial Relations, U.C. Berkeley, No. 21, June 1974.

2. See Tab D - Educational Employment Relations Board recommended decisions.

3. *Social Workers' Union Local 535 v. Alameda County Welfare Dept.*, 11 Cal.3d 382 (1974)

4. See Note 1. Also Professor Grodin's article has been cited by the supreme court and in a number of appellate court decisions. This article along with his 1972 article "Public Employees Bargaining In California: The Meyers-Milias-Brown Act in the Courts" which was also published in CPER, are the most referenced scholarly work in the field.

5. *Fire Fighters, Local 1186 v. City of Vallejo*, 12 C 3d 608 (1974)

6. *Glendale City Employees Assn. v. City of Glendale*, 15 C 3d 328 (1975)

7. *Id.*

8. *East Bay Municipal Employees v. County of Alameda*, 3 Cal. App. 3-578 (1970)

9. *Firefighters, Local 1974 v. City of Pleasanton*, 56 Cal. App. 3d 959 (1976)

10. *City of Hayward v. United Public Employees*, Local 390, 54 Cal. App. 3d 761 (1976)

11. Final Report of the Assembly Advisory Council on Public Employee Relations, March 15, 1973. California Assembly Advisory Council chaired by Benjamin Aaron.

12. Members of the Advisory Committee were: Benjamin Aaron (Chairperson), Howard S. Block, Morris S. Myers, Don Vial, Donald H. Wollett.

13. The court referenced the union shop provisions for transit district employee organizations under the Public Utilities Code and the agency shop provisions of the Educational Employment Relations Act.

14. *Bagley v. City of Manhattan Beach,* 18 C 3d 22 (1976)

15. See *Fire Fighters v. Vallejo.*

16. *San Francisco Fire Fighters, Local 798 v. City and County of San Francisco,* App. 129 Cal. Rptr. 39 (1976)

17. *Los Angeles County Employees Union Local 434 v. Los Angeles County Civil Service Commission,* Superior Court, County of Los Angeles, Dept. 83. C 158155 (1976)

18. See *AFSCME v. County of Los Angeles* - Tab C.

19. *Huntington Beach Police Officers Assn. v. City of Huntington Beach,* 58 Cal. App. 3d 492 (1976)

20. For an example of the standards utilized by the NLRA see: *Fibreboard Corp. v. NLRB* in Tab C. Three major points considered by the court in this case were:

    1. The effect on the employer's freedom to manage,

    2. The propriety of negotiations,

    3. Purpose of the statute.

APPENDIX TO TAB A

CALIFORNIA PUBLIC EMPLOYEE BARGAINING REVISITED:

THE MMB ACT IN THE APPELLATE COURTS

This article appeared first in CPER (California Public Employee Relations) No. 21 (June 1974).

California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts

*By Joseph R. Grodin**

Two years ago in this journal, I attempted to analyze the Meyers-Milias-Brown Act against the backdrop of court decisions. My conclusions, briefly stated, were as follows: (1) The Act itself is both sketchy and vague: "...it does not say very much about the critical issues which confront labor-management relations in the public sector; and what it does say it says with confusing lack of clarity." (2) Given the absence of an administrative agency, the primary task of interpreting and applying the Act has fallen to the Courts. "The Courts have, on the whole, done an admirable job of exegesis, but their decisions cannot help but reflect the underlying weakness of the text." (3) It is apparent that the MMB Act requires a major revamping, along with other statutes bearing upon public employee labor relations in California; and (4) It would be preferable that the revamping take place on a comprehensive basis pursuant to careful study and report by a legislative or gubernatorial commission, rather than than on the basis of ad hoc amendments which have characterized the legislative process to date.

Since the publication of that analysis two developments have occurred which have bearing on these conclusions. First, the State Assembly did appoint a special commission to study and make recommendations with respect to the various statutes which deal with public employee bargaining in California; the commission submitted its report, with recommendations for a comprehensive statute to be administered by a state agency; and the statute which the commission recommended, with minor changes, has been pending before the state legislature.

The second development has been the proliferation of appellate decisions under the statute. My earlier article focused, of necessity, on the manner in which trial courts dealt with the statutory language. There were no appellate decisions which involved interpretation of the Act, except in an incidental way. Now the arena of judicial implementation has shifted to the appellate level, and it is the purpose of this article to re-examine the statute in operation from that perspective.

I. Scope of the Statute: Definition of 'Public Agency'

The MMB Act applies to every "public agency," and that term is defined to include "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not."[1] The definition is a broad one, but not broad enough to include a community hospital, according to the Court of Appeal in *Service Employees International Union Local No. 22, AFL–CIO v. Roseville Community Hospital*,[2] even though the hospital was built by the

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City of Roseville on its own property with funds from bonds approved by the voters, and thereafter leased to a nonprofit corporation which had responsibility for its operation. The purpose of the MMB Act, the Court said, was "to establish a procedure for discussion of working conditions, etc., by organizations representing employees who are without the traditional means of enforcing their demands by collective bargaining and striking, thus providing an alternative which would discourage strikes and yet serve the public employees' interests." There being no claim that the Roseville Community Hospital "is not subject to ordinary collective bargaining procedures and other concerted activities of the type generally approved by law," the relationship of the hospital with its own employees was outside the scope of statutory purpose. The terms "quasi public corporation" and "public service corporation," the court concluded, must refer only to "entities which are specifically designated as such by the statutes under which they are organized and under which they operate."

The restrictive interpretation which the Court gives to the statutory definition of the term "public agency" will not give rise to serious problems in most cases, since employers falling outside that definition are likely to be subject to the National Labor Relations Act, at least if they do sufficient volume of business to meet National Labor Relations Board jurisdictional yardsticks. Indeed, the Court relied upon several decisions by the NLRB asserting jurisdiction over nonprofit corporations which operate on leases from governmental entities. But nonprofit hospitals are expressly excluded from coverage under the NLRA, and the Court's observation that they are subject to "ordinary collective bargaining procedures and other concerted activities of the type generally approved by law" is accurate only if it is understood as meaning that there are no existing legal prohibitions in California against strikes by employees of nonprofit hospitals. At the same time, such employees have no legal means (other than self-help) of acquiring recognition or compelling bargaining, which was the issue in the *Roseville* case. The Court's conclusion underscores the desirability of legislative action which would either extend the NLRA to nonprofit hospitals or provide for their inclusion under comparable state statute. Both possibilities are presently under consideration.

II. The Problem of the Preamble

The previous article pointed to the paradox of the Act's preamble (Section 3500) which begins by stating that one of the Act's purposes is to provide "a uniform basis" for recognition and representation, and then declares that nothing in the statute "shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system *or which provide for other methods of administering employer-employee relations* ...." (Emphasis added.) A literal reading of the qualifying language would remove any pre-emptive effect from the statute, leaving its implementation wholly optional with local governments. In the March 1972 article I suggested that the quoted language might be read as protecting only those labor relations "methods" which are consistent with, and effectuate the declared purposes of, the statute as a whole; and I observed that such an interpretation was consistent with the decisions to date.

Such an interpretation of the qualifying language remains consistent with the appellate decisions rendered since. In *Los Angeles County Firefighters v. City of Monrovia*,[3] for example, the City of Monrovia claimed the qualifying language served to exempt it from the provisions of the Act with respect to recognition. The Court rejected that contention, stating:

> "We do not agree. If the City's argument had merit, every public agency would be exempted.... It appears from our examination of the entire act that the Legislature intended by it to set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations...."

III. Protected Employee Conduct

The California Supreme Court had its first opportunity to interpret the MMB Act in April of this year, and the case was a difficult one.[4] (See Documents Section.) On May 14, 1969, Social Workers Union Local 535, recognized representative for employees of the Alameda County Welfare Department, sponsored a noon hour rally at the county administration building to protest what the union claimed to be a failure by the county to meet and confer in good faith. Certain county vehicles were observed at the rally, and county records indicated that some of the employees using those vehicles did not have official business at the administration building at that time. Accordingly, some 30 welfare workers were summoned to individual meetings with supervisors concerning their possible misuse of county vehicles to attend the rally. Question arose as to the right of employees to have their union representative accompany them to the meetings, and when the county made clear that it had no intention of permitting union representation, seven employees refused to attend. For that refusal, the seven employees were suspended for three days for "insubordination." The question for the Court was whether that suspension violated the Act.

Section 3500 of the Act declares that it is state policy to recognize the right of public employees to be "represented" by employee organizations of their choice "in their employment relationships with public agencies." Section 3502 protects the right of public employees to participate in the activities of such organizations "for the purpose of representation on all matters of employer-employee relations," and a correlative section, 3503, establishes the right of recognized employee organizations to represent their members in "employment relations with public agencies." Section 3504 defines the scope of representation to include "all matters" relating to employer-employee relations, "including, but not limited to, wages, hours, and other terms and conditions of employment...." Section 3506 prohibits interference with rights protected under Section 3502; and Section 3508 states that the right of employees to form, join, and participate in the activities of employee organizations "shall not be restricted by a public agency on any grounds other than those set forth in this section." The issue of statutory interpretation was whether these sections gave employees and/or their unions the right to union representation in the sort of interviews which were being conducted by the welfare department.

Under analogous sections of the National Labor Relations Act, the extent of the right of employees to insist upon union representation at predisciplinary interviews has been the subject of considerable litigation. The NLRB's view has been that an employee is entitled to union representation at such an interview (or at least may not be disciplined for insisting upon representation) when the employee reasonably anticipates that disciplinary action might result. Two courts of appeal, however, have refused to accept the Board's position, holding that the right to representation attaches only at the stage that discipline is actually imposed. The county in its argument to the State Supreme Court relied heavily upon these precedents.

The Court, in an opinion by Justice Tobriner (Justice McComb dissenting), distinguished these federal precedents on the ground that they did not involve the potential of discipline for union-related activities. This was not a "normal interview with regard to employment matters but, instead, an inquiry that focused upon the employee's conduct regarding the use of county cars in connection with a union rally." Such an inquiry, with overtones of discipline of members who attended the rally, carried with it an inherent potential for intimidation and coercion. Union representation was vital from the standpoint of the employee in order to reduce the potentially coercive atmosphere of the employer-directed interview and to assure the employee that he would not be penalized for union activities. The union itself had an interest in assuring that no sanctions, "blatant or subtle," were meted out on account of an individual member's participation in union affairs. Finally, both members and the union had an interest in assuring that a rule

against noon hour use of county cars would not be enforced discriminatorily; that is, only against their use in connection with a union rally. "[A] public employee's right to union representation under section 3504," the Court held, "attaches to an employer-employee interview which an employee reasonably fears may investigate and sanction his union-related activities."

The facts of the case were unusual, and for that reason the limited holding of the Court is not likely to have widespread application. The Court does not say that employees are immune from discipline for misusing government property simply because the misuse occurs in connection with union activity. So far as the Court's opinion is concerned, the County of Alameda remains free to adopt and enforce a rule against use of county vehicles for non-business purposes, so long as the rule is enforced in a manner that does not discriminate against union activity. Nor does the Court suggest that the county was precluded from making inquiry into possible misuse of vehicles simply because union activity was involved. On the contrary, the opinion states that "the employer possessed what appears to be a legitimate reason for inquiring...." Finally, the opinion does not extend the right of union representation to predisciplinary interviews except in those cases where an employee reasonably fears that the interview concerns union-related activities. The issue of extension remains, presumably, for another day.

The Court's approach to the MMB Act, however, and what it says about the statute generally are of potentially broader significance. Tobriner's opinion implies, first of all, a liberal and receptive attitude toward the effectuation of statutory purpose. In that connection, it relies heavily on experience under the National Labor Relations Act. At one point the opinion states:

> "Federal labor relation legislation has, of course, frequently been the prototype for California labor enactments, and, accordingly, in the past we have often looked to federal law for guidance in interpreting state provisions whose language parallels that of the federal statutes."

The opinion goes on to suggest that in certain respects the scope of employee and organizational rights under the MMB Act may actually be broader than under the federal statute:

> "Unquestionably, in defining the scope of representation in section 3504, the Legislature relied heavily upon the analagous sections of the federal Labor Management Relations Act; as one commentator has noted: "[t]he phrase 'wages, hours, and other terms and conditions of employment' [of section 3504] is taken verbatim from the LMRA, where it is has been given a generous interpretation, including anything that might affect an employee in his employment relationship." (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 749; fns. omitted). Professor Grodin additionally observes, however, that "[t]he phrasing of the first part of section 3504 [i.e., 'including *but not limited to*'] suggests the scope of representation under the [Meyers-Milias-Brown] Act is even more broad" than under the federal statute (*id.*); thus, *while the federal authorities undoubtedly provide a useful starting point in interpreting the scope of our state provision, they do not necessarily establish the limits of California public employees' representational rights.*" (Emphasis added.)

"In the instant case," the Court said, "we need not probe the area in which the state provision extends the right of representation beyond federal law." Instead, the Court distinguished federal precedents as described above. The implication for future cases, however, may be significant.

IV. Recognition: Establishment of the Bargaining Relationship

The MMB Act is egregiously ambiguous with respect to the circumstances under which a public agency is required to recognize an employee organization. Section 3507 provides that a public agency may adopt "reasonable rules and regulations" for the "administration of employer-employee relations," and lists various matters which may be included. The 1968 MMB Act amendments to the preceding George Brown Act added to the list of "provisions for recognition," without further guidance. In 1970, Section 3507 was amended to provide that "No public agency shall unreasonably withhold recognition of employee organizations," but no criteria of reasonableness were provided. Finally, in 1971 the legislature amended Section 3507 to add to the list of matters on which a public agency may adopt "reasonable rules and regulations": "exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof...."

The 1971 amendment raises more questions than it answers. Is "exclusive recognition" now mandatory, or are systems of non-exclusive recognition also permissible? Is the adoption of rules pursuant to Section 3507 a precondition to the validity of a system of exclusive recognition? What limitations exist, if any, with respect to the procedures by which the "vote of the employees" is determined? What limitations are imposed, if any, upon the creation of agency-wide units? And, most significantly, what criteria and standards of judicial review are implied by the term "appropriate unit," in view of the fact that the Act contains no meaningful independent unit determination procedures[5] nor any standards for unit determination other than Section 3508, which authorizes the limiting of peace officers to their separate organizations, and Section 3507.3, which provides that professional employees have the right to be represented separately from nonprofessionals?

Not surprisingly, the ambiguity of the statute has given rise to a good deal of litigation. A common problem involves the recognition by a public agency of an "inside" union, to the exclusion of an AFL–CIO union which then complains either of the unit established, or the manner in which recognition was accorded, or both. The first decision displaying that fact pattern was *Los Angeles County Firefighters Local 1014 v. City of Monrovia*, supra. In 1961 the City of Monrovia had, by resolution, recognized the Monrovia Municipal Employees Association "as the only organized group who can speak on behalf of the interests of the greatest number of City Employees." Nine years later, Local 1014 of the Firefighters Union requested recognition as representative of employees of the Monrovia Fire Department; and, when the city deferred action on their request, granting them only the interim right to participate in salary discussions, the firefighters sought a writ of mandate to compel recognition and bargaining. The suit was premised in part on the MMB Act and in part on the provisions of the Labor Code (Sections 1960 et. seq.) which state that firefighters have the right to organize and to discuss matters involving wages, hours, and working conditions with the governing body.

The Court of Appeal held the firefighters entitled to relief under both statutes. As to the former, the Court observed that the legislature intended to set forth "reasonable, proper and necessary principles which public agencies must follow in their rules and regulations"; that if the rules and regulations of a public agency do not meet the legislatively established standards, the "deficiencies" are "supplied by appropriate provisions of the act"; and that "the policy set forth in the city's administrative manual...clearly does not meet the standards prescribed by the Legislature." The city's "open door" policy of allowing all individuals and organizations representatives to speak did not constitute sufficient compliance with the Act since, among other things, such a policy placed nonrecognized organizations in a secondary position, without the rights, duties, and obligations provided by the state. Accordingly, the Court ruled that the Firefighters Union was entitled to recognition "as 'recognized employee organization' representing [those] firefighters [who are members of the union] in their employment

relationship with the City...and that the City meet and confer in good faith with the Union on all matters within the scope of such representation...."

The Court's opinion is singularly unenlightening as to why the policy adopted by the City of Monrovia failed to meet the standards prescribed by the MMB Act. Was it because the policy was adopted prior to the Act, and therefore failed to consider the factors relevant under the statute? Or was it because the policy, on its merits, did not constitute a "reasonable" rule governing public employer-employee relations? If the latter, was the policy "unreasonable" (1) because the Act requires recognition of every employee organization which requests it? (2) because the principle of exclusivity adopted by the city was not established pursuant to employee vote? (3) because a unit comprising all city employees is an unreasonable unit, inherently or under the circumstances? or (4) because it is an abuse of discretion not to accord a separate unit and separate recognition to firefighters? Alternative (1), I have argued elsewhere, is not a reasonable construction of the statute,[6] and was in any event negated by the 1971 amendments, which were not in effect when the *Monrovia* case arose, but which the Court took note of in its opinion. Alternative (2) is a defensible position, but would support only the conclusion that the city's policy is invalid, not that the firefighters are entitled to their own exclusive unit. Moreover, the Court's opinion quite clearly did not adopt that alternative, for (ignoring the 1971 exclusivity amendments) it ordered that the firefighters union was entitled to recognition only on behalf of "those firefighters who are members." Alternative (3) would also not support an order requiring recognition of the firefighters union. Only the last alternative provides an adequate explanation of the result, and the conclusion is a reasonable one, though on grounds not articulated by the Court. In Sections 1960, et. seq., of the Labor Code, the legislature previously made explicit its judgment that firefighters were entitled to separate representation. Reading the two statutes together, it is proper to conclude that a policy which denies firefighters such representation is not a "reasonable" policy within the meaning of the MMB Act.

Policy derived from another statute was not available, however, as a guide to decision in the second appellate decision in this category. In *Operating Engineers Local Union No. 3 v. The Board of Supervisors of Madera County*,[7] the County of Madera adopted an ordinance which limited recognition under the MMB Act to an organization "composed of at least fifty-one (51) per cent of the authorized classified positions of Madera County that are eligible for membership in an employee organization as determined by the Board of Supervisors." The trial court held the ordinance invalid on the ground (among others) that it had a deterrent effect upon organization by nonincumbent groups, and it issued a writ of mandate requiring the County to:

> "cease to enforce the provisions of Ordinance No. 332, and to refrain from granting exclusive recognition to any employee organization based on any unreasonable numerical or percentage requirement, and, in any event from requiring a representation of 51% of the authorized classified positions of the County in such employee organization."

On appeal, the decision of the trial court was affirmed in an opinion which was unreported, and which therefore cannot be relied on as precedent. The Court of Appeal reasoned that the "state has delegated limited authority to local agencies to impose regulations governing recognition of employee organizations" and that neither Section 3501 nor Section 3507, both relied upon by the County, constituted authority for its recognition rule. Section 3501, the Court said, "defines what a recognized employee organization is; it is not broad enough to give a local agency the authority to establish the terms and conditions for recognition"; and Section 3507 "does not include the power to adopt an ordinance the effect of which is to limit recognition to a sole and, a fortiori, exclusive organization. Rather, both section 3501 and section 3507 provide

that the employees have the right to determine whether any particular employee organization shall be given exclusive recognition; the agency cannot require exclusive representation as a condition of recognition." Moreover, said the Court, the ordinance "usurps the right of the employee organizations to promulgate rules and regulations, including 'reasonable restrictions regarding who may join' (Sec. 3503) and the right of the members to determine whether they shall have exclusive representation (Sec. 3507)." The union asked the Court to go further and set forth criteria for determining what would constitute reasonable requirements for recognition, but the Court declined to do so on the ground that the question was not before the trial court. Instead, the Court referred the parties to Section 3507.1.[8]

The decision is puzzling in many ways. The 1971 amendment to Section 3507 providing for exclusive recognition was not in effect at the time of the trial court decision, but it was in effect at the time of the appellate decision. Indeed, it was enacted at the same time as Section 3507.1, to which the Court makes reference, yet the Court makes no explicit reference to the language of the amendment. It is thus difficult to determine from the Court's opinion whether it felt (1) the amendment was inapplicable, and without the amendment exclusive recognition was impermissible; (2) exclusive recognition on a county-wide basis was impermissible, despite the amendment; or (3) exclusive recognition on a county-wide basis would be permissible under the terms of the amendment only pursuant to a vote of the employees, which had not been held. Alternative (1) would be difficult to defend, since even though the amendment might not be relevant to determining the propriety of the writ of mandate in the first instance, it would clearly be relevant in determining whether the writ should continue in effect. Alternative (2) is capable of defense, but not without further facts and analysis, neither of which appear in the Court's opinion. The 1971 amendment expressly allows exclusive recognition pursuant to a vote of the employees "of the agency or an appropriate unit thereof," implying that exclusive recognition on an agency-wide basis may under some circumstances be appropriate. The Court's statement that Section 3507 "does not include the power to adopt an ordinance the effect of which is to limit recognition to a sole and, a fortiori, exclusive organization" cannot, standing alone, be taken as an accurate statement of the law. And while the facts of the case might well lead to the conclusion that a county-wide unit would be unreasonable under the circumstances, the circumstances are not set forth, nor is the thrust of the Court's opinion limited in such a manner. Rather the Court seems to be talking about alternative (3) when it talks about the right of employees "to determine whether any particular employee organization shall be given exclusive recognition." If the Court was saying that a vote of the employees is a precondition to the validity of exclusive recognition, that would appear to be a reasonable construction of the statute. But that construction should lead to an order enjoining the granting of exclusive recognition without a vote. It is not at all clear, then, on what basis the Court affirmed the much broader order granted by the lower court.

In the third case in this category, *International Brotherhood of Electrical Workers, Local No. 1245 v. Fresno Irrigation District*,[9] there was no unit issue at all. All parties were in tacit agreement that a unit consisting of the District's field employees (approximately 73 in number) was appropriate, and the dispute was over whether the District properly recognized the incumbent Fresno Irrigation District Employees Association as their representative under the MMB Act, under circumstances in which the IBEW had demanded (1) recognition on the basis of authorization cards, which it claimed to have from a majority of the employees, and which it was prepared to turn over to the State Concilation Service for check against the employee roster, or in the alternative (2) the conduct of an election by secret ballot to determine majority choice. The District began by insisting upon proof that the IBEW was "qualified" to represent employees of an irrigation district, and ended by according recognition to the incumbent Association based primarily upon conversations by supervisors with some employees who said they preferred the Association to the IBEW. Under federal law principles, the granting of recognition to one union in the face of another union's request for recognition, supported by a credible showing of

interest and demand for election, would be an unfair labor practice in itself; and the procedure of determining employee sentiment through interrogation would be independently unlawful. Moreover, the District sought to defend its position on the basis of factors (e.g., its estimate that the Association would better serve the interests of its employees) which were not related to employee choice at all. The IBEW argued that the MMB Act made employee choice the touchstone of exclusive recognition, and required some reasonable method of determining that choice, either through authorization cards (if there was no substantial dispute) or through election (if there was).

The trial court, however, upheld the District's actions as "reasonable," and the Court of Appeal, in an unpublished opinion, affirmed. Rejecting the union's argument that minimal federal standards should be read into the MMB Act in determining whether recognition had been "unreasonably" withheld, the Court held that an election was not required, and that the District's resolution of the matter was not shown to be "arbitrary or capricious." The Court's rejection of federal standards is questionable, particularly in light of subsequent opinions which emphasize the utility of such standards in applying the MMB Act. Moreover, it is difficult to understand how rejection of a union's offer for an objective card check or for an election, and subsequent reliance upon the hearsay results of employee interrogation, could be regarded as "reasonable" by any standards. In any event, the facts of the case occurred prior to the adoption of the 1971 exclusivity amendment; and, while the Court makes no reference to that amendment in its opinion, it is apparent that the statutory phrase "pursuant to vote of the employees" would have bearing upon the issue were the case to arise today.

Unlike the *Fresno Irrigation District* case, which involved a question of representation procedure in a context in which there was no unit dispute, *Alameda County Assistant Public Defenders Association v. County of Alameda*,[10] involved a pure unit issue: whether the County of Alameda violated the MMB Act when it established a bargaining unit consisting of all non-health-related professional employees, and on that basis denied separate recognition to an association seeking to represent attorneys in the Public Defender's office. The Court of Appeal held that it did. Section 3507.3 of the MMB Act provides that "Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees," but it does not expressly grant particular professions the right to be represented apart from other professional groups, and the Court did not base its decision on that ground. Rather, the Court held that the unit established by the County was not an "appropriate" one within the meaning of the 1971 exclusive recognition amendment, and that the County's rule was therefore not a "reasonable" one within the meaning of Section 3507.

The unit established by the county might be appropriate, the Court reasoned, if the public defenders did not have an association of their own and were not seeking recognition on a separate basis. The language "appropriate unit" parallels the language of the NLRA and cases decided under the federal statute are therefore pertinent. Referring to a case in which the NLRB held that a group of professional engineers were entitled to be represented separately from other professionals, because of their "unique community of interest based upon the distant nature of their function, their separate supervision and work place, the lack of substantial interchange with other professional employees, and the fact that they are separately hired by the departmental supervisor," the Court concluded that these factors were present in the case of attorneys in the public defender's office as well. "It does seem incongruous," the Court suggested, "that assistant public defenders should be grouped in a bargaining unit with auditors, planners, rodent and weed inspectors." They are "sui generis," the Court said, "having little community of interest with the other professional groups which Unit XI tries to place in one organization." Accordingly, the denial to them of their own bargaining unit constitutes a violation of Section 3507.

The *Public Defender* opinion thus represents both an openness to federal precedent interpreting similar statutory language and a willingness to undertake substantially independent review of the reasonableness of a public agency's unit determination.[11] My views on the former are set forth in my previous article. As to the latter, the Court's approach seems appropriate where, as in all the representation cases discussed so far, the initial determination was made not by an impartial agency, but in effect by an interested party. The possibility of self-interest on the part of a public agency as employer is obvious. Where, as in some cities and counties, the initial determination of representation rights or unit appropriateness is made by a neutral body or an arbitrator, the scope of judicial review may appropriately be narrower.

V. Union Security and Dues Checkoff

There is still no appellate decision on the validity of union security arrangements under the MMB Act, although an arbitrator's decision upholding the validity of an agency shop agreement in the City of Hayward is likely to provide the basis for such a determination. The validity of an exclusive dues deduction arrangement in the City of Sacramento, however, has been upheld on appeal. In *Sacramento County Employees Organization v. County of Sacramento*,[12] the County established several bargaining units pursuant to an arbitrator's determination and conducted elections within each unit, recognizing the victorious unions as exclusive bargaining representatives for the units involved. Following certification of the election results, the county implemented an ordinance providing that within each unit dues deductions shall be permitted only for members of the recognized organization. The County Employees Association and Local 22, SEIU, which won two of the units, objected nevertheless to their exclusion from dues deduction rights in three units for which AFSCME Local 146 was certified as bargaining representative. Their attempt to obtain a preliminary injunction against the exclusive dues deduction arrangement was denied by the Superior Court, and the Court of Appeal affirmed that decision.

There is little in the appellate court's decision that breaks new ground. Rejecting the plaintiffs' contention that the right of local governments to adopt rules and regulations on labor relations matters is limited to the subjects mentioned in Section 3507, the Court stated:

> "The Legislature did not provide in specific terms what rules and regulations the local agency should or must adopt in extending exclusive recognition.... By not allowing dues deductions to competing organizations some insulation could be furnished to recognized employee organizations from constant challenges from competing organizations and help provide a more stable framework within which the public employer and a recognized organization can *meet and confer*."

Like the Superior Court, the appellate court distinguished *Renken v. Compton City School District* (which invalidated a resolution of a local school board allowing deductions in favor of a particular organization if a minimum of 50 per cent of the employees gave signed approval) on the ground that the holding in *Renken* was based on the premise that the procedure was "arbitrary and discriminatory," whereas under the MMB Act, an exclusive dues deduction system is reasonably related to the concept of "recognized" organizations.

VI. Meeting and Conferring: The Scope of Representation

Section 3505 of the MMB Act establishes the duty of public employers and employee organizations to meet and confer in good faith regarding "wages, hours, and other terms and conditions of employment," a term which is taken verbatim from the NLRA. The Section then goes on to define the phrase "meet and confer in good faith" by reference to "matters within the scope of representation," and the latter term is defined in Section 3504 to include:

> "all matters relating to employment conditions and employer-employee relations, *including, but not limited to*, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (Emphasis added.)

In *Los Angeles County Employees Association, Local 660 v. County of Los Angeles*,[13] the unions sought to compel the county to bargain the size of caseloads carried by eligibility workers. The Employee Relations Ordinance adopted by the County in 1968 defined the scope of bargaining in terms identical with the definition contained in Section 3505. It also provided for the creation of an Employee Relations Commission to administer and implement the ordinance. The Commission, after hearing evidence on charges filed by the unions, ruled in their favor and ordered the county to "cease and desist" from its refusal to bargain over the caseload issue. When the county continued to refuse, the unions sought and obtained from the superior court a writ of mandate enforcing the Commission's decision, and from the granting of that writ the county appealed.

The appellate court held that the county had a duty under *both* the MMB Act *and* the county ordinance to negotiate over the caseload issue, and sustained the writ. As to the MMB Act, it was apparently assumed by the parties, and certainly by the Court, that caseloads involve a "condition of employment" within the meaning of Section 3505. The county's argument was that its duty to meet and confer under Section 3505 was limited by the "merits, necessity, or organization" exception to the definition of "scope of representation" contained in Section 3504; and that the caseload issue, because it involved a service for which the county was responsible pursuant to state law, fell within that exception. To this the appellate court replied:

> "We do not think section 3504 limits section 3505 in this manner. The problem of interpreting these sections, and their relationship to each other, is that an argument can plausibly be made that *all* management decisions affect areas of mandatory service to the public *and* the working conditions of public employees; or, conversely, that all decisions rendered concerning a public employee labor dispute of necessity will determine the quality of mandated public service *and* the operation of management.
>
> "Section 3505 requires the governing body of the public agency, or its representatives, to 'meet and confer in good faith regarding wages, hours and other terms and conditions of employment....' There is no reason why the public agency cannot discuss those aspects of the caseload problem, even though the 'merits, necessity, or organization' of the service must be outside the scope of the required discussion. Whether such limited discussion is likely to be fruitful is nothing the public agency should prejudge."

The Court's observation that there is an inevitable overlap and interrelationship between decisions affecting wages, hours, and working conditions on one hand and decisions affecting the quality and nature of mandated public service on the other provides a pragmatic approach to the dilemma posed by the exclusionary language of Section 3504. It suggests, accurately, that subject matter which is of natural interest to both parties cannot realistically be divided into rigid categories based upon *either* the description of what is bargainable or the description of what is not. Rather, these two descriptions must be taken as representing policies which may in a particular situation conflict with one another. When they do, it is up to the tribunal to reconcile

them, not on the basis of abstract preconceptions of bargainable categories, but rather on the basis of the particular facts and a weighing of the interests involved. Moreover, as the Court suggests in the second paragraph, it may be impractical in some cases to make that assessment until the parties have at least embarked upon discussions and identified their areas of agreement and disagreement. At that point, if the issue of bargainability persists, it may be that some aspects of the problem will appear to be within the scope of bargaining and others not. An initial presumption of bargainability seems appropriate if the negotiating process is not to be stifled by legalism.[14]

Having decided that the county had an obligation under the MMB Act to bargain over the subject of caseloads, consideration of the effect of the county ordinance and the decision of the Employee Relations Commission was unnecessary, for nothing the county could do by ordinance or agency decision could detract from the scope of bargaining imposed by the state statute. Nevertheless, the Court proceeded to discuss the ordinance, to uphold the Commission's decision, and to confirm the trial court's ruling that the Commission's decision could be enforced by writ of mandate. Finally, the Court considered the county's argument that enforcement of the Commission's order deprives the Board of Supervisors of its "exclusive responsibility to exercise its discretionary governmental powers." The Court's response was that the obligation to negotiate did not carry with it the obligation to agree to any particular proposal. This response provides the point of departure from which the division of the Court of Appeal in San Francisco reached a different result in a case where the issue was not bargainability, but arbitrability. That case is discussed in the final section of this article.

The statutory definition of the obligation to "meet and confer in good faith" provided the basis by which the Court of Appeal for the Third Appellate District recently decided an issue which has troubled public employee bargaining in California for some time: whether a public entity may lawfully pay salary increases retroactive to the date of expiration of a presently existing salary ordinance. In *San Joaquin County Employees' Association v. County of San Joaquin*, (3 Civil 13978, May 10, 1974), the association sought to bargain for such an agreement, but the county refused on the grounds that retroactive payment would constitute an unconstitutional gift of public funds, and (though this contention was raised later) that in any event the county lacked statutory authority to make such a payment. The association brought suit for, and obtained, a declaratory judgment to the effect that such an agreement is lawful, and the Court of Appeal affirmed.

The Court began its analysis with the MMB Act, observing that it "has drawn liberally from the experiences of private management-labor relations," and that retroactivity is a common element of private sector wage negotiations. While public entities confront an obstacle not encountered in the private sector, in the form of budget deadlines, the legislature took that fact into account when it amended Section 3505 in 1971 to provide that the parties would meet "promptly upon request" and endeavor to reach agreement "prior to the adoption by the public agency of its final budget for the ensuring year." It is the budget date (in the case of counties, August 30) rather than the fiscal year date which the legislature set as the target for reaching agreement. Therefore, the Court concluded, the legislature must have contemplated that any pay adjustments negotiated after July 1 (the typical fiscal year date) would be made retroactive to that date, and the county had a duty to meet and confer on the subject.

The significance of the case, apart from the issue which it decides, lies in the Court's determination to give broad, practical scope to the objectives of the MMB Act and, in the Court's language, not to impose any "hypertechnical impediment" to the achievement of those objectives. "The entire import" of the statute, the Court declared, "is to permit as much flexibility in employee-governmental agency relations with regard to all aspects in the employer-employee milieu as a

voluntary system will permit." The Court's treatment of the constitutional and statutory authorization issues, which are outside the scope of this article, proceeded from that premise.

VII. Agreements and Their Enforcement

Section 3505.1 of the MMB Act provides:

> "If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, *which shall not be binding*, and present it to the governing body or its statutory representative *for determination*." (Emphasis added.)

The underlined language is susceptible to two differing interpretations: one, that the written memorandum of understanding is not binding as a contract upon the public agency unless and until the governing body or its statutory representative had made the "determination" to adopt it; and two, that the memorandum of understanding can never give rise to a contractual obligation, but may only provide the basis for unilateral determination in the form of ordinance or resolution.

At the time of the previous article, while courts had not squarely confronted the issue of statutory interpretation, case law supported the former approach. Since that time there have been two developments which bear upon the issue. First, it has been held by the Court of Appeal in Los Angeles that the Winton Act, applicable to labor relations between school districts and their employees, does not authorize binding agreements between a school board and a teachers' negotiating council, and that any agreements reached as a result of meetings and conference sessions must be implemented unilaterally, subject to change (except as otherwise provided by law) at the pleasure of the board.[15] The Winton Act does not contain language referring to agreements, however, and the Court's analysis stresses the difference in legislative history between the two statutes. The Winton Act case therefore has little precedent value for the MMB Act.

Last November, however, another division of the Court of Appeal in Los Angeles issued a decision which raises serious question as to the enforceability of agreements under the MMB Act itself. In *Glendale City Employees Association v. City of Glendale*,[16] a memorandum of agreement approved by the Glendale City Council provided for a salary survey "to place Glendale salaries in an above average position with reference to the jurisdictions compared, with proper consideration given to internal alignments and traditional relationships." The association brought suit complaining that the salary ordinances subsequently adopted by the city were not in accord with the agreed-upon formula. The trial court read the memorandum as a precise commitment by the city to fix wages for the fifth step of each classification at least one penny above the arithmetical average for the fifth step in comparable classifications in other jurisdictions, and issued a writ of mandate to that effect.

The Court of Appeal reversed on two grounds. First it disagreed with the trial court's interpretation of the memorandum. "More like a policy declaration than a formula," the Court stated, "it did not impose on the city's representatives an obligation sufficiently fixed and certain to be compelled by writ of mandate by a court." Up to that point, the decision involved no interpretation of the MMB Act. But, the Court went on, "even if a specific formula were implied in the memorandum, it was not binding on the city council, which had the legislative discretion to adopt a salary ordinance on terms other than those in the memorandum." In reaching that conclusion, the Court relied upon the "which shall not be binding" clause of Section 3505.1.

Plaintiffs in the *Glendale* case have petitioned the Court for a rehearing, and the petition has been granted. Consequently, revision of the Court's opinion remains a possibility.

In *Wilson v. San Francisco Municipal Railway*,[17] decided earlier in 1973, the Court of Appeal in San Francisco interpreted and enforced a memorandum of agreement between the Public Utilities Commission of the City and County of San Francisco and the Transport Workers of America which provided, among other things, for a three-step grievance procedure. The city did not question the validity of the agreement, but the Court, in a footnote, stated:

> "According to inferences which may reasonably be drawn from the record on appeal, and to a statement in appellant's opening brief...the 1968 agreement was executed pursuant to state law (see Govt. Code Secs. 3500, 3501, 3505.1), and after the City's electors had amended its charter to enable such agreements and the City's board of supervisors had authorized the public utilities commission to enter into this agreement with the unions."

The *San Joaquin County Employees Association* case, discussed in the previous section, also deals tangentially with the subject of agreements. The county in that case raised no question concerning the enforceability of agreements in general, but only the legality of an agreement for retroactivity, and the Court does not deal with the former issue. The opinion notes that the Act does not compel a governing body to adopt any agreement reached between government and union negotiators, but that if in the course of bargaining the county "reached the conclusion that pay raises should be retroactive," then "good faith required it to implement the results of negotiations between itself and the Association by making pay raises retroactive...." The implication—that failure to implement the results of negotiations may in itself constitute a violation of statute—suggests an alternative legal recourse for unions complaining that the public employer reneged on its commitment.

VIII. Strikes and Impasse Resolution Procedures

The MMB Act is remarkable among public employee bargaining statutes for its failure to provide procedures designed to encourage the peaceful resolution of disputes. Section 3505.2, the only provision related to dispute settlement, simply states that if the parties fail to reach agreement after a reasonable period of time they "may" agree upon appointment of a mediator and share his costs. In *Alameda County Employees Association v. County of Alameda*,[18] plaintiff association, arguing that the Section would be redundant if its only effect were to authorize an agreement to mediate, suggested that a party's refusal to consent to mediation be considered *prima facie* evidence of failure to "meet and confer in good faith." On that basis, a party refusing to mediate would be required to show good cause, or at least some cause, for its refusal. The trial court rejected that interpretation of the Act and the Court of Appeal affirmed on the ground there was nothing in the statute to suggest that the word "may" was not intended to have its customary meaning, connoting permission rather than requirement.

Under existing law, therefore, adoption of impasse resolution procedures is a matter for local option. The most interesting development in that regard has been the adoption of provisions for compulsory and binding arbitration of certain impasse disputes by the Novato Fire Protection District (through ordinance), San Francisco (by agreement), and Vallejo and Oakland (through charter amendments). *Fire Fighters Union Local 1186 v. City of Vallejo*,[19] currently pending before the California Supreme Court, presents the first test of judicial attitude toward these experiments.

In 1970 the voters in the City of Vallejo adopted a new City Charter which, in Section 809, directed the City Council to provide by ordinance for a system of collective negotiating, including

mediation and factfinding. The scope of negotiations under Section 809 is described in language identical to that used in Section 3505 of the MMB Act: "matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law...." In the same election the voters approved, as a separate proposition, Section 810 of the Charter, which required that the collective bargaining ordinance further provide that "if the parties do not reach agreement within 10 days after the report and recommendations of the fact-finding committee, the issues shall be submitted to arbitration." The remainder of Section 810 describes the procedure for selection of a tripartite arbitration panel; states that the decision of a panel majority shall be final and binding "to the extent permitted by law"; and provides for termination from employment of any employee who participates in a strike.

In August 1971, the City and Firefighters Local 1186 reached impasse on 28 bargaining issues. All 28 were submitted to mediation and then to factfinding in accordance with Section 809, but the City Council rejected the report of the Factfinding Committee, and the union demanded arbitration in accordance with Section 810. The city agreed to submit 24 of the issues to arbitration, but it claimed that four issues were non-negotiable (and therefore nonarbitrable) because they fell outside the scope of representation and/or came within the ambit of the "management rights" exclusionary clause. The four issues were identified as "Manning Procedure," "Personnel Reduction," "Vacancies and Promotions," and "Schedule of Hours." The union sought, and obtained, from a Superior Court in Solano County a writ of mandate directing the city to proceed to arbitration on all four issues, and from that judgment the city appealed. The union appealed concurrently from that portion of the trial court's judgment which denied the union's claim that the arbitration provisions of the charter constituted an "agreement to arbitrate" within the meaning of the California Arbitration Act.

The Court of Appeal affirmed the conclusion of the trial court that "the unilateral act of the city in adopting its charter provision" did not give rise to an "agreement" within the meaning of the Arbitration Act. And it distinguished state and federal cases involving broad construction of arbitration provisions in collective bargaining agreements on the ground that the provisions in those cases either did not contain an exclusionary clause or contained one which was "vague." Its task, the Court said, was to construe the exclusionary language as a matter of statutory interpretation.

While the exclusionary language of the charter was derived from the MMB Act, the *Los Angeles County Employees* case did not control, the court held, since that case involved only the duty to meet and confer and not the duty to arbitrate. A requirement that the County of Los Angeles meet and confer with respect to case loads for eligibility workers did not constitute any intrusion upon management authority, since the requirement did not impose any obligation to agree, whereas arbitration "removes from the elected city council and from the people, through their powers of referendum, initiative, and recall, the power to decide." If the exclusionary clause is to have any meaning, the Court asserted, it "must be intended to exclude from the arbitration process those issues which are strictly governmental in character." On that ground (and expressly declining to reach the question of improper delegation of power), the Court proceeded to the bargaining issues in dispute. The decision at this point is worth quoting:

> "Under the issue termed 'constant manning procedure', the union seeks to add one engine company (which raises questions of amount of equipment and fire station facilities for it) and to increase personnel from 25 to 47. Determination of the total personnel, the amount of equipment and the facilities for its use, together with the number of fire companies and the personnel to be assigned to each engine or truck, seems clearly to be a matter turning upon the 'merits, necessity, or organization' of the fire department. In light of *Los Angeles County*

Employees Assn., we find no problem in submitting these issues to negotiation. But if any effect is to be given to the charter proviso, they are not properly subjects of arbitration.

* * *

"As to the issue of 'personnel reduction,' we hold that the order of layoffs and priorities for re-employment are proper subjects of arbitration. But whether there shall be a reduction of force, and if so its extent, are for governmental determination. As to 'vacancies and promotions,' the entire issue is properly arbitrable except as to the position of assistant fire chief. As to 'schedule of hours,' all issues are arbitrable save insofar as they may extend to the apparently unlikely point of determining the size of the fire-fighting force which, for the same reasons discussed under 'constant manning procedure,' must be deemed an issue not intended to be submitted to arbitration."

As a matter of interpretation, the Court's conclusion that the scope of issues subject to arbitration under Section 810 of the charter is narrower than the scope of issues subject to the meet-and-confer process under Section 809 or under the MMB Act seems questionable. The Court is clearly correct in suggesting that there are policy reasons for distinguishing between the two processes: in the absence of effective strike capability on the part of a union, compulsory arbitration is obviously a more substantial limitation upon management action than the duty to bargain. There are also policy considerations on the other side, however: if compulsory arbitration is intended both as an equitable trade-off for the right to strike and as an effective strike deterrent, it may be seen as being more equitable, and operate more effectively as a deterrent, if it includes all matters subject to negotiation and not just some of them. The question is, how did the voters of Vallejo view the balance between these competing policies when they adopted Section 810 of the Charter. Since Section 810 itself contains no language of limitation with respect to the scope of arbitration, by implication relying on the scope description contained in Section 809, and since the description contained in Section 809 is the same as that contained in the MMB Act, the thrust of the charter provisions appear to run counter to the Court's conclusion.

Beneath the charter interpretation issue, however, lies an issue of more general significance having to do with the proper relationship between court and arbitrator in determining arbitrability of negotiating disputes. In private sector grievance arbitration, of course, the relationship has been explored intensively, and the principle has developed that if the arbitration provision is susceptible of an interpretation which covers the dispute then the court should order arbitration, reserving the right to review the arbitrator's decision against the claim that he exceeded his authority. The California Arbitration Act has been interpreted to embody that principle. Moreover, under that Act there is no appeal from a court's order requiring arbitration. Except in unusual cases, where an "extraordinary writ" may be available, the party ordered to arbitrate must proceed to arbitration and defer judicial review until after the award. It is for these reasons that the union urged upon the courts in the Vallejo case the proposition that Section 810 constitutes an "agreement" within the meaning of the Arbitration Act.

It is difficult to quarrel with the Court's rejection of that proposition. If a union and a public agency enter into a memorandum of agreement providing for arbitration and the memorandum is adopted by the governing body then presumably an "agreement" exists. Perhaps the same can be said for a situation in which the governing body unilaterally adopts an ordinance providing for arbitration, under circumstances in which it is effecting an agreement reached through negotiation. But to say that the adoption of arbitration provisions by the electorate through charter

amendment constitutes an "agreement" to arbitrate surely stretches the usual understanding of that term.

But the California Arbitration Act aside, there are considerations underlying the rule of judicial restraint in private sector arbitration matters which have application, in some respects greater application, to the arbitration of issues disputes in the public sector. One is that if arbitration is to be the expeditious process it is intended to be, courts should not open unnecessarily wide the door to pre-arbitration judicial challenge. Another is that it is often difficult for a court, before arbitration takes place, to determine the contours of the issues and, consequently, the "jurisdiction" of the arbitrator. Both these considerations apply to the Vallejo situation. Negotiation on the issues involved in the case began in April 1971. The trial court's decision in favor of the union was rendered May 1972, and the appellate court's decision came in December 1973. Now, more than three years after the negotiations commenced, the case is being briefed and argued to the Supreme Court. If arbitration is to have a future in public sector labor relations, that is not a particularly auspicious beginning.

The delay would be worthwhile, perhaps, if the appellate court had furnished guidelines for determining in the future the arbitrability of disputes under the Vallejo charter provisions, or under the provisions of other, similar legislation. But the "strictly governmental" test is surely not of much value. Devoid of empirical content (in dealing with government employees, after all, what is not "governmental"?), it is more a statement of conlcusion than a tool of analysis. Indeed the court, having adopted the test, proceeds to ignore it in discussing specific issues, reverting instead to the language of the exclusionary clause itself. That clause, of course, is scarcely more illuminating, and the Court's attempt to distinguish private sector arbitrability cases on the ground that they involve "vague" exclusionary clauses is singularly unpersuasive.

But the Court's difficulty in formulating guidelines is understandable, given the nature of the problem. In the first place, any attempt to deal with what is arbitrable and what is not in terms of mutually exclusive categories of behavior is doomed to failure, for reasons discussed earlier in connection with the scope of bargaining. In the second place, collective bargaining and issues arbitration are together a dynamic process, in which the positions of the parties and their interaction with the arbitrator is in a state of constant flux. Proposals get modified and non-negotiable positions become negotiable as the parties sort out their priorities, develop understanding of the implications of their positions, and perceive alternative solutions which they may not previously have considered. To determine what is arbitrable and what is not against this changing context is a bit like trying a balancing act in the middle of a rushing torrent.

Consider, for example, the issue of "Manning Procedures." The Court states that under this issue the union seeks to add one engine company and to increase personnel from 25 to 47, and that the proposal may involve additional equipment and fire station facilities. If that were the issue, and if an arbitrator were to accept the union's position, the decision might be seen as intruding rather deeply into the policy-making domain. In the course of factfinding, however, the union modified its position and the recommendation of the Fact Finding Committee was that the manning schedule presently in effect (i.e., eight engine companies manned with three firefighters each per shift) be maintained without change during the term of the agreement, any shortages in manpower being filled by overtime assignment.

Suppose the manning issue had gone to arbitration (with full reservation of objections as to arbitrability) and the arbitrator had reached the same result as the Fact Finding Committee. Would the arbitrator have invaded the province of "Merits, Necessity, or Organization"? Would the answer not depend, at least in part, upon the nature of the arguments and evidence before the arbitrator, specifically with reference to the impact of the proposal upon (1) wages and working conditions of the employees, and (2) policy concerns of the public agency which transcend

wages and working conditions? If, for example, the union sought to justify particular manning procedures solely on the basis that they best served the public interest in fire protection, and if the arbitrator sustained the union's position on that ground, the balance would appear to weigh heavily against the arbitrator's decision as invading the province of governmental policy-making. If, on the other hand, the union were able to demonstrate a substantial relationship between manning and the workload and safety of employees (e.g., that if the number of firefighters per company were reduced, the firefighters who remain would have a heavier workload, with greater risk), it would seem reasonable to impose upon the public agency a greater burden of demonstrating why compliance with the union's request might prejudice some transcendent policy concern.

Such an evaluation is difficult prior to the completion of arbitration. Moreover, there is always the possibility that the arbitrator, or the arbitrator together with the parties, may arrive at a solution which differs from any of the prior positions of the parties and which is therefore not subject to prior evaluation at all. Suppose, for example, that an arbitrator dealing with the manning issue found merit in the city's argument that there might be policy reasons for altering the existing manning schedule during the life of the agreement, and either imposed, or induced the parties to agree upon, an alternative which made allowance for such a contingency. That kind of compromise is endemic to the arbitral process, and it should be the policy of the law to encourage it. To be sure, there may be occasions when the issues are sufficiently defined at a pre-arbitral state to warrant judicial determination of arbitrability without proceeding to arbitration. In such cases, pre-arbitral determination may actually save time and expense to the parties. But such occasions are likely to be rare, and the twin policies of encouraging expeditious arbitration and avoiding premature judgment should serve to support a policy of judicial restraint with respect to issues arbitration similar to that which exists in the case of grievance arbitration at the present time.[20]

IX. Conclusions.

Appellate decisions serve to confirm the general conclusions reached in the previous article. The Act is desperately in need of legislative attention. The relationship between state law and local charter or ordinance provisions remains in need of clarification, particularly as regards the status of civil service or prevailing wage provisions. A forthright acceptance of the principle of exclusive recognition within bargaining units, based on employee choice as determined by secret ballot election or other appropriate procedure, is still required. The necessity of a state labor relations agency is underscored by the opinions. It should have jurisdiction extending at least to matters involving protection of organizational rights, representation issues (including unit determinations and elections), and enforcement of the duty to bargain. Local agencies should be allowed to establish alternative procedures provided they are neutrally administered and subject to review by the state agency for conformity with state policy. The issue of union security has to be clarified, as does the power of a local agency to enter into binding agreements, including provisions for grievance arbitration. Finally, of course, the statute must confront and resolve state policy with respect to the strike issue and with respect to alternative, or supplementary, dispute resolution procedures. In a subsequent article I intend to deal with the recommendations of the Assembly Commission on these various points..

1. Govt. Code Sec. 3501(c).

2. 24 Cal.App. 3d 400, 101 Cal.Rptr. 69 (1972).

3. 24 Cal.App. 3d 289, 101 Cal.Rptr. 78 (1972).

4. *Social Workers Union, Local 535, SEIU, AFL-CIO et al., v. Alameda County Welfare Department*, S.F. 23015 (Super. Ct. No. 395290), Apr. 30, 1974.

5. Section 3507.1 provides that: "*In the absence of local procedures* for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations *for mediation or for recommendation* for resolving the dispute." (Emphasis added.)

6. 12 CPER 1, 7 (March 1972).

7. Fifth Appellate District, 5 Civil 1511 (Sept. 28, 1972). The Court's opinion, officially unpublished, is reproduced at 16 CPER 57.

8. See *supra*, note 5.

9. Third Appellate District, 3 Civil 13890 (Oct. 1, 1973). The decision, not officially published, is reproduced at 20 CPER 79.

10. 33 Cal. App. 3d 825, 100 Cal. Rptr. 392 (1973).

11. The opinion is subject to the criticism, however, that the Court went beyond the record in making its factual determinations.

12. 28 Cal. App. 3d 424, 104 Cal. Rptr. 619 (1972).

13. 33 Cal. App. 3d 1, 108 Cal. Rptr. 625 (1973).

14. The Court uses unfortunate language in the second paragraph when it talks about the public agency discussing "those aspects" of the caseload problem (presumably those having to do with terms and conditions of employment), "even though the 'merits, necessity, or organization' of the service must be outside the scope of the required discussion." Insofar as the language implies that a particular aspect of the problem may be allocated into one category or another on some a priori basis, instead of on the basis of balancing the policies expressed, the implication is inconsistent with the Court's previously established premise.

15. *Grasko v. Los Angeles City Board of Education*, 31 Cal. App. 3d 290 (1973).

16. No. 544 GERR; B-8.

17. 29 Cal. App. 3d 870, 105 Cal. Rptr. 855 (1973).

18. 30 Cal. App. 3d 518, 106 Cal. Rptr. 441 (1973).

19. 35 Cal. App. 3d 894, hearing granted by Sup. Ct.

20. Similar criticism may be leveled at the Court's treatment of the remaining issues. Under the heading of "Personnel Reduction," the union proposed initially that if the City Council decides to reduce the Fire Department personnel, a representative of the city would first confer with the union "for the purpose of bargaining with respect to any reduction." The proposal also stated that "The burden of proof shall rest with the city and in event a reduction is necessary...the employee with the least seniority shall be laid off first." According to the union's brief, the "burden of proof" language was clarified by the union in factfinding proceedings to mean that the city would have the responsibility to set forth its reasons for any intended reduction. The Fact Finding Committee recommended adoption of the requirement that the city confer prior to any reduction, and stated: "That after, if the parties are in agreement that such reduction is necessary in order to comply with the decision of the City Council, layoffs shall be in accordance with seniority...." The language "if the parties are in agreement" implies that reduction without union consent would be impermissible, and perhaps that was the intent, in view of the Committee's recommendations on manning. To that extent, the "Personnel Reduction" and "Manning" issues are quite similar. The Court implies, however, that the union is not entitled to arbitrate even the question whether the city should be required to bargain with respect to the decision to reduce personnel. Since it would be possible for the agreement to require that the city must bargain over such a decision without also requiring that it submit the issue to arbitration in the event of disagreement, the Court seems to ignore its own distinction between negotiation and bargaining.

The "Vacancies and Promotions" issue is of a quite different order. The union's demand was for a contract provision requiring vacancies to be filled by promotion from within the department, subject to the grievance procedure in the event the city claimed an individual was not qualified for the job. The Fact Finding Committee

adopted the proposal with a proviso excluding the Deputy Fire Chief and appointments made by the City Council. While the city initially took the position that the entire issue was non-arbitrable, its brief to the Court of Appeal focused upon the claim that the newly created position of Assistant Fire Chief, which would have been subject to the contractual promotion procedure on the basis of the Committee's recommendation, was in fact outside the bargaining unit and therefore beyond the scope of the union's representation.

B

ANNOTATED SUBJECT INDEX

CONTENTS

TAB B

ANNOTATED SUBJECT INDEX

PUBLIC SECTOR LABOR RELATIONS COURT DECISIONS

In this tab the reader finds an annotated index of bargaining issues and subjects that have been dealt with by California courts. Key court decisions involving the scope of bargaining are cited and serve as a convenient and, hopefully, useful reference guide for the student as well as the practitioner.

The cases are largely those which have been ruled upon at either the appellate or supreme court level, and most of them are reproduced in full in Tab C of this manual. In some instances, superior court cases have also been referenced, but only when the case itself is on appeal to a higher court or when a particularly pertinent interpretation has been made on a subject pending a decision in another case at a higher court.

It must be stressed that this index is <u>not</u> exhaustive of all subject matter which might be considered within the scope of bargaining under the various California public sector bargaining statutes. It deals <u>exclusively</u> with subjects that have been cause for litigation and, for the most part, appealed. Therefore, many or perhaps most subjects that are commonly accepted as being within the scope of bargaining are not included here.

The reader will note that many of the important cases dealing solely with recognition are not referenced and/or commented upon in the index.

The reason for this is practical: While uniquely within the scope of bargaining under the MMBA, procedures for recognition are at this point, for most jurisdictions, a moot question. The reader with a particular interest in this area will find the landmark decisions relating to recognition under the MMBA, discussed in considerable detail in the Grodin article, in the appendix to Tab A.

ADMINISTRATIVE RELIEF, EXHAUSTION OF

The California Supreme Court in *Glendale City Employees' Assn. v. City of Glendale (1976)* ruled that law suits are not necessarily barred "for failure to exhaust administrative remedies." The employees association had brought suit against the city to compel it to make wage and salary adjustments as agreed upon in a memorandum of understanding. The association did not utilize a grievance procedure established by city ordinance before seeking judicial relief.

The court, in permitting the legal action, stated that the "requirement of exhaustion of administrative remedies does not apply if the remedy is inadequate." In looking at the city's grievance procedure the court found it inadequate in that it applied to the resolution of disputes concerning the interpretation or application of ordinances resulting from a memorandum of understanding (MOU). In this case, the grievance concerned the binding nature of the MOU proper. Secondly, the grievance procedure was considered suitable to the resolution of "minor individual grievances." The court stated that

> A procedure which provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact is manifestly inadequate to handle disputes of the crucial and complex nature of this instant which turns on the effect of the underlying memorandum of understanding itself.

The appellate court in *Huntington Beach Police Officers Assn. v. City of Huntington Beach (1976)* cited the reasoning in the *Glendale*

case in upholding the right of the employee association to seek a writ of mandate before exhausting administrative remedies. In addition to using the *Glendale* criteria of inadequacy and inapplicability of the grievance procedure in a specific case, the court in *Huntington* also used the criterion of futility of seeking administrative relief as a reason for litigation before exhausting administrative remedies. The court held that "where the administrative agency has made it clear what its ruling would be, idle pursuit of further administrative remedies is not required by the exhaustion doctrine."

AGENCY SHOP

The agency shop is now not permitted in California local government agreements. In April, 1976, the California Supreme Court refused to review the decision of the appellate court in the case of *City of Hayward v. United Public Employees International Union, AFL-CIO, Local 390 (1976)*, which reversed the superior court decision. The question, according to the appellate court, was "whether the MMBA permits the creation of an agency shop in an agency of local government."

Judge Christian set forth the principle that "without common law collective bargaining rights, public employees enjoy only those rights specifically granted by the statute." In referring to the Meyers-Milias-Brown Act (MMBA), the judge noted that "the MMBA does not explicitly refer to agency shop agreement; no reported decision has previously addressed the issue of the legality of this type of agreement."

In deciding the legality of the agency shop provision, Section 3505 of the MMBA was cited as providing that "...public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency."

The court concluded that the right not to join or participate cannot reasonably be reconciled with an agency shop provision and stated that "...[s]uch union security devices as the agency shop must await authorization by the Legislature."

ARBITRATION--INTEREST AND RIGHTS

When arbitration is used as part of an impasse procedure to determine the terms of a new labor agreement, it is known as "interest" arbitration. When issues pertaining to the interpretation of an existing agreement are arbitrated, that process is known as "rights" arbitration.

Most of the rulings of California courts involving arbitration in the public sector have concerned themselves with the legality and scope of interest arbitration. At least one recent decision, however, appears to address the legality of grievance, or rights, arbitration. Important distinctions have also been drawn between what is permissible in general law jurisdictions and a city or county governed by charter.

Charter Cities

The California Supreme Court decision in *Fire Fighters v. City of Vallejo (1974)* validated the legality of using arbitration as an impasse procedure under a city charter provision for issues within the scope of negotiations under the Meyers-Milias-Brown Act. The court commented on "... the strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration." Noting further that a number of supreme court decisions of other states had found the process to be constitutional, the California court concluded that "to the extent that the arbitrators do not proceed beyond the provisions of the Vallejo charter there is no unlawful delegation of legislative power."

In a case (later sent back to the appellate court by the California Supreme Court) the appellate court, deciding *San Francisco Fire Fighters v. City and County of San Francisco (1976)*, limited the application of the Vallejo decision. The court found that an agreement between the city and the fire fighters which provided for arbitration of certain disputes was an illegal delegation of authority in view of the San Francisco Charter. The court pointed out that a city charter is a city's supreme law. The San Francisco Charter delegates to its Fire Commission the authority and duty to, among other things, prescribe rules and regulations for governing its employees. The court further noted the absence of arbitration provisions in the MMBA. However, the inclusion of the provision that "nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system... " was seen as decisive. The city charter in effect created a civil service for the fire fighters and gave the Fire Commission exclusive authority to prescribe its own rules and regulations. The court concluded that "neither the City's mayor, nor its board of supervisors, nor its fire commission, had authority to approve the Memorandum's provisions for arbitration of grievances concerning the fire commission's rules and regulations."

Taking note of the *Vallejo* decision, the court in *San Francisco* pointed out that the Vallejo City Charter explicitly provided for

arbitration of certain disputes. Therefore, "while there seems to be no doubt that the City of San Francisco might have agreed by appropriate charter enactment, to the Memorandum's arbitration procedure...the Meyers-Milias-Brown Act nowhere permits that result by any lesser, or different, method."

The California Supreme Court reviewing the above case remanded it to the appellate court for a rehearing in light of the *Bagley v. City of Manhattan Beach* decision.

For discussion of the rights of public transit district employees regarding interest arbitration, see *Los Angeles Metropolitan Transit Authority v. Railroad Trainmen (1960)*.

General Law Cities

Cities that are not chartered, i.e., general law cities, are subject to provisions in the California Government Code specifying their structure and distribution of authority. The California Supreme Court, in deciding the legality of a proposed initiative for binding arbitration for fire fighters in *Bagley v. City of Manhattan Beach (1976)*, ruled that such an initiative would be invalid in a general law city. The court stated:

> The language of Government Code section 3605 (giving the city council the authority and duty to fix wages), the provisions of the Meyers-Milias-Brown Act, and the Legislature's repeated refusal to enact any law permitting general law cities to fix salaries by arbitration compel the conclusion that the Legislature intends the city council of a general law city to fix compensation, precluding the fixing of compensation by arbitrator.

In a footnote, the court states that charter cities are not subject to Section 3605 of the Government Code. What meaning this may have for the *San Francisco Fire Fighters* case remains to be seen.

BINDING CONTRACTS

Concerning the binding nature of memoranda of understanding negotiated under the Meyers-Milias-Brown Act, the California Supreme Court stated in *Glendale City Employees Assn. v. City of Glendale (1975)* that "once the governmental body votes to accept the memorandum, it becomes a binding agreement." The court looked closely at Section 3505.1 of the MMBA, which provides that after agreement is reached by the parties "they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination." If the memorandum is not binding except on presentation to the governing body, it was concluded, then "favorable 'determination' engenders a binding agreement."

The legislative intent was also felt to support interpretation that adopted memoranda of understanding were binding. The MMBA was designed for the purpose of resolving disputes, a purpose not served if one party to a negotiated agreement could repudiate that agreement.

The supreme court also looked at an appellate court decision on a case arising under the narrower George Brown Act (*East Bay Municipal Employees v. County of Alameda, 1970).* In this case the appellate court upheld an agreement between the county and the union covering the reinstatement of striking employees. The appellate court expressed the opinion that "the modern view of statutory provisions

similar to the Brown Act is that when a public employer engages in such meetings with the representatives of the public employee organization, any agreement that the public agency is authorized to make and, in fact, does enter into, should be held as valid and binding to all parties."

Considering the above decision, the supreme court in *Glendale* concluded that "if under the more limited provisions of the George Brown Act, which does not specifically refer to an 'agreement reached by the representatives of the public agency and a recognized employer organization,' nevertheless the negotiation and agreement by such parties are 'valid and binding,' we conclude a fortiori that the memorandum of understanding reached under the broader Meyers-Milias-Brown Act is indubitably binding."

The City of Glendale subsequently petitioned the United States Supreme Court to review the case on the basis that the California Supreme Court's decision had violated the doctrines of due process and separation of powers. The United States Supreme Court declined to hear the case (1976).

The binding nature of agreements (and ordinances) reached pursuant to a strike settlement has been affirmed by the California Supreme Court as well as appellate courts, given appropriate authority by the parties involved. For further discussion, see *City and County of San Francisco v. Cooper (1975)* and *East Bay Municipal Employees v. County of Alameda (1970)*.

BROWN ACT--RELATIONSHIP TO MEYERS-MILIAS-BROWN ACT

The George Brown Act was originally passed in 1961 and included in the Government Code, Sections 3500-3509. The legislative revisions of 1968 and 1971 reserved those sections for the Meyers-Milias-Brown Act. The George Brown Act was reenacted as Government Code Sections 3525-3536. It is limited to the relationship between the state government and state employees (including higher education).

The scope of representation as defined by Section 3529 includes "all matters related to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." It may be noted that this language is identical to that used in Section 3504 of the Meyers-Milias-Brown Act.

The California Court of Appeal in *Lipow v. Regents of the University of California (1976)* was called upon to interpret sections of the Brown Act in regard to good faith meeting and conferring. Explaining the newness of the legal sections involved and, therefore, the lack of direct case law, the court stated, "we look for guidance therefore to the companion chapter dealing with public employee relations enacted in 1961. (Government Code ss. 3500 et seq.)."

The now repealed Winton Act along with the National Labor Relations Act (NLRA) were also used to elucidate the meaning of the Brown Act. In defending the propriety of using the federal act and related case law, the court in *Lipow* cited the court's opinion in another

MMB case, *Social Workers' v. Alameda County Welfare Dept. (1974).* The *Alameda* court stated that the courts "have often looked to federal statutes for guidance in interpreting state provisions whose language parallels that of federal statutes."

The principle of parallel language along with the explicit parallelism of the scope sections of the MMBA and the Brown Act appear to be shaping the scope of bargaining under the Brown Act to the parameters that are developing for scope under the MMBA.

CASELOAD

See WORKLOAD

CHARTER LABOR RELATIONS PROVISIONS

The significance of local charters to public sector labor relations has been demonstrated in *Bagley v. City of Manhattan Beach (1976)*, where the California Supreme Court ruled that a general law city should not by ordinance delegate decision-making authority which the state legislature has placed with a specific official or government body. Thus a proposed ordinance providing for binding arbitration of unresolved interest disputes was declared invalid.

In *Fire Fighters v. City of Vallejo (1974)*, the supreme court was favorable to the arbitration process. The charter of that city provides for the negotiation process. The authority for arbitration was contained in a charter amendment which had been added by referendum after the city council had rejected arbitration proposals.

The necessity of specific charter authority for processes such as arbitration are currently under reconsideration by the appellate court. In its 1976 decision in *San Francisco Fire Fighters v. City and County of San Francisco*, the court of appeal decided that where a charter gives exclusive decision-making authority to a specific office or body, "the City's mayor and Board of Supervisors whose authority is derived from the Charter may not reasonably, or as a matter of law, have authority to do an act, or make an agreement, in derogation of the Charter." Examining the MMBA, the court found "...no grant of authority for the delegation of power here at issue in paragraph (d) or elsewhere in that section of the Act [Section 3507]." The court concludes that "while there seems to be no doubt

that the City might have agreed by appropriate charter enactment to the Memorandum's arbitration procedure...the Act nowhere permits that result by any lesser, or different, method."

The case was subsequently sent to the California Supreme Court for review. That court remanded the case to the appelate court for rehearing in light of the appeal court's decision in *Bagley v. City of Manhattan Beach (1976).*

A recent superior court decision, *San Diego County Deputy Sheriff's Assn. v. County of San Diego (1976)* addressed the right of an employee organization to meet and confer regarding proposed charter amendments which affect items within the scope of negotiations. Where the items are not preempted by the county charter or clearly within the control of management, proposals once "agreed upon or recommended by an agency of County government and adopted by the Board, then...must be presented to the employees who will have the right to 'meet and confer' if the subject is within the scope of representation."

The case of *AFSCME Local 119 v. County of Los Angeles (1975)* is the leading case in regard to the management obligation to bargain over labor relations matters regulated by a charter-created civil service commission. For further discussion, see JOB CLASSIFICATION UNDER CIVIL SERVICE SYSTEMS, and LOCAL RULES AND REGULATIONS.

CONDITIONED AGREEMENT

The appellate court in *Placentia Fire Fighters v. City of Placentia (1976)* upheld the trial court's decision in deeming the actions of the city not in violation of the MMBA when the city withdrew from certain positions it had taken early in the negotiations process. In this case, both sides had agreed at the beginning of negotiations that binding agreement on any individual item would be conditioned by overall settlement of all issues. Thus a change in position after impasse had been reached, along with unilateral implementation of actions which had been considered in negotiations, were held not to be evidence of bad faith bargaining.

See UNILATERAL IMPLEMENTATION, GOOD FAITH BARGAINING

CONTRACTING OUT

Although there are no appellate or supreme court decisions directly concerned with the issue of contracting out under the MMBA, the matter was addressed in *Fire Fighters v. City of Vallejo (1974)*. The California Supreme Court observed that federal cases (particularly *Fibreboard Corp. v. Labor Board (1964)* indicate that where "...a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and layoff employees is subject to bargaining."

In the *Fibreboard* case, the U.S. Supreme Court said that unions may demand the right to bargain in order "to prevent possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit."

See LAYOFFS, also TEMPORARY EMPLOYEES.

DISCIPLINE

There are as yet no California appellate or supreme court decisions which directly involve discipline clauses negotiated under the MMBA. A current case awaiting a decision by the court of appeal has implications for negotiating disciplinary actions. The Los Angeles County Superior Court in *Los Angeles County Employees Assn. v. Los Angeles County Civil Service Commission (1976)* ruled that the Civil Service Commission was obligated to meet and confer with the employee association before adopting rules affection association members. This decision has been appealed.

As major discipline rules are often within authority of civil service commissions, a ruling endorsing the obligation of the commissions to meet and confer would further open discipline actions to negotiation. For negotiability of personnel rules not set by civil service commissions, see *Fire Fighters v. City of Pleasanton (1976)*.

Negotiation of discipline clauses must be done with cognizance of other applicable statutes and court decisions.

The finding of the appellate court in *Grier v. Alameda-Contra Costa Transit District (1976)* supported the principle that unless there is statutory exemption, general statutes have primacy over the statutory right of contract in the public sector unless the jurisdiction is specifically exempted from statutory coverage. In this case, a contract provision dealing with tardiness fines that were greater than those permitted by the Labor Code was declared invalid.

The case of *Skelley v. State Personnel Board (1975)* serves to indicate the need for recognition of requirements for constitutional due process. This case concerns an employee covered by the California State Personnel Board (S.P.B.), who had been dismissed by the State Department of Health Care Services after a hearing before a representative of S.P.B. The court ruled that the dismissal procedure, as defined in the appropriate California statutes, denied the employee "due process of law, as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, and Article 1, sections 7 and 15, of the California Constitution." The penalty of dismissal was ruled to be "excessive and disproportionate to the misconduct on which it was based."

The court, after examining federal due process cases, culled certain procedural rights which must be accorded the employee before discharge or suspension is imposed. These minimal "preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (For further discussion see companion module, *Contract Administration in Public Sector Collective Bargaining.*)

DISCRIMINATION AND PROTECTED ACTIVITY

See UNION PARTICIPATION, MANAGEMENT INCENTIVE PAY

DUES CHECKOFF

A dues checkoff system for the members of the recognized employee organization is permitted if such a measure is adopted by the public agency after meeting and conferring with representatives of the employee organization.

The court of appeal in *Sacramento County Employees v. County of Sacramento (1972)* found the authority for such a measure in Section 3507 of the MMBA, which permits a public agency to adopt rules and regulations for matters "as are reasonably necessary to carry out the purposes of this chapter" after consulting with the employee organizations.

The court saw limiting dues deductions to the recognized employee organization as serving the principle of extending exclusive recognition. The purposes of the MMBA would be served since "by not allowing dues deductions to competing organizations some insulation could be furnished to recognized employee organizations from constant challenges from competing organizations and help provide a more stable framework within which the public employer and a recognized organization can meet and confer."

DUTY TO BARGAIN

The Meyers-Milias-Brown Act mandates public employers to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations." The act further requires of management to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (Section 3505)

The appellate court's decision in *Los Angeles County Employees v. County of Los Angeles (1973)*, in which the county was ordered to negotiate on maximum caseload for social workers, served to underscore the duty to negotiate on matters affecting conditions of employment even if the particular issue also involves matters concerning the "merits, necessity and organization of service," or policy items which are reserved to management decision.

The court pointed out that the problem of illegal delegation did not rule out negotiation, since even though the law may require government officials "to negotiate on a particular subject...it does not...extend to requiring them to reach a specified result pursuant to such negotiation...negotiation does not mean agreement; neither the state law or the local ordinance equates negotiation with compulsory collective bargaining."

In *Lipow v. Regents of the University of California (1976)* the California Court of Appeal looked closely at the MMBA along with the NLRA and the Winton Act to arrive at an understanding of Section

3530 of the Government Code (the Brown Act). Noting the definition of negotiating in good faith in the MMBA (see GOOD FAITH BARGAINING) and the Winton Act, the court noted that "the duty to negotiate refers...only to the necessity of meeting and conferring in good faith. Neither side is under any compulsion to agree as to any matter in dispute under our state statutes." The court points out the propriety and precedent for looking at federal law and decisions "in interpreting state provisions whose language parallels that of the federal statutes." The opinion cited the United States Supreme Court in *National Labor Relations Board v. Katz (1962)*, in which the Court held that an employer's unilateral change in conditions of employment under negotiation violates the NLRA in that it circumvents the duty to negotiate. Such circumvention frustate[s] the objectives of [the NLRA] much as does a flat refusal." However, distinctions are made showing that in some cases unilateral actions, made after notice and consultation, may not be construed as disparaging the union (and thus not violating the duty to bargain).

In *Fire Fighters v. City of Pleasanton (1976)*, the California Court of Appeal emphasized the broad scope of negotiation found within the MMBA. Under Section 3504 the parties must bargain over all matters affecting the employer-employee relationship which includes, but is not limited to, wages, hours and other terms and conditions of employment in arriving at its decision.

The appellate court, partially upholding the trial court, ordered the city of Pleasanton to meet and confer in good faith with the union

before adopting amendments that changed existing personnel policies and practices affecting conditions of employment. Some perfunctory meetings with the union prior to adoptation of the amendments were not felt to have fulfillled the duty to bargain under MMBA.
See UNILATERAL IMPLEMENTATION.

FACTFINDING

While not specifically provided for in the MMBA, factfinding as an impasse procedure has been incorporated into the employer-employee relations provisions of some jurisdictions. The factfinding provision of the Vallejo City Charter was referred to in *Fire Fighters v. City of Vallejo (1974)*.

The factfinding reference in *Bagley v. City of Manhattan Beach (1976)* indicated that factfinding over certain issues (e.g., wage setting) might not be considered valid in general law cities. This finding has generated considerable discussion in the field as factfinding, by definition, does not involve a "binding delegation of authority" which was considered illegal by the court in *Bagley*.

GOOD FAITH BARGAINING

A definition of good faith meeting and conferring is found in Section 3505 of the MMBA: representatives of both the public agency (if not the agency itself) and of the recognized employee organization" have 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. . . ."

Under the NLRA and local California ordinances, numerous criteria have been developed to define good faith bargaining under the MMBA. The California Supreme Court and appellate courts have dealt with portions of this obligation.

See DUTY TO BARGAIN, MEET AND CONFER.

IMPASSE PROCEDURES

Arbitration

General law cities may not delegate to an arbitrator decision-making areas given by the California Government Code to legislative bodies or commissions. *(Bagley v. City of Manhattan Beach, (1976).*

Charter cities may provide for binding arbitration by charter enactment. *(Fire Fighters v. City of Vellejo, 1974: San Francisco Fire Fighters v. City and County of San Francisco, 1976)*

See ARBITRATION

Factfinding

While not specifically provided for in the MMBA, factfinding provisions are contained in many agreements and ordinances in California. Their use may be questionable in general law cities. *(Fire Fighters v. City of Vallejo, 1974; Bagley v. City of Manhattan Beach, 1976)*

See FACTFINDING

Mediation

Mediation as an impasse procedure is specifically permitted by Section 3505.2 of the MMBA. Mediation is permitted, but not mandated *(Alameda City Employees' Assn. v. City of Alameda, 1973).*

See MEDIATION

JOB CLASSIFICATION UNDER CIVIL SERVICE SYSTEMS

The California Court of Appeal in *AFSCME v. COUNTY OF LOS ANGELES (1975)* found that the county was not required to negotiate job classifications as the county charter and the county employee relations ordinance preempted the subject reserving it to the discretion of the Los Angeles Civil Service Commission.

In its ruling, the court noted that the county was not in violation of the MMBA and in enacting its employee relations ordinance, it "determined that the best interests of County Government would be best served, for the time being at least, if the Civil Service Commission retained job classification free of negotiation...."

The court additionally stated that decision was not being made on the negotiation of "wages, hours and other terms and conditions of employment within the job classifications after the civil service commission makes such classifications." It was pointed out that "on these latter subjects, the Director of Personnel does, under the provisions of the Charter, have the authority to negotiate."

The matter of the obligation to bargain over issues reserved to civil service systems has not yet been settled. A Los Angeles superior court in *Los Angeles County Employees Union v. Los Angeles County Civil Service Commission (1975)* found that while the County Director of personnel was not obligated to bargain with the employee groups on matters which are by charter within the purview of the Civil Service Commission, the Commission itself is so obligated.

The case was appealed. The appellate court decision is now pending.

LAYOFFS

Personnel reductions are negotiable to the extent that they affect the working conditions and safety of remaining employees or result from a decision to contract out.

The California Supreme Court in *Fire Fighters v. City of Vallejo* looked at cases under the NLRA in determining that decision to lay off one or more employees is "not alone sufficient to render the decision itself a subject of bargaining." From federal cases the court inferred that "an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the timing of and the number and identity of the employees affected."

In the context of the particular case under consideration, the court decided that "to the extent that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining...."

In regard to contracting out bargaining unit work, the court stated "the decision to subcontract and lay off employees is subject to bargaining."

See also CONTRACTING OUT.

LOCAL RULES AND REGULATIONS

The California Court of Appeal in *Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976)* expressed the opinion that the legislature had not meant to preempt all aspects of labor relations in the public sector with the passage of MMBA. However, "we can not attribute to it an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the MMB Act."

A city resolution which exempted work schedules from negotiations was ruled to be "in conflict with the declared purpose of the MMB Act and the mandatory language of section 3505...and therefore invalid."

The court, surveying earlier California public sector cases, drew on the principle that "[w]ith respect to matters of statewide concern, charter cities are subject to and controlled by applicable general state law if the Legislature has manifested an intent to occupy the field to the exclusion of local regulation....Labor relations in the public sector are matters of statewide concern subject to state legislation in contravention of local legislation by chartered cities."

The court in *Huntington* also commented on the *AFSCME v. County of Los Angeles (1975)* decision (cited below), differentiating between provisions of a city charter regulating a civil service system (which may be exempted) and other types of exemptions from negotiations by local rules and ordinances.

As pointed out in *AFSCME v COUNTY OF LOS ANGELES (1975)*, the MMBA specifically states that the act is not meant to supersede existing state laws, local charters, or local rules and ordinances which provide for civil service systems or other systems "for the administration of employer-employee relations in accordance with the provisions of this chapter." (Section 3500) The appellate court, in declaring job classification exempt from negotiations with the Los Angeles County Department of Personnel, stated that "the MMBA and the [Los Angeles County] ERO specifically provide that a governmental body when it enacts legislation to permit union bargaining, may by preemptions reserve subject matter from negotiations."

The implications of this decision may be modified as a result of the case of *Los Angeles County Employees Union v. Los Angeles County Civil Service Commission (1975)*, in which a superior court mandated negotiation of classification with the Los Angeles County Civil Service Commission. This decision is to be reviewed by the appellate court.

See JOB CLASSIFICATION, CHARTER AMENDMENTS

MANAGEMENT INCENTIVE PAY

Incentive pay extended to all members of management except those who choose to be represented by employee organizations was declared illegal by the California Court of Appeal in *San Leandro Police Officers Assn. v. City of San Leandro (1976).* The court, finding the action discriminatory under Section 3506 of the MMBA, ordered the city to "eliminate the discrimination by any lawful means." The council was allowed the discretion to decide the particular method of doing so and "remain/ed/ free to extend or eliminate the program, but it /could/ not discriminate among its employees for exercising their rights under the Meyers-Milias-Brown Act."

See UNION PARTICIPATION

MANAGEMENT RIGHTS

In the language of the Meyers-Milias-Brown Act, the exclusion of "merits, necessity, or organization of any service or activity provided by law or executive order" from bargaining under the MMBA (Section 3507), may be taken as the public sector equivalent of management's rights or prerogatives. Decisions solely affecting such issues are reserved to management.

The California Supreme Court in *Fire Fighters v. City of Vallejo (1974)* deduced that the California "legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of 'wages, hours and working conditions' to include more general managerial policy decisions."

A similar position was taken by the court of appeal in *Los Angeles County Employees Assn. v. County of Los Angeles (1973).*

See "MERITS, NECESSITY AND ORGANIZATION OF SERVICE", DUTY TO BARGAIN AND UNILATERAL IMPLEMENTATION.

MANNING REQUIREMENTS

Manning requirements are within the scope of negotiations under the MMBA to the extent that they affect safety or other working conditions. The California Supreme Court in *Fire Fighters v. City of Vallejo (1974)* decided this issue.

See WORKLOAD.

MEDIATION

Mediation is permissible under the Meyers-Milias-Brown Act which provides that if the parties fail to reach an agreement within a reasonable time, they together may agree upon a mediator.

However, given that both parties have met and conferred, the refusal to submit to mediation does not violate the MMBA. "There is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation," concluded the appellate court in *Alameda County Employees' Assn. v. County of Alameda (1973)*. Focusing on the MMBA phrase "may agree on the appointment of a mediator," the court ruled mediation to be "an option granted to the parties in the endeavor to reach an agreement if both parties are so disposed." Furthermore, the court ruled that there was no statutory requirement that reasons be specified for a refusal to mediate.

"MEET AND CONFER," "MEET," AND "CONSULTATION IN GOOD FAITH"

"We perceive no basis for distinguishing between the term 'consultation in good faith' as used in section 3507, and the 'meet and confer in good faith' process defined in section 3505" stated the appellate court in *Fire Fighters v. City of Pleasanton* (1976). Considering the broad scope of representation of the MMBA and the declared purpose of the act, the court ordered the city to engage in meeting and conferring in good faith, in the manner prescribed by the act, about proposed personnel amendments (items for which the MMBA prescribes "consultation in good faith.")

Subsequently the Superior Court for the County of San Diego, in *San Diego Sherriffs Assn. v. County of San Diego* (1977) concluded that "Meyers-Milias-Brown does not create two types of conferences -- one a full-scale negotiation ('meet and confer'), the other an exchange of views ('meet' or consult)." Referencing scholarly opinion and the *Pleasanton* decision, the judge stated that "the assumption that /sections/ 3504.5 and 3505 are mutually exclusive, imposing different standards applicable to different types of governmental action...is compelled neither by statutory language nor by legislative history."

See DUTY TO BARGAIN

"MERITS, NECESSITY, AND ORGANIZATION OF SERVICE"

The broad scope of representation of the MMBA includes "all matters relating to employment conditions and employer-employee relations... except, however, that the scope of representation shall not include consideration of the *merits, necessity, or organization of any service or activity* provided by law or executive order " (Section 3504, emphasis added). The law reserves the right to make policy decisions to public agency management, and exempts such policy issues from the bargaining process.

The problem of issues concerning both conditions of employment and policy issues was addressed by the appellate court in *Los Angeles County Employees Assn. v. County of Los Angeles* (1973). In ordering the county to negotiate on the size of social workers caseload, the court did not find the above quoted section of the MMBA (Section 3504) to limit Section 3505, which requires the public agency to meet and confer regarding terms and conditions of employment. "There is no reason why the public agency can not discuss those aspects of the caseload problem, even though the 'merits, necessity, or organization' of the service must be outside the scope of the required discussion." Concerning the local ordinance, which paralleled the MMBA, the court found that:

> The ordinance commits the county to negotiate wages, hours and conditions of employment, though affirming the exclusive right of the county to make certain management decisions. The county does not give up these management powers when it engages in the negotiations which are required by the ordinance. Granted that

> the subjects are interrelated, it is both possible and proper for the county to enter into discussions and receive the viewpoint of the employee representatives on those aspects of the problem which are covered by the promise to negotiate.

The California Supreme Court in *Fire Fighters v. City of Vallejo* (1974), in determining the arbitrability (which is congruent with the scope of negotiations under the MMBA) of several issues which impact on conditions of employment and policy, examined the MMBA phrase "merits, necessity or organization." The court was of the opinion that "apparently the legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions." Seeing this motivation as similar to federal precedents under the NLRA which took into consideration management prerogatives, the Supreme Court affirmed the negotiability of issues having impact on both policy and employment conditions, to the extent that these issues affected conditions of employment.

NRLA: RELEVANCE TO DECISIONS UNDER MMBA

Decisions made under the National Labor Relations Act have frequently served as precedent for cases to be decided under the Meyers-Milias-Brown Act. The California Supreme Court in *Social Workers v. Alameda County Welfare Department* (1974) explained that "federal labor legislation has...frequently been the prototype for California labor enactments, and accordingly, in the past we have often looked to federal law for guidance in interpreting state provisions whose language parallels that of the federal statutes....Unquestionably, in defining the scope of representation in section 3504, the Legislature relied upon the analogous sections of the federal Labor Management Relations Act...."

In *Fire Fighters v. City of Vallejo*, Justice Tobriner reiterated the use of federal precedent for the interpretation of state and local labor legislation where the texts are parallel and the intent similar. Addressing the objections of the city as to the use of NLRA precedents for interpretation of the city's charter provision, the California Supreme Court Justice stated:

> Although we recognize that there are certain basic differences between employment in the public and private sectors, the adoption of wages, hours and working conditions just as in private sector demonstrates that the Legislature found public and private sector employment relations sufficiently similar to warrant similar bargaining provisions. We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter.

The justice had observed earlier in this decision that "the scope of bargaining provision inthe Vallejo City Charter in large measure parallels that set out in the Meyers-Milias-Brown act."

See also *Placentia Fire Fighters v. City of Placentia* (1976).

NO-STRIKE AGREEMENTS

No-strike agreements are within the scope of bargaining under the MMBA. In *Placentia Fire Fighters v. City of Placentia* (1976) the appellate court ruled that the "City's demand for a no-strikes, no-slowdowns, no lockouts provisions, even without an arbitration agreement, was not necessarily evidence of bad faith."

See also *City and County of San Francisco v. Cooper* (1975).

PROMOTIONS

See VACANCIES AND PROMOTIONS

PUBLIC SCHOOL EMPLOYEES--SCOPE OF BARGAINING

The scope of bargaining for public school employees is defined by Section 3543.2 of the Educational Employment Relations Act (SB 160). An apparent distinction is made within the act between the "*scope of representation*" and areas of "*consultation.*" Should this distinction be held to be substantive, the scope of negotiations, as specifically limited by the act, indicates a narrower scope of bargaining for educational employees than that enjoyed by employees covered by the MMBA, the Brown Act, or the various transit district acts. For further discussion see Tab D, "The Developing Scope Under the Educational Employment Relations Act."

PUBLIC TRANSIT WORKERS--BARGAINING RIGHTS

Legislation governing public transit districts is contained within the California Public Utility Code. The language of the statutes establishing the districts and governing the labor relations of the respective districts differs. However under this varying legislation, transit district employees have the right to bargain collectively and to strike. Except as limited by the individual statute, the scope of bargaining for public transit district employees has been held to be identical to that enjoyed by private transit company employees as governed by the NLRA. See *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainman* (1960) and *Alameda-Contra Costa Transit District v. Amalgamated Transit Union* (1972)* In regard to limitations on scope of bargaining in public transit districts, see *Grier v. Alameda Contra Costa Transit District* (1976).

*This case was not certified for publication. For further reference this case may be cited as *Alameda-Contra Costa Transit District v. Amalgamated Transit Union*, 1 Civil No. 29201 (Cal. Ct. App., 1st App. Dist., Aug. 21, 1972).

RECOGNITION

Unlike the NLRA, the MMBA places the administrative rules that regulate the act at the local level within the scope of bargaining. The rules thus covered (Section 3507) include provisions for verification of the membership of the employee organization(s) as well as the status of organization officers and representatives, recognition of employee organizations, and provisions for exclusive recognition of employee organizations.

For further discussion of recognition under the MMBA, see article by Joseph Grodin, "California Bargaining Revisited: The MMB Act in the Appellate Courts," reproduced in this module.

RESIDENCY REQUIREMENTS

Residency requirements are now limited by the 1974 amendment to the California Constitution, which provides that:

> A city or county, including any chartered city or chartered county, or public district, may not require that its employees be residents of such city, county, or district except that such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location. (Article XI, Section 10.5)

The City of Vallejo arbitration award, issued November 1975 pursuant to the California Supreme Court decision in *Fire Fighters v. City of Vallejo* (1974), included a residency provision.

The arbitrated agreement required fire department employees to live within 30 miles of the main fire station dependent on the city council finding that the welfare and safety of the residents required such a measure.

RETROACTIVITY

Retroactive pay raises fall within the mandatory scope of negotiations under the Meyers-Milas-Brown Act.

In the case of *San Joaquin County Employees' Association v. County of San Joaquin* (1974), the appellate court cited the amended portion in Section 3501 of the MMB, which provides among other things that the parties attempt to reach agreement "prior to the adoption by the public agency of its final budget for the ensuing year." The court noted that public agencies have a statutory budget deadline (August 30 for counties) which differs from the start of the fiscal year (usually July 1). Accordingly the court interpreted the intent of the legislature to have been "that any pay adjustments negotiated would be made retroactive to July 1, the pay of employees continuing in the interim on the previous year's schedule, just as would be the case with private labor-management agreements."

In addressing the argument that such retroactive raises would violate the California Constitution as being gifts of public funds or extra compensation for past services, previous state attorney general opinions were cited as supporting the legality of such actions where "the adjusted salary rates were indefinite and subject to future determination."

Citing statutory authorization for retroactive pay raises for state and educational employees, the court concluded that "no prohibition

exists against the payment of retroactive salaries, and that defendant County has a duty to meet and confer in good faith with plaintiff association on the issue of retroactive pay raises."

RIGHT OF REPRESENTATION

Justice Tobriner, writing the opinion for the California Supreme Court in *Social Workers' Union v. Alameda County Welfare Department* (1974), stated that

> the Meyers-Milias-Brown Act defines the *scope* of the employee's right to union representation in language that is broad and generous....Section 3503 establishes the right of recognized employee unions directly to represent their members in 'employment relations with public agencies.' This right to representation reaches '*all* matters of employer-employee relations,'...and encompasses 'but is not limited to wages, hours, and other terms and conditions of employment'....

In the above mentioned case, the Supreme Court decided that the right of representation extends to an "employer-conducted interview which an employee reasonably anticipates may involve his union activities and...may lead to disciplinary action because of such union-related conduct."

The court of appeal decision in *San Leandro Police Officers Assn. v. City of San Leandro* (1976) also defended the right of public employees to join employee organizations for the purpose of representation and to do so without being discriminated against.

See UNION PARTICIPATION

RIGHT OF SELF REPRESENTATION

Section 3502 of the Meyers-Milias-Brown Act, which provides for the right of public employees to organize employee organizations for the purpose of representation on matters of employer-employee relations, also provides that:

> Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

These rights are protected by Section 3506, which prohibits public employers and employee organizations from interfering with employees exercising their rights under Section 3502.

In declaring the agency shop unlawful under the MMBA, the appellate court in *City of Hayward v. United Public Employees* (1976) cited the above sections as containing "freedom of choice provisions" which form the basis for "the statutory right of employees to represent themselves." The court in this case ruled union security devices such as the agency shop illegal since such devices cannot be reconciled with the aforementioned rights--rights created by the legislature which can only be modified by the legislature.

An appeal for review by the California Supreme Court was denied.

RIGHTS ARBITRATION

See ARBITRATION

SAFETY

The issue of safety was considered to be negotiable by the 1974 ruling of the California Supreme Court in the case of *Firefighters v. City of Vallejo.* In deciding the arbitrability of manning procedures, the Supreme Court decreed that the case go to arbitration to disclose whether, in this instance, the manning issue primarily involved workload and safety of the employees or city fire prevention policy. Relating federal precedent to the case at hand, the court stated that "insofar as the manning proposal does in fact relate to the question of employees' workload and safety, decisions under the National Labor Relations Act fully support the union's contention that the proposal is arbitrable ...the courts have recognized rules and practices affecting employee safety as mandatory subjects of bargaining since they indirectly concern the terms and conditions of his employment (*NLRB v. Gulf Power Company).*" See NLRA: RELEVANCE TO DECISIONS UNDER MMBA; also IMPASSE PROCEDURES.

SCHEDULE OF HOURS

Schedule of hours is a mandatory subject of bargaining. Section 3504 of the MMBA states that "the scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wage, *hours* and other terms and conditions of employment, . . ." (Emphasis added)

The California Supreme Court held that a proposal concerning a schedule of hours was "clearly negotiable and arbitrable" although the city claimed it to be exempt from negotiations as involving the organization of the fire service (*Fire Fighters v. City of Vallejo, 1974)*. Pointing to the city charter which explicitly gave employees the right to bargain over wages, hours and working conditions, and citing cases under the NLRA, the justices declared schedule of hours to be a negotiable issue.

In *Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976)*, the appellate court commented on the city's EER Resolution, provisions of which "purport to exclude work hour schedules from the scope of representation, the attempted exclusion must yield to the meet and confer requirements of the MMB act." The resolution was ruled to be "in conflict with the declared purposes of the MMB Act...and therefore invalid." See also *Placentia Fire Fighters v. City of Placentia (1976)*.

SENIORITY

Seniority as a criterion for personnel relations has been ruled negotiable under the MMBA by the California Supreme Court in *Fire Fighters v. City of Vallejo (1974)*.

Similarly, the Court ruled that vacancy and promotion proposals concerning job security and advancement opportunities come under the rubric of terms and conditions of employment and were therefore also negotiable. Seniority was a factor in these proposals.

See VACANCIES AND PROMOTIONS and LAYOFFS

TEMPORARY EMPLOYEES, USE OF

The use of temporary employees for overtime work was ruled to be within the scope of negotiations by the California Court of Appeal in *Dublin Professional Fire Fighters v. Valley Community Services District (1975).*

Affirming the judgment of the trial court, the appellate court noted that federal cases have recognized that issues bearing on employee workload are proper subjects for negotiation. Associate Justice Christian then stated that:

> The assignment of overtime work to temporary service personnel will have an obvious effect on the workload and compensation of the regular employees, since the regular employees will be deprived of their customary priority in seeking such work.... The district is required to meet with the representatives of its employees and discuss their grievances candidly."

See also CONTRACTING OUT.

TIMELINESS OF DEMANDS

The district in *Dublin Professional Fire Fighters v. Valley Community Services District (1975)* contended that a request to meet and confer made after adoption of a budget was ineffective. The appeal court looked at Section 3505 of the MMBA, providing in part that the representatives of the agency and employee organization "meet and confer promptly upon request by either party and... 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." It then held the interpretation of the district to be incorrect. The court made the distinction between "the obligation, in proper cases, to 'meet and confer promptly' upon request which is absolute, while the statutory admonition to 'reach agreement' before the adoption of the budget which is only hortatory." In conclusion, the court decided that "a request for conference may be made at any time by either side, though the possibilities of resolving disagreements will of course be much influenced by the practical realities of the budget cycle."

This case did not involve matters contained within an existing contract nor discussed during negotiations for an existing agreement. (See *Contract Administration in Public Sector Collective Bargaining*, UCLA IIR, 1976.)

TOTALITY OF CONDUCT

The California Court of Appeal in *Placentia Fire Fighters v. City of Placentia (1976)* looked toward federal precedent to define good faith bargaining. The court found that "the question of good or bad faith is primarily a factual determination based on the totality of the circumstances" and ruled that the superior court's finding of the city's having bargained in good faith "must be upheld if it is supported by the record as a whole."

See GOOD FAITH BARGAINING, DUTY TO BARGAIN

UNILATERAL IMPLEMENTATION (AFTER REACHING IMPASSE)

The court of appeal in *Placentia Fire Fighters v. City of Placentia (1976)* did not find the city had failed to meet and confer in good faith, nor did it violate the MMBA when it unilaterally implemented a forty-hour work week and awarded retroactive pay raises after negotiations with the union had reached impasse.

The court, examining the MMBA, found that although "agreement between the public agency and its employees is to be sought as the result of meetings and conferences held in good faith if possible; but agreement is not mandated." It then deduced that government is not required to cease operations because agreement has not been reached. The justices also pointed out that the act provides the parties may agree to mediation to resolve a dispute after making good faith efforts to come to agreement, "but are not required to do so."

The firm adherence to a position was ruled not to be evidence of lack of good faith bargaining on the part of the city. Referring to federal precedent and the case of *Los Angeles County Employees Assn. v. County of Los Angeles (1973)*, the opinion stated that "The 'right to remain firm' is thus established as the corollary to the duty to bargain in good faith. No mandatory duty to agree is imposed by the Meyers-Milias-Brown Act and the 'right to remain firm has been implicitly recognized."

UNION PARTICIPATION

The right to join and participate in an employee organization in order to be represented in employee-employer relations and not be discriminated against by the employer because of exercising of this right was defended by the appellate court in *San Leandro Police Officers Assn. v. City of San Leandro, (1976).* The city council of San Leandro adopted a plan by which management employees would receive a monthly bonus as a "management incentive." Managerial employees in the police and fire department were excluded from this plan. In response to a protest, the city indicated it had made known that the decision to be represented by an employee organization would exempt employees from these benefits. The court of appeal, in affirming the basic decision of the lower court, found that the city had"interfered with and discriminated against a group of employees by reason of their decision to exercise their right to participate in employee organizations, thereby violating Government Code section 3506." The city was free to decide the manner of changing the program "to eliminate the discrimination by any lawful means."

Participation in union activities as "protected employee conduct" was an issue in the California Supreme Court decision in *Social Workers' Union v. Alameda County Welfare Department (1974).* The court, referring to the MMBA, expressed the view that in passing the act, the state legislature accorded public employees the basic

right of association "which, obviously, embraces that most vital aspect of unionism: the right of attendance at a union meeting or rally. Thus section 3502 provides that "public employees shall have the right to form, join, and *participate in the activities of employee organizations* of their own choosing for the purpose of representation on all matters of employer-employee relations."

The court then noted that "two sections of the (Government) Code specifically protect public employees against interference or intimidation by public agencies in the exercise of the employees' right of association. (Sections 3506 and 3508)."

The appellate court in deciding *Healdsburg Police Officers Assn. v. City of Healdsburg (1976)*, in which several police officers who were active in the formation of a union were dismissed without a preliminary hearing, basically upheld the superior court decision. The officers were judged to be entitled to a hearing on the basis of constitutional rights of due process, rules, practices, and understandings of the agency, and the principle drawn from other cases, namely that

> The right to a hearing must likewise be afforded when a public officer employed at will claims that he was dismissed because he exercised a statutory right to join and participate in the activities of an employee organization....

UNIT DETERMINATION

Section 3507 of the MMBA, permitting a public agency to adopt reasonable rules and regulations (after consulting in good faith) for administration of the act, uses the term "appropriate unit" in regard to exclusive recognition.

The California Court of Appeal in *County of Alameda Public Defenders Association v. County of Alameda (1973)* noted that the use of "appropriate unit" in the MMBA parallels the language of the NLRA, inviting consideration of federal precedent for determinating appropiateness. Along with the local ordinance which includes as possible criteria for unit determination "such factors as community of interest among employees, history of representation and general field of work," the court attempted to decide the question of "whether requiring all professional employees to be in one organization for the administration of employer-employee relations is reasonable and appropriate. "

In deciding the right of public defenders to be organized into a separate unit apart from other professionals, the court cites the most relevant NLRB case *(Douglas Aircraft Co.)** in which the NLRB permitted a distinct unit for a group of engineers because the engineers "... 'possessed a unique community of interest based upon the distinct nature of their function, their separate supervision and workplace, the lack of substantial interchange with

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**Douglas Aircraft Co.*, 157 NLRA 68, 61 LRRM 1434 (1969).

other professional employees."

The appellate court concluded that denying recognition to a separate unit of public defenders "violates section 3507 of the Government Code in that thereby professional employees with common interests and having an organization of their own choice, are unreasonably forced into an organization with other employees with whom there exists little if any community of interest."

The appellate court in *Organization of Deputy Sheriffs v. County of San Mateo (1975)* cited the above-mentioned *Alameda* case as using NLRB standards of appropriateness. The court also noted that the MMBA does not exclude management employees from having organizational and representational rights, contrary to federal policy. However, said the court, "the segregation of management employees into a separate bargaining unit is appropriate under standards used by the NLRB...." Section 3507.5 of the MMBA provides for the representation of management employees, but also permits the agency to adopt reasonable rules restricting such employees from representing organizations that include non-management employees. The legislative intent of these provisions was seen as a way of possibly "retaining to the public employer some measure of protection against conflict of interest considerations that might arise when management employee's loyalties are split between the employer's interests and

those of employees while preserving to such employees an optional right to form their own organization...."

In the *San Mateo* case, the court ruled that the county's proposal to form a bargaining unit composed solely of county peace officers engaged in management was reasonable and met the requirements of the MMBA.

VACANCIES AND PROMOTIONS

Vacancies and promotions, as they concern job security and advancement opportunities, are mandatory subjects of bargaining under the MMBA.

The California Supreme Court's decision in *Fire Fighters v. City of Vallejo* deemed the method of filling vacancies and access to promotions negotiable and arbitrable as they affect terms and conditions of employment.

Concerning the negotiability of these items as they apply to supervisory positions, NLRA precedent is applied where the local ordinance is silent. Under the NLRA supervisory and managerial employees are excluded from the bargaining units; thus the court concluded "that under the charter the union can claim no right to bargain as to supervisory positions." In this instance, the disputed issue of whether the position of deputy fire chief fell into the supervisory category was sent to arbitration to determine whether the deputy fire chief's duties actually were supervisory. The position would be included or excluded from the bargaining unit on the basis of duties rather than title.

WORKLOAD

The California Supreme Court's refusal to review the appellate court's decision, which held that Los Angeles County must meet and confer on the issue of social workers' caseload, affirmed the negotiability of workload under the MMBA (*Los Angeles County Employees Assn. v. County of Los Angeles, 1973).*

Noting that the local bargaining ordinance contained the same approach to bargainable issues as did the MMBA, the appellate court saw the question before it as "whether the size of caseloads assigned to eligibility workers constitutes an item within the mandatory section of the Meyers-Milias-Brown Act /Gov. Code 3505/ which requires negotiation by public employees of issues relating to wages, hours, and other terms and conditions of employment or within the applicable provisions of the local ordinance...."

Recognizing the interrelationship of working conditions of public employees, management decision, and the quality of public service, and noting that issues of level of public service would fall outside the scope of negotiations, the court felt that a demand for a lower caseload could be more directly related to terms and conditions of employment. The court concluded that "it is both possible and proper for the county to enter into discussions and receive the viewpoint of the employee representatives on those aspects of the problem which are covered by the promise to negotiate."

Upholding the decision of the superior court, the appellate court ordered the county to cease and desist from refusing to negotiate with the employee representatives over size of caseload.

In its 1974 *Vallejo* decision, the California Supreme Court referred to the previously cited *Los Angeles County Employees* case as supporting the union position that manning, i.e., the number of persons available to fight each fire, determines the amount of work each employee must perform. The court drew the analogy that "because the caseload, i.e., "workload" of the social workers effectively determined the number of these workers needed to service the recipients of aid, bargaining over the size of caseloads in *Los Angeles County Employees* was in reality comparable to bargaining over 'manning' levels."

Showing the applicability of decisions made under the National Labor Relations Act, the court then cited federal cases to demonstrate the interpretation of workload issues as being mandatory subjects of bargaining.

The California Supreme Court ruled that the manning issue go to arbitration to determine the degree to which this issue impacted on "wages, hours and working conditions." If the issue did primarily impact on workload (and safety), it would be deemed to fall within the scope of arbitration (and therefore also within the scope of negotiations).

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TAB C

INTRODUCTION

The material contained in this tab is a compilation of key court decisions relating to California public sector labor relations.

At the present time California's public sector is governed by four different laws: the George Brown Act covering state employees; the Educational Employment Relations Act covering classified and certificated educational employees, K through 14; the Meyers-Milias-Brown Act covering local government employees; and the Public Utility Code provisions covering certain public transit workers.

In reviewing this material, it was found that the majority of the cases relate to the Meyers-Milias-Brown Act. This is due, in part, to the newness of the EERA and the relatively small number of cases that have been litigated with regard to scope of bargaining under the PUC Code and the Brown Act. It is suggested, however, in a number of decisions included in this section as well as by the EERB rulings that appear in Tab D, that there is a strong interrelationship between these statutes. That is, despite the various and important differences between them, the courts and now the EERB hearing officers, have judged these statutes in reference to the forty years of precedent established under the National Labor Relations Act. This interrelationship is strengthened by the fact that in many instances these laws are mutually affected by other state statutes. Moreover, they are all subject to the provisions of the California Constitution. For these reasons, it is believed that students and practitioners may find it beneficial to become familiar with all of these rulings, irrespective of the act to which a given ruling immediately pertains.

TABLE OF CASES

Cases are listed alphabetically by jurisdiction or public agency involved. Those cases marked with an asterisk (*) are not reproduced within the module.

AFSCME, Local 119 v. County of Los Angeles,
49 Cal. App. 3d 356 (1975)

Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 C. 2d 684 (1960)

Bagley v. City of Manhattan Beach,
18 C 3d 22 (1976)

NLRB v. Katz,
369 U.S. 736 (1962)*

Fibreboard Paper Products v. NLRB,
379 U.S. 203 (1964)

NLRB v. Wooster Division of Borg-Warner
356 U.S. 342 (1958)

Placentia Fire Fighters, Local 2147 v. City of Placentia,
57 Cal. App. 3d. 9 (1976)

Firefighters, Local 1974 v. City of Pleasanton,
56 Cal. App. 3d. 959 (1976)

Sacramento County Employees Organization, Local 22 v. County of Sacramento, 28 Cal. App. 3d. 424 (1972)

San Diego County Deputy Sheriff's Association v. County of San Diego, Superior Court, County of San Diego, Case No. 382748 (1976)

San Joaquin County Employees Ass'n. v. County of San Joaquin,
39 Cal. App. 3d 83 (1974)

San Leandro Police Officers Ass'n. v. City of San Leandro,
55 Cal. App. 3d. 553 (1976)

Deputy Sheriffs of San Mateo County v. County of San Mateo,
48 Cal. App. 3d. 331 (1975)

San Francisco Fire Fighters, Local 798 v. City and County of San Francisco, App. 129 Cal. Rptr. 39 (1976)

City and County of San Francisco v. Cooper,
13 Cal. 3d. 898 (1975)*

Skelly v. State Personnel Board,
15 Cal. 3d. 194 (1975)

Fire Fighters, Local 1186 v. City of Vallejo,
12 C 3d. 608 (1974)

33 Cal.App.3d 825

[825] ALAMEDA COUNTY ASSISTANT PUBLIC DEFENDERS ASSOCIATION, Plaintiff and Appellant,

v.

COUNTY OF ALAMEDA et al., Defendants and Respondents,
Alameda County Employees Association, Intervenor and Respondent.

Civ. 31726.

Court of Appeal, First District, Division 4.

Aug. 6, 1973.

Hearing Denied Oct. 3, 1973.

Action by association of public defenders alleging that county's establishment of representation unit illegally denied the public defenders the right to representation by a professional organization of their own choice. The Superior Court, County of Alameda, M. O. Sabraw, J., determined that the association was not entitled to a separate unit from the representation unit and plaintiff appealed. The Court of Appeal, Bray, J., held that denying recognition to public defender's association violated statute securing right of professional employees to be represented separately from nonprofessional employees in that the public defenders were unreasonably forced into an organization with other employees with whom there existed little, if any, community of interest.

Reversed with direction.

County Superior Court in favor of defendants-respondents.[1]

Question Presented

Does the establishment of Unit XI illegally deny the Assistant Public Defenders of the right to representation by a professional organization of their own choice?

Record

Pursuant to the provisions of Government Code section 3500 et seq.,[2] the Alameda County Board of Supervisors on October 13, 1970, enacted the Alameda County Employee Relations Ordinance (Ord. 70–68) which provided rules and regulations for the organization and operation of organizations for the administration of county employer-employee relations. On February 23, 1971, appellant Public Defenders Association petitioned the county to recognize the association as the representative of attorneys employed in the public defender's office for the purpose of presenting grievances and recommendations regarding wages, salaries, hours and working conditions.

On March 9, 1971, respondent county through respondent board of supervisors established Representation Unit XI, consisting of all non-health-related professional employees working for respondent county for the purposes of meeting and conferring with regard to wages, salaries, hours and working conditions. Unit XI includes approximately 360 county professional employees in various occupations, to wit, librarians, planners, agricultural inspectors, auditors, buyers, systems and procedures analysts, appraisers and engineers, as well as attorneys in the public defender's office.

Appellant alleges that because Representation Unit XI consists of employees of such diverse and varied job functions and classifications, the attorneys of the public defender's office will be denied their right under Government Code section 3507.3 to be represented by an employee organization of their own choice consisting of professional employees. 828

Shortly after the establishment of Unit XI, the Alameda County Public Defenders Association and the Western Council of Engineers, together with the American Federation of State, County and Municipal Employees and United Public Employees Union, Local 390, formed a coalition employee organization known as the Coalition of Professional Employees. This coalition, about April 15, filed with the board of supervisors a petition for its certification as the recognized employee organization for the non-health-related professional employees.[3] A secret ballot election was then conducted involving a majority of all county employees voting for 14 different representation units, including the unit consisting of non-health-related professional employees. The results of the election were announced on May 7, 1971, with 162 votes cast for the Alameda County Employees Association and 131 votes cast for the Coalition of Professional Employees. Apparently none of the public defenders voted at the election. Appellant's brief states that 92 percent of the attorneys in the public defender's office have indicated that they want appellant Public Defenders Association to represent them.

In this proceeding respondent Alameda County Employees Association filed a complaint in intervention by way of answer. After an evidentiary hearing, the court

1. Western Council of Engineers comprised in part of engineers employed by Alameda County originally was joined with appellant in the petition and complaint in this action. It joined in the appeal from the judgment herein. However, at its request, and for failure to pay the statutory filing fee, its appeal was heretofore dismissed.

2. Government Code sections 3500–3511 were originally known as the Brown Act (Stats.1961, ch. 1964). The Brown Act was later amended and it became known as the Meyers-Milias-Brown Act (Gov. Code, § 3510). For brevity it will be referred to herein as the "Brown Act."

3. The Alameda County Employees Association had previously filed such a petition with the board of supervisors.

filed findings of fact and conclusions of law in which the court declared, *inter alia,* that under the provisions of Government Code section 3507.3 attorneys in the public defender's office have a right to be represented separately from nonprofessional employees, but they do not have a right to be represented separately from other professional employees, that Unit XI has been established in accordance with law, particularly Government Code section 3507.3, and that the Public Defenders Association is not entitled to a separate unit from Unit XI. Judgment was entered accordingly.

The effect of section 3500 et seq., Government Code (the Brown Act).

Appellant contends that, by reason of the 829 provision in Government Code section 3500[4] that the purpose of the Brown Act is, *inter alia,* to provide "a uniform basis for recognizing the right of public employees to join organizations of their own choice," assistant public defenders are entitled to have a bargaining organization limited to them.

While under section 3507 of the Government Code, Unit XI might be an "appropriate" employee bargaining association for professional employees of the county who do not have an organization of their own, the real question is whether, in view of the fact that the assistant public defenders had an organization of their own and chose to have it as their sole bargaining body, the county could deny organization representation and force the public defenders into Unit XI. Another way of stating the issue is whether requiring all professional employees, regardless of their type, to be in one organization for the administration of employer-employee relations is reasonable and appropriate, in view of section 3507, providing that the county may adopt "reasonable rules and regulations" and may create "appropriate" units for this purpose.

The language of "an appropriate unit" in Government Code section 3507 parallels the language of the National Labor Relations Act, section 9(a), allowing the National Labor Relations Board to certify labor organizations selected by the majority of employees in a "unit appropriate for such purposes . . ." (29 U.S.C.A. § 159.) The parties to this appeal have indicated by citation of cases decided under the National Labor Relations Act that the construction placed upon that act is helpful in construing similar language in the Brown Act.

In International Assn. of Fire Fighters v. County of Merced (1962) 204 Cal.App. 2d 387, 392, 22 Cal.Rptr. 270, the court stated that the construction placed by the United States Supreme Court on the provisions of the federal Labor Management Relations Act was helpful in determining the connotation of similar language in Labor Code section 1962. In Board v. Hearst Publications (1944) 322 U.S. 111, 134, 64 830 S.Ct. 851, 862, 88 L.Ed. 1170, the United States Supreme Court said: "Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter."

[1] The discretion given the county under section 3507 appears to be as broad as that given to the Labor Relations Board under the National Labor Relations Act. The standard by which the county is to be

4. Section 3500 provides in pertinent part: "It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies."

Section 3507 provides for the adoption by a public agency of reasonable rules and regulations for the administration of employer-employee relations and for the verifying of and the exclusive recognition of employee organizations.

governed in determining the appropriate bargaining unit is whether or not such determination is "reasonable." (Gov.Code, § 3507; J. Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719, 741.)

[2] Moreover, as stated by Professor Grodin, *supra,* at page 741, "The 1971 'exclusive recognition' amendment to section 3507 uses the term 'appropriate unit,' arguably inviting reference to standards of appropriateness established elsewhere in the private and public sectors. It also refers, however, to a vote of employees 'of the agency or an appropriate unit thereof,' suggesting that exclusive recognition may be accorded on an agency wide basis without regard to whether lesser units would be appropriate." Such reasoning parallels the reasoning and case law decided under the National Labor Relations Act. Numerous cases have pointed out that the board need not determine the *ultimate* unit or the *most* appropriate unit. The act requires only that the unit be "appropriate." (Morand Bros. Beverage Co. (1950) 91 NLRB 58, 26 LRRM 1501, enforced 190 F.2d 576 (7th Cir. 1951); accord Federal Electric Corp. (1966) 157 NLRB 89, 61 LRRM 1500; F. W. Woolworth Co. (1963) 144 NLRB 35, 54 LRRM 1043.)

Government Code section 3507, subdivision (d), provides that the rules of a public agency may provide for "exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or *an appropriate unit thereof* . . . ." (Emphasis added.) Alameda County apparently attempted to set standards for determining an appropriate unit when it enacted Ordinance 70-68, section 7-8.05, which provides in part: "The Director shall be guided by the policy of the Board that any single representation unit shall encompass as many position classifications as possible consistent with the full use by employees of the privileges of organization and representation established by this ordinance. Within the limits of this policy, criteria used in recommending representation units may include, but shall not be limited to *such factors as community of interest among employees,* history of representation and the general field of work." (Emphasis added.) 1831

[3] The question to be decided then becomes whether requiring all professional employees, regardless of type, to be in one organization for the administration of employer-employee relations is reasonable and appropriate. Section 3507 further provides: "No public agency shall unreasonably withhold recognition of employee organizations."

There are rulings of the National Labor Relations Board which seem to give comfort to both appellant and respondents. However, the ruling of that board which most nearly approaches the situation in the instant case is that of Douglas Aircraft Co. (1966) 157 NLRB 68, 61 LRRM 1434, in which the board held that a group of professional engineers were entitled to be represented separately from other professionals. The board stated: "On the basis of the entire record, we are persuaded that the professional employees in the petition for unit possess a unique community of interest based upon the distinct nature of their function, their separate supervision and work place, the lack of substantial interchange with other professional employees, and the fact that they are separately hired by the departmental supervisor. In our opinion, these factors negate the Employer's contention that the petitioned for employees consist of an arbitrary, piecemeal segment of the professional employees in the plant. Consequently, the petitioned for unit, in our opinion, is an identifiable group with a separate community of interest, and there is a reasonable basis for separating the unit from the rest of the professional employees at the Employer's Long Beach Facility."

Certainly attorneys have a distinct function from librarians, planners, etc. Public defenders have separate supervision, place of work and hiring procedures. There is very little if any interchange between pub-

lic defenders and the other professions grouped together in Unit XI.

"Unit determinations are as critical to the bargaining process as districting is to the political process. Such determinations affect not only the number but also the character of the organizations which represents an agency's employees. The definition of units may determine, for example, such matters as whether traditional civil service employees associations gain or lose strength in comparison to unions, whether craft unions gain or lose strength in comparison to unions seeking to represent employees on departmental or cross-departmental bases, and the like. The pro-
1832 cedures by which such decisions are made, and the criteria brought to bear upon the decisions, are among the most significant factors in any industrial relations system." (J. Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts, *supra,* 23 Hastings L.J. 719, 738.)

It does seem incongruous that assistant public defenders should be grouped in a bargaining unit with auditors, planners, rodent and weed inspectors. The attorneys in the public defender's office are *sui generis,* having little community of interest with the other professional groups which Unit XI tries to place in one organization. This conclusion does not place a greater burden on the County of Alameda, given Government Code section 3502, which provides in relevant part: "Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency."

Section 3507.3 provides, in part: "Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees." Its express terms do not grant appellant the right to be represented apart from other professional groups. Section 3507, subdivision (d), does, in that, as hereinbefore stated, it provides for recognition of "an appropriate unit" of the agency.

Denying recognition to appellant violates section 3507 of the Government Code in that thereby professional employees with common interests and having an organization of their own choice, are unreasonably forced into an organization with other employees with whom there exists little, if any, community of interest.

The judgment denying appellant's petition is reversed and the superior court is directed to issue a writ of mandamus as prayed for by appellant.

DEVINE, P. J., and RATTIGAN, J., concur.

SOCIAL WORKERS' UNION, LOCAL 535, SEIU, AFL-CIO, et al., Plaintiffs and Appellants,

v.

ALAMEDA COUNTY WELFARE DEPARTMENT et al., Defendants and Respondents.

S. F. 23015.

Supreme Court of California, In Bank.

April 30, 1974.

Proceeding on petition for writ of mandate to compel county welfare department to set aside suspensions of certain of its employees for declining to attend, without union representative, meeting with supervisor concerning employees' alleged

27. See Stillwater, The California Banker's Lien Law: A Reappraisal of a Creditor's Remedy in a New Economic Context (1972) 27 Bus.Law 777, 781–782.

28. Quoted in footnote 1, *supra*.

29. See footnotes 2 and 4, *supra*.

misuse of county vehicles at union rally. The Superior Court, Alameda County, Lyle E. Cook, J., denied writ, and petitioners appealed. The Supreme Court, Tobriner, J., held that employees' statutory right to effective union representation included right to have union representatives accompany them to meeting; thus employees could not be subjected to sanction for their insistence that representative be permitted to attend meeting.

Judgment affirmed in part and reversed in part and cause remanded.

McComb, J., dissented and filed opinion.

Vacating 106 Cal.Rptr. 609.

Levy & Van Bourg, Victor J. Van Bourg and Stewart Weinberg, San Francisco, for plaintiffs and appellants.

Richard J. Moore, County Counsel, and Douglas H. Hickling, Deputy County Counsel, Oakland, for defendants and respondents.

TOBRINER, Justice.

In this case we must determine whether a public employee may be disciplined for declining to attend, without his union representative, a meeting with his supervisor concerning the employee's alleged misuse of a county car at a union rally. The Alameda County Welfare Department (Department) ordered three-day suspensions for seven employees after the employees declined to attend such a meeting from which their union representative had been excluded. The employees, and their union, Social Workers Union, Local 535, SEIU, AFL–CIO (union), then sought a writ of mandate to compel the Department to set aside the suspensions, but the superior court denied the writ, concluding that the relevant statutory provisions granted the vidual employees appeal from that adverse their employer. The union and the indiemployees no right to the presence of a union representative at such a meeting with judgment.

For the reasons discussed below, we have concluded that a public employee's statutory right to effective union representation (Gov.Code, § 3500 et seq.) includes a right to have a union representative accompany him to a meeting with his employer when the employee reasonably anticipates that such meeting may involve union activities and when the employee reasonably fears that adverse action may result from such a meeting because of union-related conduct. In the instant case we find that the public employees could reasonably anticipate that the meetings, set up by their employer to investigate their transportation to a union rally protesting the employer's conduct, might result in disciplinary action related to their union activity; thus, we believe such employees were justified in insisting that their union representative be permitted to attend the meeting and were not subject to sanction for such insistence. Accordingly, we reverse the judgment as to those employees who properly exhausted their administrative remedies.

The essential facts underlying this litigation are not at issue. On May 14, 1969, the union sponsored a noon hour rally at the Alameda County Administration Building to protest, as described by the union, the failure of the County of Alameda to "meet and confer in good faith" with the union concerning subjects within the scope of representation allowable under the stat-

ute. (Gov.Code, § 3505.) An investigation undertaken by county administrators indicated that certain county vehicles were observed at the union rally; further examination of county garage records and "employee day sheets" suggested that some of the employees using these vehicles did not have official business at the administration building during the time in question. The responsible county supervisor testified at the administrative proceeding that, based on these revelations, "circumstantially it appeared" that a misuse of county property had occurred. In July 1969, some 30 employees were ordered to attend individual meetings with the chief assistant welfare director or his deputy concerning the employees' possible misuse of county vehicles to attend the May 14, 1969, union rally.

A dispute soon arose over the right of the employees to be accompanied to these meetings by their union representative. After the chief assistant welfare director made clear that the union representative would not be permitted to attend, 23 employees acquiesced in the supervisor's demand that they appear alone before him or his assistant. Based solely on these meetings, the assistant supervisor transmitted a report on the matter to the welfare director including recommendations as to discipline.[1]

The seven employees involved in the instant case, however, declined to meet with the chief assistant welfare director or his deputy to discuss the alleged misuse of county vehicles in connection with a union rally without a union representative.[2] All seven individuals were ultimately suspended for three days for insubordination in refusing to attend the interview without a union representative. Thereafter, the employees and their union commenced the instant proceeding, challenging the validity of the suspensions.

After reviewing the facts outlined above, the superior court concluded that "no law, ordinance, rule or regulation authorizes or requires the presence of union representatives at such interview." "Such interview," in the language of the findings of the court, consisted of a confrontation by the county with workers upon the issue "whether or not the vehicles were in the area because the employees had departmental business in the vicinity, or, in the alternative, whether the vehicles were used for the transportation of the employees to and from the demonstration." On the basis of

1. Thereafter three of the employees so appearing received a letter from the Department stating in part: "First the meeting with you was held because a car signed out to you had been reported in the vicinity of a Union demonstration (the non-County activity). A further check indicated that your job related acivities on that day did not justify your being in the area. . . . You stated that you were unaware of rules forbidding the use of county cars in the manner which you did. Notwithstanding your unawareness it was not reasonable for you to assume that utilization of County equipment for transportation *in connection with an employee organization* was permissible." (Emphasis added.) Copies of these letters were placed in the employees' permanent personnel records.

2. On July 24, 1969, petitioner Kemper, the first employee to be contacted by the supervisor, brought his union representative to the meeting scheduled for him, but was sent away when he refused to proceed in the absence of the representative. Kemper's meeting with his supervisor ended with the following dialogue: Kemper: "I don't want to be belligerent, but I still feel that it is my prerogative to have the union rep with me and I would still like to have Mr. Bowers." The supervisor: "If that's the way you feel about it, you can leave."

At the administrative hearing before the county civil service commission, another of the suspended employees, Mrs. Brooks, testified that she had refused to attend the meeting without her union representative even though she had driven her own car to the rally and could provide evidence from her passengers to verify that fact; indeed, one of the passengers did testify to that effect at the hearing. When asked by the Department's counsel why she was reluctant to attend the meeting by herself in view of her innocence of any wrongdoing, Mrs. Brooks answered that she had already learned of Kemper's suspension in connection with these matters and felt that she "needed somebody, I didn't want to go talk to [the deputy supervisor] or . . . the Commission's attorney, or somebody else on such an issue."

its conclusion, the court denied the requested writ of mandate.[3]

We shall explain why we have concluded that, contrary to the conclusion of the trial court, the subject matter of the employer's investigation in the instant case fell within the penumbra of the protected rights of the employees and justified the employees' claim to a right of union representation. Since the investigation touched upon the statutorily guaranteed associational rights of the employees, and since the employees could reasonably fear that the investigation might lead to disciplinary penalties for such union participation,[4] we hold that the employee could properly demand the presence of a union representative at such an interview.

The Meyers-Milias-Brown Act, the controlling statutory structure in this field, is built upon the recognition of the rights of association and representation of the public employee.[5] Government Code section 3500 guarantees public employees "the right . . . to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies." After many years of indecision as to the organizational rights of public employees, the Legislature finally accorded them this basic right of association which, obviously, embraces that most vital aspect of unionism: the right of attendance at a union meeting or rally. Thus, section 3502 provides that "public employees shall have the right to form, join, and *participate in the activities of employee organizations* of their own choosing for the purpose of representation on all matters of employer-employee relations." (Emphasis added.)

Two sections of the code specifically protect public employees against interference or intimidation by public agencies in the exercise of the employees' right of association. Thus section 3506 provides: "Public agencies . . . shall not interfere with, intimidate, restrain, coerce, or discriminate against public employees because of their exercise of their rights under Section 3502." Section 3508 reiterates this principle: "The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section."[6]

3. The superior court also determined that three of the seven employees (appellants Doyle, Pofscher and Chan) had failed to exhaust their administrative remedies, which constituted an additional ground for barring relief. In this appeal, appellants have not demonstrated that this finding of the superior court was erroneous, and accordingly we affirm the trial court's judgment with respect to these three employees.

The trial court additionally found that although a fourth appellant, Weber, had properly exhausted his administrative remedies by seeking relief from the Alameda County Board of Supervisors, Weber was not entitled to relief in this proceeding because the board of supervisors had not been joined as a defendant. Upon remand of this proceeding, however, appellants should be accorded an opportunity to amend their petition to join the board of supervisors as a party defendant.

4. Although the trial court rendered a factual finding that the county confrontation with the employees did not "relate" to any union activity, the court also found the interviews were "to ascertain whether or not the vehicles were in the area because the employees had departmental business in the vicinity, *or in the alternative, whether the vehicles were used for the transport of the employees to and from the demonstration.*" (Emphasis added.) We shall explain *infra* that the right of representation afforded by the Meyers-Milias-Brown Act attaches, as a matter of law, to a confrontation, which an employee reasonably anticipates may involve his union activities and reasonably fears may ultimately lead to disciplinary action because of such union-related conduct.

5. See generally Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719; Witt, Local Labor Relations (1972) 23 Hastings L.J. 809.

6. Section 3508 provides in relevant part: "The governing body of a public agency may . . . designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws or local ordinances, and may . . . limit or prohibit the right of employees in such positions or classes of positions to form, join or participate

And, in recent years, numerous cases have enforced these prohibitions against a variety of employer conduct which impinged upon or threatened employees because of their union affiliations or activities. (See, e. g., Ball v. City Council (1967) 252 Cal. App.2d 136, 139–140, 60 Cal.Rptr. 139; cf. International Ass'n of Fire Fighters v. City of Palo Alto (1963) 60 Cal.2d 295, 300, 32 Cal.Rptr. 842, 384 P.2d 170; International Ass'n of Fire Fighters v. County of Merced (1962) 204 Cal.App.2d 387, 391–392, 22 Cal.Rptr. 270.)

In addition to ensuring a public employee's right to engage in a wide range of union-related activities without fear of sanction, the Meyers-Milias-Brown Act defines the *scope* of the employee's right to union representation in language that is broad and generous.

Section 3503 establishes the right of recognized employee unions directly to represent their members in "employment relations with public agencies."[7] This right to representation reaches "*all* matters of employer-employee relations," (Gov.Code, § 3502; emphasis added) and encompasses "but [is] not limited to, wages, hours, and other terms and conditions of employment" (Gov.Code, § 3504).

The narrow question presented in the instant case is whether this broadly defined right of representation attaches to an employer-conducted interview which an employee reasonably anticipates may involve his union activities and reasonably fears may ultimately lead to disciplinary action because of such union-related conduct. For the reasons discussed hereafter, we hold that the right of union representation does apply under these circumstances.

Over the lengthy history of governmental regulation of employee-management relations, the inherent threat to union activism posed by employer interrogation has been well documented. Scores of judicial decisions, on both the state and federal levels, attest to the potentially coercive and intimidating effect of employer inquiries into an individual employee's union activities. (See, e. g., Petri Cleaners, Inc. v. Automotive Employees, etc., Local No. 88 (1960) 53 Cal.2d 455, 460, 462, 2 Cal.Rptr. 470, 349 P.2d 76; Graybar Mfg. Co., Inc. (1955) 111 N.L.R.B. 167, 168–169 [35 L.R.R.M. 1435]; A. L. Gilbert Co. (1954) 110 N.L.R.B. 2067, 2071–2072 [35 L.R.R.M. 1314].) Even when an employer presents an entirely "innocent" motive for such a questioning session, because of the normal tension between management and union and the interview's connection with union matters, the questioned employee is likely to view the employer's inquiries as directed at or arising out of his union activity, and the employee will frequently, and understandably, assume that such questioning sessions can be avoided in the future by curtailing his participation in union activities.

In light of the inherently coercive nature of such questioning sessions, numerous cases have imposed limitations on the employer's right to carry out such investigation into union activity generally (see, e. g., Hendrix Manufacturing Co. v. N.L.R.B. (5th Cir. 1963) 321 F.2d 100, 104; N.L.R.B. v. United Wire & Supply Co. (1st Cir.

in employee organizations where it is in the public interest to do so; however, the governing body may not prohibit the right of its employees who are full-time 'peace officers . . .' to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

"The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section."

7. In Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 283–284, 32 Cal.Rptr. 830, 384 P.2d 158, we upheld the right of a public employee union to bring suit in its own capacity to enforce the employment rights of its members.

1962) 312 F.2d 11, 13; Blue Flash Express, Inc. (1954) 109 N.L.R.B. 591, 594) and, in particular, have found improper coercive inquiries directed at an employee's attendance at union meetings or rallies. (See, e. g., Crawford Manufacturing Co. v. N.L.R.B. (4th Cir. 1967) 386 F.2d 367, 370; N.L.R.B. v. Western Meat Packers, Inc. (10th Cir. 1966) 368 F.2d 65, 67; Weston & Brooker Co. (1965) 154 N.L.R.B. 747, 751, enforced (4th Cir. 1967) 55 L.C. ¶ 11,790; May Aluminum, Inc. (1965) 153 N.L.R.B. 26, 29, enforced (5th Cir. 1967) 55 L.C. ¶ 11,897.) [8]

In the instant case, of course, the employer possessed what appears to be a legitimate reason for inquiring into its employee's method of transportation to the union rally, and the union does not contend that the employer's questioning session, in itself was improper or discriminatory. (Cf. Blue Flash Express, Inc. (1954) 109 N.L.R.B. 591.) Nevertheless, such an interview, touching as it did upon the employee's participation in a union activity, contained the inherent potential for intimidation and coercion noted above and, in our view, justified the employee's request for the presence of a union representative under the applicable, broad statutory provisions.

Recognition of the right to union representation in this setting is vital for several reasons. First, from the point of view of the questioned employee, the presence of a union representative will help assure the employee that he will not be penalized for his union activities and will tend to reduce the potentially coercive atmosphere of the employer-directed interview. Second, the union itself, of course, has a considerable interest in assuring that no sanctions, blatant or subtle, are meted out by the employer on account of an individual member's participation in union affairs. Finally, the union and its members have an additional, more generalized interest in guaranteeing that the employer does not adopt any new employment policies which, in application, tend to discriminate against union members or their activities. Thus, for example, in the instant case a union representative present at the interview might have protested an attempt by the employer to discriminatorily resurrect a generally unenforced rule concerning the noon hour use of county cars simply because of a connection here with union activities.[9]

In light of these considerations, we now hold that a public employee's right to union representation under section 3504 attaches to an employer-employee interview which an employee reasonably fears may investigate and sanction his union-related activities.[10]

The respondent county suggests, however, that the recognition of an employee's

8. In N. L. R. B. v. Ralph Printing & Lithographing Co. (8th Cir. 1967) 379 F.2d 687, 691, the Eighth Circuit condemned the employer's compilation of a list of employees attending a union meeting, explaining that such a list would inevitably create "the clear impression that [the employer] was keeping its employees' union activities under surveillance. An impression of surveillance might well instill in the employee a fear of reprisal from the employer. Such conduct is violative of section 8(a)(i) [of the National Labor Relations Act] as it could inhibit the right of employees to pursue their union activities untrammeled by the fear of possible employer economic coercion or other forms of retaliation."

9. Although the present record is inadequate to evaluate any contention of discriminatory application of the county's rule on use of county cars, it is noteworthy that the county itself focussed on the use of the cars to attend a union rally in its "warning" letter sent to three employees. (See fn. 1.) The letter declares that "it was not reasonable for [the employee] to assume that utilization of county equipment for transportation *in connection with an employee organizational activity was permissible.*" (Emphasis added.)

10. Respondents cite two California decisions in support of their contention that public employees possess no statutory right to union representation in disciplinary matters; neither controls here. Board of Education v. Cooper (1955) 136 Cal.App.2d 513, 289 P.2d 80, involved a teacher dismissed for his refusal to answer questions propounded to him under oath during an investigation of his alleged Communist Party affiliations; dictum in the opinion of the Court of Appeal stated that an employee enjoys no right to *counsel* when questioned by his employer,

right to union representation under the circumstances of the instant case is inconsistent with several recent federal decisions interpreting similar "right to representation" provisions of the federal Labor Management Relations Act (29 U.S.C. §§ 157, 158(a), 158(d)).[11] Although we agree with respondent's suggestion that the interpretation of the analogous provisions of the federal act is relevant to our present decision, as we shall explain we find nothing in the recent federal cases which conflicts with the conclusion we have reached above.

Federal labor relation legislation has, of course, frequently been the prototype for California labor enactments, and, accordingly, in the past we have often looked to federal law for guidance in interpreting state provisions whose language parallels that of the federal statutes. (See, e. g., Englund v. Chavez (1972) 8 Cal.3d 572, 589–590, 105 Cal.Rptr. 521, 504 P.2d 457; Petri Cleaners, Inc. v. Automotive Employees, etc., Local No. 88 (1960) 53 Cal. 2d 455, 459, 2 Cal.Rptr. 470, 349 P.2d 76.) Unquestionably, in defining the scope of representation in section 3504, the Legislature relied heavily upon the analogous sections of the federal Labor Management Relations Act; as one commentator has noted: "[t]he phrase 'wages, hours and other terms and conditions of employment' [of section 3504] is taken verbatim from the LMRA, where it has been given a generous interpretation, including anything that might affect an employee in his employment relationship." (Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719, 749; fns. omitted.) [12] Professor Grodin additionally observes, however, that "[t]he phrasing of the first part of section 3504 [i. e., 'including *but not limited to*'] suggests the scope of representation under the [Meyers-Milias-Brown] Act is even more broad" than under the federal statute (*id.*); thus, while the federal authorities undoubtedly provide a useful starting point in interpreting the scope of our state provision, they do not necessarily establish the limits of California public employees' representational rights.

In the instant case, however, we need not probe the area in which the state provision extends the right of representation beyond federal law, because the two recent federal decisions relied on by the county to support its position that no representational rights attached in the instant case are clearly distinguishable from the instant matter. In N.L.R.B. v. Quality Manufacturing Co. (4th Cir. 1973) 481 F.2d 1018 and Mobil Oil Corp. v. N.L.R.B. (7th Cir. 1973) 482 F.2d 842, the respective Circuit

but that language does not apply in the instant case involving a claim of the right to *union* representation under a statute establishing the right of public employees to organize.

Torrance Education Ass'n v. Board of Education (1971) 21 Cal.App.3d 589, 98 Cal. Rptr. 639, also relied upon by respondent, held merely that the Winton Act (Ed.Code, § 13080 et seq.) does not prohibit school administrators from requiring teacher attendance at faculty meetings while barring union officials; the case did not involve the right to union representation during a confrontation with an employer which an employee reasonably anticipates will involve union activities.

11. 29 United States Code section 157, provides that "[e]mployees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 158, subdivision (a)(1) makes it an unfair labor practice to interfere with the exercise of these rights, and section 158, subdivision (d) defines the scope of collective bargaining as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ."

12. At least one Court of Appeal has already invoked federal law precedents in support of its construction of the Meyers-Milias-Brown Act. (Service Employees Internat. Union, Local No. 22 v. Roseville Community Hosp. (1972) 24 Cal.App.3d 400, 408–409, 101 Cal.Rptr. 69.)

Courts of Appeals refused to enforce a National Labor Relations Board rule which recognized the right of an employee to have a union representative present at *any* employer-employee interview when the employee reasonably anticipated that disciplinary action might result from the interview.[13]

Neither *Quality Manufacturing* nor *Mobil Oil* are applicable to the instant case, however, for in neither decision did the employer-employee interview arise under circumstances in which the employee could reasonably fear that the questioning would relate to his union activities. Indeed the *Mobil Oil* court was careful to note explicitly that the circumstances before it did not involve such potential interrogation of union activities, emphasizing that "this is not a case in which there is any danger that the questioning was actually motivated by a desire to impair the employees' right to organize, to detect Union activity, or in any way to influence collective bargaining negotiations." (482 F.2d at p. 845; see Dobbs Houses, Inc. (1964) 145 N.L.R.B. 1565, 1571 [55 L.R.R.M. 1218].)

In sum, the employer's investigation here did not constitute a normal interview with regard to employment matters but, instead, an inquiry that focused upon the employee's conduct regarding the use of county cars in connection with a union rally. The very lifeblood of the union is its meetings and rallies; without them, the union expires. An inquiry into this subject matter, with its overtones of discipline of union members who attended the rally, could only create fear on the part of those subject to the process and lead them to urge the reasonable request that a union representative be present to assist them.

13. The National Labor Relations Board adopted its interpretation of the scope of the federal act's "right to representation" provision in a recent en banc decision. (See Weingarten Inc. & Retail Clerks Union, Local Union No. 445, Retail Clerks International Association AFL-CIO (March 16, 1973) 202 N.L.R.B. No. 69 (en banc) [1973 C.C.H., N.L.R.B. ¶ 25,151].) Although the

The judgment of the superior court is affirmed with respect to appellants Doyle, Pofscher and Chan. With respect to the remaining appellants the judgment is reversed and the cause remanded to the superior court for proceedings consistent with this opinion.

WRIGHT, C. J., and MOSK, BURKE, SULLIVAN and CLARK, JJ., concur.

McCOMB, Justice (dissenting).

I dissent. I would affirm the judgment for the reasons expressed by Mr. Justice Kane in the opinion prepared by him for the Court of Appeal in Social Workers' Un., Loc. 535 v. Alameda Cty. Welf. Dept. (Cal.App.) 106 Cal.Rptr. 609.

[1] ALAMEDA COUNTY EMPLOYEES' ASSOCIATION, et al., Plaintiffs and Appellants,

v.

COUNTY OF ALAMEDA et al., Defendants and Respondents.

Civ. 28520.

Court of Appeal, First District, Division 1.

Feb. 14, 1973.

Hearing Denied April 25, 1973.

[518]

Mandate proceeding in which it was contended, inter alia, that salary ordinance deprived employees of rate of pay to which they were entitled under county charter and that Civil Service Commission and Board of Supervisors failed to meet and confer in good faith with representatives of public employees association as required by Meyers-Milias-Brown Act. The Superior Court, Alameda County, Gordon Minder, J., denied petition, and petitioners appealed. The Court of Appeal, Molinari, P. J., held that evidence supported findings that county, in adopting salary ordinance which applied to specific fiscal year and provided for 2½% increase for certain classifications for second half of such fiscal year, had not abused its discretion and had not violated charter provision that "In fixing compensation, the Board of Supervisors shall in each instance provide a salary or wage at least equal to the prevailing salary or wage." The Court further held that where county had fulfilled its duty under such Act to "meet and confer in good

Peter Adomeit, Brundage, Neyhart, Grodin & Beeson, San Francisco, for plaintiffs and appellants.

Richard J. Moore, County Counsel, James E. Jefferis, Asst. County Counsel, Douglas Hickling, Deputy County Counsel, County of Alameda, Oakland, for defendants and respondents.

[521] [1]MOLINARI, Presiding Justice.

This is an appeal by petitioners Alameda County Employees' Association, Saundra V. Bainer and Eli Muela from a judgment denying their petition for a writ of mandate directed to the County of Alameda.

[522] [1]The petition was filed by petitioners on their own behalf and on behalf of the members of the association who were employed by the County of Alameda in a variety of specified job classifications. We shall hereafter refer to the petitioners jointly as "petitioner." The petition was partly concerned with the nature of the obligations imposed by sections 36 and 48 of the Charter of Alameda County on the Civil Service Commission and the Board of Supervisors of Alameda County respecting the establishment of salaries for employees within the specified classifications. Section 36 provides, in relevant part: "It shall be the duty of the Civil Service Commission: . . . (e) To recommend to the Board of Supervisors at least sixty days prior to the end of each fiscal year a rate of pay for each class in the classified civil service based upon a comparison of salaries being paid for like service and working conditions in other comparable places of public and private employment in order that all salaries shall be uniform for like service in each class of the classified civil service." Section 48 provides: "In fixing compensation, the Board of Supervisors shall in each instance provide a salary or wage at least equal to the prevailing salary or wage, for the same quality of service rendered to public employers and private persons, firms or corporations under a similar employment, in case such prevailing salary or wage can be ascertained."

In its first cause of action petitioner alleged that the Civil Service Commission (hereinafter "the Commission") recommended, and the Board of Supervisors (hereinafter "the Board") adopted, a salary ordinance which deprived the employees, for the first half of the fiscal year, of the rate of pay to which they were entitled under the charter. The fiscal year ran from July 1, 1969, through June 30, 1970. The salary ordinance provided a 2½ percent increase for certain classifications as of January 1, 1970. Petitioner alleged that the prevailing wage for the entire fiscal year was no less than the wage afforded as of January 1, 1970.

In its second cause of action petitioner alleged that the salary ordinance deprived some classifications of employees of the rate of pay to which they were entitled for the entire fiscal year. It alleged that as to these classifications the rate which was afforded as of January, by virtue of the 2½ percent increase, remained below the prevailing wage.

In its third cause of action petitioner alleged that the Commission and the Board acted arbitrarily, unreasonably, and in violation of the aforementioned sections of the charter in adopting the salary ordinance for the fiscal year 1969–1970; that the Commission and the Board utilized a salary survey containing stale data in that the information pertaining to 10 out of 12 jurisdictions was one year old; that these agencies failed to consider [523] [1]the amount by which salaries had lagged behind those in other jurisdictions during the preceding year and the effect which inflation had

and would have on the salaries set; and that the action of these agencies in deferring the 2½ percent increase until January, on the basis that there would be some upward salary movement in nearby jurisdictions, was arbitrary and unreasonable in that only one such jurisdiction had a fiscal year commencing in January.

Petitioner also alleged in the third cause of action that the Commission and the Board had failed to consider that some employees perform work which is similar to that performed by others and yet receive a lower rate of pay; that the Commission and the Board abandoned their procedure of arriving at the prevailing wage by an averaging process and offered no reasonable explanation for their recommendations and determinations; that the salary ordinance was determined and influenced by the figures previously set forth in the county's preliminary budget; and that neither the Commission nor the Board made any determination of the prevailing wage.

Petitioner's fourth cause of action was concerned with the nature of the obligations imposed on the Commission and the Board by sections 3505 and 3505.2 of the Government Code.[1]

During the period of time pertinent to the instant case, section 3505 provided as follows: "The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. [¶] 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation." Section 3505.2 provides as follows: "If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency in the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations." 1524

In its fourth cause of action petitioner alleged that, after numerous conferences and meetings between the parties, there remained a number of areas of disagreement, as set forth in the third cause of action; that on June 5, 1969, it formally requested the Board to submit these disputes to third-party mediation and fact-finding, as assertedly provided for by section 3505.2; that the Board arbitrarily and without good cause failed to submit to mediation; and that by virtue of this and related conduct, the Commission and the Board failed to meet and confer in good faith as required by section 3505.

The county filed a return and answer on September 29, 1969, denying the material allegations set forth in the first three causes of action and affirmatively alleging numerous facts relating to the adoption of the salary ordinance. The county asserted that this portion of the petition failed to state a cause of action. In response to the fourth cause of action, the county denied that section 3505.2 provided for fact-finding and denied that the Board had arbitrarily and without good faith refused to submit to mediation. The county alleged that mediation under section 3505.2 was purely discretionary and dependent upon the mutual agreement of the parties. The

1. All statutory references are to the Government Code unless otherwise indicated.

county alleged that the board's decision not to submit to mediation was a reasonable discretionary act. The county also asserted that this portion of the petition failed to state a cause of action.

In denying the peremptory writ the court made findings of fact and conclusions of law. The court found that the Board had adopted the salary ordinance pursuant to the following procedural process: First, a salary survey, involving approximately 700 classifications, was prepared. All organizations included in the survey were contacted in order to check the comparability of positions with those in Alameda County. Second, in accordance with the requirements of section 3505, there were 11 "meet and confer" sessions with representatives of interested employee organizations, including petitioner. Third, a tentative salary proposal was prepared by the staff of the Commission. Fourth, from April 4, 1969, through May 9, 1969, the Commission held six hearings during which it heard from department heads and from employee organizations, including petitioner. Fifth, the Commission prepared its salary recommendations, and referred them to the Board. Sixth, prior to adopting the ordinance, the Board held six public hearings. The hearings took place from May 6, 1969, through May 29, 1969, and the Board heard from representatives of em-
1525 ployee organizations, including petitioner, representatives of taxpayer organizations and the public.

The court found that the salary rates which were effective July 1, 1969, afforded a salary at least equal to the prevailing salary or wage for the same quality of service rendered to public employers and private persons, firms or corporations under similar employment; that the salary rate increases of 2½ percent, which were effective January 1, 1960, were not required in order to bring salaries into line with the prevailing rates, but rather were enacted pursuant to the Board's power to set salaries at levels in excess of prevailing rates, in order to anticipate possible upward adjustments; that certain classifications which had been questioned by petitioner were warranted by the requirements and duties associated with the classifications, and that persons within these classifications received a salary at least equal to that prevailing for like service in public and private employment; and that on numerous occasions the Board, directly and through its designated representatives, personally met and conferred with representatives of petitioner, freely exchanged information, opinions, and proposals, and endeavored to reach agreement on matters within the scope of representation.

The court's conclusions of law may be summarized as follows: That section 36(e) of the charter obligated the Commission to recommend to the Board a rate of pay based upon a comparison of salaries being paid for like service and working conditions in other comparable places of public and private employment; that the Commission adhered to these standards in formulating its recommendations; that there was substantial evidence before the Commission to support its finding and ascertainment of recommended rates of pay; that the Commission did not act arbitrarily, capriciously, unreasonably, or fraudulently in making its recommendations to the Board; that section 48 of the charter obligated the Board to ascertain the prevailing wage in similar public and private employment for the same quality of service, and then to fix salaries at sums no less than those ascertained; that the Board adhered to these standards in enacting the salary ordinance; that there was substantial evidence before the Board at the time it considered and enacted the salary ordinance to support its finding and ascertainment that the salaries under the ordinance were at least equal to the prevailing rate; that the Board did not act arbitrarily, capriciously, unreasonably, or fraudulently in enacting the ordinance; that because of the differences in the classifications which had been questioned by petitioner there was no requirement that persons employed in these classifications receive similar salaries; that mediation under section 3505.2 is permissive or discre- 1526

tionary and not mandatory; and that failure to consent to mediation is not evidence of bad faith within the meaning of section 3505.

On appeal petitioner contends that Alameda County violated the prevailing wage provisions in the charter by dividing the yearly increases into two parts and deferring the second part until January 1, 1970, and that the Board violated the Meyers-Milias-Brown Act (§§ 3500–3511) when it refused, without reasons, to bring its dispute with petitioner to a third-party mediator or fact-finder. The record discloses the following evidence relevant to the issues inherent in these arguments.

The Commission's staff, as in previous years, conducted a salary survey in order to ascertain the wages being paid by private employers and by other public entities for comparable classifications of work. The classifications which were most frequently reflected in the survey were denominated "key classifications." These classifications were viewed as the prime indicator for salary movements in related classifications for which there was less comparable data. With one exception, the survey set forth the salaries which were being paid by other employers as of the time the survey was conducted. The exception pertained to the City and County of San Francisco. At the time the survey was conducted, the San Francisco Board of Supervisors had already adopted a salary ordinance for the fiscal year 1969–1970 and these figures, rather than the figures reflecting current salaries, were set forth in the survey.

The survey segregated the salaries being paid by other public entities, while including the salaries paid by private employers in one figure. Gershenson, petitioner's expert witness, testified that this treatment of the salaries in the private sector was not unreasonable and did not significantly affect the result. He also testified that the fact that the survey did not take into account the varying number of employees in the different public jurisdictions did not make a great deal of difference. After setting forth the salaries being paid by other public entities and by employers in the private sector, the survey indicated the average salary for each key classification. The average was computed by dividing the sum of all the salaries by the number of salaries considered.

The Commission's staff was under the direction of Alfred Nardi who held the position of personnel director. Nardi and his staff were directed by the Commission to meet and confer with the employee groups. Nardi proceeded to meet with employee groups, including petitioner. The information set forth in the salary survey was utilized as the basis for discussions. In the course of these meetings, Nardi informed the employees that although the arithmetic mean was set forth in the salary survey, it was not indicative of a formula used in setting salaries. He explained that the mean was included only because it was a reference point which the Board had gotten accustomed to consulting. Nardi stated that the mean tended to be either too high or too low if there were either extremely high or extremely low figures in the survey. He explained that what was sought was a salary which fell within the middle of the figures in the survey. 1527

After meeting with representatives of employee groups, Nardi submitted his recommendations to the Commission. The document presented included all of the information set forth in the salary survey as well as present and proposed salaries for Alameda County. Attached to the document was a memorandum which stated that the proposals generally matched the maximum position reached by the Board the previous year, and that this meant equating to the prevailing rate by using current figures plus a 2½ percent "lag" adjustment effective January 1, 1970. The memorandum noted that any movement beyond this position would exceed the Board's position of the previous year.[2]

2. The memorandum recognized that in a few instances special problems required special adjustments and that among these were the nurses.

Nardi testified that, in making his recommendations, he attempted to stay within the center area disclosed by the salary survey. He discarded the highest and the lowest figure for each classification. Nardi explained that if there were an uneven number of figures, the center area was between the two middle figures. If there were an even number of figures, the center area was the range between the three central figures. Nardi testified that in making his recommendations he was cognizant of the Board's obligation to fix wages at the prevailing rate. He stated that his recommendations were intended to bring salaries in line with the rates prevailing at the time the salary survey was taken. Gershenson testified that this procedure of selecting a central tendency was not an unreasonable way of arriving at a prevailing rate.

With respect to the 2½ percent "lag" adjustment, Nardi testified that although he knew that salaries would increase in the fiscal year 1969–1970, he did not know by how much and he was not willing to hazard a guess. Nardi gave three reasons for having selected the figure of 2½ percent. First, this was the next increment in the county salary schedule. Second, as the rate of inflation during the preceding year had been 5 percent, a 2½ percent rise could be anticipated in the first six months of the coming fiscal year. Third, the Board had authorized a similar increase
1528 the preceding year and thus it could be anticipated that they would approve the increase. Gershenson testified that although 2½ percent was a conservative figure, it was reasonable.

Nardi gave two reasons for having recommended that the increase be effective January 1, 1970, rather than July 1, 1969. First, the Board had authorized a similar mid-year increase during the preceding year and this seemed to establish a precedent. Second, if the increase were effective July 1, 1969, it would force other jurisdictions to enact a comparable increase. Nardi stated that it was wrong to force other jurisdictions to increase their salaries on the basis of his guess as to what they might in fact do. Gershenson testified that it was unreasonable and not in accord with the custom and practice of labor statisticians to provide that the effective date be deferred until January 1, 1970. Gershenson also stated that if all public jurisdictions chose to ignore salary trends, salaries in the public sector would remain static, except that the private sector might have some influence if salaries fell above the center.

At a meeting held on April 23, 1969, the Commission informed the representatives of employee organizations that they could appear at future meetings and made presentations respecting any disagreements which they had had with the Commission's staff. The representatives of employee groups and the heads of departments appeared at meetings held on April 25, April 30, May 2, and May 9, and expressed their views on the tentative salary proposal.

On May 2, 1969, the Commission referred its recommendations to the Board. With the exception of a few upward revisions, the Commission's recommendations were in accord with the tentative salary schedule which had been proposed by Nardi and the Commission's staff. The Commission recommended that effective July 1, 1969, certain specified classifications were recommended for increases varying from 0 percent increase to a 10 percent increase, and that effective Janaury 1, 1970, 469 classifications were recommended for an additional 2½ percent increase. In its memorandum accompanying its recommendations, the Commission stated that the proposed salaries generally fell in the center of the current rates paid by other bay area agencies and that they generally took into account that some upward salary movement by nearby agencies would probably occur after July 1, thus justifying the January increase.

Nardi presented the recommendations of the Commission to the Board at a meeting held on May 6, 1969. The Board then set

the first public hearing on the salary ordinance for May 13, 1969. Public hearings
1529 were conducted on this date and also on May 20, 22 and 27. Representatives of employee organizations as well as other interested persons appeared before the Board and expressed their views.

During these hearings, Nardi was present to serve as a technical adviser. Nardi did not present any independent report, but rather responded only when directly questioned by the Board. In answer to a question, Nardi explained to the Board that the Commission's recommendations were based on the center of the range of figures disclosed by the salary survey.

Nardi testified in the proceedings below that he had not included a technical explanation of the procedures utilized in making the salary survey in the memorandum attached to the Commission's recommendations because he was following a practice utilized by the Board in the past. Nardi testified that he did not provide the Board with any statistical data on salary trends nor did he advise them that all but two of the jurisdictions in the salary survey had salary increases effective July 1.

The Board voted on the various sections of the ordinance on May 27 and May 29. A comparison of the data for each of the 89 key classifications as set forth in the salary survey with the salary rates effective under the ordinance as of July 1, 1969, discloses that the ordinance rates for 76 of the key classes are at or above the central rate of the survey data for the particular class where an odd number of rates were collected for such class, or at or above the range of the central two survey rate figures where an even number of rates were collected for the particular class. There are only 13 instances in which the ordinance rates fall below the central rate, and the ordinance rates for seven of these classes are above the arithmetic mean. The ordinance rates for the remaining five key classifications are within 1 percent of the central rate.

On July 8, 1969, a representative of petitioner appeared before the Board and presented a formal request to submit certain disputes to a third-party mediator and fact-finder. At a meeting held on July 10, 1969, the Board denied the request.

Adverting to the issue presented by this appeal, we observe that petitioner contends that the county violated the prevailing wage provisions contained in the charter by dividing the yearly increase into two parts and deferring the second part until January 1, 1970. It asserts that the effect of this action was to deprive employees of prevailing wages for one-half of the 1969–1970 fiscal year. In response to this argument the county asserts that the prevailing wage provisions did not obligate the Board to predict possible salary movements in other jurisdictions. The county states that the issue raised by petitioner is, in effect, 1530 whether there is substantial evidence to support the trial court's finding that the rates taking effect on July 1 were at least equal to the prevailing wage, and that the increase effective January 1 was not required to bring salaries into line with the prevailing wage, but was enacted by the Board under its power to set salaries at a level in excess of the prevailing rate in order to anticipate possible upward adjustment elsewhere.

As we perceive it, the single issue is whether the salary ordinance is in accord with the provisions of the charter. In resolving this issue we note that courts have declined to fix the prevailing wage at some definite amount as "Its definition is relative to time and place, both of which are within the purview and cognizance of the administrative board in each case." (Metropolitan Water Dist. v. Whitsett, 215 Cal. 400, 414, 10 P.2d 751, 757.) Similarly, the courts have refused to set forth any specific formula by which the prevailing wage must be determined as this determination may require consideration of various factors such as fringe benefits, hours of work, and productivity which are not easily equated a specific figure. (Anderson v. Board of Supervisors, 229 Cal.App.2d 796,

799, 40 Cal.Rptr. 541; Gowanlock v. Turner, 42 Cal.2d 296, 310, 267 P.2d 310.)

[1] Governing bodies may not, however, adopt any formula which they choose. The courts have generally interpreted the term "prevailing wage" as being synonymous with market value. (Metropolitan Water Dist. v. Whitsett, supra, 215 Cal. 400, 414–415, 10 P.2d 751.) Accordingly, in determining the prevailing wage a governing body may not arbitrarily abandon a previously-employed formula in favor of a new formula which involves unfair comparisons and results in denying workers the increase they would have received had the standard formula been utilized. (Sanders v. City of Los Angeles, 252 Cal. App.2d 488, 492–495, 60 Cal.Rptr. 539.)

[2] Section 48 of the Alameda County Charter provides in relevant part that "In fixing compensation, the Board of Supervisors shall in each instance provide a salary or wage at least equal to the prevailing salary or wage, . . . in case such prevailing salary or wage can be ascertained." In order to resolve the issue posed by the instant case it must be determined whether this provision obligates the Board to anticipate increases which may occur in other public jurisdictions and in the private sector during the course of the fiscal year for which they are fixing salaries.

It is first to be observed that this section of the charter begins with the modifying phrase, "in fixing compensation." This suggests that the Board is obligated to afford salaries which are in accord with the
1531 salaries prevailing at the time they fix the compensation for the ensuing fiscal year. This interpretation is in accord with the customary usage of the term "prevailing." That word is defined as applying "to what is predominant or widespread beyond others of its kind or class at a time or place indicated, implicit, or assumed to be the present . . . . " (Webster's Third New Internat. Dict.) In sum, "prevailing" refers to the present.

It is next to be noted that this section of the charter concludes with the phrase, "in case such prevailing salary or wage can be ascertained." In construing a similar charter provision, the California Supreme Court defined the word "ascertain" as follows: " 'to fix, to render certain or definite; to establish and determine; to clear of doubt or obscurity . . . to find out by investigation . . . or to hear, to try, and determine.' [Citation.]" (Walker v. County of Los Angeles, 55 Cal.2d 626, 635, 12 Cal.Rptr. 671, 676, 361 P.2d 247, 252.) It would thus be in derogation of the common meaning of the term used in the Alameda County Charter to find that the Board was obligated to engage in speculation as to what might occur in the future. We therefore conclude that section 48 of the charter does not obligate the Board, in fixing compensation, to anticipate future increases in the rates of pay afforded by other employers.

[3, 4] The fixing of compensation for public employees is a legislative function. (Banks v. Civil Service Commission, 10 Cal.2d 435, 442, 74 P.2d 741; City and County of San Francisco v. Boyd, 22 Cal. 2d 685, 689, 140 P.2d 666; Carrier v. Robbins, 112 Cal.App.2d 32, 35, 245 P.2d 676; Anderson v. Board of Supervisors, supra, 229 Cal.App.2d 796, 798, 40 Cal.Rptr. 541.) However, it is established that prevailing wage provisions constitute a positive limitation on the governing body's discretionary power to determine the rate of compensation. (Walker v. County of Los Angeles, supra, 55 Cal.2d 626, 635, 12 Cal. Rptr. 671, 361 P.2d 247.) Such provisions are to be liberally construed in favor of the worker. (Walker v. County of Los Angeles, supra, at pp. 634–635, 12 Cal.Rptr. 671, 361 P.2d 247; Goodrich v. City of Fresno, 74 Cal.App.2d 31, 36, 167 P.2d 784.)

[5] Under provisions such as section 48 of the Alameda County Charter, the Board has a mandatory duty to make a finding as to the prevailing wage. This determination may be made either prior to or at the

time the salary ordinance is adopted by the Board. (Walker v. County of Los Angeles, supra, 55 Cal.2d 626, 635, 12 Cal.Rptr. 671, 361 P.2d 247; Sanders v. City of Los Angeles, 3 Cal.3d 252, 262, 90 Cal.Rptr. 169, 475 P.2d 201.) After having made this determination, the Board has no discretion to adopt an ordinance which provides for a lesser rate of compensation. (Sanders v. City of Los Angeles, supra, at p. 262, 90 Cal.Rptr. 169, 475 P.2d 201; Goodrich v. City of Fresno, supra, 74 Cal. App.2d 31, 36, 167 P.2d 784.)

1532 [6] Our next inquiry, therefore, is whether the charter restricts the Board's discretionary power to afford compensation in *excess* of the prevailing rate and to provide that such additional compensation shall be received only during the second half of the fiscal year.

Section 48 provides that the Board "shall in each instance provide a salary or wage *at least equal* to the prevailing salary or wage, . . ." (Emphasis added.) The clear import of this language is that the Board retains its discretionary power to fix compensation at a rate which exceeds the prevailing wage. (*Cf.* City and County of San Francisco v. Boyd, supra, 22 Cal.2d 685, 690, 140 P.2d 666.) There is nothing in the language of this section which suggests that the Board does not retain the discretionary power to determine that the portion of the compensation which is in excess of the prevailing wage shall be received only during the latter half of the fiscal year. Petitioner's contention that a contrary interpretation is mandated by *Walker* and *Sanders* is not tenable. These decisions stand only for the proposition that under a prevailing wage provision there is no discretionary power to provide that compensation which is *equal* to the prevailing wage shall be received only during the latter half of the fiscal year. (Walker v. City of Los Angeles, supra, 55 Cal.2d 626, 634–635, 12 Cal.Rptr. 671, 361 P.2d 247; Sanders v. City of Los Angeles, supra, 252 Cal.App.2d 488, 490, 493, 60 Cal.Rptr. 539.)

We therefore conclude that, under section 48 of the charter, the Board retained its discretionary power to afford compensation in excess of the prevailing wage and to provide that such excess be received only during the latter half of the fiscal year.

[7] It is thus evident that, in order to comply with the prevailing wage provisions contained in the charter, the Board had to determine the prevailing wage and provide for compensation which was at least equal to the prevailing wage. It is established that courts will not interfere with such action unless it "is fraudulent or so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." (City and County of San Francisco v. Boyd, supra, 22 Cal.2d 685, 690, 140 P.2d 666, 668; Walker v. City of Los Angeles, supra, 55 Cal.2d 626, 639, 12 Cal.Rptr. 671, 361 P.2d 247; Anderson v. Board of Supervisors, supra, 229 Cal.App.2d 796, 798, 40 Cal.Rptr. 541; Carrier v. Robbins, supra, 112 Cal.App.2d 32, 35, 245 P.2d 676.)

[8] We are satisfied from a review of the evidence in this case that it substantially supports the findings of the court below and its conclusions that the county did not abuse its discretion in adopting the salary ordinance for the fiscal year 1969–1970 and that it did not violate the prevailing wage provisions set forth in the charter.

1533 Turning to the contention that the Board violated the Meyer-Milias-Brown Act when it refused to agree to mediation, we first observe that the act does not specifically obligate public agencies to bargain collectively with the representatives of employee organizations (§ 3509) but requires that they "shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment" with such representatives. (§ 3505.) The act also provides that if the parties fail to reach agreement within a reasonable time, they "together may agree upon the appointment of a mediator mutually agreeable to the parties." (§ 3505.2.)

Petitioner contends that the county's obligation to meet and confer in good faith includes a duty to specify the reasons for the county's refusal to agree to mediation after an impasse had been reached. It likewise contends that section 3505.2, in providing for permissive mediation, does not give either party the right to unreasonably and arbitrarily refuse to mediate. In effect, petitioner is arguing that an unexplained refusal to agree to mediation constitutes a per se violation of the duty to meet and confer in good faith.

The proper construction of these sections is to be determined by reference to the intent of the Legislature. (Kimball v. County of Santa Clara, 24 Cal.App.3d 780, 784, 101 Cal.Rptr. 353.) The legislative purpose is disclosed by section 3500 which provides in part that the purpose of the act is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." The issue posed is thus whether this purpose can be effectuated only by according sections 3505 and 3505.2 the construction advanced by petitioner.

In resolving this issue we may not ignore the plain language of the statute. (Kimball v. County of Santa Clara, supra, 24 Cal.App.3d 780, 784, 101 Cal.Rptr. 353.) At the time of the proceedings below, section 3505 provided, in pertinent part, that " 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation." The meaning of this language is clear and explicit. As we noted in our previous review of the record, the staff of the Commission met with petitioner's representatives, the Commission afforded petitioner an opportunity to present its views at several meetings, and the Board held meetings at which petitioner's representatives appeared and offered their opinions on the 1534
proposed salary ordinance. There is nothing the record which suggests that these meetings were a sham. No contention is made by petitioner that the meetings were not conducted in good faith. There is substantial evidence, therefore, to support the finding that the county fulfilled its duty to "meet and confer in good faith."

[9] Adverting to the issue of mediation, we note that section 3505.2 provides that if the parties fail to reach an agreement within a reasonable time they "together *may* agree upon the appointment of a mediator . . . . ." (Emphasis added.) When the word "may" is used in legislation it is to be given its customary meaning and is to be construed as permissive and conferring discretion unless it appears from the terms of the statute that it was the intent of the Legislature to impose a duty and that the public or third persons have a claim to have the power exercised. (Kemble v. McPhaill, 128 Cal. 444, 446, 60 P. 1092; Roberts v. Duffy, 167 Cal. 629, 638, 140 P. 260; Driscoll v. East-West Dairymen's Assn., 52 Cal.App.2d 468, 472, 126 P.2d 467.) There is nothing in the instant statute which suggests that "may" is not to be accorded its usual construction.

[10, 11] We conclude, therefore, that there is a duty to "meet and confer in good faith," but there is no duty to agree to mediation. If the requirement of meeting and conferring in good faith is met it is not unreasonable for either of the parties to refuse to submit the matter to mediation. There is no requirement in the statutes, moreover, that reasons be specified for the refusal to mediate. In sum, if the parties meet and confer in good faith they do all that is required of them by the statutes. Mediation is merely an option granted to the parties in the endeavor to reach an agreement if both parties are so disposed. We apprehend that since the

agreement to mediate is subject to mutual agreement, no duty to mediate is imposed upon the employees as well. They too, in a particular instance, may feel that mediation is not the desirable approach to the resolution of the differences.

The judgment is affirmed.

SIMS and ELKINGTON, JJ., concur.

[DUBLIN PROFESSIONAL FIRE FIGHTERS LOCAL 1885, AFL-CIO, Plaintiff and Respondent,

v.

VALLEY COMMUNITY SERVICES DISTRICT et al., Defendants and Appellants.

Civ. 35137.

Court of Appeal, First District, Division 4.

Feb. 6, 1975.

Community services district appealed a judgment of the Superior Court, Alameda County, Robert K. Barber, J., granting writ of mandamus compelling district and its officers to meet and confer with local union concerning assignment of overtime work to temporary employees. The Court of Appeal, Christian, J., held that a request for conference with representatives of public agency may be made at any time and does not have to be made prior to agency's adoption of its final budget; and that assignment of overtime work was proper subject for a conference.

Affirmed.

Byron D. Athan, in pro per.

Davis, Cowell & Bowe, John H. Cohenour, San Francisco, for plaintiff and respondent.

[CHRISTIAN, Associate Justice.

Dublin Professional Fire Fighters Local 1885 brought this action against Valley Community Services District and its officers to compel the district to "meet and confer" with the union concerning the assignment of overtime work. The district's appeal is from a judgment granting a writ of mandamus.

Prior to June 1973, the district usually assigned overtime work to its regular employees. On May 15, 1973, however, a new policy was adopted, requiring use of temporary employees for overtime work. The union thereafter requested a conference with the district to discuss the new rule. The trial court found that the district had refused to meet and confer in good faith with employee representatives.

[1] The requirement that a public agency meet and confer with recognized organizations of its employees is expressed in Government Code section 3505. In pertinent part, the statute provides that representatives of the public agency and of the employee organization shall "meet and confer promptly upon request by either party and . . . endeavor to reach agreement on matters within the scope of repre-

sentation prior to the adoption by the public agency of its final budget for the ensuing year. . . . " The district contends that the statutory reference to the adoption of a budget implies that a request to meet and confer is ineffective if it is not made prior to the adoption of a budget. It is pointed out by the district that a budget for the 1973–1974 fiscal year was adopted on May 15, 1973, while the union did not ask for a conference until August 28. The construction proposed by the district is not correct; the obligation, in proper cases, to "meet and confer promptly upon request" is absolute, while the statutory admonition to "reach agreement" before the adoption of the budget is only hortatory. Agreement may not be reached at all, as the statute recognizes in stating that the negotiators should "endeavor" to reach agreement before the budget is adopted. Negotiation is required not only concerning wages and hours (both matters which may have budgetary impact) but also concerning "other terms and conditions of employment" which may have no effect on the budget. We conclude that a request for conference may be made at any time by either side, though the possibilities of resolving disagreements will of course be much influenced by the practical realities of the budget cycle.

[2] The district also contends that the assignment of overtime work was not a proper subject of discussion under Government Code section 3505. The obligation to meet and confer in good faith extends to wages, hours and other terms and conditions of employment. (Gov.Code, § 3505.) In Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 615–616, 116 Cal. Rptr. 507, the Supreme Court noted that the phrase "wages, hours, and other terms and conditions of employment" was borrowed from the National Labor Relations Act (29 U.S.C., § 158, subd. (d)). The court concluded that it is appropriate to use precedents under the federal statute as a guide to interpretation of analogous or identical language in state labor legislation. (12 Cal.3d at pp. 616–617, 116 Cal.Rptr. 507.) The cases have recognized that issues relating to the workload of employees are proper subjects for negotiation. (Gallenkamp Stores Co. v. N.L.R.B. (9th Cir. 1968) 402 F.2d 525, 529, fn. 4; N.L.R.B. v. Bonham Cotton Mills, Inc. (5 Cir. 1961) 289 F.2d 903–904; Los Angeles County Employees Assn., Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1, 108 Cal.Rptr. 625; Beacon Piece Dyeing & Finishing Co., Inc. (1958) 121 N.L.R.B. 953, 954, 956; see also Fire Fighters Union v. City of Vallejo, *supra*, 12 Cal.3d at pp. 619–621, 116 Cal.Rptr. 507.) The assignment of overtime work to temporary service personnel will have an obvious effect on the workload and compensation of the regular employees, since the regular employees will be deprived of their customary priority in seeking such work. It may be that the district's new policy is to be preferred to the former practice. Nevertheless, the district is required to meet with the representatives of its employees and discuss their grievances candidly. The purpose of the statute is "to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes . . . ." (Gov.Code, § 3500.) The peremptory writ of mandate was properly granted.

The judgment is affirmed.

CALDECOTT, P. J., and EMERSON,* J., assigned, concur.

* Under appointment by the Chairman of the Judicial Council.

GLENDALE CITY EMPLOYEES' ASSOCIATION, INC., et al., Plaintiffs and Appellants,

v.

CITY OF GLENDALE et al., Defendants and Appellants.

L. A. 30357.

Supreme Court of California, In Bank.

Oct. 3, 1975.

Rehearing Denied Oct. 30, 1975.

An association of city employees brought action against the city for writ of mandate to compel the city council to provide salary and wage increases to the employees according to a memorandum of understanding. The Superior Court, Los Angeles County, Robert W. Kenny, J., granted the writ, and the city appealed. The Supreme Court, Tobriner, J., held that under the Meyers-Milias-Brown Act, the memorandum of understanding, once approved by the city council, became binding upon the parties. Discretion available to a city in interpreting the city charter provisions was not available to the city in construing the memorandum of agreement. Administrative remedies were inadequate, and mandamus lay to enforce the memorandum.

Judgment reversed and cause remanded to permit joinder of appropriate city officials.

Mosk, J., filed an opinion concurring in part and dissenting in part.

Opinion, 114 Cal.Rptr. 153, 39 Cal. App.3d 303, vacated.

Mohi, Morales & Glasman, Mohi, Morales, Dumas & Glasman, and Frank C. Morales, Los Angeles, for plaintiffs and appellants.

Lemaire & Faunce, Cy H. Lemaire, Edward L. Faunce, Los Angeles, Davis, Cowell & Bowe, Alan C. Davis and Wayne S. Canterbury, San Francisco, as amici curiae on behalf of plaintiffs and appellants.

Joseph Rainville and Richard W. Marston, City Attys., Robert L. Smith and Frank R. Manzano, Asst. City Attys., Burke, Williams & Sorensen, George W. Wakefield and Richard R. Terzian, Los Angeles, for defendants and appellants.

David S. Kaplan, Sacramento, Richard S. Whitmore and Gillio & Whitmore, Sunnyvale, as amici curiae on behalf of defendants and appellants.

TOBRINER, Justice.

With the enactment of the George Brown Act (Stats.1961, ch. 1964) in 1961, California became one of the first states to recognize the right of government employees to organize collectively and to confer with management as to the terms and conditions of their employment. Proceeding beyond that act the Meyers-Milias-Brown Act (Stats.1968, ch. 1390) authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency.[1] The present case raises among other issues which we shall discuss the fundamental question unanswered by the literal text of these statutes: whether an agreement entered into under the Meyers-Milias-Brown Act, once approved by the governing board of the local entities, binds the public employer and the public employee organization. We conclude that the Legislature intended that such an understanding, *once ratified,* is indeed binding upon the parties.

1. *Statement of facts.*

Pursuant to the Meyers-Milias-Brown Act, negotiators for plaintiff Glendale City Employees' Association, Inc., the designated representative for the city employees, met with Charles Briley, the assistant city manager, to discuss employee salaries for the 1970–1971 fiscal year. The parties negotiated a memorandum of understanding, which they presented to the city council. On June 9, 1970, the council passed a motion approving the memorandum. The memorandum of understanding provides for a cost of living adjustment, sick leave, incentive pay, and a salary survey; the only matter that remains at issue is the survey provision.[2]

1. The Meyers-Milias-Brown Act (Gov.Code, §§ 3500–3510) applies to employees of municipalities and most other local governmental agencies. Employees of school districts, however, fall under the Winton Act (Ed.Code, §§ 13080–13090) and employees of some transit districts come within the scope of special legislation governing those districts (see, e. g., Pub.Util.Code, §§ 25051–25057). The George Brown Act, now renumbered as Government Code sections 3525–3536, still governs relations between the state and its employees.

2. The parties also dispute the meaning of language in the preamble to the memorandum respecting the effective date of the understanding. The disputed language states that "The items in this agreement are subject to the approval of the City Manager and the City Council of the City of Glendale, and will be placed into effect upon the taking of administrative action by the City Manager's Office and the adoption of the necessary ordinances and resolutions by the City Council if acceptable to them, in accordance with the terms and conditions hereinafter set forth." Plaintiffs maintained that the understanding became effective upon the council's adoption of a resolution approving the memorandum; defendants argue that it

The survey provision reads as follows: "The parties hereto will conduct a joint salary survey and using as guide lines data secured from the following jurisdictions, Burbank, Pasadena, Santa Monica, Long Beach, Anaheim, Santa Ana, Los Angeles City and Los Angeles County. *The intent of the survey will be to place Glendale salaries in an above average position with reference to the jurisdictions compared with proper consideration given to internal alignments and traditional relationships.* The data used will be that data available to us and intended for use in fiscal year 1970–71. Adjustments which it is agreed shall be made will have an effective date of October 1, 1970. It is intended that comparisons will be made on a classification basis and not title only, and that the classifications shall be determined by professional judgment of the highest qualified personnel people with whom we would confer in the jurisdictions with which we will compare." (Emphasis added.)

The city conducted the survey. Consistent with past practice, the city organized the data by preparing bar graphs comparing Glendale salaries with the surveyed jurisdiction. Although the graphs show the entire salary range for each job classification, the parties are primarily concerned with the salaries paid employees in the top (5th or E) step of each salary range since a majority of Glendale employees are at that level.

By viewing the bar graphs, the city manager could obtain a rough idea of how Glendale salaries at each step compared with salaries paid in surveyed jurisdictions. On this basis the city manager, in September of 1970, prepared a draft salary ordinance. Plaintiff association, using the survey data, computed the arithmetic average of salaries from the surveyed jurisdictions for the top step of each job classification, and discovered that in many instances the salary proposed in the draft ordinance was below this average. Over the objection of the association the city council, on October 1, 1970, enacted the ordinance (Salary Ordinance No. 3936) recommended by the city manager.

On behalf of the class of city employees, plaintiff association and certain of its members filed the instant suit against the City of Glendale and its councilmen. Upholding the binding nature of the memorandum of understanding, the trial court admitted parol testimony of the negotiators to aid in the interpretation of its provisions. On the basis of that testimony, the court concluded that the city must compute the arithmetic (mean) average of the salaries paid employees in the highest step of each comparable classification in the surveyed jurisdictions, and must pay Glendale employees in the fifth step of each classification a salary equal to the average from the surveyed jurisdiction, plus one cent. Salaries of workers in the lower steps would be determined by the existing ratio of such salaries to step E salaries, thus preserving "internal alignments" as required by the memorandum.[3]

The court concluded that Salary Ordinance No. 3936 did not meet these criteria, and that the failure of the city to pay salaries in excess of the arithmetic average of

does not take effect until the council adopted ordinances implementing its terms.

Since the city did adopt a salary ordinance with the intent of implementing the memorandum, even under defendants' interpretation the agreement has gone into effect.

3. The trial court also found: (a) that salary data from Los Angeles City and Los Angeles County should be included in computing the average salary, not merely utilized as "reference points" as the city claimed; (b) that the term "traditional relationships" referred to the historical relationship between salaries paid certain Glendale employees and the salaries paid employees of other jursidictions holding comparable positions; (c) that the term "internal alignments" referred to salary relationships between Glendale employees at different salary steps and classes; (d) that the proviso rquiring "proper consideration" for traditional relationships and internal alignments did not authorize the city to rely on such factors to justify payment of below-average salaries.

surveyed jurisdictions constituted an abuse of discretion and a breach both of the memorandum of understanding and of the city's duty under the Meyers-Milias-Brown Act. Finally, the court concluded that since plaintiffs had no adequate remedy at law, mandamus should issue to compel defendants to compute and pay compensation to city employees in accord with the formula set out in the court's findings and conclusions. The court directed that 25 percent of all retroactive salaries and wages recovered should be payable to plaintiffs' counsel as attorneys' fees.

Defendants appealed. They contend that the memorandum of understanding was not binding, that the trial court erred in its interpretation of the memorandum, and that in any event the memorandum cannot be enforced by writ of mandamus. Defendants also argue that the present suit is not a proper class action, and that relief is barred by plaintiff's failure to exhaust administrative remedies. Plaintiffs filed a cross-appeal which raises a single limited issue; plaintiffs maintain that whenever an employee's salary must be increased to bring it into line with the survey, it should be increased not only to a figure one cent above average, but to a figure lying on a higher salary range.

2. *The memorandum of understanding, once approved by the city council, is binding upon the parties.*

[1] The Meyers-Milias-Brown Act, as set forth in Government Code section 3505.1, provides that after negotiations "If agreement is reached by the representatives of the public agency and a recognized employee organization . . . they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination."[4] As we shall explain once the governmental body votes to accept the memorandum, it becomes a binding agreement.

The historical progression in the legislative enactments began with the George Brown Act.[5] That act sought in general to promote "the improvement of personnel management and employer-employee relations . . . through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed." (Stats.1961, ch. 1964, p. 4141.) It provided, in former section 3505, that "The governing body of a public agency [or its representatives], shall meet and confer with representatives of employee organizations upon request, and shall consider as

4. Section 3500 of the Meyers-Milias-Brown Act does not clearly prescribe whether a local agency may adopt methods of administering employer-employee relations which differ from those prescribed by the act. (See discussion in Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 723–725; Grodin, *California Public Employee Bargaining Revisited: The NMB Act in the Appellate Courts* (1974) California Public Employee Relations No. 21, p. 2.) We need not reach that question here, for Glendale has adopted a format for labor-management relations essentially identical to that set out in the Meyers-Milias-Brown Act. The city's employee relation ordinance states that employee organizations shall present written proposals on salaries, fringe benefits and other conditions of employment to the city manager. It then provides in language parallel to Government Code section 3505.1, that "If agreement is reached by the City Manager and the recognized employee representative, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to The Council by May 1 of each year." (Ordinance No. 3830, § 11.)

5. The George Brown Act originally appeared as Government Code sections 3500–3509. The legislative revisions of 1968 and 1971 reserved those sections for the Meyers-Milias-Brown Act, and reenacted the George Brown Act, now limited to the relationship between the state government and state employees, as Government Code sections 3525–3536.

fully as it deems reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (Stats.1961, ch. 1964, p. 4142.)[6]

During the years following enactment of the George Brown Act public employee unions continued to grow in size[7] and to press their claims that public employees should enjoy the same bargaining rights as private employees so long as such rights did not conflict with the public service.[8] The George Brown Act, originally a pioneering piece of legislation, provided only that management representatives should listen to and discuss the demands of the unions. Apparently the failure of that act to resolve the continual controversy between the growing public employees' organizations and their employers led to further legislative inquiry. Moreover, subsequent enactments of other states, which granted public employees far more extensive bargaining rights,[9] further exposed the limitations of the George Brown Act.

[336] Cognizant of this turn of events the Legislature in 1968 enacted the Meyers-Milias-Brown Act.[10] Expressly intending the new law to strengthen employer-employee communication, the Legislature provided for "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment." (Gov.Code, § 3500.) The public agency must not only listen to presentations, but "meet and confer in good faith" (Gov. Code, § 3505), a phrase statutorily defined to include a free exchange of information, opinions and proposals, with the *objective* of reaching "agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year." (*Ibid.*) Section 3505.1, quoted earlier, provides that if agreement is reached it should be reduced to writing and presented to the governing body of the agency for determination. This statutory structure necessarily implies that an agreement, *once approved by the agency, will be binding.* The very alternative prescribed by the statute—that the memorandum "shall not be binding" except upon presentation "to the governing body or its statutory representative *for determination,*"—manifests that *favorable* "determination" engenders a binding agreement.

Why negotiate an agreement if either party can disregard its provisions? What point would there be in reducing it to writing, if the terms of the contract were of no legal consequence? Why submit the agreement to the governing body for determination, if its approval were without significance? What integrity would be left in government if government itself could attack the integrity of its own agreement? The procedure established by the act would be meaningless if the end-product, a labor-management agreement ratified by the governing body of the agency, were a document that was itself meaningless.

The Legislature designed the act, moreover, for the purpose of resolving labor disputes. (See Gov.Code, § 3500.) But a statute which encouraged the negotiation of agreements, yet permitted the parties to retract their concessions and repudiate their promises whenever they choose, would impede effective bargaining. Any concession by a party from a previously

6. This provision, reenacted as Government Code section 3530, still governs the relationship between the state and state employees organizations.

7. See *East Bay Mun. Employees Union* v. *County of Alameda* (1970), 3 Cal.App.3d 578, 583, 83 Cal.Rptr. 503, footnote 7; Edwards, *The Emerging Duty to Bargain in the Public Sector* (1973) 71 Mich.L.Rev. 885, 886; Werne, *Collective Bargaining in the Public Sector* (1969) 22 Vand.L.Rev. 833.

8. Anderson, *The Impact of Public Sector Bargaining* (1973) Wis.L.Rev. 986, 988.

9. See authorities cited footnote 4, *supra.*

10. See California Senate Select Committee on Local Public Safety Employment Practice, To Meet and Confer: A Study of Public Employee Labor Relations (1972) pages 25–26.

held position would be disastrous to that party if the mutual agreement thereby achieved could be repudiated by the opposing party. Successful bargaining rests upon the sanctity and legal viability of the given word.

In applying the Meyers-Milias-Brown Act, "the courts have uniformly held that a memorandum of understanding, once adopted by the governing body of a public agency, becomes a binding agreement." (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 756.) [11] The leading decision, however, is one which although decided in 1970 arose under the earlier George Brown Act, *East Bay Mun. Employees Union v. County of Alameda,* supra, 3 Cal.App.3d 578, 83 Cal. Rptr. 503. Settling a strike by county hospital employees, Alameda County agreed to reinstate the strikers without loss of any benefits previously earned by those employees. Upon reinstatement, however, the county classified the strikers as new employees, with resultant loss of seniority, vacation, sick leave, retirement and other benefits.

Reversing a trial court ruling which declined to enforce the agreement, the Court of Appeal through Justice Wakefield Taylor stated that the George Brown Act "required the public agency to meet and confer and listen. . . . [T]he modern view of statutory provisions similar to the Brown Act is that when a public employer engages in such meetings with the representatives of the public employee organization, any agreement that the public agency is authorized to make and, in fact, does enter into, should be held as valid and binding as to all parties." (3 Cal.App.3d 578, 584, 83 Cal.Rptr. 503, 507.) If, under the more limited provisions of the George Brown Act, which does not specifically refer to an "agreement reached by the representatives of the public agency and a recognized employer organization," nevertheless the negotiation and agreement by such parties are "valid and binding," we conclude a fortiori that the memorandum of understanding reached under the broader Meyers-Milias-Brown Act is indubitably binding.

3. *The city has failed to comply with the terms of the memorandum of understanding.*

[2] Defendants challenge the trial court's finding that the city did not comply with the terms of the agreement. We have pointed out that the trial judge found the agreement uncertain in meaning and admitted parol evidence to aid in its construction. Defendants do not contend that the evidence received was inadmissible under the parol evidence rule,[12] nor that the evidence so admitted does not support the

11. Professor Grodin's article, published in March 1972, cites only superior court decisions in support of his position, but subsequent to that publication two Courts of Appeal decisions have also enforced agreements reached under the Meyers-Milias-Brown Act. (*San Joaquin County Employees' Ass'n, Inc. v. County of San Joaquin* (1974) 39 Cal.App. 3d 83, 88–89, 113 Cal.Rptr. 912; *Wilson v. San Francisco Mun. Ry.* (1973) 29 Cal.App. 3d 870, 105 Cal.Rptr. 855.) These decisions, as well as the Court of Appeal opinion in the instant case, are analyzed in a second article by Professor Grodin, *California Public Employees Bargaining Revisited: The MMB Act in the Appellate Courts* (1974) California Public Employee Relations No. 21, page 2.

Professor Edwards of the University of Michigan Law School summarized the decisions of other states: "It is increasingly apparent in the developing case law that once a contract has been signed, the public employer must, in effect 'adopt' the contract and do everything reasonably within its power to see that it is carried out." (Edwards, *The Emerging Duty to Bargain in the Public Sector* (1973) 71 Mich.L.Rev. 885, 929.) The phrase "everything reasonably within its power" refers to the problems, discussed by Edwards, which may arise when a public agency agrees to a contract but must depend on appropriations from another agency to carry out that contract. Since the Glendale City Council has authority to appropriate sums needed to pay the salary increase it agreed to pay, those problems do not arise in the present case.

12. See *Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968), 69 Cal.2d 33, 40,

findings and conclusions of the trial court. Instead, the defendants argue first, that the city singularly enjoys a unilateral right to insist upon any reasonable interpretation of the agreement that it chooses, and second, that the agreement can properly be interpreted to require only the taking of a salary survey, leaving the fixing of salary ranges to later administrative determination.

The city's claim to a unilateral right to interpret the memorandum rests upon numerous cases holding that a city wage ordinance will not be held to conflict with charter provisions requiring payment of prevailing wages unless the city's action is "so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law." (*Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 261, 90 Cal.Rptr. 169, 175, 475 P.2d 201, 207; *Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 639, 12 Cal.Rptr. 671, 361 P.2d 247; *City & County of San Francisco v. Boyd* (1943) 22 Cal.2d 685, 690, 140 P.2d 666.) [13] The city seeks to apply this doctrine to the present case; it argues that in enacting Salary Ordinance No. 3936 it attempted to comply with its duty under the memorandum, and that this ordinance cannot be set aside unless it is fraudulent or palpably unreasonable.

This argument, however, misses the point; the issue here is not the validity of Ordinance No. 3936, but the sufficiency of that ordinance to fulfill the city's duty under the memorandum. Although the cited cases recognize the broad discretion of a city in interpreting its respective charter's prevailing wage provisions, and although defendant city here would analogize the instant issue with such a prevailing wage case, defendant's position founders on the rock of the *bilateral* nature of the instant memorandum of understanding. We do not probe the city's interpretation and application of a prevailing wage ordinance or even an alleged abuse of discretion by the city in so applying it; we deal here with a mutually agreed covenant, a labor management contract. We know of no case that holds that one party can impose his own interpretation upon a two-party labor-management contract.

[3] In pre-Wagner Act days some courts considered collective bargaining agreements to be merely statements of intention or unilateral memoranda. (See Chamberlain, *Collective Bargaining and the Concept of Contract* (1948) 48 Colum. L.Rev. 829, 832; Annot. (1935) 95 A.L.R. 10, 34–37.) But all modern California decisions treat labor-management agreements whether in public employment [14] or private [15] as enforceable contracts (see Lab.Code, § 1126) which should be interpreted to execute the mutual intent and purpose of the parties.[16]

69 Cal.Rptr. 561, 442 P.2d 641; *Tahoe National Bank v. Phillips* (1971), 4 Cal.3d 11, 22–23, 92 Cal.Rptr. 704, 480 P.2d 320; Jones, *Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes* (1969) 13 U.C.L.A.L.Rev. 1241, 1263–1269 fully discusses the effect of the parol evidence rule on the interpretation of collective bargaining agreements.

13. See also *Alameda County Employees Ass'n v. City of Alameda* (1973), 30 Cal.App.3d 518, 532, 106 Cal.Rptr. 441; *Sanders v. City of Los Angeles* (1967), 252 Cal.App.2d 488, 490, 60 Cal.Rptr. 539; *Anderson v. Board of Supervisors* (1964), 229 Cal.App.2d 796, 798–800, 40 Cal.Rptr. 541; *San Bernardino Fire & Police Protective League v. City of San Bernardino* (1962), 199 Cal.App.2d 401, 408, 18 Cal.Rptr. 757.

14. See *East Bay Mun. Employees Union v. County of Alameda, supra*, 3 Cal.App.3d 578, 584, 83 Cal.Rptr. 503; *San Joaquin County Employees' Ass'n, Inc. v. County of San Joaquin, supra*, 39 Cal.App.3d 83, 88–89, 113 Cal.Rptr. 912.

15. See *Posner v. Grunwald-Marx, Inc.* (1961), 56 Cal.2d 169, 177, 14 Cal.Rptr. 297, 363 P.2d 313; *McCarroll v. L. A. County etc. Carpenters* (1957), 49 Cal.2d 45, 66–67, 315 P.2d 322; *Holayter v. Smith* (1972), 29 Cal.App. 3d 326, 333–334, 104 Cal.Rptr. 745; *San Diego etc. Carpenters v. Wood, Wire, etc. Union* (1969), 274 Cal.App.2d 683, 689, 79 Cal.Rptr. 164; *Div. Labor L. Enf. v. Ryan Aero. Co.* (1951), 106 Cal.App.2d Supp. 833, 236 P.2d 236.

16. Civil Code section 1636 declares that "A contract must be so interpreted as to give

This principle applies as much to agreements between government employees and their employers as to private collective bargaining agreements.[17] Agreements reached under the Meyers-Milias-Brown Act, like their private counterparts, are the product of negotiation and concession; they can serve as effective instruments for the promotion of good labor-management relations only if interpreted and performed in a manner consistent with the objectives and expectations of the parties.

The city raises many other objections to the trial court's interpretation of the agreement: it contends that the memorandum gave the council discretion to choose whether to implement the survey findings; that the memorandum is but an agreement to agree in the future concerning new salary ranges; that the term "average salaries" in the memorandum does not mean an arithmetic average but refers to the city's practice of using bar graphs to visualize an average salary level; that the phrase "proper consideration [for] internal alignments and traditional relationships" in the memorandum authorizes the city to use such alignments and relationships to justify payment of below average salaries.

[4, 5] All the above contentions violate the established rule that if the construction of a document turns on the resolution of conflicting extrinsic evidence, the trial court's interpretation will be followed if supported by substantial evidence. (See 6 Witkin, Cal.Procedure (2d ed, 1971) pp. 4248–4249 and cases there cited.) In light of this rule, defendants, in order to overturn the trial court's interpretation, must demonstrate either that the extrinsic evidence on which the court relied conflicts with any interpretation to which the instrument is reasonably susceptible (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co., supra*, 69 Cal.2d 33, 40, 69 Cal. Rptr. 561, 442 P.2d 641) or that such evidence does not provide substantial support for the court's interpretation. But defendants present neither contention. Their arguments, based upon an interpretation of the memorandum on its face without reference to the extrinsic evidence or the trial court's findings, pose no issue cognizable within the scope of our appellate review.

4. *Plaintiff union may maintain this action on behalf of the Glendale city employees; allegations that this suit is a class action are superfluous and do not affect the validity of the judgment.*

[6–8] Plaintiffs' complaint alleges, and the court found, that plaintiffs filed suit on behalf of the class of city employees. Defendants argue that plaintiffs failed to provide adequate notice to the members of the class;[18] plaintiffs respond that defend-

effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." This section was applied to the interpretation of private collective bargaining agreements in *General Precision, Inc. v. International Association of Machinists* (1966), 241 Cal.App.2d 744, 746–747, 50 Cal.Rptr. 921 and *McKay v. Coca-Cola Bottling Co.* (1952), 110 Cal. App.2d 672, 676, 243 P.2d 35.

In *Posner v. Grunwald-Marx, Inc.* (1961), 56 Cal.2d 169, 177, 14 Cal.Rptr. 297, 363 P. 2d 313, we observed that a collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . . It calls into being a new common law—the common law of the particular industry." (56 Cal.2d 169, 177, 14 Cal.Rptr. 297, 301, 363 P.2d 313, 317, quoting *United Steelworkers v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 578–579, 80 S.Ct. 1347, 4 L.Ed.2d 1409.)

17. Courts have frequently drawn upon precedents involving private labor-management relations to aid in determining the rights of public employees and employee organizations. (See, e. g., *Firefighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 617, 116 Cal.Rptr. 507, 526 P.2d 971; *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 341, 113 Cal.Rptr. 461, 521 P.2d 453; *San Joaquin County Employees' Assn., Inc. v. County of San Joaquin, supra*, 39 Cal.App.3d 83, 86, 113 Cal.Rptr. 912).

18. The record indicates only that plaintiff union posted notice of the action on various bulletin boards. After the court found in favor of plaintiffs, the union posted a second notice advising employees that their counsel

ants first raised this issue on appeal. Plaintiffs' class allegations, however, are superfluous; plaintiff association, as the recognized representative of city employees, may sue in its own name to enforce the memorandum of understanding. (See *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 283–284, 32 Cal.Rptr. 830, 384 P.2d 158.) Since the class action format adds nothing to the rights or liabilities of the parties,[19] the issue of notice to the members of the class is immaterial.

The instant case in this respect closely resembles *Daniels v. Sanitarium Ass'n, Inc.* (1963), 59 Cal.2d 602, 30 Cal.Rptr. 828, 381 P.2d 652, in which we first confirmed the right of a union to sue as a legal entity. In *Daniels*, the union vice-president sued as a "representative" of the union; we held that the suit should have been filed by the union directly. We stated, however, that "we do not believe the form in which the action is brought should be crucial. Here Daniels sued 'in a representative capacity for and on behalf of' the union . . . But the union, as we have pointed out, may sue as an entity for the wrong done to itself; such an action is not a class action but a direct one by the union. Hence the better and simplest form of procedure would be the suit in the name of the union as such. Since the matter is procedural only, however, we have considered, and sustained, the instant complaint as one brought by the union as an entity." (59 Cal.2d at pp. 608–609, 30 Cal.Rptr. at p. 833, 381 P.2d at p. 657.)

In accord with *Daniels*, we conclude that the unnecessary allegations and findings that the suit is a class action do not detract from the merits of plaintiff association's suit as the recognized representative of the city employees. "Superfluity does not vitiate." (Civ.Code, § 3537.)

5. *Plaintiffs' action is not barred for failure to exhaust administrative remedies.*

Defendants contend that this suit is barred by plaintiffs' failure to exhaust administrative remedies. Defendants refer to the grievance procedure established by Ordinance No. 3830, enacted in 1968. Section 9 of this ordinance provides that an aggrieved employee, whose dispute relates to "the interpretation or application of this Ordinance, an ordinance resulting from a memorandum of understanding, or of rules or regulations governing personnel practices or working conditions" should first consult informally with his supervisor. If that consultation does not resolve the dispute, the employee may file a grievance form with the supervisor, who must enter his decision and reasons and return the form to the employee. If dissatisfied with the supervisor's response, the employee may forward the form to the division head; if dissatisfied with the division head's response, he may forward the form to the city manager, whose decision is final. Plaintiffs did not follow this procedure before instituting the present action.

[9, 10] The requirement of exhaustion of administrative remedies does not apply if the remedy is inadequate. (*Ogo Asso-*

would request an award of attorneys' fees, and the manner in which employees could appear in order to be heard in opposition to that award.

19. It is not necessary to find this suit a proper class action in order to uphold the portion of the judgment awarding counsel for plaintiffs 25 percent of all retroactive salaries and wages received. That award may be sustained under the rule that a litigant who creates a fund in which others enjoy beneficial rights may require those beneficiaries to pay their fair share of the expense of litigation. (See *Sprague v. Ticonic Nat'l Bank* (1939) 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184; *Estate of Stauffer* (1959) 53 Cal.2d 124, 132, 346 P.2d 748; *Estate of Reade* (1948) 31 Cal.2d 669, 671–672, 191 P.2d 745; *Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal. 2d 274, 277, 153 P.2d 714; *Farmers etc. Nat. Bank v. Peterson* (1936) 5 Cal.2d 601, 607, 55 P.2d 867; Dawson, *Lawyers and Involuntary Clients: Attorneys Fees From Funds* (1974) 87 Harv.L.Rev. 1597.)

ciates v. City of Torrance (1974) 37 Cal. App.3d 830, 834, 112 Cal.Rptr. 761; *Diaz v. Quitoriano* (1969) 268 Cal.App.2d 807, 812, 74 Cal.Rptr. 358; Comment, *Exhaustion of Administrative Remedies in California* (1968) 56 Cal.L.Rev. 1061, 1079–1080.) The city's grievance procedure is inadequate to the resolution of the present controversy in two respects.

First, the pertinent portion of Ordinance No. 3830 provides only for settlement of disputes relating to the "interpretation or application of . . . *an ordinance resulting* from a memorandum of understanding." (Emphasis added.) The crucial threshold issue in the present controversy—whether the ratified memorandum of understanding *itself* is binding upon the parties—does not involve an "ordinance" and hence does not fall within the scope of grievance resolution.

Second, the city's procedure is tailored for the settlement of minor *individual* grievances. A procedure which provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact is manifestly inadequate to handle disputes of the crucial and complex nature of the instant case, which turns on the effect of the underlying memorandum of understanding itself. (Cf. *Martino v. Concord Community Hosp. Dist.* (1965) 233 Cal.App.2d 51, 57, 43 Cal. Rptr. 255.)

6. *Mandamus lies to enforce the memorandum of understanding.*

[11–13] The usual remedy for failure of an employer to pay wages owing to an employee is an action for breach of contract; if that remedy is adequate, mandate will not lie. (See *Elevator Operators etc. Union v. Newman* (1947) 30 Cal.2d 799, 808, 186 P.2d 1 and cases there cited.) But often the payment of the wages of a *public* employee requires certain preliminary steps by public officials; in such instances, the action in contract is inadequate and mandate is the appropriate remedy. (See *Tevis v. City & County of San Francisco* (1954) 43 Cal.2d 190, 272 P.2d 757 (mandate to compel officials to approve payroll); *Ross v. Board of Education* (1912) 18 Cal.App. 222, 122 P. 967 (mandate to compel officials to approve payment); cf. *Flora Crane Service, Inc. v. Ross* (1964) 61 Cal.2d 199, 37 Cal.Rptr. 425, 390 P.2d 193 (mandate to compel controller to certify that funds have been appropriated).) The superior court in the present case concluded that since "enforcement of the rights of [plaintiffs] requires obtaining the official cooperation necessary to implement the application of the formula agreed upon in the Memorandum of Understanding. . . . [Plaintiffs] do not have a speedy or adequate remedy at law to prevent the deprivation of their rights other than by mandamus."[20]

Although defendants do not challenge the court's conclusion that plaintiffs have no other adequate remedy, they nonetheless urge that the remedy of mandamus is not available. Defendants contend that the adoption of a salary ordinance constitutes a legislative act within the discretion of the city council, and that mandamus will not issue to compel action lying within the scope of agency or official discretion, or to compel performance of a legislative act.[21]

[14] Defendants' contention rests upon the mistaken impression that the trial court mandated the enactment of a new salary ordinance. The trial court's judgment, however, proceeded upon the theory that

20. Plaintiffs also sought declaratory relief, and undoubtedly established a controversy sufficient to justify that remedy. (See *Walker v. County of Los Angeles* (1961) 55 Cal. 2d 626, 636–637, 12 Cal.Rptr. 671, 361 P.2d 247; *San Bernardino Fire & Police Protective League v. City of San Bernardino, supra*, 199 Cal.App.2d 401, 417, 18 Cal.Rptr. 757.) The fact, however, "that an action in declaratory relief lies . . . does not prevent the use of mandate." (*Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 603, 241 P.2d 283, 289.)

21. See 5 Witkin, California Procedure (2d ed. 1971) page 3851 and cases there cited.

the council's approval of the memorandum of understanding in itself constituted the legislative act that fixed employee salaries in accord with that understanding. The writ, therefore, did not command the enactment of a new salary ordinance, but directed the non-legislative and ministerial acts of computing and paying the salaries as fixed by the memorandum and judgment.[22] The use of mandamus in the present case thus falls within the established principle that mandamus may issue to compel the performance of a ministerial duty[23] or to correct an abuse of discretion.[24]

"The critical question in determining if an act required by law is ministerial in character is whether it involves the exercise of judgment and discretion." (*Jenkins v. Knight* (1956) 46 Cal.2d 220, 223–224, 293 P.2d 6, 8.) In the present case, the city entered into an understanding which, we have held, became a valid and binding agreement upon approval by resolution of the council. That agreement, as interpreted by the trial court, is definitive, and admits of no discretion.

The findings and judgment establish precise mathematical standards which, applied to the survey data, yield the exact sums due. The trial court, in fact, awarded plaintiffs prejudgment interest on the ground that the action was one "to enforce an underlying monetary obligation *the amount of which was certain or could have been made certain by calculation.*" (Emphasis added.) Unquestionably the *negotiation* and *approval* of the understanding involved the exercise of discretion by city officials. (*San Joaquin County Employees' Ass'n, Inc. v. County of San Joaquin, supra,* 30 Cal.App.3d 83, 87–88, 113 Cal.Rptr. 912.) But in approving the understanding, the city exhausted that discretion; the duty of its officials to carry out its obligations is of ministerial character.

7. The cause must be remanded for joinder of the city officers charged with the duty of computing and paying wages and salaries of city employees.

[15, 16] As we have noted, the trial court mandated performance of the ministerial acts of computing and paying the salaries as fixed by the judgment. The court's writ, however, was directed only to the city and its councilmen; plaintiffs failed to join as additional defendants the city officials entrusted with the administrative duties of computing and paying sal-

22. Part 1 of the trial court judgment provides "That a peremptory writ of mandate issues directing the respondents . . . to proceed at once to provide salary and wage increases . . . in accordance with the following standard: . . . ." The judgment then sets out in detail the formula by which the wage increase for each step of each job classification must be computed. Part 2 of the judgment then provides that "When the foregoing computations have been made, respondents are further directed to proceed at once to pay the differential sum due each said employee for the period October 1, 1970 through June 30, 1971, together with interest as provided by law. . . . ."

23. See *People ex rel. Younger v. County of El Dorado* (1971), 5 Cal.3d 480, 491, 96 Cal.Rptr. 553, 487 P.2d 1193; *Jenkins v. Knight* (1956), 46 Cal.2d 220, 293 P.2d 6; California Civil Writs (Cont.Ed.Bar 1970) sections 5.25–5.26.

24. "While mandamus will not lie to control the discretion exercised by a public officer or board . . . it will lie to correct an abuse of discretion by such officer or board." (*Baldwin-Lima-Hamilton Corp. v. Superior Court* (1962) 208 Cal.App.2d 803, 823, 25 Cal.Rptr. 798, 811; see *Walker v. County of Los Angeles, supra,* 55 Cal.2d 626, 639, 12 Cal.Rptr. 671, 361 P.2d 247; Cal.Civil Writs (Cont.Ed.Bar 1970) §§ 5.33–5.35; 5 Witkin, Cal.Procedure (2d ed. 1971) pp. 3853–3854.) Contrary to the claim of the concurring and dissenting opinion, see *infra* at p. 526 of 124 Cal.Rptr., at p. 622 of 540 P.2d, appellate courts in this state have on numerous occasions mandated legislative bodies to enact salary ordinances. (See, e. g., *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 262, 90 Cal.Rptr. 169, 475 P.2d 201; *Walker v. County of Los Angeles* (1961) 55 Cal.2d 626, 639, 12 Cal.Rptr. 671, 361 P.2d 247; *Sanders v. City of Los Angeles* (1967) 252 Cal.App.2d 488, 60 Cal.Rptr. 539; accord *Griffin v. Board of Supervisors* (1963) 60 Cal.2d 318, 33 Cal.Rptr. 101, 384 P.2d 421 (mandate directing board of supervisors to reapportion county).)

aries. The trial court judgment and mandate thus suffer from a procedural defect similar to that discussed by the Court of Appeal in *Martin v. County of Contra Costa* (1970), 8 Cal.App.3d 856, 87 Cal.Rptr. 886.

In *Martin*, plaintiffs sued the county and its board of supervisors to mandate payment of uniform allowances. The trial court rendered judgment only against those named defendants, and not against the county officers responsible for payment of the allowances. In remanding the cause for further proceedings, the Court of Appeal stated that "The only defect in proceedings and judgment is the failure to join the proper ministerial officers of the county government. Plaintiffs should be permitted to join the proper parties . . . . Since the county is the real party in interest and has been represented throughout, those ministerial officers should not be permitted to assert any laches or limitations upon being joined, but should be bound by the findings made against the county and its board of supervisors which have been approved in this opinion." (8 Cal.App.3d at p. 866, 87 Cal. Rptr. at p. 892.)

Following the reasoning of the Court of Appeal, we hold that the present judgment in favor of plaintiffs must be reversed and remanded to permit joinder of the appropriate city officials. These ministerial officers should not be permitted to assert any defense of laches or limitations, and will be bound by the findings of the trial court made against the city.

8. *Plaintiffs' cross-appeal is not meritorious.*

[17] The City of Glendale has traditionally determined employee salaries by establishing a five-step salary range for each job classification. The trial court directed that whenever Glendale's salary for the fifth step of a salary range was less than the average salary from the surveyed jurisdictions, the city must raise the fifth step salary to an amount equal to that average plus one cent; it further directed that salaries for steps one through four be raised proportionately to the fifth step salary.

Plaintiffs argue on their cross-appeal that the trial court, instead of directing payment of fifth step salaries equal to the survey average plus one cent, should have ordered the city to provide salary increases to the closest fifth step of a higher range above the average. We believe, however, that the court did exactly that which plaintiffs now request; in fixing step five salaries at the average plus one cent, and increasing step one through four salaries proportionately, the court in effect established a new salary range at a level sufficient to assure plaintiffs a salary above the average from the surveyed jurisdiction. Although plaintiffs would prefer a raise to a salary range which exceeded that average by more than the one cent differential established by the trial court, they point to nothing in the memorandum of understanding or the evidence which bars the creation of new salary ranges so long as they yield an above-average wage.

9. *Conclusion.*

For the foregoing reasons, the judgment is reversed, and the cause remanded for further proceedings in accord with the views expressed in this opinion. Each side shall bear its own costs on appeal.

WRIGHT, C. J., and McCOMB, SULLIVAN, CLARK and RICHARDSON, JJ., concur.

MOSK, Justice (concurring and dissenting).

I concur in the reversal of the judgment, but I dissent from the directions given upon remand.

The majority make out a persuasive case for finding that a memorandum of understanding regarding municipal employee salaries was reached and that the city should in good conscience honor its agreement. From that moral reading, however, the ma-

jority leap to a legal conclusion which results in judicial invasion of the legislative process, and the matter is returned to the trial court for issuance of an order which cannot, or should not, be enforced.

The posture in which this case comes to us is of significance. First of all, the plaintiffs sued no ministerial officers; they sued the City of Glendale and five individuals identified as "the duly elected councilmen," members of the "governing body" of the City of Glendale. No other persons, particularly none with ministerial as distinguished from legislative duties, appeared in the action at any time.

Secondly, the trial court issued a writ of mandate "directing the respondents and each of them [i. e., the city and the duly elected councilmen] to proceed at once to provide salary and wage increases to petitioners . . . ."

And finally, in their petition for hearing the petitioners seek mandate to enforce a memorandum "executed by the City of Glendale," not mere performance of a duty by an identified ministerial public servant.

I

The majority have cited no authoritative cases in which a city and its legislative body have been mandated to adopt an ordinance, relating to salaries or to any other subject. The reason there are no such appellate cases is elementary: adoption or rejection of an ordinance has always been recognized as an act of legislative discretion and courts may not interfere with that legislative function. Each councilman has his electorally bestowed right to vote "aye" or "nay" on any proposal pending before the body. Perhaps, as here, the city and its governing legislators should have honored an obligation, but they cannot be compelled to do so by mandate of a court.

Let us review the cases cited by the majority to purportedly support their conclusion that a city and its councilmen may be ordered to enact a specified ordinance. In *Tevis v. City and County of San Francisco* (1954), 43 Cal.2d 190, 194, 272 P.2d 757, 760, members of a commission, the secretary of the civil service commission and the controller "were directed to certify and approve payrolls." This was clearly a ministerial act, but, the court continued at page 200, 272 P.2d at page 763, city officials "may not be compelled to authorize the payment of compensation or issue a warrant when funds are lacking [i. e., unappropriated]." This court expressed the hope the city would make funds available, but there was no order for it to do so. *Ross v. Board of Education* (1912), 18 Cal.App. 222, 122 P. 967, involved an order directing members of a board to pay $100 due on an employment contract.

Flora Crane Service, Inc. v. Ross (1964), 61 Cal.2d 199, 37 Cal.Rptr. 425, 390 P.2d 193, concerned mandate against the city controller because he had failed to perform what the court found to be a ministerial duty (*id.* at p. 204, 37 Cal.Rptr. 425, 390 P.2d 193). To the same effect is *San Francisco v. Boyd* (1941), 17 Cal.2d 606, 110 P.2d 1036: involving an employment contract, the mandate suit was not directed to the city or its legislative body, but against the controller, a ministerial officer. Similarly in *Ackerman v. Moody* (1918), 38 Cal.App. 461, 176 P. 696, the city auditor, not the City of San Diego or its council, was ordered by mandate to certify a recall election.

The majority, in footnote 24, desperately attempt to find some authority for courts to mandate legislative bodies. They miss the target. *Sanders v. City of Los Angeles* (1970), 3 Cal.3d 252, 90 Cal.Rptr. 169, 475 P.2d 201, and *Sanders v. City of Los Angeles* (1967), 252 Cal.App.2d 488, 60 Cal.Rptr. 539, arose out of the same circumstances. The courts found that a ministerial officer had failed to perform his charter-required function. "As the adviser of the committees and the council and as the responsible official of the city, the City Administrative Officer failed utterly to perform his duties." (*Id.* at p. 493 of 252 Cal.App.2d, at p. 543 of 60 Cal.Rptr.) He, and several administrative departments—

recreation and parks, library, retirement system, pensions—were then directed to perform their ministerial duties.

In *Walker v. County of Los Angeles* (1961), 55 Cal.2d 626, 632, 12 Cal.Rptr. 671, 674, 361 P.2d 247, 250, the court declared that the Board of Supervisors failed to perform its duty, but found only that the board has "a quasi-judicial, *non-legislative,* fact-finding function *preceding* the performance of the indicated legislative act." (Italics added.) It was that nonlegislative function the board was mandated to perform.

It is true that we ordered the Board of Supervisors to redistrict supervisorial districts in *Griffin v. Board of Supervisors* (1963), 60 Cal.2d 318, 33 Cal.Rptr. 101, 384 P.2d 421. I point out, however, that this court obviously has had second thoughts about the propriety of such an order, for it was not repeated in subsequent reapportionment cases. We never again mandated a legislative body to pass a reapportionment act; we indicated that if it did not do so by a specified time, the court would undertake the task. And we did. (*Silver v. Brown* (1965) 63 Cal.2d 270, 281, 46 Cal.Rptr. 308, 405 P.2d 132; *Legislature v. Reinecke* (1972) 6 Cal.3d 595, 603, 99 Cal. Rptr. 481, 492 P.2d 385; *Legislature v. Reinecke* (1972) 7 Cal.3d 92, 93, 101 Cal.Rptr. 552, 496 P.2d 464; *Legislature v. Reinecke* (1973) 10 Cal.3d 396, 110 Cal.Rptr. 718, 516 P.2d 6.)

Thus it is abundantly clear that appellate courts do not order a political subdivision as an entity, or its legislative body, to act or to refrain from acting in any specified manner.

Tandy v. City of Oakland (1962), 208 Cal.App.2d 609, 25 Cal.Rptr. 429, is a case in point. Plaintiffs sought to mandate the city council to rezone their property on a theory that the current zoning ordinances were unconstitutional as applied. The court held that such ordinances "are entirely within the discretion of the municipal legislative body" and that "a court cannot substitute its judgment for that of the municipality" (*id.* at p. 612, 25 Cal.Rptr. at p. 430). To the identical effect is *Johanson v. City Council* (1963), 222 Cal.App.2d 68, 72, 34 Cal.Rptr. 798.

II

The majority seem to assume that a mere ministerial act, performed by unidentified "appropriate city officials" (ante, p. 525 of 124 Cal.Rptr., p. 621 of 540 P.2d), will provide the peititoners with the remedy they seek. The assumption is unjustified.

As alleged in the complaint and as found by the trial judge, on September 29, 1970, the city council adopted salary ordinance No. 3921, which, said the trial court, "did not provide increases in salaries and wages" based upon the purported formula. The adoption of that ordinance was clearly a legislative act, as, indeed, is the passage or rejection of any ordinance. If there are to be any other or different salary provisions, ordinance No. 3921 must be repealed by the city council and another ordinance adopted in its stead. Such action will also be strictly legislative in character.

That brings us back to square one: there is no authority for this court, or any court, to direct how the city councilmen, individually or collectively, are to vote on any measure proposed to repeal ordinance No. 3921. Pursuant to a bargained understanding, the councilmen may be under a moral obligation to adopt a new salary ordinance. However, the question before us is not the existence of a prior commitment, but whether a court may compel a legislative result.

The procedure employed by the Court of Appeal in *Martin v. County of Contra Costa* (1970), 8 Cal.App.3d 856, 87 Cal.Rptr. 886, and adopted by the majority here, is untenable. The court there conceded "the general principle that the courts have no power to compel the performance of a leg-

islative act" and that the petitioners asked for mandate to compel the city "to enact a county ordinance which compensates and provides benefits for petitioners" (*id.* at p. 865, 87 Cal.Rptr. at p. 891). It then proceeded to direct joinder of ministerial officers. How, it must be asked, can the ministerial officers secure enactment of a county ordinance as prayed? The *Martin* court gives us no clue, nor do the majority advise us here how the unidentified ministerial officers, at this late date to be amended into the case, are to undertake the legislative task of repealing ordinance No. 3921 and adopting another measure in its place.

III

Finally, I am compelled to make an embarrassing inquiry. How do my learned colleagues propose to enforce their order?

Naturally it is to be hoped that all good citizens will accept a final judicial determination of their rights and duties. But let us assume arguendo that the Glendale City Councilmen are intransigent, that they steadfastly refuse to vote to repeal ordinance No. 3921 and to adopt another salary ordinance in its stead. Are my colleagues prepared to cite the entire legislative body for contempt of their order? (See, e. g., *City of Vernon v. Superior Court* (1952), 38 Cal.2d 509, 519–520, 241 P.2d 243.) I would hope not. Yet the potential need to do so demonstrates one of the pitfalls when the judiciary attempts in any manner to dictate how the legislative process is to function.

In the final analysis, this is not a labor or salary case nor is it litigation over a contract. This is purely and simply an issue of separation of powers. I, for one, am unwilling to embark upon a murky project of ordering legislative members to adopt an ordinance, no matter how desirable I may believe the ordinance to be.

Rehearing denied; MOSK, J., dissenting.

[Civ. No. 36260. First Dist., Div. Four. Feb. 18, 1976.]

HENRY GRIER et al., Plaintiffs and Appellants, v. ALAMEDA-CONTRA COSTA TRANSIT DISTRICT, Defendant and Respondent.

SUMMARY

Several bus drivers employed by a public transit district, and their union, brought an action against the district for declaratory relief and damages, alleging that the district's enforcement of a provision of a collective bargaining agreement requiring drivers who arrived for work late to work without pay for periods in excess of the time actually lost through tardiness, violated Lab. Code, § 2928, providing that no deduction from the wages of an employee on account of his coming late shall be made in excess of the proportional wage that would have been earned during the time actually lost. The trial court entered a judgment for the transit district, holding that the statute was not applicable to the transit district. (Superior Court of Alameda County, No. 424097, Robert L. Bostick, Judge.)

The Court of Appeal reversed and remanded. The court held that it did not appear that the Legislature intended the transit district's labor relations to be governed only by the Public Utility Code provisions creating the district, and also held that the application of the Labor Code provision to the district would not result in an infringement upon its sovereign governmental powers. The court concluded that the effect of the provision requiring late drivers to work a certain period without pay was to withhold wages for work actually performed, and thus it violated Lab. Code, § 2928, and that the district and the union were without authority to include such a provision in the collective bargaining agreement. The court also held that the fact that the provision was omitted from a subsequent bargaining agreement, prior to the appeal, did not render the appeal moot, since plaintiffs had sought damages in addition to declaratory relief, which was a material issue requiring

determination. (Opinion by Caldecott, P. J., with Rattigan and Christian, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a, 1b) **Appellate Review § 120—Dismissal—Grounds—Mootness—What Constitutes.**—An appeal by bus drivers employed by a public transit district from an adverse judgment in an action against the district seeking declaratory relief and damages arising out of the enforcement of a provision of a collective bargaining agreement was not rendered moot by the fact that a new collective bargaining agreement was entered into prior to the appeal which did not contain the contested provision, where plaintiffs' claim for damages was based upon the alleged invalidity of the provision and remained to be determined if the trial court's decision was found to be erroneous.

(2) **Appellate Review § 119—Dismissal—Grounds—Mootness.**—Although as a general rule an appeal presenting only abstract or academic questions should be dismissed as moot, the appeal is not moot nor subject to dismissal if the question to be decided is of general public interest, or if there is a likelihood of recurrence of the controversy between the same parties or others, or if there remains material questions for the court's determination.

(3) **Public Transit § 2—Transit Districts—Labor Relations.**—In an action by bus drivers employed by a public transit district, in which the complaint alleged that a provision of the collective bargaining agreement between the union and the district violated Lab. Code, § 2928, prohibiting deductions from wages of employees late to work in excess of time actually lost, the trial court erroneously concluded that only the provisions of the Transit District Law (Pub. Util. Code, §§ 24501 et seq.), and the rules and regulations adopted by the board of directors of the district pursuant thereto, controlled the district's labor relations, where nothing in the express language of the Transit District Law indicated an intent for such exclusiveness, and where the statutory provisions governing collective bargaining by other transit districts, expressly provided that those districts should not be limited or restricted by provisions of other laws or

statutes, but no such express provision was contained in the transit district laws applicable to the defendant district.

(4) **Public Transit § 2—Transit Districts—Labor Relations.**—The general rule that in the absence of express words to the contrary, public entities are not included within the general words of a statute, did not preclude Lab. Code, § 2928, prohibiting excess deduction of wages from employees coming late to work, from being applied to a public transit district, where it did not appear that the application of the statute to the district would infringe its sovereign powers, inasmuch as the district had enacted a rule requiring drivers who arrived for work late to work without pay for periods in excess of the time actually lost through tardiness, pursuant to a collective bargaining agreement with the driver's union, which implicitly acknowledged the district's belief that the matter was beyond its sovereign powers as to discipline. Furthermore, a subsequent collective bargaining agreement omitted the wage deduction provisions, thus indicating that the previous rule was not necessary to the continued reliable functioning of the district. Governmental agencies are excluded from the operation of general statutory provisions only if their inclusion would result in an infringement upon sovereign governmental powers.

(5) **Labor § 11—Regulation of Working Conditions—Wages—Requirements as to Payments.**—Since full payment of accrued wages is an important state policy, enacted for protection of employees generally, it is not to be avoided by the terms of a private agreement. Accordingly, a public transit district and a union representing bus drivers employed by the district, were without authority to agree to any provision in violation of Lab. Code, § 2928, prohibiting the deduction from the wages of an employee coming late to work in excess of the proportionate wage that would have been earned during the time actually lost.

(6) **Labor § 11—Regulation of Working Conditions—Wages—Requirements as to Payments.**—A provision of a collective bargaining agreement between a union and a public transit district, which required drivers who arrived for work late to sit, without pay, in the dispatching area of the transit district until the driver was released for the day or was assigned to a run, which penalty was imposed without regard to the actual amount of time that the employee was tardy, violated Lab. Code, § 2928, prohibiting the deduction from

the wages of an employee on account of coming late to work in excess of the proportionate wage that would have been earned during the time actually lost, where other employees of the district were paid full compensation for performing the same duty of waiting for assignment at the dispatching area. Accordingly, the effect of the provision was to withhold wages for work actually performed and was therefore invalid.

[See **Cal.Jur.2d**, Labor, § 19 et seq.; **Am.Jur.2d**, Labor, § 1802.]

COUNSEL

Brundage, Neyhart, Beeson & Tayer, Joseph Freitas, Jr., and Peter N. Hagberg for Plaintiffs and Appellants.

Hardin, Cook, Loper, Engel & Bergez, Herman Cook, Steven M. Kohn, Robert E. Nisbet and Richard W. Meier for Defendant and Respondent.

OPINION

CALDECOTT, P. J.—Plaintiffs and appellants Henry Grier, Michael Chuba, Donald E. Figas, and Orlin Purdue, Sr., on behalf of themselves and all others similarly situated, and Division 192, Amalgamated Transit Union, the labor union representing the named plaintiffs and other bus drivers employed by respondent, brought this action for declaratory relief and damages. The complaint alleged that respondent Alameda-Contra Costa Transit District (hereinafter Transit District) was violating Labor Code section 2928 by requiring drivers who arrived for work late to work without pay for periods in excess of the time actually lost through tardiness. Following judgment for respondent this appeal was filed.

Respondent Transit District is a public entity created pursuant to the provisions of the Transit District Law, Public Utilities Code sections 24501-27509. The individual appellants are bus drivers, employees of respondent, and are members of appellant Division 192, Amalgamated Transit Union (hereinafter union). The union is the collective bargaining representative for the bus drivers employed by the Transit District.

The collective bargaining agreement signed by the union and the Transit District contained certain provisions relating to "oversleeps," the euphemistic term applied to tardiness for work for any reason. Section 50 of the agreement provided that drivers who were late for work without a satisfactory excuse would serve "penalty point" duty. This consisted of sitting in the dispatching area of the Transit District until the driver was released for the day or was assigned to a run. The penalties for oversleeps were imposed without regard to the actual amount of time that the employee was tardy; i.e., five minutes of tardiness could result, on a first oversleep, in two hours of penalty point, or, on a fifth oversleep, in 12 hours of penalty point. A driver not assigned to a run during the two hours of penalty point was released for that day, and was not paid at all for the two hours. A driver sitting penalty point who was actually assigned to a run during that time was paid for all time worked, with a minimum of four hours guaranteed pay.

Other drivers for the Transit District regularly perform the same duties, sitting in the dispatch office waiting for an assignment. This is called sitting "pay point." These drivers are paid either straight time or time and a half, depending on whether they work on their regular days, or days off.

Labor Code section 2928 provides: "No deduction from the wages of an employee on account of his coming late to work shall be made in excess of the proportionate wage which would have been earned during the time actually lost, but for a loss of time less than 30 minutes, a half hour's wage may be deducted."

Appellants argued that the penalty point provisions were in violation of the quoted Labor Code section, and sought damages for the hours worked without pay. Respondents contended, and the court below found, that Labor Code section 2928 does not apply to the Transit District.

I

(1a) Respondent contends that this appeal has been rendered moot by the parties' entry into a new collective bargaining agreement in August 1974, containing no oversleep provisions. It asserts that since the penalty point system is no longer in effect, the question of whether it was invalid under Labor Code section 2928 is moot.

(2) Although, as a general rule, an appeal presenting only abstract or academic questions should be dismissed as moot (*Paul* v. *Milk Depots, Inc.*, 62 Cal.2d 129, 132 [41 Cal.Rptr. 468, 396 P.2d 924]), the appeal is not moot nor subject to dismissal if the question to be decided is of general public interest (*County of Madera* v. *Gendron*, 59 Cal.2d 798, 804 [31 Cal.Rptr. 302, 382 P.2d 342, 6 A.L.R.3d 555]); or if there is a likelihood of recurrence of the controversy between the same parties or others; or if there remain material questions for the court's determination. (*Diamond* v. *Bland*, 3 Cal.3d 653, 657 [91 Cal.Rptr. 501, 477 P.2d 733]; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind*, 67 Cal.2d 536, 541 [63 Cal.Rptr. 21, 432 P.2d 717].) This appeal should not be considered moot.

(1b) In addition to declaratory and injunctive relief relating to the oversleep provisions, the complaint sought damages for the individual named plaintiffs and the class they claimed to represent. The claim for damages was based upon the alleged invalidity of the penalty point system under state law, and the wages unpaid for periods of sitting penalty point when no assignment out was made.

This issue of damages is plainly a "material issue for the court's determination." If the decision of the court below is found to be erroneous, and the oversleep section is found to violate applicable state law, the case must be remanded for a determination of the number of hours each employee was required to work without pay. Thus, though the other questions may be moot as a result of the new collective bargaining agreement, the matter of damages is not. (Cf. *Sauer* v. *McCarthy*, 54 Cal.2d 295, 297 [5 Cal.Rptr. 682, 353 P.2d 290]; *Elevator Operators etc. Union* v. *Newman*, 30 Cal.2d 799, 803 [186 P.2d 1].)

Respondent urges that the case of *Consol. etc. Corp.* v. *United A. etc. Workers*, 27 Cal.2d 859 [167 P.2d 725], is controlling. The Supreme Court dismissed the appeal as moot, because a new contract had been entered into superseding the agreement in question and the union's claim of damages was based on breach of contract and there was no breach. *Consol. Corp.* is plainly distinguishable from the instant case. (See also *Keith Garrick, Inc.* v. *Local No. 2*, 213 Cal.App.2d 434, 435 [28 Cal.Rptr. 750] (appeal dismissed as moot because new collective bargaining agreement entered and *plaintiffs had waived damages*); *Paoli* v. *Cal. & Hawaiian Sugar etc. Corp.*, 140 Cal.App.2d 854 [296 P.2d 31] (appeal

dismissed as moot because new collective bargaining agreement entered and *plaintiffs had not appealed the trial court's finding of "no damages."*).)[1]

II

(3) The court below concluded that the Legislature intended that *only* the provisions of the Transit District Law (Pub. Util. Code, § 24501 et seq.) and the rules and regulations adopted by the board of directors of the Transit District pursuant thereto, should control the district's labor relations. Nothing in the express language of the Transit District Law indicates an intent for such exclusiveness.

The court below cited several portions of the Transit District Law in support of its conclusion. Section 24883 provides that the board of directors "is the legislative body of the district and determines all questions of policy." Section 24886 authorizes the board to adopt a personnel system. Section 24936, subdivision (d), empowers the general manager to administer the personnel system adopted by the board and "to appoint, discipline or remove all officers and employees subject to the rules and regulations adopted by the board and the labor provisions

[1]With regard to damages, respondent further asserts that this case is not a proper class action because no evidentiary hearing was held below to determine the propriety of proceeding as such. it should be noted, of course, that regardless of the class aspects of the case, the individual plaintiffs have asserted monetary claims, and these alone are sufficient to preclude a finding of mootness.

The complaint alleged that the individual employees sued on behalf of all bus drivers in the Transit District, who were too numerous to be joined and who would be adequately represented by the named plaintiffs. Further, it alleged that the union is the bargaining representative for the bus drivers, and sued in that capacity in their behalf.

The questions of law raised are common to the class; the only question of fact is individual damages, and "[t]he mere fact that ultimately each class member will be required to establish his individual amount of damages does not preclude the maintenance of a class action." (*Santa Barbara Optical Co., Inc.* v. *State Bd. of Equalization*, 47 Cal.App.3d 244, 250 [120 Cal.Rptr. 609].) Of course, ordinarily, a hearing is essential to determine whether and how to proceed in the class form under Code of Civil Procedure section 382. (*Bauman* v. *Islay Investments*, 45 Cal.App.3d 797, 800 [119 Cal.Rptr. 681]; *Home Sav. & Loan Assn.* v. *Superior Court*, 42 Cal.App.3d 1006 [117 Cal.Rptr. 485].) However, not only did the parties stipulate to propriety of the class during the hearing on the preliminary injunction, but obvious questions of acquiescence and waiver are also present.

More significantly (in view of the due process notice requirements, which of course could not be satisfied for *absent* class members by stipulation or waiver of the parties), the union was joined as a plaintiff. As bargaining agent for the bus drivers under the very collective agreement challenged, the union is a proper class action representative (*Professional Fire Fighters, Inc.* v. *City of Los Angeles*, 60 Cal.2d 276, 283-284 [32 Cal.Rptr. 830, 384 P.2d 158]; *California Sch. Employees Assn.* v. *Willits Unified Sch. Dist.*, 243 Cal.App.2d 776, 780 [52 Cal.Rptr. 765]; see also Class Action Manual (prepared by Los Angeles Superior Court) § 404, p. 7), and as agent for its members received appropriate notice herein.

of this law, whichever are applicable." Section 25051 authorizes the board to negotiate with an appropriate collective bargaining unit to reach agreement on "the terms of a written contract governing wages, salaries, hours, working conditions, and grievance procedures."

The trial court reached its conclusion by applying the rule of construction that specific statutes control general statutes, and that specific provisions relating to a particular subject will govern general provisions which might otherwise, standing alone, be broad enough to include the subject to which the more particular provision relates. (Code Civ. Proc., § 1859; *McGriff* v. *County of Los Angeles*, 33 Cal.App.3d 394, 399 [109 Cal.Rptr. 186]; *Bozaich* v. *State of California*, 32 Cal.App.3d 688, 697 [108 Cal.Rptr. 392].) In the instant case, however, this principle is of little assistance: it might be argued with equal force that the *specific* provision is that restricting wage deductions for tardiness (Lab. Code, § 2928), and the general provisions are those broadly governing the Transit District without reference to such details as oversleep regulations.

The most salient point in support of a conclusion opposite to that of the trial court is that the statutory provisions governing the Southern California Rapid Transit District, the Orange County Transit District, and the San Diego Transit District, contain the precise language that respondents urge us to find by implication here. These Public Utility Code provisions (§§ 30750, subd. (c), 40126 and 90300, subd. (f)), all state, in relation to collective bargaining provisions that: "The obligation of the district to bargain in good faith with a duly designated or certified labor organization and to execute a written collective bargaining agreement with such labor organization covering the wages, hours, and working conditions of the employees represented by such labor organization in an appropriate unit, and to comply with the terms thereof *shall not be limited or restricted by the provisions of the Government Code or other laws or statutes*. . . ." Insofar as the various transit district laws are substantially similar, the absence of such a provision in the Alameda-Contra Costa County law (and in the San Francisco Bay Area, Stockton, and Marin laws) evidences a different intent on the part of the Legislature, even though the laws were enacted at different times. (*City of Port Hueneme* v. *City of Oxnard*, 52 Cal.2d 385, 395 [341 P.2d 318].) The Legislature plainly thought it necessary to include the express language negating other statutory restrictions in the later-enacted provisions of the San Diego, Orange County, and Southern California laws. The absence of such express terms in the other, earlier transit district laws indicates that a different meaning was intended.

Thus, it does not appear that the Legislature intended Alameda-Contra Costa County Transit District labor relations to be governed *only* by the Public Utility Code provisions relating thereto. Rather, the rules and regulations adopted by the board of directors (and administered by the general manager under § 24936 subd. (d)), including those adopted by a resolution approving a collective bargaining agreement, must themselves be promulgated *subject to* the limitations and restrictions of other applicable laws.

III

The specific question of the applicability of Labor Code section 2928 must therefore be discussed. Two matters are presented for decision: whether the section applies to the Transit District; and, if so, whether it invalidates section 50 of the collective bargaining agreement.

(4) The first problem invokes the general rule that in the absence of express words to the contrary, public entities are not included within the general words of a statute. (*People* v. *Centr-O-Mart*, 34 Cal.2d 702, 703 [214 P.2d 378]; *Estate of Miller*, 5 Cal.2d 588, 59[illegible] [55 P.2d 491].) However, this broad statement has received narrower application, so that governmental agencies are excluded "from the operation of general statutory provisions *only if their inclusion would result in an infringement upon sovereign governmental powers.* 'Where . . . no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only.' " (*City of Los Angeles* v. *City of San Fernando*, 14 Cal.3d 199, 276-277 [123 Cal.Rptr. 1, 537 P.2d 1250]; italics added; quoting *Hoyt* v. *Board of Civil Service Commrs.*, 21 Cal.2d 399, 402 [132 P.2d 804].)

The court below, citing *Nutter* v. *City of Santa Monica*, 74 Cal.App.2d 292 [168 P.2d 741], concluded that application of Labor Code section 2928 to invalidate section 50 of the agreement would impinge upon the sovereign powers of the Transit District and thus violate the above prescription. "Serious interference with the Board's management of personnel problems in the District would result, and the ability of the District to perform its function of providing reliable on-schedule transportation to the public would be damaged."

Labor Code section 2928 is part of what has been termed the "established policy of our Legislature of protecting and promoting the right of a wage earner to all wages lawfully accrued to him." (*City of Ukiah* v. *Fones*, 64 Cal.2d 104, 108 [48 Cal.Rptr. 865, 410 P.2d 369].) Although public entities are exempted by statute from some code provisions relating to wages (e.g., Lab. Code, §§ 213, subd. (b), 220), Labor Code section 2924 (grounds for employer termination of employment before end of term), a part of the same division and chapter, has been applied to a public entity. (*Holtzendorff* v. *Housing Authority*, 250 Cal.App.2d 596, 609-610 [58 Cal.Rptr. 886].)

Two factors belie the assertion of infringement of sovereign powers in the present case. The very fact that wages, hours, and working conditions are to be set by the collective bargaining process distinguishes this case from *Nutter, supra*, relied upon by the trial court. In *Nutter*, the court characterized the relevant Labor Code sections as relating "to the field of industry in which employer-employee relationships are fixed by contract" (74 Cal.App.2d 292, 297), and held the general labor statutes inapplicable to a governmental entity based upon this distinction.

In the present case, the Transit District clearly retains the right to establish rules and regulations governing employee discipline (as do private employers generally). However, insofar as it is required to negotiate in good faith with the union on wages, salaries, hours, working conditions and grievance procedures (Pub. Util. Code, § 25051), it does *not* have any power to unilaterally adopt rules or regulations affecting such matters, as they are properly subjects of collective bargaining. Labor Code section 2928 relates to deductions from wages. The Transit District implicitly acknowledged its belief that this matter was beyond its sovereign powers as to discipline when it submitted the subject to the bargaining process. In this it was correct, and the application of the statute to the Transit District therefore, could not infringe upon any sovereign power.

Labor Code section 2928 permits deduction from wages for time actually missed due to oversleep. Moreover, the new collective agreement, providing for suspension of drivers who oversleep, indicates that the oversleep rules of section 50 were not necessary to the continued reliable functioning of the Transit District. Respondent does not offer any argument that the new regulation (consistent with Lab. Code § 2928) has impaired its performance, or that the new format has "injuriously affect[ed] the capacity to perform state functions." (Nutter, *supra*, 74 Cal.App.2d at p. 300.)

However, it does not follow that, because the subject of penalty point provisions was not within the sovereign powers of the Transit District, it was necessarily within the scope of permissible agreement between the parties. (5) As noted earlier, full payment of accrued wages is an important state policy, enacted for protection of employees generally As such, it is not to be avoided by the terms of a private agreement. (Civ. Code, § 3513; *Benane* v. *Internat. Harvester Co.*, 142 Cal.App.2d Supp. 874, 878-879 [299 P.2d 750].) The parties were therefore without authority to agree to any provision in violation of the statute.[2]

IV

(6) The final question presented, then, is whether section 50 of the collective bargaining agreement was contrary to Labor Code section 2928. The court below held that "Plainly, if Labor Code § 2928 applies to § 50, the latter must be declared void." With this we must agree.

Respondent argues, as it did below, that Labor Code section 2928 applies only to "deductions from wages," and, giving those words their ordinary meanings, section 50 of the agreement does not fall within the prohibition because (1) sitting penalty point is not working; (2) therefore, no wages were earned; and (3) there is thus no deduction from wages. Respondent urges that the oversleep provisions are "properly characterized as requiring a late employee to wait for further employment (as in a hiring hall). . . ."

This argument is without merit. Employees of the Transit District who are not sitting penalty point are paid full compensation for performing the same duties, namely, waiting for assignment at the dispatching area in full uniform. Respondent thus recognizes that such duties constitute compensable work, and it is undisputed that the employees sitting penalty point do so at the requirement of the Transit District. In the absence of section 50 of the agreement, employees waiting for assignments at the Transit District's behest would be compensated for such work. The effect of section 50, therefore, is to withhold wages for work actually performed. Such a provision violates the plain prohibition of Labor Code section 2928, and constitutes a deduction from wages, as found by the trial court.

[2]*United Air Lines, Inc.* v. *Industrial Welfare Com.*, 211 Cal.App.2d 729 [28 Cal.Rptr. 238], is cited by respondent in support of its argument that the terms of the collective bargaining agreement, negotiated pursuant to Public Utilities Code section 25051, should control over conflicting state law. However, the case is not persuasive, as it involved federal preemption of state law, not at issue here.

Section 50 was therefore invalid, and the affected employees are entitled to the wages withheld by the Transit District for time spent sitting penalty point without pay. The precise amounts due to particular employees are to be determined by the trial court on remand.

The judgment is reversed and the cause remanded to the superior court to determine damages in accordance with this opinion.

Rattigan, J., and Christian, J., concurred.

CITY OF HAYWARD, etc., et al., Plaintiffs and Appellants,

v.

UNITED PUBLIC EMPLOYEES, LOCAL 390, OF the SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, an Unincorporated Association, Defendant and Respondent.

Civ. 36690.

Court of Appeal, First District, Division 4.

Jan. 23, 1976.

Hearing Denied April 15, 1976.

City and city manager brought action challenging agency shop agreement between city and union. The Superior Court, Alameda County, Spurgeon Avakian, J., declared agreement lawful, and city and manager appealed. The Court of Appeal, Christian, J., held that the Meyers-Milias-Brown Act did not permit agency shop agreement whereby union membership was not made condition of employment, but all employees, including those who did not choose to join union, had to pay union dues.

Reversed with directions.

John W. Scanlon, City Atty., Myron A. Johnson, Asst. City Atty., Hayward, for appellants City of Hayward and William C. Hanley.

Van Bourg, Allen, Weinberg, Williams & Roger by David A. Rosenfeld, San Francisco, for respondent.

Raymond J. LaJeunesse, Jr., James Newton Wilhoit, III, National Right to Work Legal Defense Foundation, Fairfax, Va., Maureen McClain, Littler, Mendelson & Fastiff, San Francisco, for amicus curiae.

CHRISTIAN, Associate Justice.

The City of Hayward and its city manager appeal from a judgment declaring that an "agency shop" agreement between the City and respondent United Public Employees, Local 390, is lawful.

Respondent (hereinafter "the Union") is a labor organization affiliated with the Service Employees International Union, AFL–CIO; certain employees of the City are members of the Union. On July 11, 1972, the Union and the City entered into a "Memorandum of Understanding," whereby the City recognized the Union as representing a majority of the employees in the City's Maintenance and Operations Unit.

The agreement covered wages, hours, and other terms and conditions of employment, about which there is no controversy. A dispute arose, however, over the validity of section 1.02 of the agreement, which provides that, although employees are not to be required to join the Union, all employees in the Maintenance and Operations Unit, including nonmembers of the Union,

> "shall, as a condition of continued employment, pay to the union an amount of money equal to that paid by other employees in the appropriate unit who are members of the union, which shall be limited to an amount of money equal to the union's usual and customary initiation and monthly dues."

[1] Except as may be authorized by statute, public employees have no right to bargain collectively with the employing agency. (*Sacramento County Employees Organization, Local 22 etc. Union v. County of Sacramento* (1972) 28 Cal.App.3d 424, 429, 104 Cal.Rptr. 619; *City of San Diego v. American Federation of State etc. Employees* (1970) 8 Cal.App.3d 308, 310, 87 Cal.Rptr. 258.) In 1961, California became one of the first states to create a right on the part of government employees to organize and to confer with management as to the terms and conditions of their employment.[1] Another enactment, the Meyers-Milias-Brown Act (Gov.Code, §§ 3500–3510 [hereinafter "MMBA"]) has created certain additional rights of organization in employees of municipalities and local agencies, and authorized representatives of labor and management to enter into written agreements for presentation to the governing body. (Gov.Code, §§ 3505–3505.1.)[2]

1. The George Brown Act, now Government Code sections 3525–3536, still governs relations between the state and its employees.

2. Unless otherwise indicated, all statutory references hereinafter are to the Government Code.

[2] The memorandum of understanding entered into by the parties was negotiated by means of procedures which conform to the MMBA. The sole question presented is whether the MMBA permits the creation of an agency shop in an agency of local government. An agency shop agreement is to be distinguished from a union shop agreement, which conditions the continuance of an employee's job on union membership; a union shop is prohibited by statute in public employment. (§ 3502.) In an agency shop, union membership is not a condition of employment, but all employees, including those who do not choose to join the union, must pay union dues. The MMBA does not explicitly refer to agency shop agreements; no reported decision has previously addressed the issue of the legality of this type of agreement.

[3] Section 3502 provides: "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations *and shall have the right to represent themselves individually in their employment relations with the public agency*." (Emphasis added.)

Section 3506 prohibits both public agencies and employee organizations from interfering with, intimidating, restraining, coercing or discriminating against public employees "because of their exercise of their rights under Section 3502." The freedom of choice provisions of each of these sections must be construed as prohibiting the extraction of union dues, or their equivalent, as a condition of continued employment. Otherwise the statutory right of employees to represent themselves would be defeated.

The trial judge did not address either of these sections; instead, he found that the agency shop provision was a "reasonable rule or regulation" adopted pursuant to the authority conferred by section 3507.

Section 3507 provides:

"A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).

"Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502(e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (f) access of employee organization officers and representatives to work locations (g) use of official bulletin boards and other means of communication by employee organizations (h) furnishing nonconfidential information pertaining to employment relations to employee organizations (i) such other matters as are necessary to carry out the purposes of this chapter.

"Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition.

"No public agency shall unreasonably withhold recognition of employee organizations."

The trial judge reasoned that the agency shop provision could be lawfully enacted

under section 3507 because "(a) it obligates the Union to represent *all* employees, (b) it requires nonmembers to share the cost of the benefits which such representation is intended to provide, and (c) it clearly relates to the administration of employer-employee relationships." He recognized the inconsistency of the provision with the employees' statutorily guaranteed freedom of choice, but reasoned that the right of the individual should be subordinated to a policy in furtherance of collective bargaining "as a vehicle for improving employment relationships and avoiding the harsh consequences of labor disputes involving public services."

[4, 5] Courts must, if possible, harmonize statutes, reconcile seeming inconsistencies and construe them to give force and effect to all provisions thereof. (*Hough v. McCarthy* (1960) 54 Cal.2d 273, 279, 5 Cal.Rptr. 668, 353 P.2d 276.) A court may not add to or detract from a statute or insert or delete words to accomplish a purpose that does not appear on its face or from its legislative history. (*Estate of Simmons* (1966) 64 Cal.2d 217, 221, 49 Cal.Rptr. 369, 411 P.2d 97.)

[6] The MMBA was enacted to promote "full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment . . . ." (§ 3500.) It was not intended to supersede existing systems for the administration of employer-employee relations in the public sector, but to strengthen such systems by improving communication. (*Ibid.*)

[7] It is argued that an agency shop agreement is a reasonable method of resolving labor disputes and that, since it is not specifically prohibited, it should be held permissible under the MMBA. But that construction would render the provisions of sections 3502 and 3506 meaningless. Section 3502 implicitly recognizes that employees may choose to join or participate in different organizations. (See, e. g., *Sacramento County Employees Organization, Local 22 etc. Union v. County of Sacramento, supra*, 28 Cal.App.3d 424, 104 Cal.Rptr. 619.) It also confers upon each employee the right not to join or participate in the activities of any employee organization. Section 3506 not only prohibits management from interfering with an employee's section 3502 rights, but also imposes the same ban on employee organizations.

[8] Without common law collective bargaining rights, public employees enjoy only those rights specifically granted by statute. Statutes governing the labor relations of other public employee groups indicate that when the Legislature has authorized union security devices, it has done so with explicit language. Certain public transit district employees have been granted extensive collective bargaining rights, including the right to contract for a closed or union shop. (See, e. g., Pub.Util. Code, §§ 25051–25057.) The labor relations of teachers and other school district employees have been governed by the Winton Act. (Ed.Code, §§ 13080–13090.) Sections 13082 and 13086 of that Act contain provisions paralleling sections 3502 and 3506 of the MMBA. The Winton Act has never been construed to authorize an agency shop. However, legislation recently enacted will repeal the Winton Act as of July 1, 1976, and add section 3540 et seq. to the Government Code. (Stats.1975, ch. 961.)

Under the new law, school district employees still have the right to refuse to join or participate in the activities of employee organizations and the right to represent themselves in their employment relations with the school district *when no exclusive representative has been recognized.* (§ 3543.) When a majority organization is recognized as the exclusive representative pursuant to the prescribed procedures (§§ 3544–3544.9), employees may no longer represent themselves. (§ 3543.) The agency shop is explicitly authorized as an

organizational security device (§ 3540.1, subd. (i)) subject to certain limitations. (§§ 3546–3546.5.) Although the MMBA has been amended from time to time since its enactment, the Legislature has never modified the language of sections 3502 and 3506 nor added provisions limiting or enlarging the rights created therein.

Those rights cannot reasonably be reconciled with an agency shop provision. The forced payment of dues or their equivalent is, at the very least, "participation" in an employee organization. Practically, it would have the effect of inducing union membership on the part of unwilling employees. While increased participation and membership is a legitimate goal or labor organizations, coercion toward that end is forbidden by statute. Such union security devices as the agency shop must await authorization by the Legislature.

The courts of other states having similar statutes recognizing the right of a public employee not to join or participate in an employee organization have held the agency shop to be unlawful. (See *Smigel v. Southgate Community School District* (1972) 388 Mich. 531, 202 N.W.2d 305; *New Jersey Turnpike Employees' Union, Local 194 v. New Jersey Turnpike Authority* (1973) 123 N.J.Super. 461, 303 A.2d 599, aff'd (1974) 64 N.J. 579, 319 A.2d 224; *Farrigan v. Helsby* (S.Ct.1971) 68 Misc.2d 952, 327 N.Y.S.2d 909, aff'd (S.Ct.App. Div.1973) 42 App.Div. 265, 346 N.Y.S.2d 39; *Pennsylvania Labor Relations Board v. Zelem* (Pa.,1974) 329 A.2d 477.) Apparently, only Rhode Island has held that there is a common law right to include an agency shop provision in a collective bargaining agreement. (*Town of N. Kingstown v. North Kingstown Teach. Assn.* (1972) 110 R.I. 698, 297 A.2d 342, 344–345 [statute merely gave teachers the right "to join or to decline to join" any employee organization].)

This conclusion is further supported by a comparison with federal statutes. Recognizing that many state labor enactments have followed federal models, California courts have often looked to interpretations of federal labor legislation when construing similar state statutes. (E. g., *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 615–617, 116 Cal.Rptr. 507, 526 P.2d 971; *Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391, 113 Cal.Rptr. 461, 521 P.2d 453; *Englund v. Chavez* (1972) 8 Cal.3d 572, 589–590, 105 Cal.Rptr. 521, 504 P.2d 457; *Service Employees' Internat. Union Local No. 22 v. Roseville Community Hosp.* (1972) 24 Cal.App.3d 400, 408–409, 101 Cal.Rptr. 69.) The National Labor Relations Act, 29 U.S.C. § 151 et seq. (hereinafter "NLRA"), contains provisions similar to sections 3502 and 3506 of the MMBA with one major difference. Section 7 of the federal act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." (29 U.S.C. § 157.) Sections 8(a)(1) and 8(a)(3) make it unfair labor practices for an employer to threaten, restrain, or coerce employees in the exercise of their section 157 rights or to encourage or discourage union activity by discrimination in employment *except* for union shop agreements. (*Id.*, §§ 158(a)(1), (a)(3).) The Supreme Court has held that, without the express provisos in sections 7 and 8(a)(3), conditioning employment upon union membership would be an unfair labor practice. (*Retail Clerks v. Schermerhorn* (1963) 373 U.S. 746, 756, 83 S.Ct. 1461, 10 L.Ed.2d 678.) The court has further held that the agency shop is the practical equivalent of the union shop. (*Id.*, at p. 751, 83 S.Ct. 1461; *Labor Board*

v. General Motors (1963) 373 U.S. 734, 743, 83 S.Ct. 1453, 10 L.Ed.2d 670.)

The provisos permitting union security arrangements were enacted by Congress in 1935 and 1947. Sections 3502 and 3506 of the MMBA were not enacted until 1961, and major revisions were made in 1968. It is reasonable to infer that the California Legislature was aware of the analogous provisions of the NLRA, and the construction thereof, and chose not to permit the agency shop in public employment in California. (Cf. *Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608 at pp. 615–617, 116 Cal.Rptr. 507, 526 P.2d 971.)

The judgment is reversed with directions to enter a new judgment declaring the agency shop provisions of the agreement to be lawful.

CALDECOTT, P. J., and EMERSON, J.,* concur.

Hearing denied; TOBRINER, J., dissenting.

57 Cal.App.3d 444

[444] HEALDSBURG POLICE OFFICERS ASSOCIATION et al., Plaintiffs and Respondents,

v.

CITY OF HEALDSBURG et al., Defendants and Appellants.

Civ. 36325.

Court of Appeal, First District, Division 2.

March 23, 1976.

Action was brought by terminated police officers against the city, city councilmen and the city manager. A peremptory writ of mandate was issued by the Superior Court, Sonoma County, John H. Moskowitz, J., and the city and other defendants appealed. The Court of Appeal, Kane, J., held that, for various reasons, the officers had been entitled to notice and hearing.

Judgment modified; as modified, judgment and orders affirmed.

Robert Y. Bell, Santa Rosa, John E. Short, Healdsburg, Teresa de la O, certified law intern, for plaintiffs and respondents.

John A. Klein, City Atty. of Healdsburg, Santa Rosa, for defendants and appellants.

[448] KANE, Associate Justice.

Defendants appeal from a peremptory writ of mandate and orders of contempt issued thereon.

The present action was brought by respondents, the Healdsburg Police Officers Association and its nine individual members, against appellants, the City of Healdsburg, five city councilmen and the city manager. The facts reveal that three city police officers were summarily discharged by appellants on September 16, [449] 1974. On October 3, 1974, the six remaining association members walked off their job in protest of the dismissal of their fellow officers and as a consequence they too were dismissed by the city. After the city refused to hold a hearing in the matter, respondents filed a petition for writ of mandate in the lower court claiming *inter alia* that: their discharge without notice and hearing violated several provisions of the Meyers-Milias-Brown Act ("MMB Act") (Gov.Code, § 3500 et seq.); unlawfully interfered with their organizational rights (Lab.Code, § 922); and violated the basic precepts of procedural due process secured by the Constitution.

After a trial and receiving evidence, the court below concluded: that at the time respondents were employed by the city the Healdsburg Police Department Manual ("Manual") explicitly granted the employees of the police department the right to a hearing before dismissal or imposition of other disciplinary measure; that this provision of the Manual became a part of the employment agreement between the city and respondents; and that as a consequence respondents were entitled to reinstatement until they were given an opportunity to be heard in their own defense. In accordance therewith, on October 29, 1974, a peremptory writ of mandate was issued ordering appellants to reinstate respondents to their former employment with back pay. Based upon the peremptory writ, a contempt proceeding was initiated by respondents, at the conclusion of which the city, under threat of sanctions, reinstated the nine individual respondents to their previous positions with back pay as ordered by the court. Appellants filed notices of appeal from both the peremptory writ of mandate and the contempt orders.

Although the rulings of the trial court are being challenged on a variety of grounds, as appellants themselves admit, the key issue on appeal is whether respondents were dischargeable at will without notice and hearing. While appellants maintain that pursuant to statute respondents held their offices at pleasure (Gov.Code, §§ 36505, 36506)[1] and could be dismissed without cause and without notice and hearing (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 97 Cal.Rptr. 657, 489 P.2d 537; *Ball v. City Council* (1967) 252 Cal.App.2d 136, 60 Cal.Rptr. 139), respondents contend that in the case at bench the right to a hearing attached by virtue of both the regulatory provisions and the constitutional mandate of due process. A careful analysis of the applicable legal principles convinces us that respondents' position is well taken, and as a consequence the rulings of the trial court must be upheld.

[1–4] It is, of course, a recognized general proposition that a public officer or employee who serves at the pleasure of the appointing authorities may be terminated

1. Government Code, section 36505, provides that "The city council shall appoint the chief of police. It may appoint a city attorney, a superintendent of streets, a civil engineer, and such other subordinate officers or employees as it deems necessary." Government Code, section 36506, in turn, sets out that "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees. *Such officers and employees hold office during the pleasure of the city council.*" (Emphasis added.)

without cause and without notice and hearing (*Bogacki v. Board of Supervisors,* supra 5 Cal.3d at p. 782, 97 Cal.Rptr. 657, 489 P.2d 537; *Ball v. City Council,* supra 252 Cal.App.2d at p. 141, 60 Cal.Rptr. 139; *Humbert v. Castro Valley County Fire Protection Dist.* (1963) 214 Cal.App.2d 1, 13, 29 Cal.Rptr. 158; *Cozzolino v. City of Fontana* (1955) 136 Cal.App.2d 608, 611, 289 P.2d 248; *Hackler v. Ward* (1951) 105 Cal.App.2d 615, 616–617, 234 P.2d 170). To this general rule, however, there are several exceptions. Thus, it is firmly established that even if a public employee serves at the pleasure of the appointing authorities, he may not be dismissed from his employment for the exercise of his First and Fourteenth Amendment rights absent a showing that the restraints which the employing body would impose on the aforementioned constitutional rights are justified by a compelling public interest (*Bogacki v. Board of Supervisors,* supra 5 Cal.3d at p. 778, 97 Cal.Rptr. 657, 489 P.2d 537; *Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 503–505, 55 Cal.Rptr. 401, 421 P.2d 409; *Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 562–563, 55 Cal.Rptr. 505, 421 P.2d 697), and in such instances the employee is entitled to a pretermination hearing (*Board of Regents v. Roth* (1972) 408 U.S. 564, 569–573, 92 S.Ct. 2701, 33 L.Ed.2d 548; *Perry v. Sindermann* (1972) 408 U.S. 593, 599, 92 S.Ct. 2694, 33 L.Ed.2d 570). The right to a hearing must likewise be afforded when a public officer employed at will claims that he was dismissed because he exercised a statutory right to join and participate in the activities of an employee organization (*Ball v. City Council,* supra 252 Cal.App.2d at pp. 142–144, 60 Cal.Rptr. 139; see also: *Fibreboard Corp. v. Labor Board* (1964) 379 U.S. 203, 217, 85 S.Ct. 398, 13 L.Ed.2d 233). Finally, the right to a pretermination hearing may be founded on the existence of rules, regulations, understandings or practices, promulgated, fostered and carried out by agency officials (*Perry v. Sindermann,* supra 408 U.S. at p. 602, 92 S.Ct. 2694; *Perea v. Fales* (1974) 39 Cal.App.3d 939, 114 Cal.Rptr. 808).

[5] In discussing the causes in a reverse order we conclude that under the circumstances here present respondents were entitled to a pretermination hearing on each of the aforestated grounds. First, the Manual,[1] which constituted a part of the 1451
department rules and regulations, delegated to the Chief of Police the power to prescribe the rules necessary for the operation of the department.[2] The Manual likewise set out that the Chief of Police shall have the control, management and direction over all members of the department with exclusive power to assign any member to any detail within the department or detail them to any public service. Even more significantly, the Manual provided in explicit terms that the employees of the police department were subject to discipline, including dismissal from employment, only for cause and after a hearing. Section 200.5 of the Manual read in part that "*The Police Chief may* reprimand, *relieve from duty,* punish or suspend from service, *any member of the Police Department for cause* in such a manner as is provided by the Police Department Rules and Regulations, Ordinances or Resolutions of the City of Healdsburg and Regulations as may be now or hereafter in force or effect, with the approval of the City Administrator and/or the City Council." (Emphasis added.) Chapter III, section I of article III, likewise put forth in pertinent

2. Section 200 of the Manual provides that "The Chief of Police shall be the Chief executive officer of the Police Department. He shall be responsible for the execution of all laws and ordinances and the rules governing the Police Department. He shall have the power to promulgate such orders to the Police Force as he may deem proper from time to time, said orders to be written or printed or issued orally." Section 200.2 of the Manual states that "The Chief of Police may prescribe rules and regulations as may be necessary for the efficient operation of the Department."

portion that "*Every* member or *employee of the Police Department, shall be subject to* reprimand, suspension, reduction in rank, deduction in pay or *dismissal from the Police Department and from the service of the City*, according to the nature of the offense, for violation of any of the rules, regulations or general orders of the Police Department, now in force, or that may be hereafter issued, *after having been given an opportunity to be heard in his or her own defense.*" (Emphasis added.) It follows that respondents were entitled to a hearing on double grounds: the Manual expressly so provided, and in addition the right to notice and hearing arose as a matter of law from the provision which authorized the dismissal of employees only for cause (cf. *Perea v. Fales*, supra).

[6] Secondly, respondents properly alleged[3] and adduced evidence at the trial showing that their discharge violated sev-
1452 eral provisions of the MMB Act which accords public employees the right to join labor organizations (Gov.Code, § 3502; *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 32 Cal. Rptr. 830, 384 P.2d 158) and prohibits public agencies from interfering with the exercise of the organizational and representational rights of their employees (Gov. Code, § 3506; see also Lab.Code, § 922; *Ball v. City Council, supra*). While failing to make specific findings of fact to that effect, the trial court in its memorandum decision concluded that "there was substantial evidence elicited at the hearing to support petitioners' contention that their dismissal resulted from their attempt to exercise such [organizational and representational] right."

[7, 8] Thirdly, as an alternative cause for issuance of the peremptory writ of mandate, it was also claimed that appellants' failure to provide notice and hearing violated respondents' constitutional right to due process guaranteed by the Fourteenth Amendment to the Constitution. It is now well settled that the requirements of procedural due process apply to the deprivation of liberty and property protected by the Fourteenth Amendment. When protected property interests are implicated, the right to some kind of prior hearing is a constitutional requisite. As emphasized in cases, the property interests which are subject to procedural safeguards are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source, i. e., statute or regulation (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 207, 124 Cal.Rptr. 14, 539 P.2d 774; *Board of Regents v. Roth*, supra 408 U.S. at pp. 569–570, 577,

3. The petition for writ of mandate avers in part that "C. 1. Respondents City Council and City Manager committed a prejudicial abuse of discretion in that said respondents acted as alleged in Paragraph VIII. A. and B. and failed to proceed in a manner required by law.

"2. *Respondents' actions are contrary to law in that they are in violation of the provisions of the 'Meyers-Milias-Brown Act' (Government Code §§ 3500–10)*, including but not limited to the following respects:

(a) Respondents have refused to meet and confer in good faith (in fact, they have refused to meet and confer at all with the Healdsburg Police Officers Association) on the legitimate matters of labor dispute alleged herein and on other matters effecting the rights and working conditions of petitioners herein and their Association.

"(b) *Respondents' actions* as alleged herein *have been part and parcel of a concerted effort to destroy and/or prevent the formation of the Healdsburg Police Officers Association and any other effective organizing effort on behalf of petitioners* herein.

"(c) Respondents have not followed any of the provisions of said Act to effectuate reasonable communication and reasonable working conditions with petitioners herein.

"3. *Respondents* themselves and by and through their agents and employees and those working in concert with them *have taken actions in violation of the mandate of Labor Code § 922 which prohibits interference by management with the organizational rights of petitioners* and their Association." (Emphasis added.)

92 S.Ct. 2701; *Perry v. Sindermann*, supra 408 U.S. at p. 601, 92 S.Ct. 2694). It follows that the cited provisions of the Manual, a department regulation, supports respondents' right to a hearing not only as a matter of statute, but also as a matter of constitutional right.

Appellants' argument that the Manual in dispute was unenforceable and legally void because it was not adopted by the city council and ran counter to several provisions of the Government Code (e. g., the rule that appointive employees of a general law city serve at the pleasure of the city council which can be changed only by ordinance (Gov.Code, §§ 36506, 45001), the authority to hire and fire city employees is delegated to the city manager (Gov.Code, § 34856)) is untenable and must be rejected for two main reasons.

One, as pointed out earlier, the Manual by express language delegated the power of discipline, including dismissal, to the Chief of Police who could exercise his power only for cause and after a hearing at which the employee affected was given the opportunity to prepare his own defense against the charges. The Manual is replete with provisions that direct and command that employees of the police department familiarize themselves with its contents, understand and follow them.[4] In addition, at the inception of their employment police officers were obligated to sign a declaration for inclusion in the personnel file which stated as follows: "I have received a copy of the General Order Manual. This will acknowledge that I have read the Manual and fully understand the meaning and intent of the policies and procedures outlined therein."

[9–13] We believe the foregoing excerpts coupled with other parts of the record support the validity and enforceability of the Manual under the theory of equitable estoppel. The record leaves no doubt that all elements of equitable estoppel are present in the case at bench. Thus, it is not disputed that even if the city council did not adopt the Manual, it at least did have knowledge of its existence. Furthermore, the Manual not only intended, but also directed that its provisions be acted upon by respondents. In fact, the Manual made it a police duty to obey all the provisions set forth therein. The forced reliance thereon and the resulting injury to respondents have also been established as a matter of record. It is blackletter law that where justice requires it, the doctrine of equitable estoppel may be invoked against a municipality or other governmental agency (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493, 496–497, 91 Cal.Rptr. 23, 476 P.2d 423; *Phillis v. City of Santa Barbara* (1964) 229 Cal.App.2d 45, 57, 40 Cal. Rptr. 27). This doctrine, of course, precludes the consenting or acquiescing party from disputing the validity of acts which were beyond the legitimate powers of the parties when done pursuant to, or in reliance upon, such consent or acquiescence (28 Am.Jur.2d, § 51, p. 662). Therefore appellants' claim that the enactment of the Manual constituted an *ultra vires* act automatically fails. We are likewise at a loss to discern any substance to appellants' contention that the theory of equitable estop-

4. The illustrative portions of the Manual read as follows:

"Every member will be furnished a copy of this Manual and is hereby directed to keep it in good condition and make such additions and deletions as ordered with such changes becoming effective when issued.

"Each member of the Department is directed to become thoroughly familiar with the contents of this Manual. Deviations from the Manual may be issued by the Chief of Police as may be necessary."

"All members of the Police Department shall familiarize themselves with the contents of these rules and regulations so that they may thoroughly understand the rules, regulations and instructions contained therein and conduct themselves accordingly . . . ."

"Members of the Department will become thoroughly familiar with the provisions of this manual and shall conform to and abide by them."

pel may not be relied upon by respondents because it was not raised in the proceedings below. It is axiomatic that although estoppel is generally a question of fact, where, as here, the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of estoppel becomes a question of law (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305, 61 Cal.Rptr. 661, 431 P.2d 245; *Crumpler v. Board of Administration* (1973) 32 Cal. App.3d 567, 581, 108 Cal.Rptr. 293). Moreover, it is indisputable that by a summary discharge appellants here denied respondents the right to a hearing which might have served to ferret out the actual reasons of dismissal and would have provided respondents the opportunity to counter the charges and to raise and prove the elements of equitable estoppel. Under these circumstances, it would be unfair indeed to deprive respondents of this equitable defense.

Two, appellants' contention must be rejected upon the further grounds that respondents' right to a hearing has accrued on the independent basis of the violation of the employees' organizational statute and also as a matter of constitutional law. As discussed before, property interests subject to procedural due process protection are not limited by a few rigid, technical forms. Property within the meaning of the Fourteenth Amendment denotes a broad range of interests that are or can be secured by rules or mutually explicit understandings —such as those presented in the instant case.

[14, 15] Appellants' alternative argument that the Manual in controversy was not properly considered by the trial court because a new manual promulgated in 1974 was in effect which by silence repealed the hearing provisions of the former Manual is also ill-founded. As recently outlined by our Supreme Court, as a general rule statutes are not to be given retroactive effect. Application of a statute to destroy interests which matured prior to its enactment is generally disfavored and, absent specific legislative provision for retroactivity, it would be manifestly unjust to interpret a new enactment in a manner that would strip the petitioner of his previously acquired status (*Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 830, 114 Cal.Rptr. 589, 523 P.2d 629). It goes without further discussion that the principles stated in *Balen* apply to the instant case where the new manual failed to provide for retroactivity and where respondents had previously acquired valuable procedural and substantive rights under the former Manual.

We are satisfied that the authorities cited by appellants are distinguishable from the case at bench. Thus, *Bogacki v. Board of Supervisors,* supra, upon which appellants primarily rely, is at variance with the case at hand in various respects. In *Bogacki,* there were no specific rules and regulations expressly granting the employee the right to a hearing before his dismissal; the discharged employee was nevertheless afforded a hearing before the county board of review; and the case was determined on the basis that the petitioner did not sustain the burden of proof that he had been discharged for the exercise of his First Amendment rights as he claimed. The other case, *Hackler v. Ward,* supra, also presents a different factual situation. In *Hackler,* the court merely held that a contract of employment for a fixed term was invalid as against the state law which granted the general law city the power to terminate the employment at pleasure. By contrast, in the instant case the validity of the Manual is not predicated on a contractual theory but, rather, on the basis of equitable estoppel which, as spelled out before, runs counter to and abrogates the *ultra vires* doctrine. Besides, in the light of the recent development and enlargement of constitutional principles relating to procedural due process (*Arnett v. Kennedy* (1974) 416 U.S. 134, 94 S.Ct. 1633, 40 L. Ed.2d 15; *Board of Regents v. Roth; Perry v. Sindermann; Skelly v. State Person-*

nel Bd., all supra), the continued validity of *Hackler* is highly questionable.

Appellants' second major attack on the trial court's rulings is founded on a series of alleged procedural errors. Of these only two contentions require consideration: one, that the peremptory writ of mandate and the contempt orders issued in its enforcement cannot stand because the writ was not preceded or followed by a judgment; two, that even if the peremptory mandate may be considered as a judgment, it should be reversed because, despite appellants' request, the trial court failed to make the necessary findings of fact as prescribed by section 632 of the Code of Civil Procedure and rule 232 of the California Rules of Court.

[16, 17] As far as appellants' first argument is concerned, we note that by statutory definition "A judgment in a special proceeding is the final determination of the rights of the parties therein"(Code Civ.Proc., § 1064). In the case at bench the writ of mandate contained the final determination of the rights of the litigants; therefore, it constituted a judgment within the meaning of the statute. In accordance therewith Judge Keane, who conducted the contempt proceedings, explicitly found that the writ itself was the judgment. But, in addition, in opposing respondents' motion to dismiss the appeal, appellants themselves took the position that the writ should be regarded as the judgment rendered in the case. Under these circumstances appellants' inconsistent claim raised on appeal cannot be heard.

[18] In reply to appellants' second contention, we observe that as a general rule findings of fact are required in a mandamus proceeding if one of the parties requests such findings (*Healy v. Stationers Corp.* (1964) 228 Cal.App.2d 601, 603, 39 Cal.Rptr. 679). However, it is equally well settled that where the only question submitted to the court is a question of law, findings are unnecessary (*Applegate Drayage Co. v. Municipal Court* (1972) 23 Cal.App.3d 628, 635, 100 Cal.Rptr. 400; *Johnston v. Security Ins. Co.* (1970) 6 Cal.App.3d 839, 844, 86 Cal.Rptr. 133). The material issues in the case at bench are undisputed. Appellants concede that respondents were discharged in a summary fashion without notice and hearing. The contents of the Manual according a right to hearing is likewise beyond controversy. The issues here presented, therefore, were legal questions which could be resolved without specific findings of fact and conclusions of law.

[19, 20] The remaining contentions of the parties require just a short discussion. Appellants' assertion that ordering reinstatement with back pay without the requisite offset compensation was erroneous is not borne out by the law or by the record. It is axiomatic that the burden of proof is on the party whose breach caused damage, to establish matters relied on to mitigate damage (*Steelduct Co. v. Hengcr-Seltzer Co.* (1945) 26 Cal.2d 634, 654, 160 P.2d 804). Appellants here failed to carry the burden of proof by showing that during their absence respondents did make or could have made earnings which could have been considered in mitigation of damages. Respondents' claim to attorneys' fees is also subject to summary disposition. 146
Pursuant to Government Code, section 800, in a civil action to review an administrative determination by a public entity, the court may award reasonable attorneys' fees only if the administrative decision resulted from arbitrary or capricious action of a public entity (*Madonna v. County of San Louis Obispo* (1974) 39 Cal.App.3d 57, 61, 113 Cal.Rptr. 916). The case at bench reveals a bona fide legal dispute and there is no showing of arbitrariness or caprice on the part of appellants.

[21] We do agree with appellants, however, that the trial court erred in ordering any pretermination hearings to be conducted before a hearing officer on the staff of the Office of Administrative Procedure of the State of California and in accordance with the procedures outlined in chapter 5

of division 3 of title 2 of the Government Code.

The nature and form of the hearing is an issue which was not litigated below. The single issue was simply whether respondents were entitled to a pretermination hearing.

The judgment (writ of mandate) is modified by striking the first two sentences of paragraph 2) of page 2 thereof. As so modified, the judgment and the orders of contempt issued thereon are, and each is, affirmed.

TAYLOR, P. J., and ROUSE, J., concur.

58 Cal.App.3d 492

[492] HUNTINGTON BEACH POLICE OFFICERS' ASSOCIATION, etc., Plaintiffs and Respondents,

v.

The CITY OF HUNTINGTON BEACH, etc., et al., Defendants and Appellants.

Civ. 15257.

Court of Appeal, Fourth District, Division 2.

May 18, 1976.

Police officers' association sought writ of mandate to compel charter city, its councilmen and chief of police to reinstate a four-day, ten-hour-day work week schedule for police personnel and to meet and confer in good faith with respect to any proposed changes in the schedule. The Superior Court of Orange County, William S. Lee, J., directed issuance of a peremptory writ, and defendants appealed. The Court of Appeal, Tamura, J., held that plaintiff's failure to exhaust administrative remedies did not bar judicial relief where not only were administrative remedies unavailable or inadequate but further pursuit would have been futile and that city's resolution purporting to render work schedule nonnegotiable was in conflict with declared purpose of the Meyers-Milias-Brown Act and, hence, was invalid.

Judgment affirmed.

Don P. Bonia, City Atty., and William Shaw Amsbary, Asst. City Atty., Huntington Beach, for defendants and appellants.

Lemaire, Faunce & Katznelson, Edward L. Faunce and Steven R. Pingel, Los Angeles, for plaintiffs and respondents.

[1895] OPINION

TAMURA, Associate Justice.

Plaintiff, Police Officers' Association of Huntington Beach, sought a writ of mandate in the court below to compel the City of Huntington Beach, its councilmen and chief of police to reinstate a four-day, ten-hour-day work week schedule ("TEN-PLAN") for police personnel and to meet and confer in good faith with respect to any proposed changes in the schedule. Following hearing and submission of the matter on the petition, demurrer, answer, and memoranda of authorities, the court entered judgment directing issuance of a peremptory writ of mandate as prayed for by plaintiff. Defendants appeal from the judgment.

The pertinent facts are as follows:

The city is a charter city. Plaintiff is a recognized employee organization of the city. On July 26, 1971, a Memorandum of Agreement relating to wages, hours, and the terms and conditions of employment of personnel in the city police department was negotiated by plaintiff and the city pursuant to the Meyers-Milias-Brown Act (Gov.Code, ch. 10, div. 4, tit. 1;[1] hereafter "MMB Act") and an implementing "Employer-Employee Relations Resolution" ("EER Resolution") previously adopted by the city council. Article XI of the Memorandum of Agreement provides: "The 'TEN-PLAN' shall be placed into effect for employees designated by the Chief of Police the first of the month following approval by the City Administrator." Shortly following city council approval and ratification of the agreement, the chief of police placed the TEN-PLAN into effect for all police department personnel.[2]

On April 16, 1974, the chief of police notified his department supervisors that effective September 30, 1974, all personnel other than patrolmen would revert to a five-day, eight-hour-day work schedule. In August 1974, personnel in the detective bureau sent a memorandum to the chief requesting a meeting to discuss the return to a five-day work week. On October 14, [1896] 1974, in a memorandum setting forth the reasons for their request, the same group asked the chief to reinstate the TEN-PLAN. The city personnel director responded to the request by stating that the work schedule was neither negotiable nor a proper subject for grievance. Thereupon, on October 18, 1974, plaintiff's representative filed a formal grievance with the personnel director complaining that the unilateral action of the chief of police in discontinuing the TEN-PLAN constituted a violation of the Memorandum of Agreement and of the MMD Act. The personnel director responded by letter dated November 20, 1974, stating that the subject matter in controversy "does not constitute a matter for grievance . . . [¶] As a mat-

ter involving the policy of police protection and service with the City, management prerogatives and for other related reasons, the purported dispute is not subject to the grievance procedures." Plaintiff thereupon filed the instant mandate proceeding.

Defendants attack the judgment below on two grounds: (1) The court lacked jurisdiction to grant the relief sought because plaintiff failed to exhaust its administrative remedies and (2) the subject of work schedule had been excluded from the meet and confer process both by the EER Resolution and the terms of the Memorandum of Agreement. From the analysis which follows, we have concluded that defendants' contentions lack merit and that the judgment should be affirmed.

I

Defendants urge that plaintiff's failure to exhaust the grievance procedure prescribed by the city's personnel rules and regulations or to pursue a remedy provided by the EER Resolution precluded the court from granting the judicial relief sought. The contention lacks merit.

[1, 2] A written memorandum of understanding negotiated pursuant to the MMB Act is, upon approval of the city council, binding upon the parties and performance of the city's obligations under the agreement may be enforced by the traditional mandate proceeding to compel performance of a ministerial duty or to correct an abuse of official discretion. (*Glendale City Employees' Assn. v. City of Glendale*, 15 Cal.3d 328, 343–344, 124 Cal.Rptr. 513, 540 P.2d 609.) Although the trial court has considerable discretion in deciding whether to grant this form of relief, where plaintiff shows compliance with the
1497 requirements for the writ, including lack of a plain, speedy and adequate remedy in the usual course of the law, he may be entitled to the writ as a matter of right. (*Flora Crane Service, Inc. v. Ross*, 61 Cal. 2d 199, 203, 37 Cal.Rptr. 425, 390 P.2d 193; *May v. Board of Directors*, 34 Cal.2d 125, 133–134, 208 P.2d 661.)

In the case at bench, despite the showing made by plaintiff, defendants contend that the court had no jurisdiction to grant the relief requested because plaintiff failed to exhaust its administrative remedies. Specifically defendants point to plaintiff's admitted failure to exhaust the grievance procedure prescribed by rule 19 of the city's personnel rules and regulations. They also urge that plaintiff should have pursued an appeal procedure prescribed by the EER Resolution.

Rule 19 of the city's personnel rules and regulations pertains to the settlement of grievances in nondisciplinary matters. It provides for a five-step procedure commencing with an informal consultation between an employee and his supervisor and culminating with an appeal to the personnel board if efforts to settle the grievance at lower levels fail. Step four consists of the formal submission of a grievance to the personnel director. Plaintiff pursued the grievance procedure through step four but did not invoke step five.

[3] Plaintiff's failure to exhaust the grievance procedure of rule 19 did not preclude it from seeking judicial relief. For the purpose of rule 19 a grievance is defined as "a dispute concerning the interpretation or application of an provision of the city's Employer-Employee Relations Resolution, or any provision of this resolution or any departmental rule governing personnel practices or working conditions, . . ." The present dispute pertained to the city's obligations under the Memorandum of Agreement and the MMB Act; it did not concern the interpretation or application of the EER Resolution, the personnel rules and regulations, or a departmental rule. Since the instant controversy is not a grievance within the meaning of rule 19, the procedure therein provided for settlement of grievances was not applicable and failure to pursue it to its ultimate conclusion does not preclude plaintiff from seeking judicial relief. (*Glendale City Employees' Assn. v. City of Glendale, supra*, 15 Cal.3d 328, 342, 124 Cal.Rptr. 513, 540

P.2d 609; *Ramos v. County of Madera*, 4 Cal.3d 685, 691, 94 Cal.Rptr. 421, 484 P.2d 93.)

498 [4] Defendants virtually concede the inapplicability of the grievance procedure prescribed by the city's personnel rules and regulations by contending that plaintiff's proper administrative remedy was to file an "appeal" with the personnel board under section 14–4 of the EER Resolution. That section provides that "any decision of the City Administrator or Personnel Director made pursuant to this resolution may be appealed to the Personnel Board" and "any decision of the Personnel Board made pursuant to this resolution may be appealed to the City Council." [3] The contention that plaintiff's failure to pursue that course of action deprived the court of jurisdiction to entertain the mandate proceeding must also be rejected. Section 14–4 simply provides that an appeal may be taken; it sets forth no procedure pursuant to which an appeal is to be heard. As explained in *Glendale City Employees' Assn. v. City of Glendale, supra*, 15 Cal.3d 328, 124 Cal.Rptr. 513, 540 P.2d 609; a procedure "which provides merely for the submission of a grievance form, without the taking of testimony, the submission of legal briefs, or resolution by an impartial finder of fact is manifestly inadequate to handle disputes of the crucial and complex nature of the instant case, which turns on the effect of the underlying memorandum of understanding itself." (At pp. 342–343, 124 Cal.Rptr. at p. 523, 540 P.2d at p. 619.)

[5, 6] Moreover, the record reveals that further pursuit of either the grievance procedure or an appeal under section 14–4 of the EER Resolution would have been futile. Throughout the entire controversy the city steadfastly maintained that a change in the application of the TEN-PLAN was a matter of management prerogative and was neither negotiable nor a proper subject for grievance. Where the administrative agency has made it clear what its ruling would be, idle pursuit of further administrative remedies is not required by the exhaustion doctrine. (*Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834–835, 112 Cal.Rptr. 761. See *Gantner & Mattern Co. v. California E. Com.*, 17 Cal.2d 314, 318, 109 P.2d 932.) This was the basis on which the trial court rejected the city's defense that plaintiff failed to exhaust available administrative remedies. The court's minute order decision states: "In view of the position taken by [defendants], the Court would deem it inequitable to require further or other exhaustion of administrative remedies." The trial court's determination is amply supported by the record. 499

3. EER Resolution section 14–4 provides:

"14–4. DECISION. APPEAL FROM. Any provision of this resolution to the contrary notwithstanding, any decision of the City Administrator or Personnel Director made pursuant to this resolution may be appealed to the Personnel Board by any employee organization or self-representing employee, adversely affected by such determination, or by the City Council.

"Any decision of the Personnel Board made pursuant to this resolution may be appealed to the City Council by any employee organization, or self-representing employee, adversely affected by such determination, or by the City Council.

"This section shall not apply to any determination made by either the City Administrator or the Personnel Board in connection with the impasse procedures pursuant to Section 9–2 of this resolution.

"Notice in writing by mail of all determinations of the City Administrator or Personnel Director or the Personnel Board pursuant to this resolution must be served upon the employee organization or the self-representing employee concerned, and the City Council, within five (5) days after such determination is made. No appeal from any such determination may be made unless a written notice of appeal is filed with the Personnel Board, in the case of an appeal to the Personnel Board, or with the City Council, in the case of an appeal to the City Council, within ten (10) days following the date of service of notice of such determination, as provided herein.

"The date of mailing of such notice of determination, as provided herein, shall be conclusively deemed the date of service thereof."

[7] For all the reasons stated, we conclude that the trial court's implied determination that administrative remedies were either unavailable or inadequate or that their further pursuit would have been futile must be upheld.[4]

II

On the merits, the city contends that the TEN-PLAN work schedule has been excluded from the meet and confer requirements of the MMB Act (1) by the provisions of the EER Resolution and (2) by the Memorandum of Agreement itself.

In support of its argument that the EER Resolution excludes work schedule from the meet and confer process, the city directs our attention to sections 3–11, 3–15 and 5–1 of the EER Resolution. Section 3–11 defines the term "meet and confer in good faith" as the mutual obligation to confer "on matters within the scope of representation." Section 3–15 defines "scope of representation" as meaning all matters relating to the employment relationship "including, but not limited to, wages, hours and other terms and conditions of employment" but excluding "City rights, as defined in section 5." Section 5–1 provides in pertinent part: "Except as
1500 otherwise specifically provided in this resolution, or amendments or revisions thereto, the city has and retains the sole and exclusive rights and functions of management, including, but not limited to, the following: . . . (c) To schedule working hours, allot and assign work. [¶] (d) To establish, modify or change work schedule or standards." The city argues that under the foregoing provisions of the EER Resolution, work schedule, including the TEN-PLAN, has been effectively excluded as a subject of the meet and confer process.

Although the provisions of the EER Resolution to which we have been directed purport to exclude work hour schedules from the scope of representation, the attempted exclusion must yield to the meet and confer requirements of the MMB Act.

[8, 9] With respect to matters of statewide concern, charter cities are subject to and controlled by applicable general state law if the Legislature has manifested an intent to occupy the field to the exclusion of local regulation. (*Pac. Tel. & Tel. Co. v. City & County of S. F.*, 51 Cal.2d 766, 768–769, 336 P.2d 514; *Pipoly v. Benson*, 20 Cal.2d 366, 369–370, 125 P.2d 482. See *Bishop v. City of San Jose*, 1 Cal.3d 56, 61–62, 81 Cal.Rptr. 465, 460 P.2d 137; *Smith v. City of Riverside*, 34 Cal.App.3d 529, 534, 110 Cal.Rptr. 67.) Labor relations in the public sector are matters of statewide concern subject to state legislation in contravention of local regulation by chartered cities. (*Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal.2d 276, 295, 32 Cal.Rptr. 830, 384 P.2d 158.)

[10] In the case at bench the provisions of the EER Resolution purporting to exclude the subject of working hours from the meet and confer process are in direct conflict with provisions of the MMB Act imposing upon governing bodies of public agencies an obligation to meet and confer in good faith regarding wages, hours and other terms and conditions of employment. (§ 3505.[5]) Thus the question is whether

4. Findings were not made because they were not requested. It must therefore be presumed that the court made all findings necessary to support its judgment. (4 Witkin, Cal.Procedure, Trial, § 310, p. 3118, and cases there cited.)

5. The following is a comparison of the pertinent provisions of the EER Resolution upon which the city relies and the counterpart provisions of the MMB Act.

Section 3–11 of the EER Resolution provides:

"3–11. MEET AND CONFER IN GOOD FAITH shall mean the performance by duly authorized city representatives and duly authorized representatives of a recognized employee organization of their mutual obligation to meet at reasonable times and to confer in good faith in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters

[501] the Legislature intended to reserve to local agencies the power to adopt labor relations regulations inconsistent with otherwise applicable provisions of the MMB Act.[6] Although the Legislature did not intend to preempt all aspects of labor relations in the [502] public sector,[7] we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate the declared policies and purposes of the MMB Act. Were we to uphold the city's regulation in question, local entities would, as Professor Grodin observed be "free to adopt rules prohibiting employees from joining unions, to decline recognition to any organization, and to refuse to meet or

within the scope of representation. This does not compel either party to agree to a proposal or to make a concession."

Section 3505 provides:

"The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

" 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have 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. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance, or when such procedures are utilized by mutual consent."

Section 3-15 of the ERR Resolution provides:

"3-15. SCOPE OF REPRESENTATION shall mean all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment. City rights, as defined in Section 5 herein, are excluded from the scope of representation."

Section 5-1 of the EER Resolution provides in pertinent part:

"Except as otherwise specifically provided in this resolution, or amendments or revisions thereto, the city has and retains the sole and exclusive rights and functions of management, including, but not limited to, the following: . . . [¶] (c) To schedule working hours, allot and assign work. [¶] (d) To establish, modify or change work schedule or standards."

Section 3504 provides:

"The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

6. The precise question before us appears to be one of first impression. In *Fire Fighters Union v. City of Vallejo*, 12 Cal.3d 608, 116 Cal.Rptr. 507, 526 P.2d 971, the court did not pass upon the question because the language of the city charter provision closely paralleled the language of the MMB Act. Similarly in *Glendale City Employees' Assn. v. City of Glendale, supra*, 15 Cal.3d 328, 334, fn. 4, 124 Cal.Rptr. 513, 540 P.2d 609, the court did not reach the question here presented because the City of Glendale had adopted a format for labor management relations essentially identical to that set out in the MMB Act.

7. Section 3500 setting forth the legislative purpose and intent contains the following qualification:

"Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed."

confer with recognized organizations on matters pertaining to employment relations —in short, to undercut the very purposes which the act purports to serve. Such an interpretation is inconsistent with the general objectives of the statute as declared in the preamble and with the mandatory language which appears in many of the sections." (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 724–725.) In the words of Professor Grodin, the power reserved to local agencies to adopt rules and regulations was intended to permit supplementary local regulations which are "consistent with, and effectuate the declared purposes of, the statute as a whole." (Grodin, *supra*, at p. 725.)

In *Los Angeles County Firefighters Local 1014 v. City of Monrovia*, 24 Cal.App. 3d 289, 101 Cal.Rptr. 78, the court held that a city which had by resolution recognized a city employee association as "the only organized group" authorized to speak on behalf of city employees was nevertheless obligated to recognize an outside union as the representative of those employees who were its members. From a review of the entire MMB Act, the reviewing court determined that the Legislature intended "to set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations . . . ." and concluded that "if the rules and regulations of a public agency do not meet the standard established by the Legislature, the deficiencies of those rules and regulations as to rights, duties and obligations of the employer, the employee, and the employee organization, are supplied by the appropriate provisions of the act." (24 Cal.App.3d at p. 295, 101 Cal.Rptr. at p. 82.)

[11–13] We agree with the foregoing authorities' assessment of the legislative intent. The city's EER Resolution in question recites that it was adopted pursuant to section 3507. That section authorizes a public agency to "adopt reasonable rules and regulations . . . for the administration of employer-employee relations under this chapter . . . ." A regulation which would cut off communication between employer and employee concerning establishment of a schedule of working hours is not a "reasonable" regulation for the administration of labor relations under the MMB Act. The Legislature has declared that the MMB Act is intended "to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of *uniform and orderly methods of communication* between employees and the public agencies by which they are employed." (§ 3500; emphasis supplied.) In furtherance of that purpose, the Legislature has in mandatory language imposed upon public agencies the duty to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations" and to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." (§ 3505.) The city's EER Resolution purporting to render work schedule nonnegotiable is in conflict with the declared purpose of the MMB Act and the mandatory language of section 3505. It is therefore invalid.

Nor may the city validly justify its attempts to make work schedule a nonnegotiable prerogative of management on the theory that the subject pertains to "organization" of a city department. Section 3504 provides: "The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or

organization of any service or activity provided by law or executive order."

In *Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608, 116 Cal.Rptr. 507, 526 P.2d 971, the court rejected the city's contention that schedule of work hours for city fire fighters affected "organization" of the service and was therefore nonnegotiable. The court explained the statutory exclusion from "scope of representation" of "consideration of the merits, necessity, or organization of any service" as merely indicating a legislative intention to forestall expansion of the phrase "wages, hours and other terms and conditions of employment" to include "more general managerial policy decisions." On the other hand, the court noted that the phrase "wages, hours and other terms and conditions of employment" was taken directly from the National Labor Relations Act; a considerable body of law has developed under the federal statute defining the scope of that term; and "working hours and work days" have been held to be negotiable subjects under the National Labor Relations Act. Accordingly, the court concluded that schedule of working hours was a mandatory negotiable subject under the MMB Act. (12 Cal.3d at pp. 616–618, 116 Cal.Rptr. 507, 526 P.2d 971.)

The city's reliance upon *American Fed. of State etc. Employees v. County of Los Angeles*, 49 Cal.App.3d 356, 122 Cal.Rptr. 591, is misplaced. That case involved a dispute over job classifications under a civil service system established pursuant to the county charter. The court held that under the express qualification in section 3500, a procedure for job classification governed by county charter and civil service regulations enacted pursuant thereto is not intended to be superseded by the MMB Act. The case at bench does not involve provisions of a city charter regulating a civil service system.

[14, 15] Defendants' remaining contention consists of a bare assertion that the parties have "by contract excluded the 'TEN-PLAN' at this time from the meet and confer process." The point is made without discussion or supporting argument. Failure to support a point by legal argument may be deemed to be an abandonment of the contention. (6 Witkin, Cal. Procedure, Appeal, § 425, pp. 4391–4392.) We may therefore properly ignore the contention.

Nevertheless we have examined the Memorandum of Agreement in an attempt to ascertain a possible basis for the city's contention. We assume that the city's position, though not articulated, is that the memorandum of understanding should be construed to mean the chief of police was to have the sole discretion, without meeting and conferring with plaintiff, to decide which employees should be under the TEN-PLAN. Although the agreement inferentially recognizes the ultimate authority of the chief to decide to what extent the TEN-PLAN shall be operative in his department, it does not, either expressly or by implication, provide that changes in policy affecting the application of the plan shall not be subject to the meet and confer process.

The undisputed facts are that pursuant to the Memorandum of Agreement the plan was put into effect for all police personnel and remained in effect for all personnel until the chief unilaterally terminated the plan except as to patrolmen. The change in policy was effected without affording plaintiff an opportunity to meet and confer. The action taken by the chief in disregard of plaintiff's request to meet and confer was in violation of section 3505 of the MMB Act.

Judgment is affirmed.

GARDNER, P. J., and FOGG, J.*, concur.

* Retired Judge of the Superior Court assigned by the Chairman of the Judicial Council.

LIPOW v. REGENTS OF UNIVERSITY OF CALIFORNIA

[1215] [1] Arthur LIPOW et al., Plaintiffs and Appellants,

v.

The REGENTS OF the UNIVERSITY OF CALIFORNIA, Defendant and Respondent.

Civ. 36065.

Court of Appeal, First District, Division 1.

Dec. 8, 1975.

As Modified on Denial of Rehearing Jan. 6, 1976.

A judgment of the Superior court for Alameda county, Wm. H. Brailsford, J., denied a writ of mandate to compel the Regents of the University of California to set aside the final revised version of a section of the university's administrative manual, dealing with appointment and reappointment of instructors and professors. Plaintiffs appealed. The Court of Appeal, Lazarus, J., held that substantial evidence supported the trial court's finding that the board of regents met its statutory obligation to meet and confer in good faith with a university council before adopting the revised section. Where supposed retroactive application of the section of the manual was not one of the stipulated issues at trial, it was one which appellants improperly endeavored to inject into the case for the first time on appeal.

Affirmed.

Van Bourg, Allen, Weinberg, Williams & Roger, Victor J. Van Bourg, Stewart Weinberg, San Francisco, for plaintiffs and appellants.

Donald L. Reidhaar, Milton H. Gordon, Berkeley, for defendant and respondent.

[218] LAZARUS,* Associate Justice.

This is an appeal from a judgment below denying a petition for a writ of mandate to compel the Regents of the University of California to set aside the final revised version of section 52 of the University's Administrative Manual issued on February 1, 1973. The section in question deals, inter alia, with appointment and reappointment of instructors and professors.

The University Council of the American Federation of Teachers, AFL–CIO, was the sole petitioner when the proceedings were first commenced in 1971 for the issuance of a writ of mandate to compel respondent, by and through its representatives, to meet and confer with the council over any proposed changes in the academic personnel rules. The council is a labor organization representing a large number of the faculty members at the university. Arthur Lipow and John G. Leonard were added as petitioners by amendment to the petition filed over a year later. There was a pretrial conference at which a joint pretrial statement was filed in which the facts referred to hereinafter were admitted. At the subsequent trial, judgment was in favor of the respondent.

The crucial question here is as to whether or not the Regents did in fact meet and confer in good faith with appellant the University Council as the bargaining representative of the faculty members who belong to the University Council as required by Government Code section 3530.[1]

DID THE REGENTS MEET AND CONFER IN GOOD FAITH WITH THE UNIVERSITY COUNCIL?

Appellants' claim is based on Government Code section 3530 which directs that "The state by means of such boards, commissions, administrative officers or other representatives as may be properly designated by law, shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action."

[219] Respondent concedes, *arguendo*, for purposes of this appeal that the Legislature has the authority to mandate the *manner* in which the university conducts its personnel policies.[2] And, although the state is only obligated under the express terms of Gov-

* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

1. Appellants' brief also endeavors to present a second issue involving the status of petitioners Lipow and Leonard alone that was apparently not properly raised in the trial court. Our comments in this connection will appear elsewhere.

2. Its brief suggests that the decision in *Ishimatsu v. Regents of University of California* (1968) 266 Cal.App.2d 854, 863–864, 72 Cal.Rptr. 756, might be the basis of a contrary argument. That case holds that the university is a statewide administrative agency with autonomous powers concerning its personnel derived from the Constitution.

ernment Code section 3530 to "meet and confer", respondent has also conceded that this must also of necessity include the implied element of "good faith".

Appellants, on the other hand, do not deny that they participated in various meetings with university officials at certain intervals while amendments to section 52 of the manual were under consideration. Nor do they argue that respondent was obligated to arrive at an agreement with appellants. What they do contend is that respondent failed to meet and confer in good faith and that in the final analysis the revisions to section 52 were therefore unilaterally enacted by the Regents.

A. *Stipulated facts.*

The question thus presented must be resolved within the framework of the following stipulated facts:

"The University Council of the American Federation of Teachers is an Employee Organization within the meaning of Government Code Sections 3500, 3526 and 3530. The University Council has been recognized by the University of California as representing academic employees of the University of California. The University of California has met and conferred with the University Council of the American Federation of Teachers and the Local Unions affiliated with it on some of the campuses of the University of California. Arthur Lipow and John G. Leonard were, at times material to the Petition, employees of the University of California and members of the University Council. Arthur Lipow was first hired in the school year 1967 as a lecturer. Since 1970 he has been employed as an assistant professor at the Davis campus of the University of California. John G. Leonard was hired as an acting assistant professor on July 1, 1968, and was appointed assistant professor on July 1, 1970 at the San Diego campus specializing in Indian History. He was on leave without pay in India from July 1, 1970 to June 30, 1971 and was returned to his appointment as an assistant professor until his employment terminated on June 30, 1973.

1220 "The Regents of the University of California is a body created by the Constitution of the State of California, and has the responsibility of administering the University of California. The President of the University is Charles Hitch. On July 9, 1970, President Hitch issued a memorandum announcing proposed changes of Rule 52 of the Administrative Manual dealing with policies and procedures concerning appointments, appraisals, and notifications of intention not to reappoint instructors and assistant professors. This memorandum contained a set of Interim Rules of govern these positions and procedures until the final language of Rule 52 could be settled.

"While Arthur Lipow served as a lecturer, the Administrative Manual defined lecturer as an individual 'not under consideration for appointment in the Professorial Series'. However, at the same time, the Handbook for Faculty Members of the University of California, as early as February 1963 and as late as May, 1968, stated that length of service as a lecturer and assistant professor is calculated in reviewing an employee for promotion and tenure. The March 1970 Handbook omits this reference. However, at all times it has been known that assistant professors are expected to engage in such scholarly pursuits as research and writing, whereas research is not required of a person serving in the position of lecturer. Rule 52 of the Administrative Manual contains the criteria for evaluating those persons eligible for tenure and promotion, that is, those persons in the Professorial Series which does not include lecturers; one such criterion is research. The Interim Rules set forth by President Hitch on July 9, 1970 omit reference to lecturers as part of the Professorial Series.

"In May of 1973, Petitioner Lipow was notified that his years as a 51% or more time lecturer would be counted toward his tenure and promotion review and that, con-

sequently, his lack of research during those years would be considered in his tenure and promotion review. This was based upon the 1973 revision of Rule 52 which in turn was based upon the University's interpretation of the February 1963 and May 1968 Handbook for Faculty Members which had never before been a part of the Administrative Manual. The only notice that Lipow could have had while he was a lecturer that his time would be considered for promotion and tenure in the Professorial Series was contained in the Handbook for Faculty Members, but this information was not in the Administrative Manual. There was no notice at any time in the Handbook for Faculty Members specifically imposing the requirement of research upon lecturers prior to the change in the
[221] Administrative Manual in 1973. Petitioner Lipow did not perform research while he served as a lecutrer. The 1973 version of Rule 52 encourages the possibility of an early review of assistant professors.

"Petitioner Leonard was notified of his non-reappointment on December 1, 1971. He appealed the decision to the San Diego Campus Committee on Privilege and Tenure where it was affirmed. Part of the reason for the non-reappointment was the fact that Indian History was being cut back on the San Diego campus, and Indian History happened to be Petitioner Leonard's specialty. At the time this decision was made, programatic changes were not specifically stated in Rule 52 and did not become a formal part of Rule 52 until 1973. The application of the proposed changes of Rule 52 were made to Petitioner Leonard while Petitioner Leonard's representative, the University Council, was attempting to meet and confer with the University.

"On November 9, 1970, Angus Taylor, Vice President of the University of California For Academic Affairs, issued a draft revision of Section 52 as a proposal.

"On February 5, 1971, Respondent received a letter addressed to President Hitch dated February 4, 1971 requesting a meeting to discuss the July 9, 1970 announcement of proposed changes in Rule 52. The November 9, 1970 proposed revision of Section 52 was distributed on that date only to the Chancellors of the various campuses of the University of California, and not to Employee Organizations such as Petitioner.

"On March 2, 1971, Vice President Taylor of the Respondent, as employee and agent of the Respondent, answered the request to meet and confer by stating that there was no need to meet in person and, instead, encouraging a telephone conversation. A meeting was arranged and did take place at the Davis campus on April 23, 1971 between representatives of the University Council and Vice President Taylor. The meeting of April 23, 1971 was terminated, and the Respondent University insisted that any further meetings be conducted on the campus level rather than on the University-wide level. Accordingly, meetings were held between the Local Unions affiliated with Petitioner University Council on the various campuses during May, June and July of 1971 concerning the first draft revision of Section 52, dated November 9, 1970.

[222] "On October 5, 1971, Vice President Taylor distributed a second draft revision of Section 52, and sent a copy to the University Council. The University Council requested to meet and confer with University-wide representatives on October 18, 1971, but Vice President Taylor responded on October 18, 1971 that further meetings would take place on the campus level and a University-wide representative, such as Vice President Taylor, would be available to assist on the local campus meetings. On January 31, 1972, Vice President Taylor informed the University Council that he agreed to send a representative of his office to meetings on the campus level and indicated 'we shall not be in haste about issuing a final version of Section 52'. This followed the filing of this action numbered 419-502 in the Superior Court of the State of California, For the County of

Alameda, alleging that the Respondents had failed to meet and confer in good faith. The hearing for the issuance of a Writ on the original Petition in this matter had been dropped from calendar.

"On September 15, 1972, the second draft revision of Rule 52 was withdrawn and a third version was issued on that date. Comments from the University Council and other groups had been taken into consideration in the drafting of the third version and Angus Taylor called for comments on the new version.

"On October 13, 1972, the University Council requested a University-wide meeting, but on October 23, 1972, the University responded by stating 'Campus meetings seem the most productive way of securing comment from your organization on proposed revisions to the manual. I will gladly cooperate in arranging to have the representative from my office at one or more of the campus meetings, if that is desired. I would like to judge the need for a University-wide meeting after a few campus meetings have been held.'

"Campus level meetings on the third draft revision took place at the San Diego, Irvine and Davis campuses of the University, and campus representatives were not authorized to alter, amend, modify, change, suspend or revoke Section 52 or authoritatively interpret the drafts, nor agree to any changes proposed by the University Council.

[223] "On December 6, 1972, the University Council representatives met on the Berkeley Campus with Berkeley Provost George Maslach and J. Dean Swift, Academic Assistant to Vice President Angus Taylor.

"On February 1, 1973 the University Council, through its Executive Secretary Sam Bottone, wrote to find out the status of the third draft of Section 52 and when a fourth draft would be available for review. On February 5, 1973, Vice President Taylor transmitted to the Council the official revised and final version of Rule 52 and, in fact, the third draft revision of Rule 52, substantially intact, was implemented in final form. The University Council demanded that it be withdrawn in order that further meeting and conferring could take place on February 13, 1973 and again on April 13, 1973. However, on April 3, 1973, Angus Taylor had informed the University Council that any further meetings would be to discuss 'possible changes in Section 52' or 'improvements' indicating that Section 52 was implemented. On April 24, 1973, the University again refused to withdraw Section 52 and agreed to meet but without withdrawing Section 52."

These stipulated facts were incorporated in the findings of fact adopted by the trial court. The court also found that at the December 6, 1972, meeting Vice-Presidential Academic Assistant Swift stated that the third draft revision of section 52 was being withdrawn to be rewritten. The following, however, are the findings that appellants now specifically seek to attack: "20. The representatives of the parties hereto met and conferred on numerous occasions over a two-year period concerning the modification of Section 52 of Respondents' Academic Personnel Manual. Petitioners made recommendations with respect to the modification of Section 52 which were incorporated in the Section ultimately adopted. [¶] 21. Respondents met and conferred in good faith with Petitioners at all times, including but not limited to the meeting of December 6, 1972." [3]

B. *Analysis of the law applicable thereto.*

Section 3530 was part of new chapter 10.5 which was added to the Government Code by Stats.1971, ch. 254, § 6, p. 403. This chapter (§ 3525 et seq.) is entitled "State Employee Organizations." Under-

3. As a conclusion of law therefrom, the court stated: "Respondents fully complied with such legal obligations as they might have had to meet and confer with Petitioners concerning the modification and reissuance of Section 52 as revised in February of 1973."

standably therefore, there has not yet been a case in which the courts have been called upon to interpret section 3530.

We look for guidance therefore to the companion chapter dealing with local public employee organizations enacted in 1961. 1224 (Gov.Code, § 3500 et seq.) There, the analogous statute is section 3505. This section, as recently amended, now includes a definition of the phrase "meet and confer in good faith." In its present form, this section reads: "The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. [¶] 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have 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. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance, or when such procedures are utilized by mutual consent."

[1] The Winton Act (Stats.1965, ch. 2041, § 2) as amended, includes a similar legislative definition of the term "meet and confer." Education Code section 13085 requires public school employers to "meet and confer" with representatives of employee organizations. What this means is explained as follows in Education Code section 13081, subdivision (d): "'Meet and confer' means that a public school employer, or such representatives as it may designate, and representatives of employee organizations shall have the mutual obligation to exchange freely information, opinions, and proposals; and to make and consider recommendations under orderly procedures in a conscientious effort to reach agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations." And this duty to negotiate refers, of course, only to the necessity of meeting and conferring in good faith. Neither side is under any compulsion to agree as to any matters in dispute under our state statutes. (*Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 Cal.App.3d 1, 4, fn. 3, 108 Cal.Rptr. 625, citing *East Bay Mun. Employees Union v. County of Alameda* (1970) 3 Cal.App.3d 578, 584, 83 Cal.Rptr. 503.) 1225

[2] The concept of industrial collective bargaining does not, of course, apply to public employees in California. (*Sacramento County Employees Organization, Local 22, etc., Union v. County of Sacramento* (1972) 28 Cal.App.3d 424, 104 Cal. Rptr. 619.) But under the Meyers-Milias-Brown Act of 1968, a "public employer must 'meet and confer in good faith regarding wages, hours and other terms and conditions of employment with representatives of . . . recognized employee organizations, . . .'" (Id. at p. 429, 104 Cal.Rptr. at p. 622.)

[3] Respondent treats the federal authorities cited and discussed in appellants' brief somewhat cavalierly, merely suggesting that they are not in point and should be ignored. We do not agree. California courts "have often looked to federal law for guidance in interpreting state provisions whose language parallels that of the federal statutes." (*Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391, 113 Cal.

Rptr. 461, 467, 521 P.2d 453, 459; accord, *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616, 116 Cal.Rptr. 507, 526 P.2d 971.)

Under the Labor-Management Relations Act (29 U.S.C., § 141 et seq.), it is an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. (29 U.S.C., § 158, subd. (a)(5).)

"To bargain collectively" is defined as "the performance of the mutual obligation of the employer and the representative of the employees *to meet* at reasonable times *and confer in good faith* with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, . . ." (29 U.S.C., § 158, subd. (d), emphasis added.)

Our courts have recognized that sections 3504 and 3505 of the Government Code borrow language from the above federal code section. (See *Fire Fighters Union v. City of Vallejo*, supra, 12 Cal.3d 608 at p. 615, 116 Cal.Rptr. 507, 526 P.2d 971; *Dublin Professional Firefighters, Local 1885 v. Valley Community, etc., Dist.* (1975) 45 Cal.App.3d 116, 119, 119 Cal.Rptr. 182; see also Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 749.)

1226 Despite the fact that in California public employees do not have the same right to bargain collectively as do workers in private industry, or as the term is used in the federal Labor-Management Relations Act, since the federal statute includes language similar to that found in both Government Code sections 3505 and 3530, it is appropriate for this court to look to relevant federal authorities for further guidance in determining what is meant by the term to "meet and confer in good faith."

In *National Labor Relations Board v. Katz* (1962) 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230, an authority upon which appellants rely heavily, the Supreme Court found that the duty to meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment "may be violated without a general failure of subjective good faith; . . ." It held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5) [29 U.S.C., § 158, subd. (a)(5)], for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal." (*Accord, Continental Insurance Company v. N.L.R.B.* (2d Cir. 1974) 495 F. 2d 44, 48.)

Katz, however, draws a distinction between those cases in which the unilateral action of the employer can be construed as disparaging or undermining the union and those in which the action cannot be so construed. (*National Labor Relations Board v. Katz, supra*, 369 U.S. 736, at p. 745, fn. 12, 82 S.Ct. 1107, 8 L.Ed.2d 230.) [4] Thus, although it is an unfair practice for an employer to grant wage increases greater than any he has ever offered the union at the bargaining table for the reason that such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union, it is not necessarily an unfair practice for an employer, after notice and consultation, to "unilaterally" institute a wage increase identical with one which the union has rejected as too low. (Id.)

[4] It appears that the instant case falls within the latter type of case, distinguished in *Katz*. Here the final form of section 52 was substantially the third draft revision of section 52. Comments from appellant the University Council and other groups had been taken into consideration in

4. Footnote 12 states: "Of course, there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low. See *National Labor Relations Board v. Bradley Washfountain Co.*, 7 Cir., 192 F.2d 144, 150–152; *National Labor Relations Board v. Landis Tool Co.*, 3 Cir., 193 F.2d 279.

the drafting of the third draft revision and
[227] further comments were requested by respondent. Campus level meetings were held on the third revision, which revision Vice-Presidential Academic Assistant Swift stated on December 6, 1972, was being withdrawn to be rewritten. It was this third draft, reflecting the comments of the University Council as well as other groups, which was implemented in final form "substantially intact." It is not this type of "unilateral" action which is condemned in *Katz*. Therefore, we cannot say as a matter of law that the action of respondent in adopting the revised section 52 was an action which is a per se violation of respondent's obligation to meet and confer in good faith.

C. *Was there substantial evidence to support the trial court's finding that the Regents met and conferred with the University Council in good faith?*

[5] The question of good or bad faith on the part of the union or employer is primarily a factual one. (*N.L.R.B. v. Reisman Bros., Inc.* (2d Cir. 1968) 401 F.2d 770, 771.) Resolution of the question of good faith necessarily involves consideration of all the facts of a particular case. (*N.L.R.B. v. Newberry Equipment Company* (8th Cir. 1968) 401 F.2d 604, 606.) In the instant case the court found that respondent at all times met and conferred in good faith. Where there is substantial evidence to support a finding of the trial court, the appellate court will uphold the trial court's finding. (*Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370, 210 P.2d 757.)

[6] "Whether a party is chargeable with an overall failure to bargain in good faith 'involves a finding of motive or state of mind,' which must be inferred from the evidence viewed as a whole." (*N.L.R.B. v. Columbia Tribune Publishing Company* (8th Cir. 1974) 495 F.2d 1384, 1391.) The duty to confer in good faith does not compel either side to make concessions or to yield any positions fairly maintained, but it does require the parties to bargain with an open mind and sincere intention to reach an agreement. (Id.)

Government Code section 3505 defines "meet and confer in good faith" to mean "that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have 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 . . . ."

[7] We cannot say in this instance that [228] there is a lack of sufficient substantial evidence in the record to support the trial court's finding that respondent met its obligation to meet and confer in good faith with appellant University Council.

On November 9, 1970, Angus Taylor, Vice-President of the University of California for Academic Affairs, issued a draft revision of section 52 as a proposal. A meeting was arranged and did take place at the Davis campus on April 23, 1971, between representatives of the University Council and Vice-President Taylor. Further meetings were held between the local unions affiliated with the University Council on the various campuses during May, June and July of 1971 concerning the first draft revision of section 52.

On October 5, 1971, Vice-President Taylor distributed a second draft revision of section 52 and sent a copy to the University Council. On January 31, 1972, Taylor informed the University Council that he agreed to send a representative of his office to meetings on the campus level.

On September 15, 1972, the second draft revision of section 52 was withdrawn and a third version was issued on that date. Comments from the University Council and other groups had been taken into consideration in the drafting of the third ver-

sion and Taylor called for comments on the new version. Campus level meetings on the third draft revision took place at the San Diego, Irvine and Davis campuses of the university.

On December 6, 1972, the University Council representatives met on the Berkeley campus with Berkeley Provost George Maslach and J. Dean Swift, Academic Assistant to Vice-President Angus Taylor. This meeting was characterized as a university-level meeting.

Appellant University Council did not make any proposals, suggestions, or proposed amendments to section 52 at that meeting. Although the University Council had drafted a detailed set of recommendations, these were not submitted to respondent. In *N.L.R.B. v. Alva Allen Industries, Inc.* (8th Cir. 1966) 369 F.2d 310, 321, the court stated, "The negotiations of the Company must be measured in the light of surrounding circumstances, which include corresponding attempts at good faith negotiation by the Union." Both Government Code section 3505 and Education Code section 13081, subdivision (d), speak in terms of the "*mutual* obligation" to meet and confer in order "to exchange freely information, opinions, and proposals."

229 There is some insinuation from the facts stated in appellants' brief that the Regents may have acted precipitously to frustrate an opportunity to discuss the proposed changes in section 52 at an All University Faculty Conference scheduled to be held in the latter part of March 1973. If true, this would indeed amount to a serious breach of good faith. But, even if it might be said that there was some testimony in this case tending to support this concluson, this would only give rise to a triable issue of fact which the trial judge who heard the evidence has resolved in favor of the respondent.

We therefore conclude that the trial court's finding that respondent acted in good faith is supported by substantial evidence, and cannot be disturbed.

IS THE QUESTION AS TO WHETHER THE CHANGES IN SECTION 52 HAVE BEEN RETROACTIVELY APPLIED TO PETITIONERS LIPOW AND LEONARD AN ISSUE THAT IS PROPERLY BEFORE THE COURT?

Appellants state in their brief: "Lipow and Leonard were added as Petitioners in this case to show two separate ways in which Assistant Professors were affected by the changes which were made in Section 52." After thus explaining that the individual petitioners were made added parties merely for exemplary reasons, they thereafter somewhat inconsistently endeavor to raise an issue involving petitioners Lipow and Leonard alone; namely, that even if the changes in section 52 had been made in good faith, they were nevertheless applied retroactively to these petitioners so as to adversely affect the status of each of them under the preexisting rules.

While respondent's brief ignored this point, it later appeared from a letter brief that was subsequently filed with the permission of this court[5] that the failure to comment on this point was intentional. This was for reasons that were then made both clear and understandable.

[8] First, the supposed retroactive application of section 52 was not one of the stipulated issues at the trial, and is therefore one that appellants have improperly endeavored to inject into this case for the first time on appeal. (Estate of Cooper (1970) 11 Cal.App.3d 1114, 1123, 90 Cal. Rptr. 283.) The factual and legal contentions made by each of the parties were set forth in the joint pretrial statement of counsel adopted as the trial court's pretrial order made and filed pursuant to rules 214 and 216 of the California Rules of Court. There, the issues in the case were thus 12:

5. We had the clerk of this court call this omission to the attention of counsel for respondent on the theory that the point may have been inadvertently overlooked.

stated: "The issues to be determined concern whether or not the University has met and conferred in good faith and whether there is an obligation upon the University to do so. The scope of the remedy is also in issue, since Petitioners ask that Leonard be returned to his position and that he and Lipow be evaluated currently on standards as they existed as of July 9, 1970, until the University has satisfied any obligation it may have to meet and confer in good faith."

Moreover, the record is replete with instances in which counsel for appellants clearly waived any issue unrelated to the "meet and confer" issue. We single out, for example, the following statement of counsel: "Lipow and Leonard are in the case because they are exemplary. Mr. Lipow, should he be unsuccessful in obtaining tenure during this current review,[6] could still bring his action. We have not sought to litigate the merits of Mr. Lipow's case in this case." [7]

Further, as pointed out in respondent's letter brief, there was no evidence to support any theory based upon retroactive application of the revised rule.

"The pretrial order determines the issues to be tried; issues that are not designated as being in dispute are no longer issues in the case [citations]. Until a request for modification is made, the trial judge and the parties have a right to rely upon the posture of the case as defined by the pretrial order." (Estate of Cooper, supra, 11 Cal.App.3d 1114 at p. 1122, 90 Cal.Rptr. 283 at p. 288.)

6. It elsewhere appears that administrative proceedings involving Mr. Lipow's status were actually pending at the time of the trial below.

7. As to Leonard, after his counsel conceded that the university had the right to eliminate the course that he had been teaching, the following colloquy occurred between court and counsel: "THE COURT: You mean you infer from this he should have a certain preference with respect to other opportunities? MR. WEINBERG: Yes, Your Honor. THE COURT: That may be available, in which he would be, say, average qualified, at least? MR. WEINBERG: Right. We don't want

[1] This disposes of the matter, and we decline to consider whether or not there is any merit to the point in question. [1231]

The judgment is affirmed.

MOLINARI, P. J., and ELKINGTON, J., concur.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 88

DATE JUNE 7, 1976

HONORABLE HARRY L. HUPP JUDGE | J.R. PIPER DEPUTY CLERK

HONORABLE JUDGE PRO TEM

NONE Deputy Sheriff | F. BABAJIAN Reporter

1 (Parties and counsel checked if present)

C 158155

LOS ANGELES COUNTY EMPLOYEES UNION LOCAL 434, etc., et al.
vs
LOS ANGELES COUNTY CIVIL SERVICE COMMISSION

Counsel for Plaintiff: LEO GEFFNER & HOWARD Z. ROS[illegible]

Counsel for Defendant: JOE BEN HUDGENS, Deputy County Counsel

NATURE OF PROCEEDINGS.

Motion for peremptory writ of mandate

Demurrer

Demurrer #1 overruled. (The Employee Relations Commission, at the County's urging, has decided the rule making powers are allotted by the charter to the Civil Service Commission. This case involves rule making. Appealing first to the Employee Relations Commission is, therefore, either futile (because the County will not recognize it's jurisdiction even if asserted) or not within the jurisdiction of the Employee Relations Commission. In either event, there is not failure to exhaust admininstrative remedies. The County cannot blow hot and cold on this point.)

Demurrer #2 overruled. (Defect asserted does not appear on face of petition.)

The Court takes judicial notice of Exhibits A and B as attached to the Petition For Peremptory Writ and Mandate, file stamped April 19, 1976. The declarations of Edward L. Faunce and Judi M. Kazahaya are received in evidence by reference. Respondent's Exhibits A (copy of the Charter of the County of Los Angeles) and B (copy of the Employee Relations Ordinance of the County of Los Angeles) are admitted in evidence.

Petitioner rests. Respondent rests.

The cause is argued.

(Continued on page 1A)

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 88

Date JUNE 7, 1976

HONORABLE HARRY L. HUPP JUDGE J.R. PIPER DEPUTY CLERK

HONORABLE JUDGE PRO TEM

NONE Deputy Sheriff F. BABAJIAN Reporter

(Parties and counsel checked if present)

C 158155

Counsel for Plaintiff

LOS ANGELES COUNTY EMPLOYEES UNION LOCAL 434, etc., et al

vs

Counsel for Defendant

LOS ANGELES COUNTY CIVIL SERVICE COMMISSION

NATURE OF PROCEEDINGS.

(Continued from page 1)

Judgment for petitioner is granted for Peremptory Writ of Mandate requiring respondent, the Civil Service Commission, to set aside it's adoption on March 3, 1976 of amendments to Rules 18.05, 20.06, 20.07 and 20.08 and not readopt the same until it has met and conferred with the petitioner regarding same.

Petitioner is ordered to prepare and serve form of proposed judgment, writ of mandate and findings of fact and conclusions of law.

(Respondent attempts to draw a distinction between the obligation to "meet" regarding personnel rules (Government Code Section 3504.5) and to "meet and confer" regarding "terms and conditions of employment" (Government Code Section 3505). The problem is that the Civil Service Commission's action is affected by both sections, since a "rule" was adopted affecting layoffs --- which is a "term and condition of employment" (Firefighters Union vs City of Vallejo, 12C3rd 608 (1974)). The case is not affected by AFSCME vs County of Los Angeles, 49 CA 3rd, 356 (1975), which merely held that the Employee Relations Commission had nothing to do with rule making power confided by the charter to the Civil Service Commission. The question here is how the Civil Service Commission must proceed. Government Code Section 3504.5 says that the Civil Service Commission must "meet with petitioner before adopting rules affecting it's members -- this would certainly include personnel rules which are not covered by Section 3505. However, when the rules also cover subjects embraced in Section 3505, then the obligation is to "meet and confer", etc., which has admittedly not been done. (International Association of Firefighters vs City of Pleasonton, 55 CA 3d 959 (1976); Los Angeles County Employees Association vs County of Los Angeles, 33 CA 3d 1 (19

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 8

JUNE 7, 1973

HONORABLE HARRY L. HUPP	JUDGE	J.R. PIPER	DEPUTY CLERK
HONORABLE	JUDGE PRO TEM		
NONE	Deputy Sheriff	F. BABAJIAN	Reporter

(Parties and counsel checked if present)

C 158155

Counsel for Plaintiff

LOS ANGELES COUNTY EMPLOYEES UNION LOCAL 434, etc., et al

Counsel for Defendant

vs

LOS ANGELES COUNTY CIVIL SERVICE COMMISSION

NATURE OF PROCEEDINGS.

(Continued from page 1A)

That the subject matter is confided by the Charter to the Civil Service Commission for coverage by rules would not except the County from the requirements of compliance with Section 3505. (Los Angeles County Firefighters Local 1014 vs City of Monrovia, 24 CA 3d 289, 294-295 (1972)). As pointed out in the latter case, agreement is not mandated, but meeting and conferring before action is. (See also International Association of Firefighters, supra.).)

[1] LOS ANGELES COUNTY EMPLOYEES ASSOCIATION, LOCAL 660, et al.,
Plaintiffs and Respondents,

v.

COUNTY OF LOS ANGELES et al.,
Defendants and Appellants.

Civ. 40626.

Court of Appeal, Second District,
Division 4.

June 20, 1973.

Hearing Denied Aug. 16, 1973.

County employee representatives sought petition of mandate to compel county to undertake certain negotiations. The Superior Court of Los Angeles County, Robert A. Wenke, J., entered judgment granting writ and the defendants appealed. The Court of Appeal, Jefferson, J., held, inter alia, that section of local public employee organization chapter providing that the scope and representation shall not include consideration of merits, necessity, or organization of any service or activity provided by law or executive order did not so limit statute providing that public employee representatives and representatives of public employee organizations shall meet and confer regarding wages, hours and other terms and conditions of employment as to preclude negotiation by social workers' union with county regarding case load carried by eligibility workers, and mandamus was a proper remedy.

Affirmed.

John D. Maharg, County Counsel, Larry A. Curtis and Daniel C. Cassidy, Deputies County Counsel, Los Angeles, for appellants.

Geffner & Satzman, Leo Geffner and Michael L. Posner, Los Angeles, for petitioners and respondents.

13 JEFFERSON, Associate Justice.

Petitioners, Local 660 of the Los Angeles County Employees Association and Local 535 of the Social Workers Union, sought a peremptory writ of mandate ordering the defendant County of Los Angeles and two of its departments, the Department of Public Social Services (DPSS) and the Department of Personnel, to undertake certain negotiations with the petitioners. The trial court granted the writ, and the defendants have appealed.

The factual and legal background of the dispute is: In 1968, the Los Angeles County Board of Supervisors passed Ordinance No. 9646, entitled the Employee Relations Ordinance.[1]

The county ordinance contains a comprehensive scheme for the handling of labor disputes between county management and county employees. It provides for the certification of employee representatives for the purpose of conducting negotiations with management representatives of the county. In section 3(*o*), the negotiation process is defined as the

> "performance by duly authorized management representatives and duly authorized representatives of a certified employee organization of their mutual obligation to meet at reasonable times and to confer in good faith *with respect to wages, hours, and other terms and conditions of employment*. . . ." (Italics added.)

Section 7 provides for the creation of an Employee Relations Commission to administer and implement the ordinance.[2]

1. It was passed pursuant to the Meyers-Milias-Brown Act, enacted by the state Legislature to provide "a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between public employees and public employee organizations." (Gov. Code § 3500.) The law empowers local governing bodies to formulate rules and regulations for the handling of labor disputes with public employees (Gov.Code § 3507). It provides for the certification of representatives of public employees, and mandates that "the governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, *shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment* with representatives of such recognized employee organizations. . . ." (Italics added.) (Gov.Code § 3505.)

2. The ordinance gives the Commission, composed of three members, the responsibility for supervision of certification procedures, the power to make suitable rules and regulations, and to conduct hearings concerning labor disputes under oath, to compel attendance therein, and to issue decisions. Section 7(g)(5) requires the Commission "To investigate charges of unfair employe relations practices or violations of this Ordinance, and to take such action as the Commission deems necessary to effectuate the policies of this Ordinance, including, but not limited to, the issuance of cease and desist orders."

14 Section 12 of the ordinance specifically enumerates certain practices by county management to be "unfair employee relations practices," including:

> "(a) It shall be an unfair employee relations practice for the County: . . . (3) To refuse to negotiate with representatives of certified employee organizations on negotiable matters."

The ordinance does not specifically enumerate what matters are "negotiable" and what matters are not.

[1] On December 3, 1970, the petitioner unions, having been duly certified as the majority representatives of social workers employed by the county to determine the eligibility of public assistance applicants, filed charges with the Commission alleging that the county management representatives had refused to negotiate with the unions since May 14, 1970, concerning the size of the caseloads carried by eligibility workers. The petitioners further alleged that the refusal to negotiate constituted an unfair employee relations practice on the part of the county as defined in Section 12(a)(3). Hearings were held before the Commission. The county maintained that the size of caseloads was not a "negotiable" matter; the unions contended that negotiation was mandatory as the issue related to "wages, hours, and other terms and conditions of employment."[3] On June 25, 1971, the Commission rendered its decision that the county's refusal to negotiate with the unions was a violation of section 12, and ordered the county to "cease and desist" from such refusal. The county continued to refuse, and the petitioners then sought and obtained the peremptory writ directing that the Commission's order be enforced.[4]

The basic issue before us is whether the size of caseloads assigned to eligibility workers at the DPSS constitutes an item within the mandatory section of the Meyers-Milias-Brown Act (Gov.Code § 3505) which requires negotiation by public employers of issues relating to "wages, hours, and other terms and conditions of employment," or within the applicable provisions of the local ordinance (which shall be set forth *infra*).

[2] The county contends that the mandatory negotiation provision of section 3505 must be read in conjunction with Government Code section 3504, which, the county 15 argues, limits the application of section 3505. Section 3504 provides:

> "The scope of representation [allowed to the representatives of public employees] shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, *except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.* [Added by Stats.1961, ch. 1964 § 1; amended by Stats.1968, ch. 1390 § 4, operative Jan. 1, 1969.]

Since the determination of the eligibility for public assistance is a service to the public for which the county is responsible

3. The duty to negotiate refers only to the necessity of meeting and conferring in good faith. There is no compulsion for either side to agree. (Section 12(o). See East Bay Mun. Employees Union v. County of Alameda, 3 Cal.App.3d 578, 584, 83 Cal.Rptr. 336.)

4. Section 12(e) provides that "If the Commission's decision is that the County has engaged in an unfair employee relations practice or has otherwise violated this Ordinance or any rule or regulation issued thereunder, the Commission shall direct the County to take appropriate corrective action. If compliance with the Commission's decision is not obtained within the time specified by the Commission, it shall so notify the other party, which may then resort to its legal remedies."

pursuant to the Welfare & Institutions Code (§§ 11050–11062), it is argued, "the scope of representation" exception applies to the size of caseloads.

We do not think section 3504 limits section 3505 in this manner. The problem of interpreting these sections, and their relationship to each other, is that an argument can plausibly be made that *all* management decisions affect areas of mandatory service to the public *and* the working conditions of public employees; or, conversely, that all decisions rendered concerning a public employee labor dispute of necessity will determine the quality of mandated public service *and* the operation of management.

Section 3505 requires the governing body of the public agency, or its representatives, to "meet and confer in good faith regarding wages, hours and other terms and conditions of employment. . . ." There is no reason why the public agency cannot discuss those aspects of the caseload problem, even though the "merits, necessity, or organization" of the service must be outside the scope of the required discussion. Whether such limited discussion is likely to be fruitful is nothing the public agency should prejudge.

Turning to the local ordinance, its provisions concerning negotiation contain the same general approach of the state legislation. The pertinent parts of the ordinance are sections 5 and 6. Section 5:

> "It is the exclusive right of the County to determine the mission of each of its . . . departments . . . set standards of services to be offered to the public, and exercise control and discretion over its organization and operations . . to direct its employees . . . determine the methods, means and personnel by which the County's operations are to be conducted; *provided*, however, that the exercise of such rights does not preclude employees . . . from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." (Italics added.)

Section 6: [16]

> "(b) The scope of negotiation between management representatives and the representatives of certified employee organizations includes wages, hours, and other terms and conditions of employment within the employee representation unit.
>
> "(c) Negotiation shall not be required on any subject preempted by Federal or State law, or by County charter, nor shall negotiation be required on Employee or Employer Rights as defined in Sections 4 and 5 above. Proposed amendments to this Ordinance are excluded from the scope of negotiation." [5]

[3] The defendant contends that section 6(c) prohibits negotiation concerning the management rights of the county as set forth in section 5, and that the outright prohibition governs "the scope of negotiation" described in section 6(b).

In determining the intent of the Board of Supervisors who enacted the local ordinance, it is instructive to refer to the report prepared by the committee appointed by the board to draft the local ordinance. The report was adopted as an accurate statement of the board's legislative intent as of September 3, 1968. The report contains a discussion of the nonadvisability of enumerating areas of mandatory negotiation:

> "County officials have urged us to go further and to include in the recommended ordinance examples of the kinds of subjects on which negotiation is not mandatory. The difficulty we have with

5. Section 4 enjoins interference with the rights of public employees to participate or not in employee organizations.

this approach is that topics proposed for negotiation, like words in a sentence, take on color and meaning from their surrounding context. Viewed in the abstract, the demand to negotiate over 'the level of service to be provided', for example, would seem to be a matter covered by Section 5 and therefore not negotiable except at the discretion of the County, as provided in Section 6(d). In the context of a specific situation, however, a demand for a lower maximum case load for social workers, for example, although theoretically related to the level of service to be provided, might be much more directly related to terms and conditions of employment." [6]

The ordinance commits the county to negotiate wages, hours and conditions of employment, though affirming the exclusive right of the county to make certain management decisions. The county does not give up these management powers when it engages in the negotiations which are required by the ordinance. Granted that the subjects are interrelated, it is both possible and proper for the county to enter into discussions and receive the viewpoint of the employee representatives on those aspects of the problem which are covered by the promise to negotiate.

[4] The defendant county further contends that the decision of the Employee Relations Commission and the subsequent order to the county to "cease and desist" from the refusal to negotiate did not create a duty on the part of the county that is enforceable by mandate. We are referred to the "report of intention" adopted by the Board of Supervisors, relative to the discussion of "cease and desist" orders:

"Although it is to be hoped that the Commission's findings and orders in unfair employee practice cases will be respected by all parties involved, it is necessary to comment briefly on the remedies that would be available to the injured party in the event that the other party refused to abide by the Commission's order. Because of the very nature of public employment, complete mutuality of remedy would not be possible in this situation. The Commission would lack authority to compel the County to obey its orders, although it would presumably advise the Board of Supervisors of any refusal by a County agency to comply. Thus, ultimately, the issue would become whether the Board of Supervisors intended to support the Commission. Refusal by the Board to do so would, of course, endanger the continued existence of the Commission."

Section 12(e) indicates rather clearly that while the Commission was not given the power to enforce its decisions, it was foreseen that a party bringing charges before that body might have to resort to "legal remedies" to obtain enforcement of a decision made. "Legal remedies" include mandamus in the proper case.

The county argues that to enforce the Commission's order deprives the Board of Supervisors of its exclusive responsibility to exercise its discretionary governmental powers.

The judgment of the superior court does no more than to require the county to negotiate in good faith in an effort to reach an agreement, "and in the event that an agreement is reached, that it be reduced to writing and signed by petitioners and respondents." Thus, there is no requirement that the board of supervisors give up any of its powers, or that the board or its representatives agree to anything. It is, of course, true that any discussion of "working conditions" impinges upon matters which are within the exclusive jurisdiction of the board of supervisors, and as to which it would be improper for the county to make binding agreement with an employee organization. But this

6. An Employee Relations Ordinance for Los Angeles County, Report and Recommendations of the Consultant's Committee, July 25, 1968.

inevitable interrelationship need not preclude negotiation as to any aspect of the caseload problem as to which the county and the employees might be able to agree without invading the subjects upon which the county is not required to negotiate.

The word "negotiation" is a term of art, specially defined in section 3(*o*) of Employee Relations Ordinance, and is limited to the subjects of "wages, hours, and other terms and conditions of employment." The judgment of the superior court, requiring the county to negotiate, goes no farther than to require what the ordinance promised. Section 3(*o*) also states "This obligation does not compel either party to agree to a proposal or to make a concession." This saving clause relieves the county of any danger that by entering into a negotiation on "working conditions," it will be swept into an agreement covering matters upon which it is not obliged to negotiate.

[5, 6] While mandamus will not lie to compel governmental officials to exercise their discretionary powers in a particular manner, it will lie to compel them to exercise them in some manner. (5 Witkin, Calif. Procedure, "Extraordinary Writs," §§ 75, 76, pp. 3851, 3852.) In the instant case, mandamus is a proper method of compelling governmental officials to comply with both state and local law requiring them to negotiate on a particular subject, although the compulsion does not, of course, extend to requiring them to reach a specified result pursuant to such negotiation. The duty to negotiate is not, by itself, a discretionary act under these circumstances. Negotiation does not mean agreement; neither the state law nor the local ordinance equates negotiation with compulsory collective bargaining. (East Bay Mun. Employees Association, cited *supra;* see Sacramento County Emp. Organization, Local 22 Etc. Union v. County of Sacramento, 28 Cal.App.3d 424, 104 Cal.Rptr. 619.)

The judgment is affirmed.

FILES, P. J., and KINGSLEY, J., concur.

Hearing denied; CLARK, J., dissenting.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 119, Petitioner and Appellant,

v.

COUNTY OF LOS ANGELES and County of Los Angeles Department of Personnel, Respondents.

Civ. No. 45160.

Court of Appeal, Second District, Division 2.

June 25, 1975.

County employees' union petitioned for issuance of a peremptory writ mandating county and its personnel department to negotiate with respect to job classifications. The Superior Court, Los Angeles County,

Clinton Rodda, Judge,* denied the writ, and union appealed. The Court of Appeal, Roth, P. J., held that Los Angeles County employees relations ordinance and charter preempt the subject of job classification to the Civil Service Commission, and thus county is not obliged to negotiate with representative of its employees with respect to job classifications.

Affirmed.

Warren, Adell & Miller, Hirsch Adell, Los Angeles, for petitioner and appellant.

John H. Larson, County Counsel, Daniel C. Cassidy, Div. Chief, Joe Ben Hudgens, Deputy County Counsel, Labor Relations Division, Los Angeles, for respondents.

ROTH, Presiding Judge.

Appellants, Local 119 of the American Federation of State, County and Municipal Employees (Union) petitioned the Superior Court to issue a peremptory writ mandating respondents, the County of Los Angeles and its Department of Personnel (County) to negotiate with Union in respect of job classifications. The trial court denied the writ and this appeal follows.

[1] Public employees as distinguished from private employees in California do not have the right to bargain collectively or to strike absent an enabling statute. (*City of San Diego* v. *American Federation of State, etc., Employees* (1970) 8 Cal.App.3d 308, 311, 87 Cal.Rptr. 258; *Almond* v. *County of Sacramento* (1969) 276 Cal.App.2d 32, 80 Cal.Rptr. 518.) In 1968 the State enacted the Meyer-Milias-Brown Act (MMBA) (Govt.Code, §§ 3500–3510) which authorized public employees to bargain with governmental entities and encouraged the entities to negotiate and consult with its employees. (*Almond* v. *County of Sacramento, supra.*)

County in 1968, conforming to the legislative policy of MMBA enacted Ordinance 9646 entitled Employees Relations Ordinance (ERO). Section 7 of ERO creates a commission of three herein referred to as ERCOM, to administer its provisions. (*Los Angeles County Employees Assn., Local 660* v. *County of Los Angeles* (1973) 33 Cal.App.3d 1, 3, 108 Cal.Rptr. 625.)

Union's petition for the peremptory writ alleged that County refused to negotiate with Union on the subject of job classification as required by ERO and thus had violated section 12(a)(3) of ERO.

Pursuant to procedure provided in ERO, ERCOM appointed a hearing officer. The

hearing officer reported to ERCOM, ratifying Union's position, and ERCOM, by a two to one vote, agreed with Union and ordered County to comply. County refused, whereupon Union petitioned for the writ above referred to. The soundness of the judgment denying the petition requires an analysis of the statutory rights of the parties.

Section 2 of ERO states the policy which inspired its enactment as: "* * * to promote the improvement of personnel management and relations between * * * County and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and services of County government." ERO further states that this policy is carried out by recognizing the rights of employees to join organizations of their own choosing to represent them in matters concerning employee relations with the County.

Section 5 of ERO clarifies certain rights exclusive to County as "management rights", which include: determination of the mission of each of its departments; the standards of the services to be offered, and measures for disciplinary action. The section also provides that notwithstanding County's retention of "management rights" nothing shall prevent employees or their representatives from "* * * conferring[1] or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment." The preceding section 4 makes a reservation of rights to employees.

Section 6 of ERO makes a distinction of decisive importance at bench between consulation and negotiation.[2] Section 6(a) restates subjects which the parties may consult or confer on, including subjects *not* subject to negotiation. Section 6(b) provides: "The scope of negotiation between management representatives and the representatives of certified employee organizations includes wages, hours, and *other terms and conditions of employment* within the employee representation unit." (Emphasis added.)

Section 6(c) provides: "Negotiation shall not be required on any subject preempted by Federal or State law, or by County Charter, nor shall negotiation be required on Employee or Employer Rights as defined in Sections 4 and 5 above. Proposed amendments to this Ordinance are excluded from the scope of negotiation." Section 16(b) reiterates: "Nothing in this Ordinance shall be construed to deny any person or employee the rights granted by Federal and State laws and the County Charter provisions."

The rights of preemption stated in ERO originate in the legislative policy stated in the opening section of MMBA, to wit, section 3500 of the Government Code, which states in pertinent part: "* * * Nothing contained herein shall be deemed *to supersede the provisions* of existing state law

1. Under section 3(d) of ERO, the word "confer" is a word of art and is defined as "* * * to communicate verbally or in writing for the purpose of presenting and obtaining views or advising of intended actions."

2. Section 3(o) of ERO defines negotiation as: "* * * performance by duly authorized management representatives and duly authorized representatives of a certified employee organization of their mutual obligation to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment, and includes the mutual obligation to execute a written document incorporating any agreement reached. This obligation does not compel either party to agree to a proposal or make a concession. Agreements concerning any matters within the exclusive jurisdiction of the Board of Supervisors or concerning any matters not otherwise delegated by the Board shall become binding when executed by the Board of Supervisors and affected certified employee organizations. Agreements concerning matters within the exclusive jurisdiction of management representatives, or otherwise delegated to them by the Board, shall become binding when executed by said affected management representatives and affected certified employee organizations."

and the *charters,* ordinances *and rules of local public agencies which establish and regulate a merit or civil service system* or which provide for other methods of administering employer-employee relations *nor is it intended that this chapter be binding upon those public agencies which provide procedures* for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed." (Emphasis added.)

[2] In fact, ERO and County Charter provisions preempt the subject of job classification to the Civil Service Commission. Nothing in ERO remotely suggests that its provisions were intended to *supersede* specific provisions of the County Charter which fixes authority of job classification in the Civil Service Commission.

Article XI, section 3(a) of the California Constitution provides in pertinent part: "For its own government, a county * * * may adopt a charter by majority vote of its electors voting on the question * * *. County charters adopted pursuant to this section shall supersede any existing charter and all laws inconsistent therewith. * * *."

Article IX of the Charter (sections 30–44.7) mandates that the County have a Civil Service Commission to administer a civil service merit system for County personnel. Section 34 of the Charter reads in pertinent part: "The [Civil Service] Commission shall prescribe, amend and enforce rules for the classified service, which shall have the force and effect of law * * *.

"The rules shall provide:

"(1) For the classification of all positions in the classified service * * *."

[3] Pursuant to Section 34 of the Charter, the Civil Service Commission has enacted Rule 6 which provides that the Commission shall classify employees on the basis of studies for which the Director of Personnel is responsible. Rule 6 is an elaborate and detailed set of printed regulations, applying to job classification. Such rules adopted within and pursuant to a Charter provision have the same force as Charter provisions. (*Campbell* v. *City of Los Angeles* (1941) 47 Cal.App.2d 310, 117 P.2d 901.)

Thus, as a consequence of ERO, County has two commissions dealing with County employment matters—a Civil Service Commission established by the County Charter and ERCOM created by section 7 of ERO.

The dispute before us specifically involves Union's request that County conduct a reclassification study on 145 employee-members of Union. A study was completed by the Director of Personnel and submitted to County's Civil Service Commission after which the Civil Service Commission reclassified the positions of 34 of the 145. Of the 34, 16 were reclassified downward, six were reclassified upward, and 12 were reclassified laterally, i. e., moved to other positions in different units of County.[3]

Pragmatically, the record shows that although Civil Service Commission did not negotiate, it did advise Union and furnish a copy of the investigation and study to Union before it acted on the study. Appellants assert that the clause in section 6(b) of ERO "other terms and conditions of employment" includes negotiation on job classification. County asserts that ERO was enacted in response to the legislative objective which inspired the enactment of MMBA by the State; County follows that objective, and as is expressly permitted by MMBA and section 6(b) of ERO, it has preempted job classification, to the end that ERO would not supersede a subject

3. The 16 employees that were reclassified downward did not have to take a pay cut since by Civil Service regulation their pay is held constant until the other members of the class to which they have been assigned catch up.

matter, jurisdiction of which has been reserved to the Civil Service Commission, in accordance with rules enacted by that commission. In brief, County asserts that since section 6(b) does not specifically include job classification for which its Charter has specific provisions, it is not included and that the Charter and ERO section 6(b) must be read together and that section 6(c) of ERO does, in fact, mandate such reading.

County's position is further fortified by section 23 ¾ of the Charter which provides in pertinent part: "The Director of Personnel shall be appointed and perform duties as provided in Article IX hereof."

Section 3(m) of ERO defines: "'Management representative' means a department head as defined in Section 22.5 of Ordinance No. 4099, the Administrative Code of the County of Los Angeles, and includes the Chief Administrative Officer and the Director of Personnel, or any duly authorized representative of such department head or officer."

Under the County Charter the Director of Personnel has many rights and duties affecting employee relations but he did not and does not have rights or duties with respect to job classification, except to make a study thereof, and he never exercised or claimed any.

There can be no doubt that ERO does require the Director of Personnel to negotiate with Union in respect of many of the personnel functions with which he is charged, but it should be noted that the same section which authorizes the Director to exercise certain functions deletes those which are the responsibility of the Civil Service Commission.

When ERO, section 3(m) was enacted, it is only fair to assume that its authors, when they specified the Director of Personnel of the County as one of two County representatives to deal with Union, were fully cognizant of the fact that he had no authority with respect to job classification.

[4] Ignoring any analysis of the statutes involved, Union insists that job classification constitutes a "term or condition of employment" within the meaning of section 6(b), and cite *Fire Fighters Union* v. *City of Vallejo* (1974) 12 Cal.3d 608, 116 Cal. Rptr. 507, 526 P.2d 971, asserting that *Vallejo* is on all fours with the action at bench and mandates such construction. We accept the doctrine of construction enunciated by *Vallejo,* but in our opinion it has no application to the facts at bench.

In *Vallejo* the court interpreted a provision in the Charter of that city which required arbitration of disputes affecting public employees, and the court was called upon to reconcile clauses in the Charter which "'grants city employees the right to bargain on wages, hours and working conditions but withholds that right as to matters involving the merits, necessity or organization of any governmental service'." Fire fighters and Vallejo during the negotiations of a contract in 1971 failed to agree on 28 issues and after submitting to mediation and fact finding "pursuant to a process prescribed in the charter" which aborted, Vallejo agreed to submit 24 of the issues to arbitration, but contended that the other four issues, "Personnel Reduction", "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure", involved "'merits, necessity or organization' of the fire fighting service * * *" and were not arbitrable. The Supreme Court in *Vallejo* demonstrates that the four subjects of dispute were embraced and involved within the Charter's language "wages, hours and working conditions" and were not necessarily excluded by the Charter's saving clause of "merits, necessity or organization of governmental service."

The *Vallejo* court did not have before it the question that Fire Fighters were attempting to supersede a specific charter provision or that Fire Fighters were ignoring preemptions in a separate ordinance

which if read together with a charter created reservations and preemptions as to particular subjects of bargaining. The court in *Vallejo* dealt only with a question of construction, free of provisions in a charter which set forth specifically any of the four subjects upon which City refused to arbitrate. There is no contention in *Vallejo* that City refused to arbitrate on the ground that its charter contained specific language for the disposition of disputes which involved "Personal Reduction," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedures" or any of said subjects. At bench the opposite is true. As pointed out above, MMBA and ERO specifically provide that a governmental body, when it enacts legislation to permit union bargaining, may by preemptions reserve subject matter from negotiations. At bench we are of the opinion that job classification was clearly excepted.

It is no answer to argue as Union does that the Civil Service Commission (as Union concedes) retains final approval of the results of any negotiation completed under the auspices of ERCOM. (*Schecter* v. *County of Los Angeles* (1968) 258 Cal. App.2d 391, 65 Cal.Rptr. 739.) It is clear from the provisions of section 3(*o*) (ftn. 2) that negotiations structured on good faith do not compel "* * * either party to agree to a proposal or to make a concession" but they do include "the mutual obligation to execute a written document incorporating the agreement reached."

For reasons irrelevant here, County when it enacted ERO determined that the interests of County government would be best served, for the time being at least, if the Civil Service Commission retained job classification free of negotiation, as defined in section 3(*o*), with Union.

We do not decide that when Civil Service Commission makes job classification that "wages, hours and other terms and conditions of employment" within the job classifications are not subject to negotiation. On this latter subject, the Director of Personnel does, under the provisions of the Charter, have authority to negotiate.

The judgment denying the peremptory writ is affirmed.

COMPTON and BEACH, JJ., concur.

[L. A. No. 25676. In Bank. Oct. 3, 1960.]

LOS ANGELES METROPOLITAN TRANSIT AUTHORITY, Respondent, v. THE BROTHERHOOD OF RAILROAD TRAINMEN (an Unincorporated Association) et al., Appellants.

[1] **Public Employees—Labor Disputes—Strikes.**—In the absence of legislative authorization public employees in general do not have the right to strike.

[2] **Statutes—Construction—Adopted Statutes.**—When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would

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[1] Union organization and activities of public employees, note, 31 **A.L.R.2d** 1142. See also **Cal.Jur.2d**, Labor, § 108; Public Officers, § 235 et seq.

[2] See **Cal.Jur.2d**, Statutes, § 67; **Am.Jur.**, Statutes, § 455.

McK. Dig. References: [1, 4-6, 8, 9] Public Employees, § 13; [2] Statutes, § 199; [3, 7] Labor, § 21; [10] Constitutional Law, § 163.

*Assigned by Chairman of Judicial Council.

be given a like interpretation. This rule is appplicable to state statutes patterned after federal statutes.

[3] **Labor—Strikes.**—Terms such as "concerted activities" are commonly used by courts and legislative bodies to refer to strikes.

[4] **Public Employees — Labor Disputes — Strikes.**—The statute creating the Los Angeles Metropolitan Transit Authority (Stats. 1957, ch. 547, as amended by Stats. 1959, ch. 519) gave its employees the right to strike by providing that such employees should have the right to bargain collectively and to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," that on acquiring any privately-owned public utility the transit authority must observe all labor contracts of the utility and that no employee should suffer any worsening of his wages, seniority, pension, vacation or "other benefits" by reason of the acquisition, and that the authority's statutory obligation to bargain collectively extended to all matters which were "proper subjects of collective bargaining with a private employer."

[5] **Id.—Labor Disputes—Strikes.**—Arbitration procedure authorized by the Los Angeles Metropolitan Authority Act of 1957, § 3.6, subd. (c), in the event of a dispute over wages, hours or working conditions, was not intended to take the place of the right to strike where this procedure could be had only "upon the agreement of both" the transit authority and the exclusive bargaining representative of its employees.

[6] **Id.—Labor Disputes—Strikes.**—Provisions of the Los Angeles Metropolitan Transit Authority Act of 1957 granting the transit authority managerial discretion with respect to such matters as the fixing of salaries did not show that § 3.6, subd. (c), relating to the right of employees to bargain collectively, was not intended to give them the right to strike where the act specifically provided that "notwithstanding any other provision" the authority must enter into a written contract governing working conditions with the accredited representative of the employees, and where, in order to obtain such contract the employees were authorized to bargain collectively and to engage in other concerted activities.

[7] **Labor—Strikes.**—Permitting employees to strike does not delegate to them authority to fix their own wages to the exclusion of the employer's discretion. In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable.

[8] **Public Employees—Labor Disputes—Strikes.**—A statute permitting public employees to strike, such as the Los Angeles Metropolitan Transit Authority Act of 1957, does not constitute an improper delegation of governmental authority. There is nothing in that statute warranting the conclusion that the transit authority does not have discretion to reject unacceptable demands of striking employees, and it could not be forced to provide service where this would require it to abandon that discretion.

[9a, 9b] **Id. — Labor Disputes — Strikes.**—The fact that statutes creating other transit systems do not contain provisions similar to the one in the Los Angeles Metropolitan Transit Authority Act of 1957 with respect to the right of employees to strike is not a proper basis for a claim that § 3.6, subd. (c) of the act, giving the right to strike, is discriminatory, since § 1.1 of the act provides that because of the "unique problem" presented in the Los Angeles metropolitan area the adoption of a "special act" and the creation of a "special authority" are required, and since the Legislature could have concluded that conditions existing in the area relating to availability of transit workers made it necessary to give the transit authority's employees the right to strike in order to obtain an experienced and efficient working force.

[10] **Constitutional Law—Classification — Presumptions.**—If any state of facts can reasonably be conceived which would support a classification made by the Legislature, the existence of that state of facts is presumed, and one who challenges the classification has the burden of showing that it is arbitrary.

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles R. Thompson, Judge. Reversed.

Action to obtain a declaratory judgment that plaintiff's employees represented by defendant brotherhood were without legal right to strike because they were employees of a public corporation. Judgment for plaintiff reversed.

Bodle, Fogel & Warren, Bodle & Fogel, George E. Bodle, Daniel Fogel and Stephen Reinhardt for Appellants.

Hirson & Horn and O. David Zimring as Amici Curiae on behalf of Appellants.

Musick, Peeler & Garrett, Gerald G. Kelly, Roderick M. Hills, Frederick B. Warder, Jr., Bruce A. Bevan, Jr., Thomas J. Reilly, Charles H. Tillinghast and Richard T. Apel, for Respondent.

GIBSON, C. J.—Plaintiff, a public corporation organized under the Los Angeles Metropolitan Transit Authority Act of 1957, operates facilities for the transportation of passengers in the counties of Los Angeles, Orange, Riverside, and San Bernardino. (Stats. 1957, ch. 547.)[1] The two principal transit companies in the Los Angeles area were acquired by plaintiff, and the employees of those companies, subject to normal turnover, are now employees of plaintiff. Defendant brotherhood is the exclusive bargaining representative of certain of plaintiff's employees, such as conductors, motormen, motor-coach operators, ground loaders, and trafficmen. This action was brought to obtain a declaratory judgment that plaintiff's employees represented by defendant brotherhood are without the legal right to strike because they are employees of a public corporation. The trial court so held, and defendants have appealed.

[1] In the absence of legislative authorization public employees in general do not have the right to strike (see 31 A.L.R.2d 1142, 1159-1161), and the questions presented here are whether the act creating the transit authority gave its employees such a right and, if so, whether the statute is constitutional as applied to the employees represented by the brotherhood.

Subdivision (c) of section 3.6 of the act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage *in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*. . . . Notwithstanding any other provision of this act . . . the authority . . . shall enter into a written contract with the accredited representative of [its] employees governing wages, salaries, hours and working conditions. . . ." (Italics added.)

Language identical with the italicized words of subdivision (c) first appeared in section 2 of the Norris-LaGuardia Act (47 Stat. 70; 29 U.S.C., § 102), and it has been contained in

[1]The act was amended in 1959 (Stats. 1959, ch. 519), and, unless otherwise noted, references in this opinion to the act are to the Los Angeles Metropolitan Transit Authority Act of 1957 as amended in 1959.

The act declares that plaintiff is a "public corporation of the State of California" and that it is not a state agency as defined by section 11000 of the Government Code, which provides that as used in title 2 of the code "state agency" includes every state office, officer, department, division, bureau, board, and commission.

section 923 of our Labor Code since 1937.[2] The identical language was also used in section 7(a) of the National Industrial Recovery Act (48 Stat. 195, 198), section 7 of the National Labor Relations Act of 1935 (the Wagner Act, 49 Stat. 449, 452), and section 7 of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act, 61 Stat. 136, 140; 29 U.S.C., § 157). The courts have uniformly interpreted these words as including the right to strike peacefully to enforce union demands with respect to wages, hours, and working conditions. (*Weber* v. *Anheuser-Busch, Inc.* (1955), 348 U.S. 468, 474-475 [75 S.Ct. 480, 99 L.Ed. 546]; *Amalgamated Association etc. M.C.E.* v. *Wisconsin Employment Relations Board* (1951), 340 U.S. 383, 389, 398 [71 S.Ct. 359, 95 L.Ed. 364, 22 A.L.R. 2d 874]; *International Union of United Automobile etc. Workers of America* v. *O'Brien* (1950), 339 U.S. 454, 456-457 [70 S.Ct. 781, 94 L.Ed. 978]; *Collins Baking Co.* v. *National Labor Relations Board*, 193 F.2d 483, 486; *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505; *G. C. Breidert Co.* v. *Sheet Metal etc. Assn.*, 139 Cal.App.2d 633, 638 [294 P.2d 93].) The cases have applied the language to a number of specific situations and have determined that it includes other activities as well as strikes but does not sanction all collective conduct of workingmen or all kinds of strikes; for example, sit-down strikes have not been included within the right to engage in other concerted activities. (See *International Union of United Automobile etc. Workers of America* v. *O'Brien* (1950), *supra*, 339 U.S. 454, 457-459; *International Union etc. A.F.L.* v. *Wisconsin Employment Relations Board* (1949), 336 U.S. 245, 255 et seq. [69 S.Ct. 516, 93 L.Ed. 651]; *Park & T.I. Corp.* v. *International etc. of Teamsters*, 27 Cal.2d 599, 604-605 [165 P.2d 891, 162 A.L.R. 1426].)

[2] When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are pat-

[2]Section 923 of the Labor Code provides in part: "Therefore it is necessary that the individual workman . . . shall be free from the interference, restraint, or coercion of employers . . . in the designation of . . . representatives or in self-organization or *in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*" (Italics added.)

terned after federal statutes. (*Scripps etc. Hospital* v. *California Emp. Com.*, 24 Cal.2d 669, 677 [151 P.2d 109, 155 A.L.R. 360]; *Holmes* v. *McColgan*, 17 Cal.2d 426, 430 [110 P.2d 428]; *Union Oil Associates* v. *Johnson*, 2 Cal.2d 727, 734 [43 P.2d 291, 98 A.L.R. 1499].) Although the cases which have interpreted the italicized words involved private employees, the act before us incorporates the exact language, consisting of 16 words, found in the earlier statutes, and it is unlikely that the same words would have been repeated without any qualification in a later statute in the absence of an intent that they be given the construction previously adopted by the courts.

[3] Terms such as "concerted activities" are commonly used by courts as well as legislative bodies to refer to strikes. This court, for example, on a number of occasions has used the words "concerted action" as an inclusive term referring to strikes, picketing, and boycotts. (See, e.g., *Petri Cleaners, Inc.* v. *Automotive Employees etc., Local No. 88*, 53 Cal.2d 455, 469 et seq. [2 Cal.Rptr. 470, 349 P.2d 76]; *Park & T.I. Corp.* v. *International etc. of Teamsters*, 27 Cal.2d 599, 603 [165 P.2d 891, 162 A.L.R. 1426]; *James* v. *Marinship Corp.*, 25 Cal.2d 721, 729 [155 P.2d 329, 160 A.L.R. 900].) Our codes provide that technical words and phrases, and others which have acquired "a peculiar and appropriate" meaning in law, are to be construed according to such meaning. (Civ. Code, § 13; Code Civ. Proc., § 16.)

[4] Other provisions of the act support the conclusion that the Legislature granted plaintiff's employees the right to strike. The employees of the two transit companies taken over by plaintiff had the right to strike prior to acquisition, and the act provides that, when plaintiff acquires any privately owned public utility, it must observe all labor contracts of the utility and that no employee "shall suffer any worsening of his wages, seniority, pension, vacation or *other benefits* by reason of the acquisition." (Italics added.) (§ 3.6, subd. (e).) The fact that the Legislature contemplated a right to strike on the part of plaintiff's employees also appears from subdivision (h) of section 3.6 which provides that plaintiff's statutory obligation to bargain collectively extends to all matters which are "proper subjects of collective bargaining with a private employer." The question whether employees may strike and the circumstances under which they may do so are proper subjects of collective bargaining, and clauses

relating to strikes are commonly found in collective bargaining contracts. When these provisions of the act are considered together with the express requirement that plaintiff bargain collectively, it is obvious that the legislative intent was to depart from the traditional system of fixing the terms and conditions of governmental employment and to establish for plaintiff and its employees a system comparable to that existing between a privately owned public utility and its employees. A further indication of such an intent is found in subdivision (g) of section 3.6, which provides that plaintiff, when authorized by its employees, may make deductions from their wages and salaries for the payment of union dues or for "any purpose for which deductions may be authorized by the employees of any private employer." To carry out its intent the Legislature chose the language which is found in statutes relating to private employees and which has been given a definite meaning through interpretation by the courts.

The right of public employees to strike has been sustained in two other jurisdictions even though the statutes did not, as here, contain provisions which specifically authorized the public employees in question to engage in collective bargaining and other concerted activities. *Local 266 etc. A.F.L.* v. *Salt River Project Agr. Imp. & Power Dist.*, 78 Ariz. 30 [275 P.2d 393, 396 et seq.], involved employees of an irrigation district which under section 7 of article 13 of the Arizona Constitution was declared to be a political subdivision of the state "and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the state or of the United States." A statute provided that the district could enter into "all necessary contracts." The court, stating that the function of the district, which supplied power to 100,000 users, was business and economic and not political and governmental, held that the provision permitted but did not require collective bargaining contracts and that since such contracts were legal the employees could strike to enforce a demand for collective bargaining. *Board of Education* v. *Public School Employees' Union*, 233 Minn. 144 [45 N.W.2d 797, 800 et seq., 29 A.L.R.2d 424], concerned the interpretation of a Minnesota statute, applicable to employees generally, which prohibited the issuance of injunctions against strikes. The statute excepted from its provisions policemen, firemen, or any other public officials

charged with duties relating to public safety, and the court held that this exception by implication precluded the issuance of an injunction against a strike by school janitors. It was reasoned that the specific exclusion of some public employees indicated an intent to include all others. It is obvious that these two cases go much further in construing statutes in favor of the right of public employees to strike than we are required to go here, since the public employees involved in this case are specifically given the right to bargain collectively and to engage in other concerted activities in aid of such bargaining.

No case has been found which has denied public employees the right to strike where, as here, the employees were specifically authorized by statute to bargain collectively and engage in other concerted activities. The following cases are distinguishable because the public employees did not have the benefit of such legislation: *Newmarker* v. *Regents of University of Calif.*, 160 Cal.App.2d 640, 646 et seq. [325 P.2d 558]; *City of Los Angeles* v. *Los Angeles etc. Council*, 94 Cal.App. 2d 36, 46 et seq. [210 P.2d 305]; *Norwalk Teachers' Assn.* v. *Board of Education*, 138 Conn. 269 [83 A.2d 482, 484 et seq., 31 A.L.R.2d 1133]; *City of Manchester* v. *Manchester Teachers Guild*, 100 N.H. 507 [131 A.2d 59, 61 et seq.]; *International Brotherhood of Electrical Workers* v. *Grand River Dam Authority*, —— Okla. —— [292 P.2d 1018, 1020 et seq.]; *City of Pawtucket* v. *Pawtucket Teachers' Alliance*, —— R.I. —— [141 A.2d 624, 627 et seq.]; *Weakley County Municipal Electric System* v. *Vick* (Tenn. App.), 309 S.W.2d 792, 801 et seq.; *Port of Seattle* v. *International Longshoremen's & W. U.*, 52 Wn.2d 317 [324 P.2d 1099, 1101 et seq.]. Some of these cases are also distinguishable upon other grounds. For example, in the two California cases as well as the one from Tennessee it was held that collective bargaining contracts would be illegal under statutes setting forth particular methods of establishing wages and working conditions and that, accordingly, a strike to enforce collective bargaining demands would be a strike for an unlawful purpose. Here, as we have seen, the employer must bargain collectively and must enter into a written contract with the brotherhood to establish wages and working conditions.

The case of *United States* v. *United Mine Workers of America*, 330 U.S. 258 [67 S.Ct. 677, 91 L.Ed. 884], cited by plaintiff, is not helpful in determining the proper construction of statutory language permitting employees to engage

"in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The meaning of the quoted words was not at issue and was not discussed by the court. It was there held that the Norris-LaGuardia Act, which prohibits injunctions against strikes, does not apply to governmental employees, the court following the rule of construction that statutes which in general terms divest pre-existing rights will not be applied to the sovereign without express words to that effect. (330 U.S. at p. 270 et seq.) The act before us, unlike the Norris-LaGuardia Act, does not affect employees generally but deals specifically with the employees of plaintiff, a public corporation, and with no one else. The rule of construction relied upon in the United Mine Workers case obviously has no application to the situation presented here. Nor is plaintiff's position supported by the analogous rule of construction that statutes in derogation of sovereignty are to be strictly construed in favor of the state. The act expressly declares that it "shall be liberally construed to carry out the objects and purposes and the declared policy of the State of California as in this act set forth." (§ 12.1.) The Legislature, as we have seen, has made clear its purpose of creating an employment relationship comparable to that existing between a privately-owned public utility and its employees, and, if plaintiff's employees were unable to strike, they would be in a far less advantageous position than private employees with respect to collective bargaining. [5] Arbitration procedure authorized by subdivision (c) of section 3.6 in the event of a dispute over wages, hours, or working conditions obviously was not intended to take the place of the right to strike. This procedure may be had only "upon the agreement of both" plaintiff and the brotherhood, and in the present case the district rejected a request for arbitration.

[6] There is no merit in plaintiff's claim that provisions of the act granting plaintiff managerial discretion with respect to such matters as the fixing of salaries show that subdivision (c) of section 3.6 was not intended to give the employees the right to strike. The act specifically provides that, "notwithstanding any other provision," plaintiff must enter into a written contract governing working conditions with the accredited representative of the employees. In order to obtain such a contract the employees are authorized to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of col-

lective bargaining or other mutual aid or protection. The employees' right to engage in other concerted activities, which, as we have seen, includes the right to strike, is thus an integral part of the bargaining process. Plaintiff's duty to bargain collectively of course interferes with its managerial discretion, but under the act its obligation in this respect takes precedence over other provisions.

In passing upon the constitutionality of the act as applied to the employees represented by the brotherhood, we are not confronted with the problems which might be posed by legislation giving the right to strike to public employees such as policemen, firemen, and public officers exercising a portion of the state's sovereign powers. Plaintiff's contention is that subdivision (c), as above construed, is invalid because it assertedly constitutes a delegation of governmental authority to private persons and is discriminatory. We do not agree.

[7] Permitting employees to strike does not delegate to them authority to fix their own wages to the exclusion of the employer's discretion. In collective bargaining negotiations, whether or not the employees strike, the employer is free to reject demands if he determines that they are unacceptable. [8] Plaintiff claims that its position differs from that of private employers, arguing that it could be compelled by mandamus to provide service even though its employees were on strike. However, there is nothing in the act warranting the conclusion that plaintiff does not have discretion to reject unacceptable demands of striking employees, and it could not be forced to provide service where this would require it to abandon that discretion. No case has been found holding that a statute permitting public employees to strike constitutes an improper delegation of governmental authority, and courts both in this state and elsewhere, although not specifically discussing the delegation point, have recognized that statutes which permit strikes by publicly employed teachers, electrical workers, maintenance workers, and longshoremen may be validly enacted. (*Local 266 etc. A.F.L.* v. *Salt River Project Agr. Imp. & Power Dist.* (Ariz.), *supra,* 275 P.2d 393, 396 et seq.; *Board of Education* v. *Public School Employees' Union* (Minn.), *supra,* 45 N.W.2d 797; see *Newmarker* v. *Regents of University of Calif., supra,* 160 Cal.App.2d 640, 646; *City of Manchester* v. *Manchester Teachers Guild* (N.H.), *supra,* 131 A.2d 59, 62; *Port of Seattle* v. *International Longshoremen's & W. U.* (Wash.), *supra,* 324 P.2d 1099, 1102-1103.)

[9a] The fact that statutes creating other transit systems do not contain provisions similar to the one involved here with respect to the right to strike cannot be a proper basis for a claim that subdivision (c) is discriminatory. Section 1.1 of the act provides that because of the "unique problem" presented in the Los Angeles metropolitan area and the facts and circumstances relative to the establishment of a mass rapid transit system there, the adoption of a "special act" and the creation of a "special authority" are required. **[10]** If any state of facts can reasonably be conceived which would support a classification made by the Legislature, the existence of that state of facts is presumed, and one who challenges the classification has the burden of showing that it is arbitrary. (*State* v. *Industrial Acc. Com.*, 48 Cal.2d 365, 371-372 [310 P.2d 7]; *City of Walnut Creek* v. *Silveira*, 47 Cal.2d 804, 811 [306 P.2d 453].) **[9b]** The Legislature could have concluded that conditions existing in the area relating to the availability of transit workers made it necessary to give plaintiff's employees the right to strike in order to obtain an experienced and efficient working force. For example, at the time the act was adopted in 1957, transit service was principally provided in the area by privately-owned utilities whose employees were represented by labor unions and had the right to strike, and many of these employees might have refused to work for plaintiff if deprived of that right. The act contemplated that plaintiff would acquire such utilities and, as we have seen, provided that their employees should not suffer any loss of benefits. Plaintiff has made no showing that the conditions which exist with respect to other transit systems are the same as those in the Los Angeles area.

The judgment is reversed.

Traynor, J., Peters, J., White, J., and Dooling, J., concurred.

SCHAUER, J., Dissenting.—In my view Judge Charles R. Thompson, the learned trial judge who decided this case below, was correct in his determination that the employes of plaintiff, as public employes, are without the legal right to strike against plaintiff, and in enjoining them from so doing.

My principal objections to the opinion of the Chief Justice are three:

1. This is the only case in the judicial history of this state or the United States, so far as our research discloses, in which

a court of last resort holds that a statute which does not unequivocally and by clear language grant to public employes a right to strike against the government as an employer, nevertheless confers such right by implication. The two cases cited in the opinion of the Chief Justice as supporting the grant by implication theory are plainly distinguishable on their facts and the statutes there involved. As is hereinafter shown the first of such cases does not deal with a true public corporation or governmental agency and the reasoning of the second, if followed here, would tend to preclude rather than support the majority's holding. Other authorities are to the contrary.

2. The precise language—the so-called 16 words—relied upon in the opinion of the Chief Justice as implying a grant of such right to strike against government has been construed exactly to the contrary by the United States Supreme Court under comparable circumstances.

3. The substance of other provisions of the subject act (hereinafter quoted in certain material parts) and the character of its composition (showing almost meticulous care in detailing and delimiting the powers, duties, rights and obligations of the authority members and employes) tend strongly against the implication found by the Chief Justice.

Admittedly plaintiff here is a public as distinguished from a private corporation and plaintiff's employes who are here represented by defendant union are public employes. The only issue is whether the state has granted such public employes the right to strike against their employer in support of a collective bargaining demand. That right, if it exists, must be found in the Los Angeles Metropolitan Transit Authority Act of 1957 (Stats. 1957, ch. 547; amended by Stats. 1959, ch. 519). Inasmuch as that act does not expressly grant any such right it becomes necessary to:

(a) Determine whether we shall abide by the heretofore unbroken rule that the right will not be deemed to exist unless specifically granted in unmistakable terms and

(b) if the majority decline to follow such rule, to examine the statute and pertinent authorities to ascertain whether the position of the Chief Justice—that a right to strike against the public employer is implied by the language he quotes—is tenable under established law when the quoted language is considered in full context.

Chapter 3 of the subject act is entitled "Creation and Or-

ganization of Authority." It contains sections 3.1 through 3.11. This chapter, it is important to note, covers both the managing members and the employes of the authority. The sections of the chapter with which at the outset it is desirable to become familiar, provide as follows:

"Sec. 3.1. There is hereby created the 'Los Angeles Metropolitan Transit Authority.'

"Sec. 3.2. . . . The powers of the authority are those granted by this act. . . .

"Sec. 3.4. The authority is composed of seven members who shall be appointed by the Governor. . . .

"Sec. 3.6. (a) The authority shall appoint a chairman . . . and shall *appoint*[1] or provide for the *appointment* of other officers . . . and *employees* as may be necessary for any purpose of the authority, including . . . the . . . *operation, maintenance, and policing* of the system. . . . *The compensation of . . . all . . . agents and employees shall be fixed by the authority. . . .* The consent of the Department of Finance shall not be required in carrying out the provisions of this Section 3.6. . . . [Italics added.]

"(c) Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. It is declared to be in the public interest that the authority shall not express any preference for one union over another. . . ."

There follow detailed provisions specifying how an arbitration board shall be selected and how, where there is a dispute, it shall be determined whether a labor organization represents a majority of the employes or whether the proposed unit is appropriate.

The language of the subject act which the opinion of the Chief Justice holds to include by implication the right to strike against government, is that portion of chapter 3 (hereinabove more inclusively quoted) which provides that the public employes "shall have the right to self-organization, . . . to bargain collectively . . . and to engage *in other concerted activities for the purpose of collective bargaining or other*

[1]The use of the words "appoint" and "appointment" in this subsection (a) and "appointed to" in subsection (e), hereinafter noted, appears to be consistent with the governmental status of the employer and employes.

mutual aid or protection." This implication, the opinion of the Chief Justice says, is warranted because the same 16 words which are italicized above have been held by the courts to include strikes by *private* employes. In view of the long-recognized rules set forth in cases hereinafter cited, it appears to me that this court may neither logically, nor by historic precedent, hold that by using the quoted 16 words (either in or out of context) the Legislature intended to authorize strikes by *public* employes merely because the same words in different context have been held to include strikes in private employment.

As Judge Thompson (in the superior court) pointed out in his Memorandum of Opinion, although it is reported in 31 American Law Reports 2d 1149, et seq., that the trend has been toward giving public employes union rights and collective bargaining, the same article further declares that (p. 1159) "*in every case that has been reported,* the right of *public* employees to strike is emphatically denied." (Italics added.) Thus the conclusion is impelled that if, in Judge Thompson's words, "the drastic right to strike against this public agency is given or established it should be done by the Legislature and in clear, precise and certain language after specifically considering the question so that there can be no doubt on the subject, rather than by being read into the Act by implication with resort to speculation and conjecture. . . . [U]nder all the facts and circumstances of this case the right to strike is not impliedly contained in the Act and . . . therefore the employees, through their union . . . do not legally have the right to strike . . ." against plaintiff.

This conclusion is further supported, if not compelled, by the decision of the United States Supreme Court in *United States* v. *Mine Workers* (1947), 330 U.S. 258, 269-279 [67 S.Ct. 677, 91 L.Ed. 884], in which the court was dealing with the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C., § 101), in section 2 of which, it is noted in the opinion of the Chief Justice in the instant case, *ante,* p. 687, the language of the 16 words "first appeared." In the Mine Workers case the court held specifically and expressly that although under the provisions of the Norris-LaGuardia Act the right of employes of the coal mines to strike was *expressly protected as against private employers,* this right, not having been granted *expressly as against the government,* simply did not exist as against government. This holding was made in the suit

brought by the government after it took possession of the mines (pursuant to Executive Order 9728 of May 21, 1946, 11 F.R. 5593) and the miners (who until that time and event had the right to strike against their private employers) thereby became government employes. In reaching its holding the court said (pp. 269-274 of 330 U.S.): "Defendants' . . . principal contention is that the restraining order and preliminary injunction were issued in violation of the Clayton and Norris-LaGuardia Acts. We have come to a contrary decision.

"It is true that Congress decreed in § 20 of the Clayton Act that 'no such restraining order or injunction shall prohibit any person or persons . . . from recommending, advising, or persuading others . . .' to strike. But by the [p. 270] Act itself this provision was made applicable only to cases 'between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment. . . .' . . . [W]e cannot construe the general term 'employer' to include the United States, where there is no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government as well as from a specified class of private persons. . . .

"By the Norris-LaGuardia Act, Congress divested the federal courts of jurisdiction to issue injunctions in a specified class of cases. It would probably be conceded that the characteristics of the present case would be such [p. 271] as to bring it within that class if the basic dispute had remained one between defendants and a private employer, and the latter had been the plaintiff below. So much seems to be found in the express terms of §§ 4 and 13 of the Act. . . . The specifications in [p. 272] § 13 are in general terms and make no express exception of the United States. From these premises, defendants argue that the restraining order and injunction were forbidden by the Act and were wrongfully issued.

"Even if our examination of the Act stopped here, we could hardly assent to this conclusion. There is an old and well-known rule that statutes which in general terms divest preexisting rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous [p. 273] and affirmative reasons for believing that the sovereign should also be

deemed subject to a restrictive statute, that this rule was a rule of construction only. Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one, and the statement of the rule in those cases has been so explicit, that we are inclined to give it much weight here. Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use 'clear and specific [language] to that effect' if it actually intended to reach the Government in all cases." It should be noted that in the case at bench, the quoted language is as applicable to the Legislature of California as it was to Congress in the cited case.[2]

Continuing with its decision the court said further: "[p. 273] But we need not place entire reliance on this exclusionary rule. Section 2, which declared the public policy of [p. 274] the United States as a guide to the Act's interpretation, carries indications as to the scope of the Act. It predicates the purpose of the Act [as, I interpolate, *so* does

[2]Further statements of the rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to such effect are that "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him [the sovereign] in the least, if they may tend to restrain or diminish any of his rights or interests." (*Dollar Savings Bank* v. *United States* (1873), 19 Wall. (U.S.) 227, 239 [22 L.Ed. 80].) "If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect." (*United States* v. *Stevenson* (1909), 215 U.S. 190, 197 [30 S.Ct. 35, 54 L.Ed. 153].) This principle has also been applied by the courts of California in a variety of situations, and therefore it must be presumed to have been borne in mind by the Legislature when the act here under consideration was drafted. (See *State* v. *Brotherhood of R. R. Trainmen* (1951), 37 Cal.2d 412, 416-420 [1, 2, 3, 4, 5] [232 P.2d 857] [per Gibson, C. J., citing and following the United Mine Workers rule; *cf.*, *California* v. *Taylor* (1957), 353 U.S. 553, 565, [footnote 12] [77 S.Ct. 1037, 1 L.Ed.2d 1034]; *Butterworth* v. *Boyd* (1938), 12 Cal.2d 140, 150 [8] [82 P.2d 434]; *Estate of Miller* (1936), 5 Cal.2d 588, 597 [9, 10] [55 P.2d 491]; *Miles* v. *Ryan* (1916), 172 Cal. 205, 207 [157 P. 5].) Moreover, the Mine Workers case (*United States* v. *Mine Workers* (1947), *supra*, 330 U.S. 258, 269-279] in which the Supreme Court of the United States held that the 16 words did *not* include a right of public employes to strike against government was decided in 1947—some 10 years before the transit act here involved was adopted by the Legislature—and that holding had also presumptively come to the knowledge of the Legislature. (See *Bellman* v. *County of Contra Costa* (1960), *ante*, pp. 363, 367 [1] [5 Cal.Rptr. 692, 353 P.2d 300]; *Buckley* v. *Chadwick* (1955), 45 Cal.2d 183, 193 [11a] [288 P.2d 12, 289 P.2d 242]; *Cole* v. *Rush* (1955), 45 Cal.2d 345, 355 [8] [289 P.2d 450, 54 A.L.R.2d 1137].)

California Labor Code, section 923] on the contrast between the position of the 'individual unorganized worker' and that of the 'owners of property' who have been permitted to 'organize in the corporate and other forms of ownership association,' and on the consequent helplessness of the worker 'to exercise actual liberty of contract . . . and thereby to obtain acceptable terms and conditions of employment.' The purpose of the Act is said to be to contribute to the worker's 'full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives . . . for the purpose of collective bargaining . . . .' *These considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees.*" (Italics added.)

It should here be once again noted and emphasized that section 2 of the Norris-LaGuardia Act (quoted in full in the Mine Workers case, *supra,* at pp. 273-274, footnote 24, of 330 U.S.) to which the high federal court adverted in the paragraph last above quoted, further sets forth as the "declared . . . public policy of the United States" that the individual worker "shall be free," among other things, from interference in self-organization or "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, as pointed out in the opinion of the Chief Justice in the case at bench, the section employs exactly the same 16 words which are relied upon in his opinion to support the right to strike against government—the right which was so emphatically denied by the Supreme Court of the United States in the Mine Workers case.

The two cases (*Local 266 etc. A.F.L.* v. *Salt River Project Agr. Imp. & Power Dist.* (1954), 78 Ariz. 30 [275 P.2d 393, 400-402 [13-18]]; *Board of Education* v. *Public School Employees' Union* (1951), 233 Minn. 144 [45 N.W.2d 797]) cited in the majority opinion (*ante,* p. 690) as supporting its reasoning and conclusion are neither analogous nor persuasive. The Agricultural Improvement and Power District whose employes were held to have the right to strike in the first of the two majority-cited cases, was, as the court there took considerable pains to point out (pp. 401-402 [15, 16, 18] [275 P.2d]), formed, owned and operated *by private land-*

holders for the express purpose of engaging in private profitable business. Thus, despite the general provision of the Arizona Constitution (art. 13, § 7) that irrigation and power districts are "political subdivisions of the state, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the state or of the United States," the operations of the particular subject district were, in essence, private rather than public. The essential facts, together with the reasoning and conclusion of the Supreme Court of Arizona, appear in the following excerpts from its opinion: (P. 400 of 275 P.2d) "[T]he court in the Los Angeles case . . . [*City of Los Angeles* v. *Los Angeles Bldg. & Const. Trades Council* (1949), 94 Cal. App.2d 36, 49 [9] (210 P.2d 305)] stated that . . . 'Fair treatment for public employees does not require legal protection for the concerted labor action generally, as in the case of private employment, for such treatment is, in the public field, compelled to a considerable extent by law.' This consideration cannot be said to exist in the case at bar. . . . [P. 401 [15]] To say that the employees of the District herein are actually 'public employees' is not the province of this court but a matter for the legislature. . . . [P. 402 [18]] Most municipal corporations are owned by the public and managed by public officials. It might be said that a strike by the employees of such municipal corporations would constitute a strike against the public. Such is not the case here. Public employment means employment by some branch of government or body politic specially serving the needs of the general public. It cannot be said that the District's employees are paid from the public treasury as are employees of the public. The public does not own the District. A governmental entity such as a city or town does not manage or benefit from the profits of this District. *Instead the owners are private landholders.* The profits from the sale of electricity are used to defray the expense in irrigating these private lands for personal profit. . . . [P. 403] [I]t cannot be said that a strike here is a strike against the public. *The District does not function to 'serve the whole people' but rather the District operates for the benefit of these 'inhabitants of the district' who are private owners.*" (Italics added.)

Under the circumstances shown the holding of the Arizona court is readily understandable; it is *not* understandable to

me how that case can be considered as authority or guide for construing the subject metropolitan authority act as by implication granting the here admittedly *public* employes the right to strike.

And in the second of the majority's relied on cases, *Board of Education* v. *Public School Employees' Union* (Minn., 1951), *supra*, 45 N.W.2d 797, 800-801 [1, 4], the court had before it statutory language which dealt directly and specifically with the right of certain public employes to strike. Such statutory language, as is stated in the opinion of the Supreme Court of Minnesota, appears in that state's " 'Little Norris-LaGuardia Act,' popularly so called because of its near identity to the federal Norris-LaGuardia Act. . . .

"Section 185.10 of our statute provides:

" 'No court of the state shall have jurisdiction to issue any restraining order, or temporary or permanent injunction, in any case involving or growing out of any labor dispute, to prohibit any person or persons participating or interested in such dispute, . . . from doing, whether singly or in concert, any of the following acts:

" '(1) Ceasing or refusing to perform any work or to remain in any relation of employment;'. . . .

"The Minnesota act, M.S.A. c. 185, although modeled after the Norris-LaGuardia Act, contains one feature which materially distinguishes it from the federal act. Section 185.19 of the Minnesota act provides: 'Sections 185.07 to 185.18 [L. 1933, c. 416, § 15] *shall not be held to apply to policemen or firemen or any other public officials charged with duties relating to public safety.*'

"This exception must refer to persons who are not employed by a private employer. The only other employer would be a public employer. Section 185.19 means that a municipality is not prevented from seeking and receiving injunctive relief against these designated employes if the facts otherwise warrant such relief. But a municipality has numerous employes who cannot come under any of these excepted classes. Janitors and janitor-engineers employed by the board of education are plainly not 'officials charged with duties relating to public safety.' If the statute specifically enumerates the employes against whom the municipality may obtain injunctive relief under M.S.A. c. 185, it would seem that it would be prevented from seeking such relief against its other employes, except as provided under c. 185. This interpretation

of the statute is in accord with the well-settled rule that where a statute designates an exception, proviso, saving clause, or a negative, the exclusion of one thing includes all others. . . . The exclusion clause indicates that the act was intended to apply to all other employes." (Italics added.)

The court then sets out in some detail the history of the legislation it was discussing, as taken from the Journal of the Senate, and continues (p. 802), "It is apparent from this legislative history that the legislature considered the bill applicable to public employes. Otherwise, there would have been no need for § 185.19, which excepts the persons designated therein from the operation of the statute. Furthermore, this legislative history shows that the legislature did consider whether public employes should be excepted from the provisions of M.S.A. c. 185, and, having done so, concluded that there should be an exception only for policemen, firemen, and any other public officials charged with duties relating to public safety." By contrast, in the case at bench no showing is made that California's Legislature even considered, much less debated and knowingly voted for, a grant to public employes of the right to strike.

Thus, neither of the two cases relied on by the Chief Justice supports the proposition that concededly public employes may derive the right to strike merely because the Transit Authority Act incorporates the 16 words which have been held to include strike rights when applied in private employment. As stated by the United States Supreme Court in *International Union, U.A.W., A.F. of L.* v. *Wisconsin Emp. Relations Board* (1949), 336 U.S. 245, 259 [69 S.Ct. 516, 93 L.Ed. 651], "The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized [in *National Labor Relations Board* v. *Jones & L. Steel Corp.* (1936), 301 U.S. 1, 33 [57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352] as a 'fundamental right'. . . ." The statutory "interpretation" by the majority here is the more remarkable in that the only inferred classification of public employes for strike eligibility is employment by the transit authority, regardless of character of work, such as operators, clerks, police, etc.

It is to be emphasized that since a grant of a right to strike against government is essentially a partial surrender of sov-

ereignty the grant should unmistakably come from the sovereign, not through inferences declared by the majority of a divided court. It may well be that California should include in the Los Angeles Metropolitan Transit Authority Act more of the provisions which are included in the Railway Labor Act, 45 U.S.C.A., elucidating more specifically the procedures to be followed in collective bargaining. But manifestly amendment or augmentation of the Transit Authority Act should be left to the Legislature or the people rather than accomplished by the unicameral act of a majority of this court. This court is not equipped and has not undertaken to conduct a study of the ramifications of its ruling nor has it assumed to define and delimit the conditions upon, the procedures leading to, or the classes of employes who may indulge in, this newly declared right to strike.

That the holding of the majority today is contrary to the weight of authority, statutory as well as decisional, is pointed up by the fact that the Congress of the United States, after the Supreme Court's decision in the United Mine Workers case, undertook to make certain that the views of the dissenters in that case should not become law through a change of personnel in the court. To that end the Congress on June 23, 1947, enacted 61 Stat. 136, ch. 120, 29 U.S.C.A. § 188, which read: "It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations, to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for three years by the United States or any such agency." This forthright position of the United States Congress was reaffirmed when, in 1955, the above quoted section was repealed and reenacted as sections 118p and 118r of 5 U.S.C.A. (69 Stat. 624-625, ch. 690), which provide (§ 118p) that "No person shall accept or hold office or employment in the Government of the United States or any agency thereof, including wholly owned Government corporations, who— . . . (3) participates in any strike or asserts the right to strike against the Government of the United States or such agency; or (4) is a member of an organization of Government employees that asserts the right to strike against the Government of the United States or such agencies, knowing that such organization asserts such right," and that

(§ 118r) "Any person who violates section 118p of this title shall be guilty of a felony, and shall be fined . . . or imprisoned . . . or both."

It is observed that the opinion of the Chief Justice does not discuss the policy of government to protect itself and its citizens as evidenced by the unequivocal language above quoted; nor does the opinion undertake to overrule or disapprove any of the many earlier holdings of the courts of this state which are either irreconcilable or inconsistent with the drastic ruling announced today. Among such cases are *State* v. *Brotherhood of R. R. Trainmen* (1951), 37 Cal.2d 412, 416-420 [232 P.2d 857]; *Nutter* v. *City of Santa Monica* (1946), 74 Cal.App.2d 292, 296-298 [1] [168 P.2d 741] ["[I]t was not the purpose of the Legislature, in the enactment of section 923 [Labor Code], to inaugurate a state policy with reference to labor relations which would be applicable to the state or its political subdivisions . . . Those who enter public employment do not thereby acquire the right to arrange, by negotiation and contract, terms and conditions of employment which are defined by law or, under established systems, are subject to regulation by governmental bodies"]; *Perez* v. *Board of Police Comrs.* (1947), 78 Cal.App.2d 638, 647 [6] [178 P.2d 537] ["Nothing can be gained by comparing public employment with private employment; there can be no analogy in such a comparison"]; *Newmarker* v. *Regents of University of Calif.* (1958), 160 Cal.App.2d 640, 647 [5] [325 P.2d 558] ["Labor Code, § 923, which declares this state's policy in favor of collective bargaining does not apply to public employment"]; *Dropo* v. *City & County of San Francisco* (1959), 167 Cal.App.2d 453, 461 [3b] [334 P.2d 972] ["In *Nutter* v. *City of Santa Monica*, 74 Cal.App.2d 292 [168 P.2d 741], the construction rule was applied to the construction of the Labor Code in a decision holding that because governmental bodies were not expressly mentioned in the Labor Code, its provisions requiring bargaining between employers and trade unions did not apply to the defendant city in its operating of local and intercity motor coach lines. Obviously, applying such a requirement to a municipality, even though it was acting in a proprietary capacity, would interfere with sovereign governmental powers. It was so held in that case. In stating the rule of construction the Nutter case said (p. 300) 'general terms of a statute will not be construed as including government if the statute would operate to trench upon sovereign rights, injuriously affect the

capacity to perform state functions or establish a right of action against the state' "] ; see also *Balthasar* v. *Pacific Elec. Ry. Co.* (1921), 187 Cal. 302, 305 [202 P. 37, 19 A.L.R. 452], quoting the rule from Blackstone's Commentaries.

The conclusion that by using the quoted 16 words the California Legislature did *not* intend to authorize strikes by *public* employes merely because the same words in different context have been held to include strikes against *private* employers appears doubly inescapable when the matter is considered in the light of the wealth of additional detail declaring and delimiting employes' rights which the Legislature has expressed in other provisions of the act. In this connection it may first be noted that this Transit Authority Act comprises 13 chapters which fill over 31 printed pages of the Statutes of 1957. The 1959 amendments of the act (Stats. 1959, ch. 519) cover more than four and one-half printed pages. As already related in part, in section 3.6, subdivision (c), of the act, provision is made for representation of the employes by a labor union of their own choosing, and subdivision (d) provides in mandatory language how such choice shall be ascertained, thus plainly negating any permission to strike to achieve objectives on that score. Subdivision (c) further provides that "In case of a dispute over wages, salaries, hours or working conditions, which is not resolved by negotiations in good faith between the authority and the labor organization, upon the agreement of both, the authority and the labor organization may submit said dispute to the decision of the majority of an arbitration board, and the decision of the majority of such arbitration board shall be final." Again, subdivision (c) repeats later that "The decision of a majority of the arbitration board *shall be final and binding* upon the parties thereto." (Italics added.) The method of choosing such board is spelled out in detail. It is also specified that there shall be no discrimination against any employe or person because of race, creed, color or sex. In my view, the very fact that the Legislature has thus declared so explicitly an authorized means of settling disputes "over wages, salaries, hours or working conditions" plainly shows that it had no intention of granting the transit authority's employes the right to use the much more drastic procedure of calling a strike against government to settle such disputes. If the right to strike were to be granted at all, it is reasonable to infer that the Legislature would have been at least as specific in expressing the grant and in detailing the circumstances of its exercise.

The opinion of the Chief Justice in support of its thesis that the 16 words do by implication extend such a grant, argues (*ante,* p. 692) that "The Legislature . . . has made clear its purpose of creating an employment relationship comparable to that existing between a privately owned public utility and its employees, and, if plaintiff's employees were unable to strike, they would be in a far less advantageous position than private employees with respect to collective bargaining," and notes (*ante,* p. 692) that the act directs that it "shall be liberally construed to carry out the objects and purposes of the declared policy of the State of California *as in this act set forth*" (§ 12.1, italics added). This "declared policy" is specifically enunciated in section 1.1 of the act, in the following words: "It is hereby declared to be the policy of the State of California to develop mass rapid transit systems in the various metropolitan areas within the State for the benefit of the people." (See also *Los Angeles Met. Transit Authority* v. *Public Utilities Com.* (1959), 52 Cal.2d 655, 661-662 [2] [343 P.2d 913].) To me it would appear that the Legislature's mandate that the act be liberally construed to carry out the expressly defined policy of *developing mass rapid transit systems for the benefit of the people,* constitutes a proscription against, rather than authority for, this court's reading into the statute an authorization to employes of such systems to strike and thus put the systems temporarily out of operation to the detriment rather than the benefit of the public. As hereinabove shown it is established law that no right to strike against government exists unless that right be conferred by the Legislature in no uncertain language. This the Legislature has not done in the provisions of the act as they now read; no argument in the opinion of the Chief Justice bedims that simple fact.

It bears emphasis that the state has expressly granted to the defendant employes (§ 3.6(c)) "the right to self-organization, to form, join or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining" and the subject act further expressly provides that (§ 3.6(c)) "Whenever the authority acquires existing facilities from a *publicly* or *privately* owned public utility . . . the authority shall assume and observe all existing labor contracts. To the extent necessary for operation of facilities, all of the employees of such acquired public utility whose duties pertain to the facilities

acquired shall be *appointed*[1] *to* comparable positions in the authority without examination, subject to all the rights and benefits of this act, and these employees shall be given sick leave, seniority, vacation and pension credits in accordance with the records and labor agreements of the acquired public utility. Members and beneficiaries of any pension or retirement system or other benefits established by that public utility shall continue to have the rights, privileges, benefits, obligations and status with respect to such established system. No employees of any acquired public utility shall suffer any worsening of his *wages, seniority, pension, vacation or other benefits* by reason of the acquisition." (Italics added.)

It is obvious that the last quoted section—and, in particular, the last sentence—is specific and express in declaring the authorized rights of employes of either publicly or privately owned utilities which are acquired by the transit authority but, significantly in the light of the law as declared in such cases as *United States* v. *Mine Workers* (1947), *supra*, 330 U.S. 258; *State* v. *Brotherhood of R. R. Trainmen* (1951), *supra*, 37 Cal. 2d 412, 416-420 [1, 2, 3, 4, 5]; and *Board of Education* v. *Public School Employees' Union* (Minn., 1951), *supra*, 45 N.W.2d 797, 800 et seq., there is no mention of the grant of a right to strike against the governmental employer after the employes become *public* employes. The same observation applies with possibly even greater force to the amendment added in 1959 (Stats. 1959, ch. 519, p. 2488, § 3.6, subd. (h)): "The obligation of the authority to bargain in good faith with a duly designated or certified labor organization and to execute a written collective bargaining agreement . . . and to comply with the terms thereof shall not be limited or restricted by the provisions of the Government Code or other laws or statutes and the obligation of the authority to bargain collectively shall extend to all subjects of collective bargaining which are or may be proper subjects of collective bargaining with a private employer." Here again, there is no mention of a right to strike against the governmental employer. It bears emphasis that a strike is not, in any ordinary usage of the term, an object or subject of collective bargaining; it is a weapon sometimes used in the process of, or in seeking to acquire the right to, collective bargaining. The fact that it may be labor's most powerful—and drastic—weapon certainly does not suggest that it is, therefore, to be deemed granted by implication as

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[1]See footnote 1, *ante*, p. 696.

against government when it is not expressly mentioned in a statute as specific and detailed in all other respects as that now before us. It is manifest also that no demand by employes against the authority would be lawful unless the demand was within the powers conferred by the statute. This follows from the specificity of the provision that "The powers of the authority are those granted by this act" (§ 3.2); such language must mean that the authority possesses no powers other than those granted by the act.

Moreover, the Legislature has not only authorized both the authority and its employes to engage in collective bargaining, but it has likewise (§ 3.6, subd. (c)) authorized the authority and the union representing the employes to provide in a collective bargaining agreement for submission of any "dispute over wages, salaries, hours and working conditions, which is not resolved by negotiations in good faith between the authority and the labor organization . . . to the decision of the majority of an arbitration board, and the decision of the majority of such . . . board shall be final." As already noted, detailed provisions follow concerning how the arbitration board shall be selected. And certainly provisions for arbitration contained in any collective bargaining agreement can be specifically enforced according to such provision. Certainly, also, in the light of such detailed spelling out by the Legislature of the rights and obligations of both the authority and its employes, including the labor organization formed or selected by the latter, to engage in collective bargaining and in arbitration, it further plainly appears that if granting the right to strike had been intended, words expressly so stating would have been added.

It may also be significant in this connection that section 4.24 of the act (as amended by Stats. 1959, ch. 519) states that: "The authority may provide for a retirement system; provided, that the adoption, terms and conditions of any retirement system covering employees of the authority represented by a labor organization in accordance with Section 3.6 shall be pursuant to a collective bargaining agreement between such labor organization and the authority." Obviously, the language used is, in the basic premise, permissive. There is neither an express statement nor an implication in the quoted language that the Legislature intended thereby to grant to the interested labor organization the right and authority to call out on strike the authority's employes as a means of "per-

suading" that public authority to agree to any terms demanded.

If the Legislature in drafting the act could and did speak in such careful and specific detail in granting, defining and protecting the bargaining and other rights of the public employes here involved, it seems obvious that if it had been intended that such employes be given the additional, drastic and heretofore universally denied, right to strike against government, that right would also have been expressly enunciated and delimited in no uncertain terms and not left for court deduction following comparison with the language used in statutes dealing with employes of private employers. The traditional rule "*expressio unius est exclusio alterius*" thus seems peculiarly applicable to this case.

In this connection it is appropriate to add that we are not, of course, concerned here with any question or necessity of finding within the terms of the act any specific or implied negation of the right to strike. On the contrary the burden is on defendant to show wherein the act effectively grants any such right. This necessarily follows from the firmly established general rule which none has heretofore disputed, that public employes, absent express authorization, are without the right to strike against government. The attempted analogy in the opinion of the Chief Justice in relying upon use of the so-called 16 words in statutes dealing with the rights of private employes (e.g., § 923 of the California Labor Code) is for this further reason, in my view, invalid. Use of the 16 words in such statutes of course operates only to confirm, and *not* to *confer or grant*, to private employes the right to strike; that right is a fundamental one which springs from constitutional guaranties and decisional common law, subject to certain restrictions in its exercise. (Eg., see *Amalgamated Utility Workers* v. *Consolidated Edison Co.* (1940), 309 U.S. 261, 263 [1] [60 S.Ct. 561, 84 L.Ed. 738]; (*J. F.*) *Parkinson* v. *Building Trades Council* (1908), 154 Cal. 581, 599-600 [98 P. 1027, 16 Ann.Cas. 1165, 21 L.R.A. N.S. 550].) "[T]he legality of the closed shop, and of the strike and boycott, primary and secondary, . . . were recognized by this court at a comparatively early date, under common law principles. . . ." (*Chavez* v. *Sargent* (1959), 52 Cal.2d 162, 178 [8] [339 P.2d 801].)

Further confirming my view of the intent of the Legislature is the fact that in chapter 5 of the subject act the transit authority (plaintiff herein) is authorized to issue revenue

bonds "for the acquisition, construction or completion of the system or any part thereof . . ." (§ 5.1), and section 5.9 specifies that "An indenture may include a clause relating to the bonds issued thereunder requiring the authority to *continuously operate the system* acquired, constructed, or completed, in whole or in part, from the proceeds of the bonds in an efficient and economical manner." (Italics added.) Obviously, if the opinion of the Chief Justice stands (construing the act to authorize the system's being struck by its employes when their self-determined demands are not met) any indenture clause requiring continuous operation must necessarily mean—if the bond is not to be defaulted—that this public corporation must at any cost meet any terms demanded by the employes' union as a condition for keeping the system in operation. Again, such a result would appear to be flatly contrary to the declared policy of the state "to develop mass rapid transit systems . . . for the benefit of the people," and irreconcilably obnoxious to the heretofore established principle that a free government should not surrender its control to a private group.

It would seem to me that reading the right to strike into the act may seriously interfere with the value and salability of the revenue bonds provided for in chapter 5, which chapter contains 42 sections specifying in detail the provisions which may or may not be included in such bonds. If a strike with its potential interruption of operations was contemplated by the Legislature, then not only, under previously discussed law, should the authorization have been expressly set forth, but the act in the chapter authorizing revenue bonds should have expressly dealt with what steps the authority should take "to continuously operate the system" in the event of a strike.

The state, to provide dependable rapid transit for the public, created this publicly owned common carrier and made it independent of the Public Utilities Commission (*Los Angeles Met. Transit Authority* v. *Public Utilities Com.* (1959), *supra*, 52 Cal.2d 655, 661 [1, 2]) and yet, the majority today hold, a union representing the employes may lawfully call a strike and, inferentially, thereby shut down service to the public! (*Cf. Northwestern Pac. R. R. Co.* v. *Lumber & S. W. Union* (1948), 31 Cal.2d 441, 446 [2] [189 P.2d 277].) Will such interruption of service be lawful because the union has a right to cause it? Or must the authority, to avoid unlawful inter-

ruption of service, yield to the union's demands? I do not understand the reasoning which makes the authority, because it is publicly owned, independent of the Public Utilities Commission but which also makes it, as though it were a private corporation, subject to strike on union call.

In conclusion it bears mention again (see *ante*, p. 696) that section 3.6, subdivision (a), requires that "The authority shall appoint . . . employees as may be necessary for . . . policing of the system" as well as for its operation and maintenance. In the event of a strike it would appear probable that "policing of the system" for protection of personnel and maintenance of equipment might well be all the more essential in the public interest. The opinion of the Chief Justice in declaring the grant by implication does not undertake to spell out any differentiation as among groups or classes of employes who are to have or have not the court-declared right to strike. Presumably, therefore, the police of the authority, trained in the skills necessary to protect the affected public property, would likewise be out on strike or respecting a picket line. Will the faithful but already overburdened police of Los Angeles city and the like sheriff's deputies of the county be called upon to fill this breach? Or will the vast properties of the transit authority go unprotected?

As has been shown, under both federal and state law as it existed at the time the Los Angeles Metropolitan Transit Authority Act was drafted and enacted, a right—actually, a privilege—to strike against government was never to be deemed granted by implication. Until today, such "right" had to be expressly granted in no uncertain language or it simply was not granted. The granting of such a privilege is a *pro tanto* surrender of sovereignty; i.e., a transfer of sovereignty in a limited field from the State of California to a labor union. But how limited is the field? The opinion of the Chief Justice does not attempt to discuss the potentialities of the problems with which his holding is fraught. Is the classification of public employes for strike purposes lawful? If employes of the Los Angeles transit authority are granted the "right" to strike, why not other public employes? Are the policemen of the transit authority constitutionally different from other police groups? There are other provisions of the act, as well as further considerations of the public interest, which could be recited as bearing against either the innovation of law or the implication of fact encompassed in the opinion of the

Chief Justice, and as supporting the holding I advance. But if the reasons already given have not persuaded, then, I think, further elaboration would be in vain.

I would affirm the judgment.

McComb, J., concurred.

Respondent's petition for a rehearing was denied October 27, 1960. Schauer, J., and McComb, J., were of the opinion that the petition should be granted.

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

BARRY BAGLEY et al.,

Plaintiffs and Appellants,

v.

CITY OF MANHATTAN BEACH et al.,

Defendants and Respondents.

L.A. 30523

(Sup. Ct. No. C 76275)

After the City Council of the City of Manhattan Beach refused to place an initiative measure on the ballot, petitioners sought a writ of mandate to compel the council to do so. The trial court denied relief, and petitioners appeal.

The proposed initiative measure provides that unresolved disputes between the city and the recognized firemen's employee organization shall be submitted to arbitration and that the arbitrator's award shall be final and binding. The arbitration requirement applies not only to unresolved disputes pertaining to the interpretation or application of contracts but also to all disputes as to wages, hours, and terms of employment.

(SEE DISSENTING OPINION)

Denying the writ, the superior court concluded the proposed measure is invalid because (1) the Legislature placed the power to determine salaries in a general law city in the city council, precluding delegation to an arbitrator and (2) there are no safeguards in the proposed initiative to prevent abuse of the arbitrator's power. We affirm the judgment on the first ground, finding it unnecessary to reach the second.

Government Code section 36506, dealing with general law cities, provides: "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees."

The language in the statute is clear. It requires compensation be fixed by the city council by ordinance or resolution; the language does not permit fixing of compensation by administrative order or by arbitrator's award.

When the Legislature has made clear its intent that one public body or official is to exercise a specified discretionary power, the power is in the nature of a public trust and may not be exercised by others in the absence of statutory authorization. (City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 923-924; California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal.3d 139, 144.)

Although standards might be established governing the fixing of compensation and the city council might delegate functions relating to the application of those standards, the ultimate act of applying the standards and of fixing compensation is legislative in character, invoking the discretion of the council. (City and County of San Francisco v. Cooper, supra, 13 Cal.3d 898, 919-921; Walker v. County of Los Angeles (1961) 55 Cal.2d 626, 634, 637; City and County of S.F. v. Boyd (1943) 22 Cal.2d 685, 689-690; Alameda County Employees' Assn. v. County of Alameda (1973) 30 Cal.App.3d 518, 532; Collins v. City & County of S. F. (1952) 112 Cal.App.2d 719, 730-731; Spencer v. City of Alhambra (1941) 44 Cal.App.2d 75, 77.) As such, and because the language of the statute is not merely clear, but redundant (cf. Geiger v. Board of Supervisors (1957) 48 Cal.2d 832, 838), the city council may not delegate its power and duty to fix compensation.

Examination of the history of other legislation relating to general law city employees confirms that we should apply the plain language of Government Code section 36506 literally. The Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510), which applies to local government employees and deals with public employee organizations

and labor relations, seeks to provide "a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations." (Gov. Code, § 3500.) Although there is provision for a written memorandum of understanding by employee organizations and representatives of a negotiating public agency, the act expressly provides that the memorandum "shall not be binding" but shall be presented to the governing body of the agency or its statutory representative for determination, thus reflecting the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others. (Gov. Code, § 3505.1; see City and County of San Francisco v. Cooper, supra, 13 Cal.3d 898, 926-928 [under the Winton Act involving school labor relations, written memorandum of understanding is not binding, the school board retaining ultimate authority].)

Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration. (Gov. Code, §§ 3505, 3505.2; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 614,

fn. 4; Alameda County Employees' Assn. v. Alameda County, supra, 30 Cal.App.3d 518, 533-534.) Similarly, Labor Code sections 1960-1963 permit firefighters to form unions and to present grievances but do not authorize arbitration.

Probably no issue in recent years has been presented to the Legislature more frequently than proposed arbitration of public employee salaries, including firemen's. (Assem. Bill Nos. 1781, 1724, 119, 86 (1975-1976 Reg. Sess.); Sen. Bill Nos. 1310, 1294, 275, 4 (1975-1976 Reg. Sess.); Assem. Bill Nos. 3666, 1243, 33 (1973-1974 Reg. Sess.); Sen. Bill No. 32 (1973-1974 Reg. Sess.); Sen. Bill Nos. 1440, 1424 (1972 Reg. Sess.); Sen. Bill No. 333 (1971 Reg. Sess.); Assem. Bill No. 98 (1970 Reg. Sess.); Sen. Bill Nos. 1294, 1293 (1970 Reg. Sess.); Assem. Bill No. 1400 (1969 Reg. Sess.); Assem. Bill No. 1935 (1967 Reg. Sess.); Assem. Bill Nos. 3084, 2500 (1963 Reg. Sess.).) But no such bill has become law.

Petitioner's reliance on Kugler v. Yokum (1968) 69 Cal.2d 371, is misplaced. The case involved the sufficiency of standards necessary to a valid delegation of legislative power in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body. Here legislative intent limiting delegability is clear.

The language of Government Code section 36506, the provisions of the Meyers-Milias-Brown Act, and the Legislature's repeated refusal to enact any law permitting general law cities to fix salaries by arbitration compel the conclusion that the Legislature intends the city council of a general law city to fix compensation, precluding the fixing of compensation by arbitrator.

It has long been settled that a city ordinance proposed by initiative "must constitute such legislation as the legislative body of such . . . city has the power to enact under the law granting, defining and limiting the powers of such body. [Citations.]" (Hurst v. City of Burlingame (1929) 207 Cal. 134, 140.) The city possessing no power under existing state statute to provide for arbitration of wage rates, such power cannot be created by local initiative.[1/]

The judgment is affirmed.

CLARK, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
SULLIVAN, J.
RICHARDSON, J.

1/ Although Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608, approved arbitration procedures adopted by initiative, Vallejo is a chartered city--not a general law city subject to Government Code section 36506.

C O P Y

BAGLEY v. CITY OF MANHATTAN BEACH

L.A. 30523

DISSENTING OPINION BY MOSK, J.

I dissent. Under the principles enunciated by this court in Kugler v. Yocum (1968) 69 Cal.2d 371, the proposed initiative should not be banned, as an improper delegation of power, from consideration by the electorate.

In divining a legislative intent to preclude the local use of arbitration for resolution of labor disputes, the majority appear to employ two theories. First, they seem to conclude that whenever a discretionary power is granted to one body, any infringement on that authority, of whatever extent or effect, is per se an improper delegation of power. (Ante, p. ___.*) Second, in the majority view, the Legislature has expressly voiced hostility to any arbitration ordinance. The former conclusion is incorrect under relevant case law, the latter as a matter of statutory interpretation.

As for the first rationale, the majority position is contradicted by Kugler v. Yocum, supra, in which we upheld a proposed ordinance decreeing that the salaries of Alhambra

*Majority opinion, page 2.

firefighters shall be no less than the average wage of firefighters employed by the City of Los Angeles and those working for Los Angeles County. The majority vainly attempt to distinguish Kugler because it involved a chartered city and thus was decided "in the absence of statutes demonstrating an intent that the power be exercised by a specific legislative body." (Ante, p. ___.*)

On the contrary, at the time of the proposed ordinance in Kugler, the Alhambra city charter provided, in a manner similar to Government Code section 36506, on which the majority rely, that "The [city] council . . . shall have power to organize the fire division and . . . establish the number of its members and the amount of their salaries . . . ." (Kugler, supra, 69 Cal.2d at p. 374, fn. 1.) As a charter provision has all the force of state law within a chartered city (Bruce v. Civil Service Board (1935) 6 Cal.App.2d 633, 636), pursuant to the majority's reasoning we could have held simply that the terms of the Alhambra charter precluded the proposed ordinance. Instead, we proceeded to scrutinize the ordinance in order to ascertain whether it contained safeguards sufficient to insure that the fundamental policy decisions regarding wages would be made by the city council, not by extraneous forces. (Kugler, supra, 69 Cal.2d 371, 376.) We declared, "Doctrinaire legal concepts should not be invoked to impede the reasonable

*Majority opinion, page 5.

exercise of legislative power properly designed to frustrate abuse. Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation,' and then only to preserve the representative character of the process of reaching legislative decision." (Id. at p. 384.)

Yet the majority imperiously label a legislative enactment an unlawful delegation without ascertaining the extent of the delegation or the availability of standards and safeguards to prevent its abuse. This result cannot be justified on the simplistic ground that the Legislature granted the city council power to fix wages. In Kugler and in every California case confronting the issue of unlawful delegation, a power has been granted by statute or the Constitution to one body and then delegated some aspect to another entity. Yet unless the delegation removes all authority from the group originally directed to exercise that power (see City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 923-924), courts have analyzed the delegation to determine whether fundamental policy-making power has been maintained by the legislative body originally designated to exercise it. (See, e.g., Clean Air Constituency v. California State Air

Resources Bd. (1974) 11 Cal.3d 801, 816; Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control (1966) 65 Cal.2d 349, 369; Gaylord v. City of Pasadena (1917) 175 Cal. 433, 437.)

In the present case, Government Code section 36506 states only that, "By resolution or ordinance, the city council shall fix the compensation of all appointive officers and employees." The proposed initiative would not divest the council of that designated power; indeed, the arbitrator's award could be implemented only by a council ordinance. Of course, the initiative would, in many instances, inhibit the council from unilaterally pronouncing decisions regarding wages, as would, for example, any collective bargaining with the firefighters. Because of this potential infringement, we should analyze the initiative in the manner undertaken by Kugler. But it is heroic and unprecedented to conclude that grants of power to one body absolutely preclude any appropriate referral of aspects of that power to another entity. (See Eastlake v. Forest City Enterprises, Inc. (1976) ___ U.S. ___.)

As for the other point relied upon by the majority--the Legislature expressly intended to prohibit local arbitration ordinances--little persuasive support is offered. Government Code section 36506, as we have seen, does not, by its terms, prohibit arbitration or other reasonable means to

resolve labor disputes. The majority can find no legislative history to suggest that the section was intended to be anything other than it facially appears to be: a general grant of power to a local government.

The majority also rely on the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.). It is true that the act does not compel local governments to submit to arbitration, but the majority misreads the statute to conclude that the act prohibits municipalities from arbitrating. The act establishes certain minimum procedures that must be undertaken by public employers and employees. They must meet and confer with each other and bargain in good faith. (Gov. Code, § 3505.) If they reach an agreement, they must prepare a memorandum of agreement (§ 3505.1). The Legislature's directive that the agreement shall not be binding reflects a reluctance to impose arbitration on unwilling municipalities, not a repudiation of local arbitration ordinances voluntarily adopted.

This is made clear in other provisions of the act. Section 3500 provides: "Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon

those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter." The act thus allows local governments to maintain their own procedures, consistent with the purposes of the act. (Ball v. City Council (1967) 252 Cal.App.2d 136, 143; Grodin, Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts (1972) 23 Hastings L.J. 719, 725.) As the act is designed to provide reasonable dispute-solving mechanisms, section 3500 seems to permit such procedures as arbitration.

Also significant are sections 3505 and 3507. The former provides that the bargaining process "should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance . . . ." Section 3507 allows a public agency to adopt "additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment." Taken together, these provisions indicate that the Meyers-Milias-Brown Act expresses no marked hostility, but benign neutrality toward local use of arbitration procedures.

Also lending dubious credence to the majority conclusion is the reference to defeat of various public

employment bills in the Legislature. (Ante, p. ___.*) As we observed recently in Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal.3d 392, 418, "At best, 'Legislative silence is a Delphic divination.'" In these circumstances, even the Oracle of Delphi would have difficulty in finding legislative hostility to local use of arbitration. Of the 22 bills cited by the majority, 14 would have required as a matter of state law public employers and employees to submit to arbitration of wage disputes. Obviously, the defeat of a bill to establish state-imposed arbitration requirements does not signify legislative opposition to voluntary local decisions to adopt arbitration. Six of the bills would have imposed mandatory mediation and fact-finding, while at the same time providing for arbitration of disputes revolving around interpretations of existing agreements, an area entirely different from arbitration of wage disputes. One of the remaining two measures cryptically stated, without further explanation, "Upon failure to reach agreement, the difference may be referred to voluntary arbitration." (Assem. Bill No. 3084 (1963 Reg. Sess.).) Only 1 of the 22 bills was at all relevant to our problem. That measure purported to amend the Meyers-Milias-Brown Act to provide that any arbitration procedures adopted by local agencies would be governed

*Majority opinion, page 5.

by the Code of Civil Procedure sections regarding arbitration. (Assem. Bill No. 3666 (1973-1974 Reg. Sess.).) The bill, thus, did not propose allowing local governments to use arbitration, but assumed that the power already existed.

In short, from the standpoint of case law and legislative history, the majority have erred in concluding that the Legislature expressly intended to prevent adoption of arbitration to resolve labor disputes.

But the initiative must still be examined to determine whether it constitutes an improper delegation of power. As stated, the keys to this determination are whether the legislative body retains the fundamental policy-making decision and whether there are sufficient safeguards in the initiative to prevent abuse of authority. (Kugler v. Yocum (1968) supra, 69 Cal.2d 371, 381-382.)

Our analysis in Kugler aids us in ascertaining when a delegation of power amounts to an abdication of the legislative policy-making role in labor matters. In approving in that case the proposed ordinance pegging wages of Alhambra firefighters to their counterparts in Los Angeles, we stated, "Once the legislative body has determined the issue of policy, i.e., that the Alhambra wages for firemen should be on a parity with Los Angeles, that body has resolved the 'fundamental issue'; the subsequent filling in of the facts in application and execution of the policy does not constitute legislative

delegation . . . the implementation of the policy by reference to Los Angeles is not the delegation of it." (Id. at p. 377.)

Similarly, the initiative in question here does not strip policy-making powers from the legislative body of Manhattan Beach. The proposed ordinance makes a fundamental policy determination, i.e., that impasses in labor disputes involving firefighters shall be resolved not by the present adversary method, with its potential for disruption of essential services, but by a mutual reasoned appeal to an impartial arbitrator. Also, it sets forth detailed procedures concerning the selection of the arbitrator and guidelines governing his decisions. Referring disputes to an arbitrator so selected and directed, like the pegging of wages to those prevalent in Los Angeles in Kugler, is not delegating but implementing policy-making.

Further, the proposed ordinance contains safeguards sufficient to prevent abuse of the grant of authority; indeed it appears to be less susceptible to abuse than the proposal approved by this court in Kugler.

First, the present initiative, unlike the ordinance in Kugler, contemplates reference to an agency beyond the control of the city council only when all else fails. In most circumstances, the firefighters and the city council will continue to reach agreements based on normal collective

bargaining. Only when an impasse is reached will there be resort to arbitration. While it may be suggested that the availability of a compulsory arbitration alternative will discourage serious compromising by disputants, it is equally likely that the potential of an adverse binding arbitration award will encourage each side to be conciliatory. In Michigan, where compulsory arbitration is available to resolve police and firefighter labor disputes, during a 15-month period 224 disputes were settled by the parties and only 105 went to arbitration; of the latter, 17 were settled before final determination by the arbitrator. (McAvoy, Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector (1972) 72 Colum.L.Rev. 1192, 1210 (hereinafter cited as McAvoy).)

Another safeguard inherent in the present initiative is the potentiality of court review of an arbitrator's decision. Under Code of Civil Procedure section 1286.2, a court must vacate an arbitration award if, inter alia, the arbitrator exceeds his powers or his award is tainted with corruption, fraud, misconduct, or procedural irregularities. While courts will not usually examine the merits of an arbitration decision (Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332 (1974) 40 Cal.App.3d 431, 437), the prospect of judicial review on the grounds listed in section

1286.2 should deter any untoward tendency of an arbitrator to rule capriciously. Indeed, the Oregon Supreme Court has held that the existence of an appeals procedure in itself may constitute an adequate safeguard against administrative abuse. (Warren v. Marion County (Ore. 1960) 353 P.2d 257, 261-262, cited with approval in Kugler at pp. 381-382 of 69 Cal.2d.)

Most significantly, the present initiative purports to afford protection to the municipal fisc. In this regard, the city and amici claim, in a strictly policy argument, that the imposition of arbitration will inevitably lead to exorbitant labor settlements and skyrocketing taxes. Implicit in their contention is a marked antipathy to arbitrators as being biased and irresponsible, particularly in matters affecting city treasuries. No authority in support of such apprehension is offered. On the contrary, this court has recognized arbitration to be a time-honored, respected method of settling labor disputes. In Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 622, a case involving a charter amendment providing for arbitration of disputes between firefighters and a city, we declared that "state policy in California 'favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization.'"

Again, a comparison with Kugler is appropriate. There we approved the proposed ordinance even though it linked firefighter salaries in Alhambra, population 64,500, with those paid in Los Angeles, where 2,743,500 people lived at the time. (69 Cal.2d at p. 385, Burke, J., dissenting.) While Los Angeles may have had greater tax resources to pay salary increases than Alhambra and a tradition of providing some of the highest salaries in the state, we reasoned that the proposed parity plan contained safeguards because "Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra." (69 Cal.2d 371, 382.)

The arbitration provisions in the present case contain a number of financial safeguards. In contrast to the Kugler initiative, the ordinance here in question sets no floor for salaries. Although the arbitrator will not be directly responsible to the electorate, the city will share an equal role with the employees in selecting him. While the salary level in Kugler was to be determined solely by one index--the wages paid by Los Angeles--the Manhattan Beach arbitrator must weigh a number of factors. The initiative requires the arbitrator not only to consider the cost of living and existing salaries and benefits in other communities, but also "the interest and welfare of the public; [and] the

availability and sources of funds to defray the cost of any changes in wages, hours and conditions of employment." As one commentator has suggested, in reference to a provision in a Nebraska statute similar to the quoted clauses, "Such a formulation avoids the possibility of an award that would necessitate increased taxes, employee lay-offs or reduced municipal services." (McAvoy, at p. 1200.)

For the foregoing reasons I conclude that the proposed initiative is not an unconstitutional delegation of power. The people of the city should not be denied the right to determine by democratic vote how their city government is to resolve labor disputes.

I would reverse the judgment.

MOSK, J.

I CONCUR:

TOBRINER, J.

FIBREBOARD PAPER PRODUCTS CORP. v. NLRB

Supreme Court of the United States

FIBREBOARD PAPER PRODUCTS CORPORATION v. NATIONAL LABOR RELATIONS BOARD et al., No. 14, December 14, 1964

LABOR MANAGEMENT RELATIONS ACT

—Refusal to bargain — Contracting out work—Conditions of employment —Management rights ▶ 54.668

Employer was required by Sections 8(a)(5) and 8(d) of LMRA to bargain with union representing some of its employees about whether to contract out to independent contractor, for legitimate business reasons, the performance of plant maintenance work in which those employees had been engaged, where the contracting out merely involved the replacement of employees in existing bargaining unit with those of the independent contractor to do the same work under similar conditions of employment. Subject matter of the dispute involves "terms and conditions of employment" within meaning of Section 8(d) of Act, and, under the facts, to require the employer to bargain about the matter would not significantly abridge its freedom to manage the business.

—Affirmative action — Resumption of business operations—Reinstatement —Back pay ▶ 56.435 ▶ 56.511 ▶ 56.409

NLRB was empowered to order resumption of operations which had been discontinued by employer for legitimate business reasons and reinstatement with back pay of employees formerly employed therein, even though the case involved only a refusal to bargain collectively on the part of employer, and notwithstanding limitation provision of Section 10(c) of LMRA. That provision was designed to preclude Board from reinstating an individual who had been discharged because of misconduct; it was not designed to curtail Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice.

On writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit (53 LRRM 2666, 322 F.2d 411). Affirmed.

Marion B. Plant, San Francisco, Calif. (Brobeck, Phleger & Harrison and Gerard D. Reilly, with him on the brief), for petitioner.

Archibald Cox, Solicitor General (Arnold Ordman, NLRB General Counsel, Dominick L. Manoli, Associate General Counsel, Norton J. Come, Assistant General Counsel, and Marion L. Griffin, with him on the brief), and David E. Feller, Washington, D.C. (Elliot Bredhoff, Jerry D. Anker, Michael H. Gottesman, and Jay Darwin, with him on the brief), for respondents.

Lambert H. Miller and Fred B. Haught filed brief for National Association of Manufacturers, as amicus curiae, seeking reversal.

Eugene Adams Keeney and James W. Hunt filed brief for Chamber of Commerce of the United States, as amicus curiae, seeking reversal.

John B. Olverson, Van H. Viot, and Matthew J. Flood filed brief for Electronic Industries Association, as amicus curiae, seeking reversal.

Full Text of Opinion

Mr. Chief Justice WARREN delivered the opinion of the Court.

This case involves the obligation of an employer and the representative of his employees under §§ 8(a)(5), 8(d) and 9(a) of the National Labor Relations Act to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." [1] The primary issue is whether the "contracting out" of work being

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[1] The relevant provisions of the National Labor Relations Act are: "Section 8(a). It shall be an unfair labor practice for an employer—

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) . . .

* * *

"(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

* * *

"Section 9(a). Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such puposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . ."

performed by employees in the bargaining unit is a statutory subject of collective bargaining under those sections.

[FACTS OF CASE]

Petitioner, Fibreboard Paper Products Corporation (the Company), has a manufacturing plant in Emeryville, California. Since 1937 the East Bay Union Machinists. Local 1304, United Steelworkers of America, AFL-CIO (the Union) has been the exclusive bargaining representative for a unit of the Company's maintenance employees. In September 1958, the Union and the Company entered the latest of a series of collective bargaining agreements which was to expire on July 31, 1959. The agreement provided for automatic renewal for another year unless one of the contracting parties gave 60 days' notice of a desire to modify or terminate the contract. On May 26, 1959, the Union gave timely notice of its desire to modify the contract and sought to arrange a bargaining session with Company representatives. On June 2, the Company acknowledged receipt of the Union's notice and stated: "We will contact you at a later date regarding a meeting for this purpose." As required by the contract, the Union sent a list of proposed modifications on June 15. Efforts by the Union to schedule a bargaining session met with no success until July 27, four days before the expiration of the contract, when the Company notified the Union of its desire to meet.

The Company, concerned with the high cost of its maintenance operation, had undertaken a study of the possibility of effecting cost savings by engaging an independent contractor to do the maintenance work. At the July 27 meeting, the Company informed the Union that it had determined that substantial savings could be effected by contracting out the work upon expiration of its collective bargaining agreements with the various labor organizations representing its maintenance employees. The Company delivered to the Union representatives a letter which stated in pertinent part:

> For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.
>
> In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you.

After some discussion of the Company's right to enter a contract with a third party to do the work then being performed by employees in the bargaining unit, the meeting concluded with the understanding that the parties would meet again on July 30.

By July 30, the Company had selected Fluor Maintenance, Inc., to do the maintenance work. Fluor had assured the Company that maintenance costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by preplanning and scheduling the services to be performed. The contract provided that Fluor would:

> furnish all labor, supervision and office help required for the performance of maintenance work . . . at the Emeryville plant of Owner as Owner shall from time to time assign to Contractor during the period of this contract; and shall also furnish such tools, supplies and equipment in connection therewith as Owner shall order from Contractor, it being understood however that Owner shall ordinarily do its own purchasing of tools, supplies and equipment.

The contract further provided that the Company would pay Fluor the costs of the operation plus a fixed fee of $2,250 per month.

At the July 30 meeting the Company's representative, in explaining the decision to contract out the maintenance work, remarked that during bargaining negotiations in previous years the Company had endeavored to point out through the use of charts and statistical information "just how expensive and costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant." He further stated that unions representing other Company employees "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discussions with this particular Local." The Company also distributed a letter stating that "since we will have no employees in the bargaining unit covered by our present Agreement, negotiations of a new or renewed Agreement would appear to us to be pointless." On July 31, the employment of the maintenance employees represented by the Union was terminated and Fluor employees took over. That evening the

Union established a picket line at the Company's plant.

[THEORY OF BOARD]

The Union filed unfair labor practice charges against the Company alleging violations of §§ 8(a)(1), 8(a)(3) and 8(a)(5). After hearings were held upon a complaint issued by the National Labor Relations Board's Regional Director, the Trial Examiner filed an Intermediate Report recommending dismissal of the complaint. The Board accepted the recommendation and dismissed the complaint. 130 NLRB 1558, 47 LRRM 1547.

Petitions for reconsideration, filed by the General Counsel and the Union, were granted. Upon reconsideration, the Board adhered to the Trial Examiner's finding that the Company's motive in contracting out its maintenance work was economic rather than anti-union but found nonetheless that the Company's "failure to negotiate with . . . [the Union] concerning its decision to subcontract its maintenance work constituted a violation of Section 8(a)(5) of the Act."[2] This ruling was based upon the doctrine estabished in Town & Country Mfg. Co., 136 NLRB 1022, 1027, 49 LRRM 1918, *enforcement granted,* 316 F.2d 846, 53 LRRM 2054 (C. A. 5th Cir. 1963), that contracting out work, "albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act."

The Board ordered the Company to reinstitute the maintenance operation previously performed by the employees represented by the Union, to reinstate the employees to their former or substantially equivalent positions with back pay computed from the date of the Board's supplemental decision, and to fulfill its statutory obligation to bargain.

[ISSUES IN CASE]

On appeal, the Court of Appeals for the District of Columbia Circuit granted the Board's petition for enforcement. 322 F.2d 411, 53 LRRM 2666. Because of the importance of the issues and because of an alleged conflict among the courts of appeals,[3] we granted certiorari limited to a consideration of the following questions:

1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?

2. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?

We agree with the Court of Appeals that, on the facts of this case, the "contracting out" of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively. We also agree with the Court of Appeals that the Board did not exceed its remedial powers in directing the Company to resume its maintenance operations, reinstate the employees with back pay, and bargain with the Union.

[REFUSAL TO BARGAIN]

I. Section 8(a)(5) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in § 8(d) as

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

"Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment. . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. Labor Board v. American Ins. Co., 343 U.S. 395, 30 LRRM 2147. As to other matters, however, each party is free to bargain or not to bargain. . . ." Labor Board v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349, 42 LRRM 2034. Because of the limited grant of certiorari, we are concerned here only

2 The Board did not disturb its original holding that the Company had not violated §§ 8(a)(1) or 8(a)(3), or its holding that the Company had satisfied its obligation to bargain about termination pay.

3 Labor Board v. Adams Dairy, Inc., 322 F.2d 553, 54 LRRM 2171 (C. A. 8th Cir. 1963), cert. pending, No. 25, 1964 Term.

with whether the subject upon which the employer allegedly refused to bargain—contracting out of plant maintenance work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform—is covered by the phrase "terms and conditions of employment" within the meaning of § 8(d).

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See Order of Railroad Telegraphers v. Chicago & N. W. R. Co., 362 U.S. 330, 45 LRRM 3104. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.

[CONTRACTING OUT]

The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.[4] The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42-43, 1 LRRM 703. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

The conclusion that "contracting out" is a statutory subject of collective bargaining is further reinforced by industrial practices in this country. While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.[5] Labor Board v. American Nat'l Ins. Co., 343 U.S. 395, 408, 30 LRRM 2147. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework.[6] Provisions relating to contracting out exist in numerous collective bargaining agreements,[7] and "contracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584, 46 LRRM 2416.

[OLIVER CASE]

The situation here is not unlike that presented in Local 24, Teamsters Union v. Oliver, 358 U.S. 283, 43 LRRM 2374, where we held that conditions imposed upon contracting out work to prevent possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit constituted a statutory subject of collective bargaining. The issue in that case was whether state antitrust laws could be applied to a provision of a collective bargaining agreement which fixed the minimum rental to be paid by the employer motor carrier who leased vehicles to be driven by their owners rather than the carrier's employees. We held that the agreement was upon a subject matter as to which federal law directed the parties to bargain and hence that state antitrust laws could not be applied to prevent the effectuation of the agreement. We pointed out that the agreement was a

4 See declaration of policy set forth in §§ 1 and 101 of the Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §§ 141, 151 (1958).

5 See Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 405-406 (1950).

6 See Lunden, Subcontracting Clauses in Major Contracts, 84 Monthly Lab. Rev. 579, 715 (1961).

7 A Department of Labor study analyzed 1,687 collective bargaining agreements, which applied to approximately 7,500,000 workers (about one-half of the estimated work force covered by collective bargaining agreements). Among the agreements studied, approximately one-fourth (378) contained some form of a limitation on subcontracting. Lunden, supra, at 581.

direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is a fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service. [*Id.*, at 294.]

Thus, we concluded that such a matter is a subject of mandatory bargaining under § 8(d). *Id.*, at 294-295. The only difference between that case and the one at hand is that the work of the employees in the bargaining unit was let out piecemeal in Oliver, whereas here the work of the entire unit has been contracted out. In reaching the conclusion that the subject matter in Oliver was a mandatory subject of collective bargaining, we cited with approval Timken Roller Bearing Co., 70 NLRB 500, 518, 18 NLRB 1370, *enforcement denied on other grounds*, 161 F.2d 949, 20 LRRM 2204 (C. A. 6th Cir. 1947), where the Board in a situation factually similar to the present case held that §§ 8(a)(5) and 9(a) required the employer to bargain about contracting out work then being performed by members of the bargaining unit.

[PROPRIETY OF NEGOTIATION]

The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters perculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests. Yet, it is contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.

The appropriateness of the collective bargaining process for resolving such issues was apparently recognized by the Company. In explaining its decision to contract out the maintenance work, the Company pointed out that in the same plant other unions "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discusions with this particular Local." Accordingly, based on past bargaining experience with this union, the Company unilaterally contracted out the work. While "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position," Labor Board v. American Nat'l Ins. Co., 343 U.S. 395, 404, 30 LRRM 2147, it at least demands that the issue be submitted to the mediatory influence of collective negotiations. As the Court of Appeals pointed out, "it is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly."

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case —the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not

encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.[8]

[ORDER OF BOARD]

II. The only question remaining is whether, upon a finding that the Company had refused to bargain about a matter which is a statutory subject of collective bargaining, the Board was empowered to order the resumption of maintenance operations and reinstatement with back pay. We believe that it was so empowered.

Section 10(c) provides that the Board, upon a finding than an unfair labor practice has been committed,

shall issue . . . an order requiring such person to cease and desist from such unfair practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . .[9]

That section "charges the Board with the task of devising remedies to effectuate the policies of the Act." Labor Board v. Seven-Up Bottling Co., 344 U.S. 344, 346, 31 LRRM 2237. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . ." Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 194, 8 LRRM 439. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." Labor Board v. Seven-Up Bottling Co., 344 U.S. 344 346, 31 LRRM 2237. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Elec., & Power Co. v. Labor Board, 319 U.S. 533, 540, 12 LRRM 739. Such a showing has not been made in this case.

There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company.[10]

It is argued, nonetheless, that the award exceeds the Board's powers under § 10(c) in that it infringes the provision that "no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ." The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct.[11] There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice as in the case at hand.

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8 As the Solicitor General points out, the terms "contracting out" and "subcontracting" have no precise meaning. They are used to describe a variety of business arrangements altogether different from that involved in this case. For a discussion of the various types of "contracting out" or "subcontracting" arrangements, see Brief for Respondent, pp. 13-17; Brief for Electronic Industries Association as *amicus curiae*, pp. 5-10.

9 Section 10(c) provides in pertinent part: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ."

10 The Board stated: "We do not believe that requirement [restoring the *status quo ante*] imposes an undue or unfair burden on Respondent. The record shows that the maintenance operation is still being performed in much the same manner as it was prior to the subcontracting arrangement. Respondent has a continuing need for the service of maintenance employees; and Respondent's subcontract is terminable at any time upon 60 days' notice." 138 NLRB, at 555, n. 19, 51 LRRM 1101.

11 The House Report states that the provision was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H. R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). The Conference Report notes that under § 10(c) "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause [interfering with war production] . . . will not be entitled to reinstatement." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

The judgment of the Court of Appeals is

Affirmed.

Mr. Justice GOLDBERG took no part in the consideration or decision of this case.

Concurring Opinion

Mr. Justice STEWART, with whom Mr. Justice DOUGLAS and Mr. Justice HARLAN join, concurring.

Viewed broadly, the question before us stirs large issues. The Court purports to limit its decision to "the facts of this case." But the Court's opinion radiates implications of such disturbing breadth that I am persuaded to file this separate statement of my own views.

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employee to "refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in § 8 (d) as:

> the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase "terms and condition of employment." That is all the Court decides.[1] The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment" is subject to the duty to bargain collectively. Within the narrow limitations implicit in the specific facts of this case, I agree with the Court's decision.

Fibreboard had performed its maintenance work at its Emeryville manufacturing plant through its own employees, who were represented by a local of the United Steelworkers. Estimating that some $225,000 could be saved annually by dispensing with internal maintenance, the company contracted out this work, informing the union that there would be no point in negotiating a new contract since the employees in the bargaining unit had been replaced by employees of the independent contractor, Fluor. Maintenance work continued to be performed within the plant, with the work ultimately supervised by the company's officials and "functioning as an integral part" of the company. Fluor was paid the cost of operations plus $2,250 monthly. The savings in costs anticipated from the arrangement derived largely from the elimination of fringe benefits, adjustments in work scheduling, enforcement of stricter work quotas, and close supervision of the new personnel. Under the cost plus arrangement, Fibreboard remained responsible for whatever maintenance costs were actually incurred. On these facts, I would agree that the employer had a duty to bargain collectively concerning the replacement of his internal maintenance staff by employees of the independent contractor.

[BASIC QUESTION]

The basic question is whether the employer failed to "confer in good faith with respect to . . . terms and conditions of employment" in unilaterally deciding to subcontract this work. This question goes to the scope of the employer's duty in the absence of a collective bargaining agreement.[2] It is true, as the Court's opinion points out, that industrial experience may be useful in determining the proper scope of the duty to bargain. See Labor Board v. American Nat'l Ins. Co., 343 U.S. 395, 408, 30 LRRM 2147. But data showing that many labor contracts refer to subcontracting or that subcontracting grievances are frequently referred to arbitrators under collective

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1 Except for the quite separate remedy issue discussed in Part II of the Court's opinion.

2 There was a time when one might have taken the view that the National Labor Relations Act gave the Board and the courts no power to determine the subjects about which the parties must bargain—a view expressed by Senator Walsh when he said that public concern ends at the bargaining room door. 79 Cong. Rec. 7659 (1939). See Cox and Dunlop, Regulation of Collective Bargaining by the NLRB, 63 Harv. L. Rev. 389. But too much law has been built upon a contrary assumption for this view any longer to prevail, and I question neither the power of the Court to decide this issue nor the propriety of its doing so.

bargaining agreements, while not wholly irrelevant, do not have much real bearing, for such data may indicate no more than that the parties have often considered it mutually advantageous to bargain over these issues on a permissive basis. In any event, the ultimate question is the scope of the duty to bargain defined by the statutory language.

It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present Act. As originally passed, the Wagner Act contained no definition of the duty to bargain collectively.[3] In the 1947 revision of the Act, the House bill contained a detailed but limited list of subjects of the duty to bargain, excluding all others.[4] In conference the present language was substituted for the House's detailed specification. While the language thus incorporated in the 1947 legislation as enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues.[5]

The phrase "conditions of employployment" is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining-demands, would be contrary to the intent of Congress, as reflected in this legislative history. Yet there are passages in the Court's opinion today which suggest just such an expansive interpretation, for the Court's opinion seems to imply that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining.[6]

[STATUTORY PURPOSE]

Only a narrower concept of "conditions of employment" will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively. Seeking to effect this purpose, at least seven circuits have interpreted the statutory language to exclude various kinds of management decisions from the scope of the duty to bargain.[7] In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment. There are other less tangible but no less important characteristics of a person's employment which might also be deemed "conditions"—most prominently the characteristic involved in this case, the security of one's employment. On one view of the matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing condi-

3 However, it did recognize that the party designated by a majority of employees in a bargaining unit shall be their exclusive representative "for the purpose of collective bargaining in respect of rates of pay, wages, hours of employment, or other conditions of employment." (§ 9(a).)

4 H. R. 3020, 80th Cong., 1st Sess., § 2 (11) (B)(vi) (1947), in 1 Legislative History of the Labor Management Relations Act of 1947, at 166-167 (1948). (Hereinafter LMRA.)

5 The conference report accompanying the bill said that although this section "did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, [it] had to a very substantial extent the same effect . . . ." 1 LMRA 538. Though this statement refers to the entire section, it is clear from the context that the focus of attention was upon the procedures of collective bargaining rather than its scope.

6 The opinion of the Court seems to assume that the only alternative to compulsory collective bargaining is unremitting economic-warfare. But to exclude subjects from the ambit of compulsory collective bargaining does not preclude the parties from seeking negotiations about them on a permissive basis. And there are limitations upon the use of economic force to compel concession upon subjects which are only permissively bargainable. Labor Board v. Wooster Div. of Borg Warner Corp., 356 U.S. 343, 42 LRRM 2034.

7 Labor Board v. Adams Dairy, 322 F.2d 553, 54 LRRM 2171 (C.A. 8th Cir. 1963); Labor Board v. New England Web, 309 F.2d 696, 51 LRRM 2426 (C.A. 1st Cir. 1962); Labor Board v. Rapid Bindery, 293 F.2d 170, 48 LRRM 2658 (C.A. 2d Cir. 1961); Jay's Foods v. Labor Board, 292 F.2d 317, 48 LRRM 2715 (C.A. 7th Cir. 1961); Labor Board v. J. M. Lassing, 284 F.2d 781, 47 LRRM 2277 (C.A. 6th Cir. 1960); Mount Hope Finishing Co. v. Labor Board, 211 F.2d 365, 33 LRRM 2742 (C.A. 4th Cir. 1954); Labor Board v. Houston Chronicle, 211 F.2d 848, 33 LRRM 2847 (C.A. 5th Cir. 1954).

tions on employment, but the more fundamental question whether there is to be employment at all. However, it is clear that the Board and the courts have on numerious occasions recognized that unions demands for provisions limiting an employer's power to discharge employees are mandatorily bargainable. Thus, freedom from discriminatory discharge,[8] seniority rights,[9] the imposition of a compulsory retirement age,[10] have been recognized as subjects upon which an employer must bargain, although all of these concern the very existence of the employment itself.

While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and of sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.

[CONDITIONS OF EMPLOYMENT]

Applying these concepts to the case at hand, I do not believe that an employer's subcontracting practices are, as a general matter, in themselves conditions of employment. Upon any definition of the statutory terms short of the most expansive, such practices are not conditions—tangible or intangible—of any person's employment.[11] The question remains whether this particular kind of subcontracting decision comes within the employer's duty to bargain. On the facts of this case, I join the Court's judgment, because all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer. The question whether the employer may discharge one group of workers and substitute another for them is closely analoguous to many other situations within the traditional framework of collective bargaining. Compulsory retirement, layoffs according to seniority, assignment of work among potentially eligible groups within the plant—all involve similar questions of discharge and work assignment, and all have been recognized as subjects of compulsory collective bargaining.[12]

Analytically, this case is not far from that which would be presented if the employer had merely discharged all his employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company.

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8 Labor Board v. Bachelder, 120 F.2d 574, 8 LRRM 723 (C.A. 7th Cir.). See also National Licorice Co. v. Labor Board, 309 U.S. 350, 6 LRRM 674.

9 Labor Board v. Westinghouse Air Brake Co., 120 F.2d 1004, 8 LRRM 604 (C.A. 3d Cir.).

10 Inland Steel Co. v. Labor Board, 170 F.2d 247, 22 LRRM 2506 (C.A. 7th Cir.).

11 At least four circuits have held that subcontracting decisions are not subject to the duty to bargain. Labor Board v. Adams Dairy, 322 F.2d 553, 54 LRRM 2171 (C. A. 8th Cir. 1963); Jay's Foods v. Labor Board, 292 F.2d 317, 48 LRRM 2715 (C. A. 7th Cir. 1961); Labor Board v. J. M. Lassing, 284 F.2d 781 47 LRRM 2277 (C. A. 6th Cir. 1960); Labor Board v. Houston Chronicle, 211 F.2d 848, 33 LRRM 2847 (C. A. 5th Cir. 1954).

12 See notes 7, 8, and 9, supra.

While such a situation might well be considered a § 8(a)(3) violation upon a finding that the employer discriminated against the discharged employees because of their union affiliation, it would be equally possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work scheduling and remuneration, and so an evasion of his duty to bargain on these questions, which are concededly subject to compulsory collective bargaining.[13] Similarly, had the employer in this case chosen to bargain with the union about the proposed subcontract, negotiations would have inevitably turned to the underlying questions of cost, which prompted the subcontracting. Insofar as the employer frustrated collective bargaining with respect to these concededly bargaining issues by its unilateral act of subcontracting this work, it can properly be found to have violated its statutory duty under § 8(a)(5).

This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.

I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

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13 Labor Board v. United States Air Conditioning Corp., 302 F.2d 280, 50 LRRM 2151 (C. A. 1st Cir.); Labor Board v. Tak Trak, Inc., 293 F.2d 270, 48 LRRM 2855 (C. A. 9th Cir.). Cf. Katz v. Labor Board, 369 U.S. 736, 50 LRRM 2177.

NLRB v. WOOSTER DIVISION OF BORG-WARNER
356 U.S. 342 (1958)

NLRB v. WOOSTER DIVISION OF BORG-WARNER

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD v. WOOSTER DIVISION OF BORG-WARNER CORPORATION, Nos. 53 and 78, May 5, 1958

LABOR-MANAGEMENT RELATIONS ACT

—Refusal to bargain—Subjects for bargaining—Strike vote clause—Recognition clause ▶54.451 ▶54.60

Employer violated Section 8(a)(5) of Act by insisting, as a condition precedent to accepting any collective bargaining contract, that the contract contain a "ballot" clause calling for a pre-strike vote of union and nonunion employees as to employer's last offer, and a "recognition" clause excluding, as a party to the contract, the international union which had been certified by Board as bargaining agent of employees, and substituting for the international the uncertified local affiliate. Neither the ballot clause nor the recognition clause is a mandatory subject of collective bargaining under Section 8(d) of Act.

Section 8(a)(5) of Act makes it lawful to insist upon matters within, and unlawful to insist upon matters without, the scope of mandatory collective bargaining under Section 8(d) of Act.

—Refusal to bargain—Parties to contract ▶54.60 ▶54.9074

Act does not prohibit the voluntary addition of a party to a collective bargaining contract, but that does not authorize employer to exclude the certified representative of employees from the contract.

On writs of certiorari to the U.S. Court of Appeals for the Sixth Circuit (38 LRRM 2660, 236 F.2d 898). Reversed and remanded in No. 53; affirmed in No. 78.

Dominick L. Manoli, Assistant General Counsel, NLRB (J. Lee Rankin, Solicitor General, Jerome D. Fenton, General Counsel, NLRB, Stephen Leonard, Associate General Counsel, and Irving M. Herman, on brief), for NLRB.

James C. Davis, Cleveland, Ohio (Robert W. Murphy, Chicago, Ill., and Squire, Sanders & Dempsey, Cleveland, Ohio, of counsel), for Wooster Division of Borg-Warner Corp.

Full Text of Opinion

Mr. Justice BURTON delivered the opinion of the Court.

In these cases an employer insisted that its collective bargaining contract with certain of its employees include: (1) a "ballot" clause calling for a pre-strike secret vote of those employees (union and nonunion) as to the employer's last offer, and (2) a "recognition" clause which excluded, as a party to the contract, the International Union which had been certified by the National Labor Relations Board as the employees' exclusive bargaining agent, and substituted for it the agent's uncertified local affiliate. The Board held that the employer's insistence upon either of such clauses amounted to a refusal to bargain in violation of § 8(a)(5) of the National Labor Relations Act, as amended.[1]

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[1] Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

The issue turns on whether either of these clauses comes within the scope of mandatory collective bargaining as defined in § 8(d) of the Act.[2] For the reasons hereafter stated, we agree with the Board that neither clause comes within that definition. Therefore, we sustain the Board's order directing the employer to cease insisting upon either clause as a condition precedent to accepting any collective-bargaining contract.

[FACTS OF CASE]

Late in 1952, the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (here called International) was certified by the Board to the Wooster (Ohio) Division of the Borg-Warner Corporation (here called the company) as the elected representative of an appropriate unit of the company's employees. Shortly thereafter, International chartered Local No. 1239, UAW-CIO (here called the Local). Together the unions presented the company with a comprehensive collective-bargaining agreement. In the "recognition" clause, the unions described themselves as both the "International Union, United Automobile, Aircraft and Agricultural Implement Workers of America and its Local Union No. 1239, U. A. W.-C. I. O. * * *."

The company submitted a counterproposal which recognized as the sole representative of the employees "Local Union 1239, affiliated with the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)." The unions' negotiators objected because such a clause disregarded the Board's certification of International as the employees' representative. The negotiators declared that the employees would accept no agreement which excluded International as a party.

The company's counterproposal also contained the "ballot" clause, quoted in full in the margin.[3] In summary, this clause provided that, as to all nonarbitrable issues (which eventually included modification, amendment or termination of the contract), there would be a 30-day negotiation period after which, before the union could strike, there would have to be a secret ballot taken among all employees in the unit (union and nonunion) on the company's last offer. In the event a majority of the employees rejected the company's last offer, the company would have an opportunity within 72 hours, of making a new proposal and

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. * * *" 61 Stat. 140, 141, 143, §§ 158(a)(5), 159(a).

2 See § 8(d) as set forth in the text of the opinion, infra, p. 6.

3 "5. RESPONSIBILITIES OF THE COMPANY AND THE UNION

"5.4 It is agreed by both the Company and the Union that it is their mutual intent to provide peaceful means for the settlement of all disputes that may arise between them. To assist both parties to carry out this intent in good faith, it is agreed that it is essential that three basic steps be taken with respect to each dispute, in order to permit the greatest opportunity for satisfactory settlement: such steps shall include (1) a clear definition of the issue or issues, officially made known to all employees in the bargaining unit; (2) a reasonable period of good faith bargaining on the issues as defined, after such issues have been made known to all employees in the bargaining unit; and (3) an opportunity for all employees in the bargaining unit to vote, by secret, impartially supervised, written ballot, on whether to accept or reject the Company's last offer, and on any subsequent offers made.

"5.5 It is mutually agreed that the definition of issues referred to in Section 5.4 will include the proposals and counter-proposals of each party; that the reasonable period of good faith bargaining referred to in Section 5.4 shall be at least 30 days, with full discussion of the issue taking place during that period; and that the secret written ballot referred to in Section 5.4 shall be supervised by a representative of the United States Mediation and Conciliation Service, or by some other party mutually agreed upon by the Company and the Union. The Company and the Union further agree that such a ballot shall be taken on Company premises, at reasonable and convenient times, and with proper safeguards, similar to those observed in NLRB elections, being taken to insure freedom of choice and a fair election.

"5.6 It is further mutually agreed that if a majority of employees in the bargaining unit reject the Company's last offer, and the Company makes a subsequent offer within 72 hours from the time the results of the election are known, another secret, impartially supervised written ballot will be taken within the following 72 hours.

"5.7 It is further mutually agreed that the question of whether or not this Agreement is to be terminated is one of the issues subject to vote by such a secret, impartially supervised, written ballot.

"5.8 It is further mutually agreed that during the life of this Agreement the Company will not engage in any form of lockout, and the Union will not cause or permit the members of the bargaining unit to take part in any sit-down, stay-in, or slow-down, or any curtailment of work or restriction of production or interference with production, or take part in any strike or stoppage of any kind, or picket the plant, on any matter subject to arbitration, and not in any other matter, until all the bargaining procedure outlined in this Agreement, (including the Grievance Procedure, where applicable, and in all cases the three steps outlined in this Article), have been completely fulfilled." 113 N.L.R.B. 1288, 1310-1311, 36 LRRM 1439.

having a vote on it prior to any strike. The union's negotiators announced they would not accept this clause "under any conditions."

From the time that the company first proposed these clauses, the employees' representatives thus made it clear that each was wholly unacceptable. The company's representatives made it equally clear that no agreement would be entered into by it unless the agreement contained both clauses. In view of this impasse, there was little further discussion of the clauses, although the parties continued to bargain as to other matters. The company submitted a "package" proposal covering economic issues but made the offer contingent upon the satisfactory settlement of "all other issues. * * *" The "package" included both of the controversial clauses. On March 15, 1953, the unions rejected that proposal and the membership voted to strike on March 20 unless a settlement were reached by then. None was reached and the unions struck. Negotiations, nevertheless, continued. On April 21, the unions asked the company whether the latter would withdraw its demand for the "ballot" and "recognition" clauses if the unions accepted all other pending requirements of the company. The company declined and again insisted upon acceptance of its "package," including both clauses. Finally, on May 5, the Local, upon the recommendation of International, gave in and entered into an agreement containing both controversial clauses.

[THEORY OF BOARD]

In the meantime, International had filed charges with the Board claiming that the company, by the above conduct, was guilty of an unfair labor practice within the meaning of § 8(a)(5) of the Act. The trial examiner found no bad faith on either side. However, he found that the company had made it a condition precedent to its acceptance of any agreement that the agreement include both the "ballot" and the "recognition" clauses. For that reason, he recommended that the company be found guilty of a *per se* unfair labor practice in violation of § 8(a)(5). He reasoned that, because each of the controversial clauses was outside of the scope of mandatory bargaining as defined in § 8(d) of the Act, the company's insistence upon them, against the permissible opposition of the unions, amounted to a refusal to bargain as to the mandatory subjects of collective bargaining. The Board, with two members dissenting, adopted the recommendations of the examiner. 113 N.L.R.B. 1288, 1298, 36 LRRM 1439. In response to the Board's petition to enforce its order, the Court of Appeals set aside that portion of the order relating to the "ballot" clause, but upheld the Board's order as to the "recognition" clause. 236 F. 2d 898, 38 LRRM 2661.

Because of the importance of the issues and because of alleged conflicts among the Courts of Appeals,[4] we granted the Board's petition for certiorari in No. 53, relating to the "ballot" clause, and the company's cross-petition in No. 78, relating to the "recognition" clause. 353 U.S. 907.

[PROVISIONS OF ACT]

We turn first to the relevant provisions of the statute. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. * * *"[5] Section 8(d) defines collective bargaining as follows:

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. * * *" 61 Stat. 142, 29 U.S.C. § 158(d).

Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment. * * *" The duty is limited to those subjects, and within that area neither party is legally obligated to yield. Labor Board v. American Insurance Co., 343 U.S. 395, 30 LRRM 2147. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree.

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[4] Labor Board v. Darlington Veneer Co., 256 F.2d 85, 38 LRRM 2574 (C.A. 4th Cir.); Labor Board v. Corsicana Cotton Mills, 178 F.2d 344, 25 LRRM 2298 (C.A. 5th Cir.). Cf. Allis-Chalmers Mfg. Co. v. Labor Board, 213 F.2d 374, 34 LRRM 2202 (C.A. 7th Cir.).

[5] See note 1, supra.

[MANDATORY BARGAINING]

The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself.[6] Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.

Since it is lawful to insist upon matters within the scope of mandatory bargaining and unlawful to insist upon matters without, the issue here is whether either the "ballot" or the "recognition" clause is a subject within the phrase "wages, hours, and other terms and conditions of employment" which defines mandatory bargaining. The "ballot" clause is not within that definition. It relates only to the procedure to be followed by the employees among themselves before their representative may call a strike or refuse a final offer. It settles no term or condition of employment—it merely calls for an advisory vote of the employees. It is not a partial "no-strike" clause. A "no-strike" clause prohibits the employees from striking during the life of the contract. It regulates the relations between the employer and the employees. See Labor Board v. American Insurance Co., supra, at 408, n. 22. The "ballot" clause, on the other hand, deals only with relations between the employees and their unions. It substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the "representative" chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative. Cf. Medo Photo Corp. v. Labor Board, 321 U.S. 678, 14 LRRM 581.

The "recognition" clause likewise does not come within the definition of mandatory bargaining. The statute requires the company to bargain with the certified representative of its employees. It is an evasion of that duty to insist that the certified agent not be a party to the collective-bargaining contract. The Act does not prohibit the voluntary addition of a party, but that does not authorize the employer to exclude the certified representative from the contract.

Accordingly, the judgment of the Court of Appeals in No. 53 is reversed and the cause remanded for disposition consistent with this opinion. In No. 78, the judgment is affirmed.

No. 53—Reversed and remanded.

No. 78—Affirmed.

Mr. Justice FRANKFURTER joins this opinion insofar as it holds that insistence by the company on the "recognition" clause, in conflict with the provisions of the Act requiring an employer to bargain with the representative of his employees, constituted an unfair labor practice. He agrees with the views of Mr. Justice Harlan regarding the ballot clause. The subject matter of that clause is not so clearly outside the reasonable range of industrial bargaining as to establish a refusal to bargain in good faith, and is not prohibited simply because not deemed to be within the rather vague scope of the obligatory provisions of § 8(d).

Concurring and Dissenting Opinion

Mr. Justice HARLAN, whom Mr. Justice CLARK and Mr. Justice WHITTAKER join, concurring in part and dissenting in part.

I agree that the company's insistence on the "recognition" clause constituted an unfair labor practice, but reach that conclusion by a different route from that taken by the Court.

However, in the light of the finding below that the company bargained in "good faith," I dissent from the view that its insistence on the "ballot" clause can support the charge of an unfair labor practice.

Over twenty years ago this Court said in its first decision under the Wagner Act: "The theory of the Act is that *free opportunity for negotiation* with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 1 LRRM 703. (Italics added.) Today's

[6] See §§ 201(c) and 203(c) of the Act, 61 Stat. 152, 154, 29 U.S.C. §§ 171(c) and 173(c).

decision proceeds on assumptions which I deem incompatible with this basic philosophy of the original labor Act, which has retained its vitality under the amendments effected by the Taft-Hartley Act. See Labor Board v. American National Insurance Co., 343 395, 401-404, 30 LRRM 2147. I fear that the decision may open the door to an intrusion by the Board into the substantive aspects of the bargaining process which goes beyond anything contemplated by the National Labor Relations Act or suggested in this Court's prior decisions under it.

The Court considers both the "ballot" and "recognition" clauses to be outside the scope of the mandatory bargaining provisions of § 8(d) of the Act, which in connection with §§ 8(a)(5) and 8(b)(3) imposes an obligation on an employer and a union to "* * * confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *." From this conclusion it is said to follow that although the company was free to "propose" these clauses and "bargain" over them, it could not "insist" on their inclusion in the collective bargaining contract as the price of agreement, and that such insistence was a *per se* unfair labor practice because it was tantamount to a refusal to bargain on "mandatory" subjects. At the same time the Court accepts the Trial Examiner's unchallenged finding that the company had bargained in "good faith," both with reference to these clauses and all other subjects, and holds that the clauses are lawful in themselves and "* * * would be enforceable if agreed to by the unions."

Preliminarily, I must state that I am unable to grasp a concept of "bargaining" which enables one to "propose" a particular point, but not to "insist" on it as a condition to agreement. The right to bargain becomes illusory if one is not free to press a proposal in good faith to the point of insistence. Surely adoption of so inherently vague and fluid a standard is apt to inhibit the entire bargaining process because of a party's fear that strenuous argument might shade into forbidden insistence and thereby produce a charge of an unfair labor practice. This watered-down notion of "bargaining" which the Court imports into the Act with reference to matters not within the scope of § 8(d) appears as foreign to the labor field as it would be to the commercial world. To me all of this adds up to saying that the Act limits *effective* "bargaining" to subjects within the three fields referred to in § 8(d), that is "wages, hours, and other terms and conditions of employment," even though the Court expressly disclaims so holding.

I shall discuss my difficulties with the Court's opinion in terms of the "ballot" clause. The "recognition" clause is subject in my view to different considerations.

['BALLOT' CLAUSE]

I. At the start, I question the Court's conclusion that the "ballot" clause does not come within the "other terms and conditions of employment" provision of § 8(d). The phrase is inherently vague and prior to this decision has been accorded by the Board and courts an expansive rather than a grudging interpretation. Many matters which might have been thought to be the sole concern of management are now dealt with as compulsory bargaining topics. E.g., Labor Board v. J. H. Allison & Co., 165 F.2d 766, 21 LRRM 2238 (merit increases). And since a "no strike" clause is something about which an employer can concededly bargain to the point of insistence, see Shell Oil Co., 77 N.L.R.B. 1306, 22 LRRM 1158, I find it difficult to understand even under the Court's analysis of this problem why the "ballot" clause should not be considered within the area of bargaining described in § 8(d). It affects the employer-employee relationship in much the same way, in that it may determine the timing of strikes or even whether a strike will occur by requiring a vote to ascertain the employees' sentiment prior to the union's decision.

Nonetheless I shall accept the Court's holding that this clause is not a condition of employment, for even though the union would accordingly not be *obliged* under § 8(d) to bargain over it, in my view it does not follow that the company was *prohibited* from insisting on its inclusion in the collective bargaining agreement. In other words, I think the clause was a permissible, even if not an obligatory, subject of good faith bargaining.

[LEGISLATIVE HISTORY]

The legislative history behind the Wagner and Taft-Hartley Acts persuasively indicates that the Board was never intended to have power to prevent good faith bargaining as to any subject not violative of the provisions or policies of those Acts. As

a leading proponent for the Wagner Act explained:

"When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 Cong. Rec. 7660.

The Wagner Act did not contain the "good faith" qualification now written into the bargaining requirement of § 8(d), although this lack was remedied by early judicial interpretation which implied from former § 8(5), 49 Stat. 453, the requirement that an employer bargain in good faith. E.g., Labor Board v. Griswold Mfg. Co., 106 F.2d 713, 5 LRRM 728. But apart from this essential check on the bargaining process, the Board possessed no statutory authority to regulate the *substantive* scope of the bargaining process insofar as lawful demands of the parties were concerned. Nevertheless, the Board engaged occasionally in the practice of determining that certain contract terms urged by unions were conditions of employment and thereby imposing on employers an affirmative duty to bargain as to such terms rather than insist upon their unilateral determination, e.g., Singer Mfg. Co., 24 N.L.R.B. 444, 6 LRRM 405, or conversely of determining that certain clauses were not conditions of employment and thereby prohibiting an employer from bargaining over them. E.g., Jasper Blackburn Products Corp., 21 N.L.R.B. 1240, 6 LRRM 169.

These early intrusions of the Board into the substantive aspects of the bargaining process became a matter of concern to Congress, and in the 1947 Taft-Hartley amendments to the Wagner Act, Congress took steps to curtail them by writing into § 8(d) the particular fields as to which it considered bargaining *should* be required. The bill originally passed by the House of Representatives contained a definition of the term "collective bargaining" which restricted the area of compulsory negotiation to specified subjects, such as wages, hours, discharge or seniority provisions, safety conditions, and vacations. § 2 (11), H.R. 3020, 80th Cong., 1st Sess. The House Report on this bill, submitted by its sponsor, noted that the suggested provision would *require* unions and employers to bargain collectively as to specified topics and would limit that area "* * * to matters of interest to the employer and to the individual man at work." H.R. Rep. No. 245, 80th Cong., 1st Sess. 7. In explaining the need for specifying the topics over which bargaining was *mandatory,* and thereby establishing "objective standards" for the Board to follow, the Report continues:

"* * *[T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counterproposals that he may or may not make * * * [discussion of Board cases].

"These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective-bargaining agreements." Id., at 19-20.

The Senate amendment to the House bill recast these provisions to read in substantially the form of present § 8(d). That is, the Senate provisions contained no elaboration of compulsory bargaining topics, but used the general phrase: "wages, hours, and other terms and conditions of employment." In commenting on these changes, the managers of the House Conference appended a statement to the House Conference Report which observed:

"* * * [T]he Senate amendment, while it did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, had to a very substantial extent the same effect as the House bill in this regard, since it rejected, as a factor in determining good faith, the test of making a concession and thus prevented the Board from determining the merits of the positions of the parties." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 34.

[FREEDOM IN NEGOTIATIONS]

The foregoing history evinces a clear congressional purpose to assure the parties to a proposed collective bargaining agreement the greatest degree of freedom in their negotiations, and to require the Board to remain as aloof as possible from regulation of the bargaining process in its substantive aspects.

The decision of this Court in 1952 in Labor Board v. American National Insurance Co., supra, was fully in accord with this legislative background in holding that the Board lacked power to order an employer to cease bargaining over a particular clause because such bargaining under the

Board's view, entirely apart from a showing of bad faith, constituted *per se* an unfair labor practice. There an employer insisted during negotiations upon the union's acceptance of a "management functions" clause which would vest exclusively in management during the period of the collective bargaining agreement the right to select, hire, and promote employees, to discharge for cause and maintain discipline, and to determine work schedules. The arguments advanced by the Board in that case in support of its conclusion that the employer had committed an unfair labor practice through its insistence on this clause were strikingly similar to those before us here. It was said that such a clause was "in derogation of" statutory rights to bargain given to the employees, and that insistence upon it was tantamount to refusal to bargain as to all statutory subjects covered by it.

But this Court, in reversing the Board, emphasized that flexibility was an essential characteristic of the process of collective bargaining, and that whether the topics contained in the disputed clause should be allocated exclusively to management or decided jointly by management and union "* * * is an issue for determination across the bargaining table, not by the Board." 343 U.S., at 409, 30 LRRM 2147. It is true that the disputed clause related to matters which concededly were "terms and conditions of employment," but the broad rationale of the Court's opinion undercuts an attempt to distinguish the case on any such ground. "Congress provided expressly that the Board should not pass upon the desirability of the substantive terms of labor agreements. * * * The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8(d) to the facts of each case * * *." 343 U.S., at 408-409, 30 LRRM 2147.

[REQUIREMENT OF ACT]

I therefore cannot escape the view that today's decision is deeply inconsistent with legislative intention and this Court's precedents. The Act sought to compel management and labor to meet and bargain in good faith as to certain topics. This is the *affirmative* requirement of § 8(d) which the Board is specifically empowered to enforce, but I see no warrant for inferring from it any power in the Board to *prohibit* bargaining in good faith as to lawful matters not included in § 8(d). The Court reasons that such conduct on the part of the employer, when carried to the point of insistence, is in substance equivalent to a refusal to bargain as to the statutory subjects, but I cannot understand how this can be said over the Trial Examiner's unequivocal finding that the employer did in fact bargain in "good faith," not only over the disputed clauses but also over the statutory subjects.

It must not be forgotten that the Act requires bargaining, *not* agreement, for the obligation to bargain "* * * does not compel either party to agree to a proposal or require the making of a concession." § 8 (d). Here the employer concededly bargained but simply refused to *agree* until the union would accept what the Court holds would have been a lawful contract provision. It may be that an employer or union, by adamant insistence in good faith upon a provision which is not a statutory subject under § 8(d), does in fact require the other party to bargain over it. But this effect is traceable to the economic power of the employer or union in the circumstances of a given situation and should not affect our construction of the Act. If one thing is clear, it is that the Board was not viewed by Congress as an agency which should exercise its powers to aid a party to collective bargaining which was in an economically disadvantageous position.

[BARGAINING PROCESS]

The most cursory view of decisions of the Board and the circuit courts under the National Labor Relations Act reveals the unsettled and evolving character of collective bargaining agreements. Provisions which two decades ago might have been thought to be the exclusive concern of labor or management are today commonplace in such agreements.[1] The bargaining process should be left fluid, free from intervention of the Board leading to premature crystallization of labor agreements into any one pattern of contract provisions, so that these agreements can be adapted through collective bargaining to the changing needs of our society and to the changing concepts of the responsibilities of labor and management. What the

[1] A variety of topics have been held to be subjects over which an employer must bargain. E.g., Inland Steel Co. v. Labor Board, 170 F.2d 247, 22 LRRM 2506 (pension and retirement plans); Union Mfg. Co., 76 N.L.R.B. 322, 21 LRRM 1187 (bonuses).

Court does today may impede this evolutionary process. Under the facts of this case, an employer is precluded from attempting to limit the likelihood of a strike. But by the same token it would seem to follow that unions which bargain in good faith would be precluded from insisting upon contract clauses which might not be deemed statutory subjects within § 8(d).

As unqualifiedly stated in American National Insurance Co., supra, p. 7, it is through the "good faith" requirement of § 8 (d) that the Board is to enforce the bargaining provisions of § 8. A determination that a party bargained as to statutory or nonstatutory subjects in good or bad faith must depend upon an evaluation of the total circumstances surrounding any given situation. I do not deny that there may be instances where unyielding insistence on a particular item may be a relevant consideration in the overall picture in determining "good faith," for the demands of a party might in the context of a particular industry be so extreme as to constitute some evidence of an unwillingness to bargain. But no such situation is presented in this instance by the "ballot" clause. "No strike" clauses, and other provisions analogous to the "ballot" clause limiting the right to strike, are hardly novel to labor agreements.[2] And in any event the uncontested finding of "good faith" by the Trial Examiner forecloses that issue here.

[LEGALITY OF CLAUSE]

Of course an employer or union cannot insist upon a clause which would be illegal under the Act's provisions, Labor Board v. National Maritime Union, 175 F.2d 686, 24 LRRM 2268, or conduct itself so as to contravene specific requirements of the Act. Medo Photo Supply Corp. v. Labor Board, 321 U.S. 678, 14 LRRM 581. But here the Court recognizes, as it must, that the clause is lawful under the Act,[3] and I think it clear that the company's insistence upon it violated no statutory duty to which it was subject. The fact that the employer here *did* bargain with the union over the inclusion of the "ballot" clause in the proposed agreement, distinguishes this case from the situation involved in the Medo Photo Supply Corp. case, supra, where an employer, without the sanction of a labor agreement contemplating such action, negotiated *directly* with its employees in reference to wages. This Court upheld the finding of an unfair labor practice, observing that the Act "* * * makes it the duty of the employer to *bargain collectively with the chosen representatives* of his employees. The obligation being exclusive * * *, it exacts 'the negative duty to treat with no other.'" 321 U.S. at 683-684, 14 LRRM 581. (Italics added.) Bargaining directly with employees "* * * would be subversive of

2 It was stipulated by the parties during hearings on the charge of unfair labor practices that collective bargaining agreements between several unions and companies have incorporated clauses requiring, in one form or another, secret ballots of employees before the union is able to call a strike. The clauses varied in defining employees to include only union members or all those working in the unit represented by the union and gave varying effect to the employee vote. The clause here involved does not purport to make the vote of the employees binding on the union.

3 I find no merit in the union's position that the "ballot" clause is unlawful under the Act since in derogation of the representative status of the union. The statute and its legislative background undermine any such argument, for the Taft-Hartley Act incorporates in two sections provisions for a pre-strike ballot of employees and earlier drafts of the Act would have made an employee ballot *mandatory* as a condition precedent to all strikes.

The Hartley Act, as passed by the House, provided that employees should be informed in writing of issues in dispute and that a secret ballot of employees should be held on the employer's last offer of settlement and on the question of a strike. Only if the employees rejected the last offer and voted to strike could the union authorize a strike. § 2(11), H. R. 3020, 80th Cong., 1st Sess. The Report on the bill states that "* * * at least the more irresponsible strikes * * * will be greatly reduced by requiring strike votes after each side has had an opportunity to state its position and to urge its fairness upon those called upon to do the striking." H. R. Rep. No. 245, 80th Cong., 1st Sess. 22.

These mandatory provisions were later discarded, and in their place Congress enacted § 203(c) in Title II of the Taft-Hartley Act, 61 Stat. 154, 29 U.S.C. § 173(c), under which the Director of the Federal Mediation and Conciliation Service is in certain situations to seek to induce the parties in dispute to agree voluntarily to an employee vote on the employer's last offer prior to a strike. In commenting on this change, the managers of the House Conference stated: "While the vote on the employer's last offer by secret ballot is not compulsory as it was in the House bill, it is expected that this procedure will be extensively used and that it will have the effect of preventing many strikes which might otherwise take place." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 63. The inescapable conclusion in view of this legislative history is that Congress, instead of making the pre-strike ballot *mandatory*, intended to leave such ballot clauses to the *decision of the parties* to a labor agreement to be arrived at through the normal collective bargaining process. Cf. § 201(c) of Title II, 61 Stat. 152, 29 U.S.C. § 171(c). There is a further provision for a pre-strike ballot in § 209(b) of Title II, 61 Stat. 156, 29 U.S.C. § 179(b), which relates to disputes which imperil national health or safety.

the mode of collective bargaining which the statute has ordained. * * *" 321 U.S., at 684. The important consideration is that the Act does not purport to define the terms of an agreement but simply secures the representative status of the union for purposes of bargaining. The controlling distinction from Medo Photo is that the employer here has not sought to bargain over the terms of the agreement being negotiated with anyone else.

['RECOGNITION' CLAUSE]

II. The company's insistence on the "recognition" clause, which had the effect of excluding the International Union as a party signatory to agreement and making Local 1239 the sole contracting party on the union side, presents a different problem. In my opinion the company's action in this regard did constitute an unfair labor practice since it contravened specific requirements of the Act.

Section 8(a)(5) makes it an unfair labor practice for an employer not to bargain collectively "with the representatives of his employees." Such representatives are those who have been chosen by a majority of the employees of the appropriate unit, and they constitute "* * * the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *." § 9(a). The Board under § 9(c) is authorized to direct a representation election and certify its results. The employer's duty to bargain with the representatives includes not merely the obligation to confer in good faith, but also "* * * the execution of a written contract incorporating any agreement reached if requested * * *" by the employees' representatives. § 8(d). I think it hardly debatable that this language must be read to require the company, if so requested, to sign any agreement reached with the same representative with which it is required to bargain. By conditioning agreement upon a change in signatory from the certified exclusive bargaining representative, the company here in effect violated this duty.

I would affirm the judgment of the Court of Appeals in both cases and require the Board to modify its cease and desist order so as to allow the company to bargain over the "ballot" clause.

▶ *locates related rulings in Cumulative D*

119 PLACENTIA FIRE FIGHTERS, LOCAL 2147, et al., Plaintiffs and Appellants,

v.

CITY OF PLACENTIA et al., Defendants and Respondents.

Civ. 14072.

Court of Appeal, Fourth District, Division 1.

March 16, 1976.

Hearing Denied May 26, 1976.

Fire fighter's union brought action against city and certain of city's officials seeking injunctive relief against city's alleged noncompliance with and violations of statutes governing public employee organizations as well as judgment for compensatory and punitive damages and attorney's fees. The Superior Court, Orange County, William S. Lee, J., denied plaintiff relief, and plaintiff appealed. The Court of Appeal, Whelan, J., assigned, held that position of bargaining representatives of city in firmly adhering to proposal for 40-hour work week of five eight-hour days did not constitute demonstration of bad faith as matter of law; that provisions of city resolution could not be adduced as bad faith in negotiations with fire fighter's union merely because such union did not participate in consultations preparatory to adoption of resolution; that city's original demand for three-year contract did not show bad faith, even though preceding contract with another group was for one year; that no unlawful discrimination was shown when city, after breakdown of negotiations, gave administrative captains retroactive pay raise; that evidence sustained trial court's finding that city met and conferred in good faith; and that union failed to show any right to relief based upon claimed deprivation of rights, privileges or immunities secured by Constitution and laws.

Affirmed.

Silber, Benezra & Taslitz, Los Angeles, Cal., for appellants.

Calvin T. Goforth, A Professional Corp., St. Sure, Moore, Hoyt & Sizoo, Oakland, Cal., for respondents.

WHELAN, Associate Justice *.

Placentia Fire Fighters, Local 2147 (Union), plaintiff, has appealed from a judgment denying it relief in its action against City of Placentia (City) and certain of City's officials.

The action was based upon alleged denial by City of Union's bargaining rights under the Meyers-Milias-Brown Act (the Act) (Gov.Code §§ 3500–3509),[1] noncom-

* Retired Associate Justice of the Court of Appeal, sitting under assignment by the Chairman of the Judicial Council.

1. "It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies. Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed." (Gov.Code § 3500.)
"(a) 'Employee organization' means any organization which includes employees of a public agency and which has as one of its

Note 1—Continued

primary purposes representing such employees in their relations with that public agency.

"(b) 'Recognized employee organization' means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

"(c) Except as otherwise provided in this subdivision, 'public agency' means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, 'public agency' does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 3 (commencing with Section 13580) of Division 10 of the Education Code or the State of California.

"(d) 'Public employee' means any person employed by any public agency, including employees of the fire departments and fire services of the state, counties, cities, cities and counties, districts, and other political subdivisions of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state.

"(e) 'Mediation' means effort by an impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice. (Gov.Code § 3501.)

"Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency." (Gov.Code § 3502.)

"Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency." (Gov.Code § 3503.)

"The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (Gov.Code § 3504.)

"Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by such governing body, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or such boards and commissions and shall give such recognized employee organization the opportunity to meet with the governing body or such boards and commissions.

"In cases of emergency when the governing body or such boards and commissions determine that an ordinance, rule, resolution or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or such boards and commissions shall provide such notice and opportunity to meet at the earliest practicable time following the adoption of such ordinance, rule, resolution, or regulation." (Gov.Code § 3504.5.)

"The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

" 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have 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. The process should include adequate time for the resolution of impasses where specific procedures for such resolution

Note 1—Continued

are contained in local rule, regulation or ordinance, or when such procedures are utilized by mutual consent." (Gov.Code § 3505.)

"If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination." (Gov.Code § 3505.1.)

"If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations." (Gov.Code § 3505.2.)

"Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation." (Gov.Code § 3505.3.)

"Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." (Gov.Code § 3506.)

"A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500.)

"Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502 (e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (f) access of employee organization officers and representatives to work locations (g) use of official bulletin boards and other means of communication by employee organization (h) furnishing nonconfidential information pertaining to employment relations to employee organizations (i) such other matters as are necessary to carry out the purposes of this chapter.

"Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 month following the date of such recognition.

"No public agency shall unreasonably withhold recognition of employee organizations." (Gov.Code § 3507.)

"In the absence of local procedures for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute." (Gov.Code § 3507.1.)

"Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute.

" 'Professional employees,' for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists." (Gov.Code § 3507.3.)

"In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization." (Gov.Code § 3507.5.)

"The governing body of a public agency may, in accordance with reasonable standards, designate positions or classes of positions

pliance by City with and violation of that Act, of certain sections of the Labor Code, and of section 1983 of title 42, U.S.C.A. Injunctive relief was asked against such alleged noncompliance and violations, as well as a judgment for compensatory and punitive damages and attorney's fees.

Judgment was entered September 14, 1973, followed by a notice of appeal.

On September 25, 1973, bargaining representatives of City and Union executed a memorandum of understanding provided for in Government Code section 3505.1 covering the wages, hours and working conditions for the period October 1, 1973 to June 30, 1976.

Following the enactment of the Act, City, in July 1971, adopted resolutions 71–R–153 declaring a policy governing employer-employee relations under the Act. Section 5 of the resolution defined City rights as follows:

"The rights of the City include, but are not limited to, the exclusive right to . . . set standards of service; *determine the procedures and standards of selection for employment and promotion*; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons, maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; *determine the content of job classifications*; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work." [Emphasis ours.]

Elsewhere the resolution provided:

"In the establishment of appropriate units . . . (2) management and confidential employees shall not be included in the same unit with non-management or non-confidential employees."

Section 6 of the resolution provided:

"(A) The City, through its representatives, shall meet and confer in good faith with representatives of formally recognized employee organizations with majority representation rights regarding *matters within the scope of representation including wages, hours and other terms and conditions of employment* within the appropriate unit.

"(B) The City shall not be required to meet and confer in good faith on any subject preempted by Federal or State law or by the City Charter, *nor shall it be required to meet and confer in good faith on* Employee or *City Rights as defined in Sections* 4 and 5. Proposed amendments to this Resolution are excluded from the scope of meeting and conferring." [Emphasis ours.]

Following the adoption of resolution 71–R–153, City entered into a memorandum of understanding covering a period ending October 1, 1972, with Placentia City Employees Association (PCEA), which then

Note 1—Continued

which have duties consisting primarily of the enforcement of state laws or local ordinances, and may by resolution or ordinance adopted after a public hearing, limit or prohibit the right of employees in such positions or classes of positions to form, join or participate in employee organizations where it is in the public interest to do so; however, the governing body may not prohibit the right of its employees who are full-time 'peace officers' as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization. "The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section." (Gov.Code § 3508.) "The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees." (Gov.Code § 3509.)

was the bargaining unit for Fire Department personnel.

By May 8, 1972, Union was in a position to and did request City to recognize it as the representative of all Fire Department employees below the rank of fire chief. On August 9, 1972, City formally recognized Union. In a letter of that date Union was told it would represent (1) firemen and (2) fire captains (suppression). Two fire captains (Edwards and Mosley) were classed as "Fire Captains (Administrative)" and were not included in the Unit at that time; all fire captains had been grouped together in the memorandum with PCEA. On August 31 Union objected to the exclusion of those two fire captains, saying they must be included or be promoted to battalion chief, a management position.

A series of meet and confer sessions began September 22, 1972. At the first meeting both sides agreed that agreement on any individual item would be contingent on each side's accepting the total bargaining package.

Sixteen other meetings were held between representatives of City and Union, the last on January 24, 1973, at which time City made its last offer, for acceptance by 5 p. m. January 29. On January 25 City sent a letter and copy of the final offer to each member of the Fire Department. That letter asked for a second membership vote and ended with the following:

> "I must emphasize again that this is the final offer, which, if not accepted, will be withdrawn. The City Council, at its last session indicated that it may take a position against paying retroactive pay in the future."

During the course of those negotiations City receded from certain of the positions it had taken earlier, conditioned of course on the agreed-upon principle that binding agreement would result only from an overall settlement of all issues.

One point on which City did not yield was its wish to change to a 40-hour workweek, with three shifts of eight hours per day.

At the City Council meeting on January 29, a status report was presented on the negotiations with Union. The next day City declared an impasse, saying "The disputed issue is the eight hour work day, forty hour work week upon which all other segments of the City of Placentia Proposed Memorandum of Understanding is conditioned." During the month of February two impasse meetings were held. No agreement having been reached on February 26, impasse procedures were discussed. At that point City and Union had conditionally agreed upon the following: recognition, union rights, grievance procedures, probation, policy of no discrimination, retirement, life insurance, clothing allowance, payroll deductions, rules and regulations, and compensation for departmental meetings. Items still in dispute included: management rights, educational incentive program, overtime pay, work schedule, no strikes or slowdowns and no lockout, designation of work assignments, conduct of meet and confer sessions, implementation of the memorandum, and duration of the memorandum.

After City had declared an impasse on January 30, the City Council, on February 20, gave Captains Edwards and Mosley an 8.1% pay raise retroactive from October 1, 1972.

On February 28, 1973, the Mayor sent the following letter to each resident of Placentia:

> "I am sending this letter to each City resident at the request of the entire City Council because of concerns expressed by you and your neighbors. Wage and fringe benefit negotiations with Local 2147 of the Firefighters Union have continued for months without settlement. The Union has delivered leaflets door to door, made unsupported accusations, and attempted to frighten the public in their efforts to force your City Council to bow to their demands. Your Councilmen reside within the City, pay

taxes, and will not permit a reduction in our fire protection. The City seeks to maintain and improve the present level of emergency and fire protection by increasing the number of on duty fire personnel.

"Your safety is our paramount concern. To this end your City Council has taken steps to insure that fire protection will never be interrupted. Under existing Mutual Aid Agreements surrounding communities are available to provide emergency assistance. The number of volunteer fire personnel has been increased and in addition to fire vehicles, police units are being equipped with resuscitators to enable a more immediate response to breathing difficulties.

"Criticism by the Union is a smoke screen to hide the real issue—the work week. The City Council proposes that the work week for fire personnel be reduced from 67 hours per week (based on 24 hour shifts) to a 40 hour work week (based on 5 eight hour shifts). You may rightfully question why a 27 hour reduction in hours would be so bitterly opposed by the Union, especially when this places fire personnel on an equal status with the remainder of public employees who have been working a 40 hour work week for years. The City proposes 5 fully productive eight hour shifts per week. This will eliminate sleeping on the job, remove beds, televisions, kitchens, and recreational facilities from fire stations. We are simply seeking an honest days work in return for the establishment of a standard work week. The City proposes increased salaries equivalent to other local communities. The City proposal also guarantees an increased number of fire personnel on duty who are awake, clothed, and ready to respond to any emergency calls.

"City Councilmen, as your elected representatives, have the responsibility of constantly reviewing fire protection to improve service at a cost that the taxpayer can afford. Our record of reducing the property tax rate during the past two years has been criticized by Union representatives who want a larger share of your tax dollar. In these days of rising taxes, decisions about tax increases must remain in the hands of your elected officials and not be handed over to employee organizations or any third parties.

"The purpose of this letter is to advise you of our position and seek your support in our efforts to prevent raising costs beyond what we, your elected representatives, feel is fair."

At a meeting of the City Council on March 6, 1973, resolution 73-R-120 was adopted, which reduced the work-week to 40 hours, increased wages and benefits, and instituted a three-shift, eight-hour work-day. On March 20, Union wrote City asking it to postpone implementation of the 40-hour work-week. City refused and firemen were notified on April 2 that the new work-day would begin April 8. City was advised by Union that its members would not comply. The following memorandum, dated April 4, was sent to all Fire Department personnel:

"The City Council has instructed this office to implement the 8-hour per day work schedule, and recent efforts have been directed toward this implementation.

"Your Union has advised us today that it will not comply with the 8-hour work schedule set to go into effect on Sunday, April 8, 1973. This is to inform you that failure to comply with the orders of the Chief of the Fire Department is insubordination, and may result in discipline up to and including discharge.

"Every effort is being made to relieve any hardship that this changeover may entail, and it is expected that all employees of the Placentia Fire Department will cooperate with the Fire Chief's orders."

On the agenda of the City Council meeting of March 6 was "Status Report regarding City Negotiations with Interna-

tional Association of Fire Fighters." The minutes of that meeting show that the City Council was told the parties had reached an impasse and there were four options open: do nothing, use a conciliator, use an arbitrator, let the City Council decide. A resolution containing those items which the City Council could consider was presented for adoption, comments by the public were heard, and the item was passed by a unanimous voice vote. No written notice that City would consider this resolution was given to Union, as called for by Government Code section 3504.5 and by resolution 71–R–153, section 8 of which states:

> "Reasonable written notice shall be given to each recognized employee organization affected of any ordinance, rule, resolution or regulation directly relating to matters within the scope of representation proposed to be adopted by the City Council or by any board or commission of the City, and each shall be given the opportunity to meet with such body prior to adoption."

City's attorney earlier in the meeting had informed the Council it could not consider items that required Union agreement.

Union knew there was a meeting on March 6. In its letter of February 20, Union had asked for a " 'hearing on the merits of the dispute,' during the Council meeting of March 6, 1973 . . . for the *sole* purpose of determining an appropriate 'impartial' impasse procedure." City's attorney said he would present Union's request and recommend a determination by the council of the issues in the dispute. The agenda for the March 6 meeting called for a "status report" on the labor negotiations, but did not include any reference to this item under "hearings." Union had presented its position to the Council on the 40-hour work-week at a meeting on February 20, 1973. Union members and officials were present at the March 6 meeting. In introducing the subject, City's attorney made reference to the adoption of a resolution dealing with all issues not requiring Union agreement. Following this presentation there was extensive discussion on the merits of the issues by Union members, interested citizens and Council members. Anyone who wished to speak was recognized. No one objected when a councilman moved to adopt the resolution.

Union contends City did not meet and confer in good faith.

Union argues the initial exclusion from the bargaining unit of the two non-union fire captains, who were designated as "Fire Captains (Administrative)" was a violation of the Act's requirement that an "appropriate unit" be designated (Gov. Code § 3507); and, further, that this action constituted discrimination against Union [2] and was evidence of bad faith.

Union maintains that giving the two "administrative" fire captains an 8.1% pay increase retroactive to October 1, 1972 was a unilateral wage increase made during the course of negotiations, and as such represented a *per se* violation of the duty to "meet and confer in good faith" under Government Code section 3505. Additionally, if that action was improper it would constitute discrimination on the basis of Union membership proscribed by Government Code section 3506.

Union says the letter sent to each member of the Fire Department January 25, 1973, by City was an attempt to negotiate directly with Union members and therefore constituted a violation of the duty to meet and confer in good faith.

On January 12, 1973, Union members, by secret ballot, had rejected a package similar to City's final offer.

The definition by City of management rights in resolution 71–R–153, and their recognition in the to-be-bargained-for agreement, are cited as evidence of bad

2. Government Code section 3506 reads: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502."

faith, specifically with regard to the determination of work assignments of firemen and fire captains.

21 City's proposals to eliminate educational incentive pay are said to be evidence of bad faith, as are its proposals for a non-strike, non-lockout, non-picketing clause.

City's regulations, embodied in resolution 71-R-153, are said to be unreasonable in the provision for exclusive power of the municipal relations officer to make unit determinations; and in the provision for the Council's making the impasse decision on the merits.

Several things are apparent from the Act:

[1] Agreement between the public agency and its employees is to be sought as the result of meetings and conferences held in good faith for the purpose of achieving agreement if possible; but agreement is not mandated. It follows that government is not required to cease operations because agreement has not been reached.

[2] There is to be only one employee representative of a unit; but a member of that unit is not required to join the representative group and may bargain directly with the public agency.

[3] In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so.

[4] Union, in attacking the trial court's finding that City met and conferred in good faith, contends in substance that the evidence shows as a matter of law City did not meet and confer in good faith. Prominent in that contention is the argument City's position on the 40-hour work-week could not be maintained in good faith. No attempt is made to show why that position could not be maintained in good faith any less than one of the alternatives adhered to by Union.

City's position does not appear to be unreasonable. In *Fire Fighters Union v. City of Vallejo*, 12 Cal.3d 608, 116 Cal. Rptr. 507, 526 P.2d 971, one of the alternatives proposed by the firefighters was a 40-hour work-week.

In the case at bench City did not take the position that consideration of the structure of the work-week was the exclusive function of City. A reasonable case can be made for the 40-hour work-week of five eight-hour days. The firm adherence to such a work-week based upon such reasons is not inevitably a demonstration of bad faith.

[5] In a case involving a city charter provision for mandatory arbitration of unresolved issues in city employer-employee negotiations (*Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608, 617, 116 Cal.Rptr. 507, 513, 526 P.2d 971, 977) it was said:

"[T]he bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter."

The same may be said of federal law and decisions when helpful in application of the Act where its provisions are similar to those of the National Labor Relations Act.

As related to the question of good faith, City's continued insistence on the 40-hour work-week, which is not essentially unreasonable, is justified by the authorities.

The court in *N.L.R.B. v. General Electric Company*, 418 F.2d 736, 762, defines the nature of the task of assessing "good faith":

"These are not simple tests; they will not be resolved by formular incantations. Sadly, neither will they be so precise that one will always know the exact limits of what is allowed, and what forbidden—but this is a problem hardly unknown in the law or to judges. The dif-

ficulty here, however, arises out of the herculean task of legislating a state of mind. Congress has ordered the Board —and this court—to effectuate its policy of encouraging good faith bargaining, and not to avoid it because the mandate is difficult to apply."

The National Labor Relations Act defines the duty to bargain:

"[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . ." (29 U.S.C.A. § 158(d).) [Emphasis ours.]

[6] The "right to remain firm" is thus established as the corollary to the duty to bargain in good faith. No mandatory duty to agree is imposed by the Meyers-Milias-Brown Act and the "right to remain firm" has been implicitly recognized (*Los Angeles County Employees Assn., Local 660 v. County of Los Angeles,* 33 Cal.App.3d 1, 7, 108 Cal.Rptr. 625).

The court in *N.L.R.B. v. Herman Sausage Co.*, 275 F.2d 229, 231–232, elaborates on the interplay between "good faith" and genuine firmness:

"[T]he employer may have either good or bad reasons, or no reason at all, for insistence on the inclusion or exclusion of a proposed contract term. If the insistence is genuinely and sincerely held, if it is not mere window dressing, it may be maintained forever though it produce a stalemate. . . .

"The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained. . . .

"On the other hand while the employer is assured these valuable rights, he may not use them as a cloak. In approaching it from this vantage, one must recognize as well that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than mere 'surface bargaining,' or 'shadow boxing to a draw,' or 'giving the Union a runaround while purporting to be meeting with the Union for purpose of collective bargaining.'"

[7] Bad faith on the part of City in meeting and conferring cannot be found in the provisions of resolution 71–R–153. That resolution presumably was adopted after "consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations" as provided in section 3507 of the Act; its provisions cannot be adduced as bad faith in subsequent negotiations merely because Union may not have participated in the consultations preparatory to adoption of the resolution.

In any event, the acceptance by City of certain proposals by Union in the impasse conferences depart from a strict adherence to the resolution's definition of City rights, notably as to "the procedures and standards of selection for employment and promotion," and as to City's right to "determine the content of job classifications." We refer to City's willingness to have all "Fire Captains" included in the bargaining unit; its agreement as to probationary employment, a grievance procedure to include advisory arbitration; and an employment policy of no discrimination.

[8] City's original demand for a three-year contract did not show bad faith, even though the preceding contract with another group was for one year. The fact Union later made a three-year contract seems to negate bad faith on the part of City, as does the fact City in the impasse offer

made by it was willing to make the contract for one year.

[9] City's original recognition of Union excluded two administrative fire captains from the bargaining unit. City's stated position was and is that the administrative captains had administrative duties.

The Supreme Court in *Fire Fighters Union v. City of Vallejo, supra,* 12 Cal.3d 608, 618, 116 Cal.Rptr. 507, 514, 526 P.2d 971, 978, stated:

> "The city contends that this proposal may not apply to appointment or promotion to the position of deputy fire chief. Although the Vallejo charter does not contain any provision for determining the proper bargaining unit, supervisory or managerial employees are routinely excluded from the bargaining units under the National Labor Relations Act. [Citations.] [B]y analogy, we conclude that under the charter the union can claim no right to bargain as to supervisory positions."

Nevertheless, City has not been unwilling to bargain as to the inclusion of the administrative captains within the bargaining unit. Those men were Edwards and Mosley. Those men were not members of Union, but had not been separately classified in the memorandum of understanding with the PCEA. Union, in the negotiations, contended those two captains should be included in the bargaining unit. City was willing in December 1972 to agree to that as a condition of an overall agreement that was not reached.

That was not necessarily a concession that City's earlier position was unreasonable that the two men should not be included in the unit because they were administrative employees. There is a recognized distinction between the horizontal union and the vertical union. Union here took the position only a horizontal union was acceptable. A contrary position was not essentially unreasonable.

On that basis no unlawful discrimination was shown when City, after the breakdown of negotiations, gave the administrative captains a retroactive pay raise; they were not then members of Union, were not within the bargaining unit as then established, were free under the Act to deal directly with City, and for all that appears may have been entitled to separate treatment by reason of their duties. Similar raises were later given to the other captains.

[10] City's demand for a no-strikes, no-slowdowns, no-lockouts provision, even without an arbitration agreement, was not necessarily evidence of bad faith.

[11] Without continuing to detail each of the other separate matters which are said by Union to show City's bad faith, we note that as to some of those based upon specific conduct of individuals rather than bargaining demands there was a conflict in the evidence; as to others permissible inferences negated bad faith; as to all no relationship was shown between the individual whose conduct was in question and the bargaining officer of City. We find the trial court's finding that City did meet and confer in good faith to be supported by the evidence.

[12] The Act provides that public agencies shall "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment . . ." (Gov.Code § 3505.) This duty includes negotiating on subjects within the scope of bargaining, and carrying on the meet and confer sessions in a manner labeled "good faith."

[13] The question of good or bad faith is primarily a factual determination based on the totality of the circumstances (see, e. g., *N.L.R.B. v. Insurance Agents' International Union,* 361 U.S. 477, 498, 80 S.Ct. 419, 432, 4 L.Ed.2d 454; *N.L.R.B. v. General Electric Company, supra,* 418 F.2d 736, 756 and therefore on appeal the trial court's finding must be upheld if it is supported by the record as a whole. (NLRB decisions are similarly treated on review.)

(*N.L.R.B. v. Herman Sausage Co., supra,* 275 F.2d 229, 231 (5 Cir.).)

[14] In general, good faith is a subjective attitude and requires a genuine desire to reach agreement (*N.L.R.B. v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26 (9 Cir.); *N.L.R.B. v. Mrs. Fay's Pies*, 341 F. 2d 489 (9 Cir.)). The parties must make a serious attempt to resolve differences and reach a common ground (*N.L.R.B. v. Insurance Agents' International Union, supra*, 261 U.S. 477, 485, 80 S.Ct. 419, 425, 4 L.Ed.2d 454). The effort required is inconsistent with a "predetermined resolve not to budge from an initial position." (*National Labor Relations Bd. v. Truitt Mfg. Co.*, 351 U.S. 149, 154, 76 S.Ct. 753, 757, 100 L.Ed. 1027—concurring opinion; *N.L.R.B. v. General Electric Company, supra*, 418 F.2d 736, 762.)

The court's findings were adequate and covered all questions of fact as to which Union requested findings and could properly request specific findings.

Code of Civil Procedure section 632 provides in part:

"Where findings are required, they shall fairly disclose the court's determination of all issues of fact in the case. . . ." [Added by amendment in 1968.]

Code of Civil Procedure section 634 reads as follows:

"When written findings and conclusions are required, and the court has not made findings as to all facts necessary to support the judgment or a finding on a material issue of fact is ambiguous or conflicting, and the record shows that such omission, ambiguity or conflict was brought to the attention of the trial court . . . it shall not be inferred on appeal . . . that the trial court found in favor of the prevailing party as to such facts or on such issue." [Significantly amended in 1959.]

In *Morris v. Thogmartin*, 29 Cal.App.3d 922, 928–929, 105 Cal.Rptr. 919, the court discusses the purpose and scope of the several amendments to the Civil Code sections on the requirements of findings and reviews the cases construing the statutes. Among the material cited the following from *Ball v. American Trial Lawyers Assn.*, 14 Cal.App.3d 289, 307, 92 Cal.Rptr. 228, is relevant in this instance:

" 'Whether a finding be in terms of a finding of an ultimate fact or whether it be a mislabeling of a conclusion of law, in face of a request for findings of specific facts under Code of Civil Procedure section 634, a finding may be inadequate. The purpose of section 634 "was to discourage the mere finding of so-called ultimate facts when such method left counsel and the appellate court unable to determine the trial court's resolution of the conflicting facts needed for a factual determination of the case. The purpose of the amendment was to compel the trial judge, when requested, to make findings on specified material issues of fact." [Citations.] A finding on a subsidiary fact probative of the ultimate fact can be material. "The findings of probative facts can be used to overcome an express finding of the ultimate fact found, or [sic] where it appears that the trial court made the alleged finding of ultimate fact simply as a conclusion from the particular facts found." [Citation.] The findings of fact must be definite and certain so that the defeated party may show how or in what manner the findings made are unsupported by the evidence. [Citations.]' " (29 Cal. App.3d 922, 928–929, 105 Cal.Rptr. 919, 923.)

[15] However, the court has no duty to make findings as to every mattter on which evidence is received at trial (see *Coleman Engineering Co. v. North American Aviation, Inc.*, 65 Cal.2d 396, 410, 55 Cal.Rptr. 1, 420 P.2d 713; *Kanner v. Globe Bottling Co.*, 273 Cal.App.2d 559, 568, 78 Cal.Rptr. 25).

" 'Failure to make definite findings on factual issues presented by pleadings, particularly where there is substantial

evidence which would have sustained a finding for the appealing party, requires a reversal.'" (*Morris v. Thogmartin*, 29 Cal.App.3d 922, 928, 105 Cal.Rptr. 919, 923, quoting *Hine v. Carmichael*, 205 Cal.App.2d 663, 666, 23 Cal.Rptr. 331.)

But the court has also concluded:

"[I]f findings are made upon issues which determine the cause and uphold the judgment, other issues become immaterial and a failure to find thereon does not constitute prejudicial error." (*Santoro v. Carbone*, 22 Cal.App.3d 721, 730, 99 Cal.Rptr. 488, 494.)

[16] The court was not required to incorporate findings of fact proposed by Union which were contrary to or inconsistent with findings which the court did make.

[17] Union has not shown any right to relief based upon the claimed deprivation of "rights, privileges or immunities secured by the Constitution and laws." The trial court's holding on that issue was proper. That extends to the actions of the City Council after the impasse negotiations had failed to reach an overall agreement.

It is not clear whether the trial court's conclusion of law that "[t]he suitability of the eight hour day work schedule is a question of policy within the exclusive province of the City Council and will not be considered or decided by the Court" referred only to the specific action taken by the City Council at the meeting of March 6, 1973, or was intended as a general proposition that the question of the length of a work-day for firemen was not within the scope of bargaining under the Act. If the latter was intended, which seems unlikely, in view of the specific language of the Act and the reasoning of *Fire Fighters Union v. City of Vallejo, supra*, 12 Cal.3d 608, 617, 116 Cal.Rptr. 507, 526 P.2d 971, the trial court was in error.

If the trial court meant that City was not powerless after the breakdown of negotiations to carry on the business of government in fixing hours of employment that were not unreasonable, then the trial court's conclusion was proper.

We are not prepared to lay down a blueprint for the future guidance of the parties.

The judgment is affirmed.

GERALD BROWN, P. J., and COLOGNE, J., concur.

[INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS UNION LOCAL 1974, AFL-CIO, Plaintiff and Appellant,

v.

CITY OF PLEASANTON et al., Defendants and Respondents.

Civ. 36270.

Court of Appeal, First District, Division 4.

April 2, 1976.

Hearing Denied May 26, 1976.] 195

Labor union representing city fire fighters brought action against city seeking injunctive and mandatory relief against certain provisions contained in resolution passed by city council. The Superior Court, County of Alameda, Donald R. Fretz, J., granted union injunctive relief with respect to three provisions of resolution and denied union relief with respect to three provisions of resolution, and the union appealed. The Court of Appeal, Rattigan, Acting P. J., held that amendment pertaining to announcement of examinations constituted a substantial change in procedure to be followed in announcing examinations and affected a condition of employment, so that city was obligated under statute to meet and confer in good faith with union to discuss proposed amendment before proceeding with its adoption, that determination that amendment was reasonable was irrelevant, that amendment to rules and regulations relating to probation-

Davis, Cowell & Bowe, Alan C. Davis, David J. Salniker, San Francisco, Cal., for plaintiff and appellant.

Kenneth C. Scheidig, City Atty., City of Pleasanton, Pleasanton, Cal., for defendants and respondents.

⊥RATTIGAN, Acting Presiding Justice.⊥

International Association of Fire Fighters Union Local 1974, AFL–CIO, a labor union (hereinafter "appellant union," or "union") appeals from a judgment entered in its action against respondents (the City of Pleasanton, its city manager, and the

members of its City Council). The appeal challenges the judgment insofar as it reflects the trial court's determination that legislative action taken by the City Council, affecting City personnel represented by the union, is valid despite the City's previous failure to have complied with certain provisions of the Meyers-Milias-Brown Act (hereinafter the "M-M-B Act," or the "Act").[1]

FACTS

The issues in the cause were joined upon the union's complaint, respondents' answer, and extensive declarations filed by both
963 sides. By stipulation, it was submitted for decision upon these documents and other evidence, both oral and documentary, received at a hearing upon the union's application for a preliminary injunction. That evidence supports the following summary:

At all pertinent times since 1970, the union has been the "recognized employee organization" representing all of the City's fire service employees, except for the fire chief, pursuant to sections 3501, 3502, and 3503 of the M-M-B Act.[2] By formal action taken on April 5, 1971, the City Council adopted a three-part legislative package entitled "Personnel Manual," or "Personnel Rules." Part I was City Ordinance No. 626 (entitled "Personnel Ordinance"). Part II was Council Resolution 71-73 (". . . Personnel Rules and Regulations"). Part III consisted of Resolutions 71-74 ("Employer And Employee Relations Procedures") and 71-75 ("Rules Supplementing Those In Resolution 71-74 Relating To Employer and Employee Relations").

Following the adoption of the "Personnel Manual," and pursuant to procedures prescribed therein, representatives of the City and the union negotiated an agreement relating to the salaries of the fire service employees represented by the union (including fire captains and the fire prevention officer), and other matters affecting such employees, for a two-year term 964
covering the fiscal years 1971-1972 and 1972-1973. The agreement was reduced to writing in the form of a "Memorandum Of Understanding" which was executed on behalf of the parties, accepted by the City Council, and took effect July 1, 1971.

On and after April 25, 1973, meetings were held between representatives of the union and the City for the purpose of ne-

1. Except where otherwise expressly indicated, all statutory references herein are to the M-M-B Act. (Gov.Code, div. 4 ["Public Officers And Employees"], ch. 10 ["Local Public Employee Organizations", commencing with § 3500].)

2. Section 3501 provides in pertinent part:
"3501. *Definitions.* As used in this chapter [i. e., in the M-M-B Act]:
"(a) 'Employee organization' means any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in their relations with that public agency.
"(b) 'Recognized employee organization' means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.
"(c) . . . '[P]ublic agency' means every . . . . city . . . .
"(d) 'Public employee' means any person employed by any public agency, including employees of the fire departments and fire services of . . . cities . . . ."

The other two sections here cited provide, in full respectively:
"3502. Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.
"3503. Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency."

gotiating a new agreement for the upcoming 1973–1974 fiscal year which was to commence July 1, 1973. The meetings resulted in an agreement between the union and the City on the wages, hours and working conditions of all of the City's fire service employees, including fire captains and the fire prevention officer, for the new fiscal year. The agreement was to take effect July 1, 1973, thus succeeding the aforementioned two-year agreement in point of time. It was similarly reduced to writing in the form of a "Memorandum Of Understanding." It was executed by union representatives and the city manager, and was accepted by the City in a resolution adopted by the City Council, in late June, 1973.

Meanwhile, the City had developed proposals for amendment of its 1971 "Personnel Manual" in certain respects. The substance of the proposed amendments was drafted into a memorandum prepared by a member of the city manager's staff. (We hereinafter refer to this document as the "staff memorandum.") A copy of the staff memorandum was delivered to the union. Its contents were subsequently discussed, between representatives of the union and the city, on at least two occasions. (See fn. 8, *post.*) The union expressed its approval of some of the proposals on these occasions, and its disapproval of others, but the City did not at any time submit the proposals to them as subjects for negotiation; the City's stated position was that its unilateral adoption of the proposed amendments was in order because they were strictly "management prerogatives."

The amendments were included in Resolution 73–111, which was presented for action at a meeting of the City Council held on June 25, 1973. Union representatives appeared at the meeting and objected to the resolution upon the grounds subsequently asserted by the union in this action. The Council, adhering to the City's "management prerogative" position, adopted Resolution 73–111 over the union's objection.

As adopted, and as now pertinent, Resolution 73–111 amended provisions of the 1971 "Personnel Manual" relative to (1) the definition of an employee "grievance," (2) pay for sick leave earned by an employee but not actually taken, (3) "educational incentive pay," (4) the procedure whereby the City announced competitive examinations for employment, (5) the time at which an employee serving an initial twelve-month probationary period would be eligible for a non-automatic "merit pay increase" and (6) the reclassification of employees holding the positions of "Fire Captain" and "Fire Prevention Officer" as "Middle Management" employees of the City. (Some specifics of the last three of these amendments, and of their respective factual contexts and effects, are hereinafter recited.)

1965

The Litigation

The union thereupon commenced the present action against respondents, seeking injunctive and mandatory relief against the six provisions of Resolution 73–111 enumerated above. After the issues had been joined, heard and submitted, the trial court filed a detailed memorandum decision ("Statement Of Intended Decision") indicating that injunctive relief would be granted in some of the respects prayed by the union and that relief would be denied in others. The court thereupon entered a judgment, without making formal findings of fact and conclusions of law.[3]

Pursuant to the court's memorandum decision, paragraph "1." of the judgment enjoins the City from implementing Resolution 73–111 in the first three respects challenged by the union (the amendments relative to the definition of "grievance," payment for unused sick leave, and "educa-

3. Findings and conclusions were omitted because no party requested them. (See Code Civ.Proc., § 632; Rule 232(b), California Rules of Court.)

tional incentive pay").[4] Paragraph "2." of the judgment denies relief in the fourth, fifth and sixth respects (the amendments affecting the City's announcement of examinations for employment, the timing of "merit pay increases" for probationary employees, and the reclassification of the positions of "Fire Captain" and "Fire Prevention Officer" as "Middle Management" employees of the City).

Appealing from the judgment insofar as it denies relief as to the last three amendments (see fn. 15, *post*), the union contends 1966 that their unilateral adoption in Resolution 73–111 was void for the City's failure to have complied with the provisions of the M–M–B Act next identified.

Section 3504.5 of the M–M–B Act required the City to give "reasonable written notice" to the union, as a "recognized employee organization," of any proposal for legislative action "directly relating to matters within the scope of representation."[5] The first paragraph of section 3505 further required the City to "meet and confer in good faith" with representatives of the union, concerning "wages, hours, and other terms and conditions of employment" of the personnel represented by the union; according to the section's second paragraph, in which the term "meet and confer in good faith" is defined, the City's obligation to do this extended to "matters within the scope of representation."[6] The recurrent term "scope of representation" is defined in section 3504 to include—with a specified exception not pertinent here—*all* matters affecting the employer-employee relationship, "including, but not limited to, wages, hours, and other terms and conditions of employment."[7]

[1] It first appears that the trial court 1967 sustained the union's contentions that the City had *in fact* failed to give notice to the union in compliance with section 3504.5, and to "meet and confer in good faith" with

4. Paragraph "1." of the judgment enjoins the City from "implementing, enforcing, or giving effect" to the sections of Resolution 73–111, which pertain to these three subjects, "to the extent said sections pertain to fire fighters employed by the City of Pleasanton."

5. Section 3504.5 provides in pertinent part: ". . . [T]he governing body of a public agency, and boards and commissions designated by law or by such governing body, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or such boards and commissions and shall give such recognized employee organization the opportunity to meet with the governing body or such boards and commissions. . . ."

6. Section 3505 states: "[¶] The governing body of a public agency or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall *meet and confer in good faith regarding wages, hours, and other terms and conditions of employment* with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501 [see fn. 1, *ante*], and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have 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. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance, or when such procedures are utilized by mutual consent." (Italics added.)

7. Section 3504 provides: "The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

the union's representatives as contemplated in section 3505, concerning any of the above-enumerated amendments proposed for adoption in Resolution 73–111.[8] It further appears that, having determined this fact, the court denied relief against the fourth and fifth amendments thus adopted (relative to the announcement of "examinations" and the eligibility of probationary employees for "merit pay increases") upon the ground that neither of them pertained to "wages, hours, and other terms and conditions of employment" (§ 3505), or to matters within "the scope of representation" (*id.*, and § 3504), or either, so as to require the City to engage in a "meet and confer" procedure with the union, pursuant to section 3505, before adopting either amendment.

The standards controlling our review of the trial court's action in these respects have been established. In the first place, the courts have not been reluctant to intervene "when a public agency has taken unilateral action without bargaining at all. In such situations, courts have been quite zealous in condemning the unilateral action and in granting appropriate relief." (Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act In The Courts* (1972) 23 Hastings L.J. 719, 753–754.) Moreover:

[2] "Section 3503 establishes the right of recognized employee unions directly to represent their members in 'employment relations with public agencies.' This right to representation reaches '*all* matters of employer-employee relations,' (Gov.Code, § 3502; italics added) and encompasses 'but [is] not limited to wages, hours, and other terms and conditions of employment' (Gov.Code, § 3504)." (*Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 388, 113 Cal.Rptr. 461, 521 P.2d 453, 465 [Original emphasis; footnote omitted. For the texts of the M–M–B Act sections cited, see fn. 2, *ante*].) The M–M–B Act thus "defines the *scope* of the employee's right to union representation in language that is broad and generous." (*Ibid.* [Original emphasis].) The phrase "wages, hours, and other terms and conditions of employment" is to be liberally construed, consistent with the "generous interpretation" which has been accorded it in decisions dealing with the federal law from which it has been incorporated into the M–M–B Act. (*Id.*, at p. 391, 113 Cal.Rptr. 461, 521 P.2d 453.)

[3] The Act is also to be construed in light of its purposes, which are stated in section 3500 as follows: "It is the purpose of this chapter [i. e., of the Act] *to promote full communication between public employers and their employees* by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment be-

8. As we have seen, there was evidence that the proposed amendments, which were finally adopted in Resolution 73–111, were communicated to the union, in writing, at least two months before the resolution was adopted in June, 1973. There was also evidence that all of the proposals were discussed at a meeting which was called for that purpose and which was attended by representatives of the union and a representative of the City; and that the proposal for reclassification of "Fire Captain" and "Fire Prevention Officer" as "Middle Management" positions was discussed at one of the meetings which produced the "Memorandum Of Understanding" covering the 1973–1974 fiscal year. It also appears that the latter meetings were conducted for the purpose of negotiating that agreement, as "meet and confer" sessions pursuant to section 3505. (See fn. 6, *ante*). The possibility that the City *did* give notice of the various proposals to the union, and that it *did* "meet and confer in good faith" with union representatives concerning them, was accordingly suggested to the trial court. Despite the absence of findings on either subject (see fn. 3 and the accompanying text, *ante*), it is clear from the memorandum decision that the court determined to the contrary in both respects. We have resorted to the memorandum decision, as we may do, for the purpose of ascertaining the process by which the trial court reached its decision. (See *Niles Sand & Gravel Co. v. Alameda County Water Dist.* (1974) 37 Cal.App.3d 924, 933 [fn. 10], 112 Cal.Rptr. 846 and authorities there cited.)

tween public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies. . . ." (Italics added.)

The Amendment Relative To The Announcement of "Examinations"

The original provision of the "Personnel Manual" on this subject appeared in section 601 (entitled "Announcement" and hereinafter cited as "section 601") of the "Rules and Regulations" adopted in Resolution 71–73. The original text of section 601 read:

"All examinations for classes in the competitive service shall be publicized by posting announcements a minimum of 15 days in advance in the City Hall, on official bulletin boards, and by such other methods as [the City's] Personnel Officer deems advisable. The announcements shall specify the title and pay of the class for which the examination is announced, preparation desirable for the performance of the work of the class, the manner of making application, minimum requirements and qualifications for the class, conditions of employment if any and other pertinent information."

1969

Section 2 of Resolution 73–111 amended section 601 to read as follows:

"All examinations for classes in the competitive service shall be publicized by the Personnel Officer by whatever means and for whatever duration of time the Personnel Officer deems advisable prior to the holding of an examination. The Personnel Officer in making his determination as to the manner and duration of announcing an examination shall take into consideration the position to be filled, the number of applications on file with the City and such other factors as will insure a sufficient number of applicants for the position. . . . [The third and final sentence of the amended section reiterated its original second sentence, quoted above, without change.] . . ."

In its memorandum decision (see fn. 8, *ante*), the trial court discussed and disposed of the section 601 amendment in this language: "Plaintiff [union] says the safety of fire fighters is involved, that hiring and filling of vacancies at any level relates to conditions of . . . employment. Basic to this argument is the premise expressed by plaintiff that the changed method 'inevitably results in the hiring of employees who are unqualified.' Safety is surely of prime importance but no evidence convinces the Court that the premise that unqualified employees will be hired is true. The uncontradicted evidence was that many more than required take the examinations. Reasonable steps to reduce that number without lowering employee quality seem proper.[9] . . . [¶] The Court finds the City's action proper re announcement of examinations."

The court thus rejected the union's arguments that the amendment portended the "hiring of employees who are unqualified" and that it was accordingly within "the scope of representation" as defined in section 3504 (see fn. 7, *ante*) and subject to the "meet and confer" requirements of section 3505 (fn. 6), because it pertained to the represented employees' "safety" con-

9. These two sentences obviously refer to the reason for the proposed amendment as stated in the staff memorandum. "In recent years, the number of qualified applicants for most positions in the competitive service has become astronomical. For example, for positions of Policeman or Fireman we will administer examinations to normally 250 to 300 individuals. Testing these many individuals is of no real value to the City." The author of the memorandum therefore recommended the amendment later adopted, for the stated reason that "the number of applicants tested could be reduced to a more appropriate and workable number."

ceived as a pertinent "condition[] of employment." (§ 3504.) The court also determined that the amendment was "[r]easonable." (See the text at fn. 9, *ante*.)

[4, 5] We first conclude that the latter determination does not command validation, of the amendment of section 601, because it is irrelevant. The question is not whether the amendment is "reasonable" or was effected for good cause, nor even whether the City was empowered to adopt it over objections expressed by the union in a "meet and confer" procedure. The issue is whether the M–M–B Act permitted the City to adopt it, unilaterally, *in the absence* of such procedure.

It appears that the trial court properly rejected the union's "safety" argument, and the "unqualified employee" consequences claimed for the amendment of section 601, as unsupported by the evidence. We nevertheless conclude that the amendment has further consequences that brought it within the "scope of representation" (§ 3504) and, accordingly, within the "meet and confer" requirements of section 3505. The reason for the amendment as stated in the city manager's staff memorandum, and the trial court's review of it, were addressed exclusively to the announcement of "examinations" to be given prospective employees who propose to enter the employ of the City for the first time and whose numbers had become unmanageable for examination purposes. (See fn. 9 and the accompanying text, *ante*.) The "examinations" actually involved are not limited to applicants for first-time employment. We refer to the following sections of Resolution 71–73, none of which was amended by Resolution 73–111 (and all of which were apparently overlooked below):

Section 111 defines four different types of "Examination[s]": "Open Competitive," "Promotional," "Continuous," and "Open-Promotional." Eligibility to take at least two of these (the "Promotional" and "Open-Promotional" types) is expressly limited by section 111 to *present employees* of the City ("permanent employees" who "meet the qualifications" for the prospective position in the one case, "permanent and probationary employees" with the requisite "qualifications" in the other), who seek *promotion* as distinguished from initial employment.

Section 118 defines "[p]romotion" as "[t]he movement of an employee from one class to another class having a higher maximum rate of pay." Section 105 defines a "[c]lass" as an identifiable "grouping" of employees. All of these sections pertain to positions in the City's "competitive service[s]," which section 107 defines to include all City employees except a limited number whose positions are "excluded" from the definition, by section 107 itself, and are named among the few "exempt services" positions listed in section 1912. Section 1302 provides that [i]nsofar as consistent with the best interests of the service *all* vacancies in the competitive service shall be filled *by promotion from within the competitive service after a promotional examination has been given*. . . ." (Italics added.)

In sum, these provisions of Resolution 71–73 establish that "examinations" of the "Promotional" and "Open-Promotional" types, at least, are of vital interest to *present* City employees who may advance in class by "promotion" and who are given preference in the filling of positions higher in "class" than those they hold. Such employees are included among those represented by the union.

The amendment of section 601 abolishes the 15-day, bulletin board announcement of *all* "examinations," without distinction, and commits the manner and duration of *all* announcements thereof to the unfettered discretion of the Personnel Officer. The prospect that examinations of such importance to present employees of the City might be conducted after wholly ineffective "announcement" may or may not be a real likelihood. However, the importance

of the "announcements" to the employees represented by the union, in light of the above-summarized sections of Resolution 71–73 which were not amended, is such that a substantial change in the procedure to be followed is an equally important "condition of employment" according to the broad meaning of the term as used in the M–M–B Act and the liberal judicial construction required of it. (*Social Workers' Union, Local 535 v. Alameda County Welfare Dept., supra,* 11 Cal.3d 382 at pp. 389–392, 113 Cal.Rptr. 461, 521 P.2d 453.) We therefore conclude that section 3505 of the M–M–B Act (see fn. 6, *ante*) obligated the City to "meet and confer in good faith" with representatives of the union, and to discuss the proposed amendment, before proceeding with its adoption in Resolution 73–111.

The Amendment Relative to Probationary Employees' Eligibility for "Merit Pay Increases"

[6] The original provision of the "Personnel Manual" on this subject appeared in section 1203 (entitled "Advancement" and hereinafter cited as "section 1203") of the "Rules and Regulations" adopted in Resolution 71–73. Section 3 of Resolution 73–111 amended section 1203, by adding a third sentence to its original two-sentence text, to make it read as follows (amendatory language italicized):

"No salary advancement shall be made so as to exceed any maximum rate established in the pay plan for the class to which the advanced employee's position is allocated. Advancements shall not be automatic but shall depend upon increased service value of an employee to the City as exemplified by recommendations of his supervising official, length of service, performance, record, special training undertaken, or other pertinent evidence, within the advancement policy established by the pay plan. *Any employee subject to a twelve month probationary period shall not normally be eligible for advancement in pay until he has successfully completed said probationary period, or any extension thereof, as provided in Section 1001 of these Rules and Regulations* [i. e., of Resolution 71–73]." [10]

The obvious effect of the amendment of this section is to make a new employee of the City "normally" ineligible for any increase in pay during the twelve-month probationary period he must serve under his "original appointment" to employment. (See fn. 10, *ante*.) Disposing of the amendment in its memorandum decision (see fn. 8, *ante*), the trial court stated in part: *"Nothing previously enacted provided for any shorter period before a pay increase.* Section 1203 as it read before the amendment said, and still says, that advancement [in pay] is not automatic. . . . Since it does not change an existing agreement or rule and does not change the probationary period, [the] City can properly adopt the . . . [amendment] . . . without notice." (Original italics.)

The court was correct in concluding that the amendment did not "change an existing agreement or rule," neither of which is shown in the evidence. However, the staff memorandum (in which the amendment was recommended) unconditionally stated that a new City employee was and had been, at the time of the recommendation, "eligible for a merit increase [in salary] *after six months employment with the City,* assuming his performance warrants said increase." (Italics added.) No evidence has been cited, nor have we perceived any, which controverts this statement. It thus appears that, although the amendment did not "change an existing agreement or rule," it halted an existing and acknowledged *practice.*

10. Section 1001 of Resolution 71–73 states in pertinent part: "All *original* appointments shall be tentative and subject to a probationary period of *twelve months* actual service. All *promotional* appointments shall be tentative and subject to a probationary period of *six months* actual service." (Italics added.)

[1973] Because the practice was of material significance to twelve-month probationary employees (some of whom are represented by the union), the amendment which terminates it is equally significant.[11] Moreover, its subject matter—the timing of eligibility for a prospective if not automatic, salary increase—pertains directly to the affected employees' "wages" as that term is used in sections 3504 and 3505. (See fns. 7 and 6, *ante*.) We again conclude that section 3505 of the M–M–B Act (see fn. 6, *ante*) required the City to "meet and confer in good faith" with representatives of the union, and to discuss the proposed amendment, before adopting it in Resolution 73–111.

THE AMENDMENT CLASSIFYING "FIRE CAPTAIN" and "FIRE PREVENTION OFFICER" AS "MIDDLE MANAGEMENT" POSITIONS

As adopted in 1971, Resolution 71–74 included a page labelled "Exhibit 'A'."[12] It designated the City's "Management And Confidential Employees" by showing their positions in two lists respectively captioned "Management and Confidential Position Class" and "Confidential." The only position in the City's fire service shown on either list was that of "Fire Chief," which appeared in the "Management and Confidential Position Class."

Section 10 of Resolution 71–74 (entitled "Appropriate Unit[s]") pertained to the establishment of "units" for the representation of specific employee groups. In section 10(D), the City "recognized," as "appropriate units," (1) its fire service employees and (2) all other employees. Section 10(B) provided in part that "management and confidential employees who are included in the same unit with non-management or non-confidential employees may not represent such employees on matters within the scope of representation."

It is undisputed that the designation of the City's "Management and Confidential Employees" in Exhibit "A" to Resolution 71–74, and the above-quoted provisions of section 10(B) thereof, were effected by the City upon the authority of section 3507.5 of the M-M-B Act.[13]

Resolution 73–111, adopted in 1973, did not amend sections 10(B) or 10(D) of Resolution 71–74. It did amend Exhibit "A" thereto so as to break down the listing of the City's "Management and Confidential Employees" into three categories respectively designated "Top Management," "Middle Management," and "Confidential." In the amended lists, the position of "Fire Chief" appeared in the "Top Management" category. Two more positions in the City's fire service were shown on the "Middle Management" list.

11. The City contends that the amendment will affect only "new employees." Resolution 73–111, as adopted June 25, 1973, provides that it shall take effect immediately. The amendment could therefore affect a "new employee" who was then serving the first six months of his twelve-month probationary period. The amendment contains no future operative date which would defer its effect to "new employees" *hired* in the future.

12. In an aside to the parties, we note that the exhibit actually appears in evidence as the last numbered page of Resolution 71–75. However, its full title ("Exhibit 'A' Employee & Employer Relations Procedure") paraphrases the title of Resolution 71–74. Both resolutions are bound together as Part III of the "Personnel Rules." For these reasons, and because the City Council subsequently treated it as an exhibit to Resolution 71–74 (when it amended the latter in Resolution 73–111, as will appear), we also treat it as part of Resolution 71–74.

13. "3507.5. In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization."

It is again undisputed that these amendments were adopted upon the authority of section 3507.5. (See fn. 13, *ante*.) It is also undisputed that the effect of the classification of the "Fire Captain" and "Fire Prevention Officer" positions as "Middle Management," in light of the unamended provisions of sections 10(B) and 10(D) as quoted or summarized above, was to bar individuals holding these positions from personally representing "non-management or non-confidential employees" in the fire service "on matters within the scope of representation." (We here quote section 10(B) of Resolution 71-74.)

In both defining and resolving the question whether the nature of the classification amendment required the City to engage in a "meet and confer" procedure with representatives of the union before adopting it, the trial court read section 3505.5 with section 3507 [14] and stated in its memorandum decision (bracketed numerals added for reference):

"[1] Section 3507 provides for certain things which can be adopted only after 'consultation in good faith' with the Union. [¶] Section 3507.5 then seems to provide that in addition to the rules and regulations a public agency may adopt under [section] 3507, it may adopt reasonable rules and regulations as therein provided. Why the words '. . . and in the same manner . . .'? The placement of commas and the words used do *not* indicate that the rules and regulations concerning classification of employees are to be enacted pursuant to Section 3507. Had it been the legislative intent to include the classification authority as requiring [section] 3507 procedures the Legislature could have said so. [¶] The Court cannot add what the Legislature did not provide.

"[2] In addition to the authority granted under Section 3507, the Legislature granted the authority to reclassify employees reasonably. The new authority does not call for its exercise pursuant to the procedures of Section 3507. Clause (i) of the subject matter of Section 3507 (i. e., '(i) such other matters as are necessary to carry out the provisions of this chapter.') which may be contained in rules and regulations adopted following consultation in good faith does not include the designation as management employees. Had it been so included Section 3507.5 would not have been needed.

"The Court finds that the authority to classify employees as management or confidential employees is not required to be exercised pursuant to the provisions of Section 3507."

[7-9] We respectfully disagree with point no. 1 because it ascribes no meaning at all to the phrase "and in the same manner as in Section 3507," as used in section 3507.5. The prefatory clause of section 3507.5 is concededly ambiguous, but the words are there. We must presume that "every word, phrase and provision employed in a statute is intended to have meaning and to perform a useful function."

14. As pertinent, section 3507 provides: "[¶] A public agency may adopt reasonable rules and regulations *after consultation in good faith*, with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).

"Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502 (e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (f) access of employee organization officers and representatives to work locations (g) use of official bulletin boards and other means of communication by employee organizations (h) furnishing nonconfidential information pertaining to employment relations to employee organizations (i) such other matters as are necessary to carry out the purposes of this chapter. . . ." (Italics added.)

(*Clements v. T. R. Bechtel Co.* (1954) 43 Cal.2d 227, 233, 273 P.2d 5, 9; *California State Employees' Assn. v. State Personnel Bd.* (1973) 31 Cal.App.3d 1009, 1013, 108 Cal.Rptr. 57.) In our view, the ambiguity of the prefatory clause is to be attributed to inartful draftsmanship. This means that the clause must be interpreted consistent with the purpose of the entire Act (cf. *Gibbons & Reed Co. v. Dept. of Motor Vehicles* (1963) 220 Cal.App.2d 277, 286, 33 Cal.Rptr. 688, 927), which is "to promote full communication between public employers and their employees . . . ." (§ 3500, quoted *supra*.) Accordingly, and while it is true that a "court cannot add what the Legislature did not provide," as the trial court put it (Code Civ.Proc., § 1858), we conclude that the Legislature *did* provide in section 3507.5 that the "rules and regulations" it authorizes are to be adopted "after consultation in good faith": i. e., "in the same manner as in Section 3507."

[10, 11] We further disagree with the trial court's second conclusion (quoted *supra*) to the effect that the comprehensive language of section 3507, subdivision (i), should be deemed controlling in the interpretation of the prefatory clause of section 3507.5. The former, read in its full context, is a general provision; the latter is specific. Both are therefore to be given effect if possible, and the specific will control against the general only if they are essentially inconsistent. (Code Civ.Proc., § 1859.) The two provisions are not inconsistent as they read: the reference to "Section 3507," in the prefatory clause of section 3507.5, reflects an attempt—however inartful—to reconcile them by requiring a procedure common to both. Our interpretation of section 3507.5 also reconciles both provisions.

[12, 13] We perceive no basis for distinguishing between the term "consultation in good faith," as used in section 3507, and the "meet and confer in good faith" process defined in section 3505. It therefore appears that the City was obligated to engage in the process with representatives of the union, concerning the classification amendment, before adopting it in Resolution 73–111.

[14] Having reached this conclusion as to all three amendments challenged on the appeal, reversal of the judgment in all three respects is required.[15] (Cf. *Dublin Professional Firefighters, Local 1885 v. Valley Community Services Dist.* (1975) 45 Cal.App.3d 116, 118–119, 119 Cal.Rptr. 182.)

The parties have ranged much further afield in their briefs, debating such additional questions as whether the classification amendment was adopted in violation of the City's "Personnel Rules," whether it is "reasonable" on its merits, and the effect of a companion resolution which pertained to the same "Middle Management" subject matter. As we have concluded that all of the challenged amendments adopted in Resolution 73–111 are void for procedural violation of the M–M–B Act, we need not consider these additional questions.

As to those matters covered in its paragraph "1.," the judgment is affirmed. As to those matters covered in its paragraph "2.," the judgment is reversed. In the latter respect, the cause is remanded to the trial court with directions to grant injunctive relief as prayed. Appellant shall recover its costs on appeal.

CHRISTIAN and EMERSON,* JJ., concur.

15. The appeal is nominally taken from the judgment in its entirety but, as previously indicated in the text, it reaches it only in the three respects mentioned. The bifurcated language of the dispositive paragraph of this decision is accordingly indicated.

* Assigned by the Chairman of the Judicial Council.

[1] SACRAMENTO COUNTY EMPLOYEES ORGANIZATION, LOCAL 22 SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, etc., et al., Plaintiffs and Appellants,

v.

The COUNTY OF SACRAMENTO, the Board of Supervisors of the County of Sacramento, etc., et al., Defendants and Respondents,

AFSCME, Sacramento County Employees Local 146, AFL-CIO, et al., Intervenors.

Civ. 13389.

Court of Appeal, Third District.

Oct. 30, 1972.

[1424]

Employee organizations representing various groups of county employees sought to enjoin county and its officers from deducting dues only from salaries and wages of members of recognized employee organizations, and to require deduction of dues for all employees upon request. The Superior Court, Sacramento County, B. Abbott Goldberg, J., denied preliminary injunction, and plaintiffs appealed. The Court of Appeal, Byrne, J., assigned, held that statutory provision that public agency may adopt reasonable rules and regulations after good-faith consultation with representatives of employee organizations provided sufficient authority for county to restrict payroll deduction of dues to members of recognized employee organizations.

Order affirmed.

Robert H. Sharpe, Sacramento, for plaintiffs and appellants.

Warren Adell & Miller, Los Angeles, and Romines, Wolpman, Tooby, Eichner, Sorensen, Constantinides & Cohen, Menlo Park, for intervenors-respondents.

John B. Heinrich, County Counsel, by Robert Galgani, Deputy County Counsel, Sacramento, for defendants and respondents.

BYRNE,* Associate Justice. 426

This is an appeal from an order denying a preliminary injunction in an action brought by plaintiffs to enjoin defendant county and its officers from deducting dues *only* from the salaries and wages *of members of recognized employee organizations*, and to require defendants to deduct dues for *all* employees upon request.

SACRAMENTO CTY. EMP. ORG., LOC. 22 v. COUNTY OF SACRAMENTO

Plaintiffs and intervenors are employee organizations representing various groups of Sacramento County employees. Defendants are the County of Sacramento and various named officers of the county. American Federation of State, County and Municipal Employees (AFSCME), Sacramento County Employees Local 146, AFL–CIO, hereafter referred to as "intervenor," intervened on behalf of defendants and is a respondent herein.[1]

Pursuant to section 3507 of the Government Code,[2] the County of Sacramento in April of 1970 adopted an employee relations ordinance. That ordinance sets forth a procedure for employee organizations to seek the determination of representation units[3] to qualify as the recognized employee organization with respect to a unit and thereby become the exclusive representative for *meeting and conferring* with the county on behalf of the employees in that unit.

After the units were determined, representation elections were held under the
427 supervision of the State Conciliation Service as provided by the ordinance. On June 21, 1971, the Sacramento County Board of Supervisors certified as "recognized" the employee organization for each of the units receiving a majority of the votes cast at the election.

Plaintiffs prevailed in two units, while intervenor prevailed in three units.

Section 2.79.040 of the ordinance, relating to employee organization rights, provides in pertinent part as follows:

"(f) Within a unit, dues deductions shall be permitted only for members of the recognized employee organization."

Following certification of the election results, administrative steps were taken to assure that dues were deducted from the pay of employees within a unit only in respect to membership in an organization certified as recognized for that unit.

The reasons for limiting dues deductions to the members of a recognized employee organization were set forth by Gerald M. Pauly, Sacramento County Employee Relations Officer, prior to the adoption of the ordinance:

"After very careful consideration, we have concluded that it is in the best interest of the county and employee organizations to include in the ordinance a provision restricting dues deductions within a representation unit to the employee organization recognized as representing that unit. The major purpose of the ordinance is to provide county employees with an opportunity to designate one employee organization as the recognized negotiating agent for a particular group of employees. Permitting other employee organizations to continue dues deductions in the representation unit would promote and encourage continued strife between organizations within the unit. After a recognized organization had been selected by secret ballot majority vote of employees in a unit, it should be the only organization eligible for dues deductions within that unit. The Legislature in adopting Sections 3500 through 3511 of the Government Code stated that one of its purposes is to promote the improvement of employer-employee relations and to strengthen employer-employee relations. We believe that restricting dues deductions to the organization selected by a majority vote of employees in a unit is consistent with Legislative intent."

Before the administrative steps could be fully implemented, plaintiffs obtained a temporary restraining order staying action by defendants. That order was subsequently vacated and a preliminary injunction was denied. This appeal followed.

1. The Licensed Vocational Nurses League of California, Inc., was also permitted to intervene on behalf of plaintiffs. However, it did not appeal.

2. Meyers-Milias-Brown Act, Government Code sections 3500–3510.

3. A "unit" is defined in the ordinance as "a group of employees established pursuant to the provisions of this chapter [Chapter 2.79, Sacramento County Code], as an entity appropriate for representation purposes."

1428 Plaintiffs first contend that this is a proper case for injunctive relief. This, of course, begs the question and is not of assistance in determining whether the court erred in denying the preliminary injunction based upon the facts and law presented to it.

Plaintiffs next contend that the denial of the relief requested appears to be based on the erroneous premise that the rules and concepts of industrial collective bargaining apply to California's public employees. They contend the memorandum of the trial court is "permeated" with this misconception. The memorandum states, in part, as follows:

"Under the Meyers-Milias-Brown Act of 1968, Sacramento County has formally acknowledged that certain employee organizations are 'recognized employee organizations.' Gov.C. § 3501(a). These 'recognized employee organizations' have the right to represent their members in their employment relations with the county, Gov.C. § 3503; and the county is required to meet and confer with them in good faith regarding wages, hours and conditions of employment, Gov.C. § 3505. Nothing in the Act prevents the county from meeting with other employee organizations. But apart from the right of individuals to represent themselves, Gov.C. §§ 3502, 3503, *the county may act as if the 'recognized employee organizations' were the exclusive bargaining agents or representatives.*" (Emphasis added.)

Plaintiffs seize on the emphasized language to argue that the court's concept expresses the theory of industrial collective bargaining which is completely foreign to the representation program designed by the Legislature for public employees.[4] (Gov. Code, § 3500 et seq.) They cite section 3509 of the Government Code which provides that section 923 of the Labor Code shall not be applicable to public employees. This section delineates the right of the worker in the private sector to bargain collectively. (See, Nutter v. City of Santa Monica (1946) 74 Cal.App.2d 292, 168 P. 2d 741.) Plaintiffs also argue that the concept of *exclusiveness* does not exist in the statute. (See, Gov.Code, § 3507.)[5]

1429 [1] It is settled in California that public employees have no right to bargain collectively. (Almond v. County of Sacramento (1969) 276 Cal.App.2d 32, 36, 80 Cal.Rptr. 518; City of San Diego v. American Federation of State etc. Employees (1970) 8 Cal.App.3d 308, 310, 87 Cal.Rptr. 258.) Under the Meyers-Milias-Brown Act the public employer must "meet and confer in good faith regarding wages, hours, and other terms and conditions of employ-

4. Plaintiffs ignore the following language in the court's memorandum:
"Such limitation of the right to dues deduction to the representative organization accords with *private and public* experience elsewhere." (Emphasis added.)

5. At the time this lawsuit was filed, this section read:
"3507. A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).
"Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (e) access of employee organization officers and representatives to work locations (f) use of official bulletin boards and other means of communication by employee organizations (g) furnishing nonconfidential information pertaining to employment relations to employee organizations (h) such other matters as are necessary to carry out the purposes of this chapter.
"No public agency shall unreasonably withhold recognition of employee organizations.
"For employees in the state civil service, rules and regulations in accordance with this section may be adopted by the State Personnel Board." (Stats.1970, ch. 64, § 1.)

1430

ment with representatives of . . . recognized employee organizations, ..." (See, Gov.Code, § 3505.)

A careful reading of the trial court's memorandum convinces us that it was not based on an erroneous premise. The main thrust of the decision is that the validity of and the authority for the county's action must be found under the pertinent code sections. The court states: "Its [dues deduction provision of ordinance] validity depends on the authority of the county under Gov.C. §§ 1157.1 and 1157.3. If, like §§ 1156, 1157.4 and 1157.5, they give the employees the right to have the deductions made, the restriction in the ordinance would be invalid. *Cf.* Cal. State Employees' Assn. v. Regents of University of California, 267 Cal.App.2d 667, 668–69, 73 Cal.Rptr. 449 (1968). But if §§ 1157.1 and 1157.3 are merely permissive and not obligatory on the county, the restriction is
429 valid. Bauch v. City of New York, supra [21 N.Y.2d 599, 289 N.Y.S.2d 951 at 953], 237 N.E.2d [211] at 213."

We think this approach was the proper one. Thus, plaintiffs' arguments with regard to industrial collective bargaining are largely irrelevant. The court was merely noting a practice in private industry and analogizing it to the problems in public employment.[6]

As a practical matter, realizing that in order to establish and prevent a two-party adversary relationship from becoming a
430 multi-party scramble following the adoption of the Meyers-Milias-Brown Act, the following counties adopted a program of exclusive representation for recognized employee organizations: Alameda, Contra Costa, Orange, San Diego and Santa Clara.

[2] Plaintiffs contend that there is no provision in Meyers-Milias-Brown Act (and particularly Government Code section 3507) authorizing payroll deduction of dues.

However, section 3507[7] does provide that a public agency *may* adopt reasonable rules and regulations after good faith consultation with representatives of employee organizations. The statute then sets forth seven broad areas in which a public agency may adopt rules. Finally, section 3507 provides that such rules and regulations may include provisions for "such other matters as are reasonably necessary to carry out the purposes of this chapter."

As we read the statute we are convinced that it provides only broad guidelines for the public agency. We find no restrictive intent upon the part of the Legislature. And when read with other applicable statutes (discussed infra), we find no lack of authority for the county to restrict payroll deduction of dues to recognized employee organizations.

The Legislature did not provide in specific terms what rules and regulations the local agency should or must adopt in extending exclusive recognition; rather, it left to local agencies themselves the right to ascertain principles consistent with the broad purposes of the Act set forth in section 3500 of the Government Code. In adopting rules and regulations resolving disputes regarding wages, hours and other terms and conditions of employment the defendant county could consider under what circumstances it would extend dues deduction privileges to employee organizations. By not allowing dues deductions to competing organizations some insulation could be furnished to recognized employee organizations from constant challenges from competing organizations and help provide a more stable framework within which the

6. See Federation of Delaware Teach. v. De La Warr Bd. of Ed. (D.C.Del.1971) 335 F.Supp. 385, 389–390 (exclusive negotiation privileges granted to teachers' association promotes compelling state interest, i. e., to keep school buildings and grounds from becoming "labor battlefields").

7. This section was amended in 1971 to specifically provide that the rules and regulations could cover "exclusive recognition of employee organizations." (Stats.1971, ch. 1575, § 1.)

public employer and a recognized organization can *meet and confer.*

Plaintiffs contend that separate statutory provisions provide for payroll deduction of organization dues and that these statutes do not permit severance in employee representation units. These statutes are sections 1157.1 and 1157.3 of the Government Code. They read:

"1157.1. Employees of a public agency, on approval of and in accordance with the provisions made by the governing body of the public agency, may authorize deductions to be made from their salaries or wages for the payment of dues in, or for any other services provided by, any bona fide association (a) whose members are comprised exclusively of such public agency, or (b) whose members are comprised exclusively of the employees of such public agency and one or more other public agencies the pay rolls of which are prepared by the same finance officer, or (c) whose members are comprised exclusively of the employees of such public agency or agencies as provided in (a) or (b) above, together with former employees of such public agency or agencies if such former employees (1) were employees of such public agency or agencies at the time of joining such association, and (2) were members of such association at the time of ceasing to be such employees."

"1157.3. Employees, including retired employees, of a public agency in addition to any other purposes authorized in this article, on approval of the governing body of such public agency, . . . may also authorize deductions to be made from their salaries, wages, or retirement allowances for the payment of dues in, or for any other service provided by, any bona fide organization whose membership is comprised, in whole or in part, of employees of such agency and employees of such organization and which has as one of its objectives improvements in the terms or conditions of employment for the advancement of the welfare of such employees, such deductions to be made in accordance with the provisions made by the governing body of the public agency."

[3] Plaintiffs first contend that these sections describe a different kind of organization from that defined in the Meyers-Milias-Brown Act. (See Gov.Code, § 3501.) Secondly, they contend these sections contemplate more than one organization's dues being deducted. (Cf. Gov.Code, § 1157.4.) Neither contention has merit. These sections are *permissive* in nature. It is obvious that the language of these sections makes the right to deductions conditional on the approval of the public agency, and thus they are permissive rather than mandatory in their terms. Under these sections, plaintiffs have no *right* to have dues deducted.

[4] Thirdly, plaintiffs argue that no necessity is shown for a restriction to a single organization. They contend the conclusion of the county that multiple deductions will result in interorganizational problems is pure speculation. We think that just the contrary is true. (See, e. g., Federation of Delaware Teach. v. De La Warr Bd. of Ed. (D.C.Del.1971) 335 F.Supp. 385, 389-390; Local 858 of A. F. of T. v. School D. No. 1 In Co. of Denver (D.C. Colo.1970) 314 F.Supp. 1069, 1076.)

[5] Under this same general contention, plaintiffs finally argue that since the county authorized payroll deductions of dues for some organizations, it *must* authorize them for others. They rely heavily upon Renken v. Compton City School Dist. (1962) 207 Cal.App.2d 106, 24 Cal.Rptr. 347.

In *Renken* the defendant school district elected to provide dues deductions for employee organizations. However, it imposed a rule that an organization had to show membership of at least fifty percent of the eligible employees before a deduction would be allowed. In striking down this requirement, the court stated:

"A governing board of a school district has no authority to enact a rule or regulation which alters or enlarges the terms of a legislative enactment. [Citations.] The resolution not only adds a requirement not found in the pertinent code sections but

is unreasonable and arbitrary in nature. While there was testimony that some employees belonged to both Local 99 and Chapter 76, the actual effect of the resolution is to limit the benefits of a system of deductions of dues to the organization which has the most members. The resolution is not founded upon a reasonable and substantial basis for classification with respect to action authorized by the provisions of sections 1157.1 and 1157.3 of the Government Code." (207 Cal.App.2d at p. 114, 24 Cal.Rptr. at p. 351.)

The court also stated: "Thereunder [Gov.Code, §§ 1157.1, 1157.3], legislative authorization appears to exist for deduction by the school district of dues for both Chapter 76 and Local 99. But such authority cannot be exercised in an arbitrary manner. If both organizations have substantially the same purposes and each serves substantially the same function on behalf of its members in relation to the school district, to deduct the dues of one and to decline to deduct the dues of the other is a use of the legislative authorization in an arbitrary and discriminatory manner. That kind of administration of granted authority is not permissible. [Citations.]" (207 Cal.App.2d at p. 118, 24 Cal.Rptr. at p. 354.)

However, the procedure in question here
1438 is not arbitrary and discriminatory since it sets up a classification based on a *recognized employee organization.* (See Gov.Code, § 3505.) The Meyers-Milias-Brown Act, with its concept of "recognized" as distinguished from other "employee organizations," was not adopted until six years after *Renken.* Plaintiffs concede the distinction in stating "the important right that an unrecognized organization lacks is the right to 'meet and confer' in accordance with the provisions of Gov.C. § 3500 et seq." Thus, "recognition" is an important factor. This basis for classification did not exist when *Renken* was decided.

We conclude that *Renken* is distinguishable from the situation presented herein.

[6] Plaintiffs contend finally that the employees are being deprived of their rights as individuals. Plaintiffs argue that the procedures set up by the county raise constitutional questions. These questions are unspecified. This contention has no merit.

The court in Bauch v. City of New York (1968) 21 N.Y.2d 599, 608, 289 N.Y.S.2d 951, 956, 237 N.E.2d 211, 215, considered the same claim and found it lacking in substance: "Nothing in the city's labor policy denies members of the petitioners' union the right to meet, to speak, to publish, to proselytize and to collect dues by the means employed by thousands of organizations of all kinds, that do not have the benefit of a dues check-off. Neither the First Amendment nor any other constitutional provision entitles them to the special aid of the city's collection and disbursing facilities." (See also, Kraemer v. Helsby (N.Y.1970) 35 A.D.2d 297, 316 N.Y.S.2d 88; Local 858 of A. F. of T. v. School D. No. 1 In Co. of Denver, supra, 314 F.Supp. at pp. 1074–1078.)

The order denying the preliminary injunction and vacating the temporary restraining order is affirmed.

RICHARDSON, P. J., and JANES, J., concur.

FILED

17 DEC 1976

BY [signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

SAN DIEGO COUNTY DEPUTY SHERIFF'S ASSOCIATION, Petitioner and Plaintiff, v. COUNTY OF SAN DIEGO: JIM BATES, individually and as a member of the San Diego County Board of Supervisors; DICK BROWN, individually and as a member of the San Diego County Board of Supervisors; LOU CONDE, individually and as a member of the San Diego County Board of Supervisors; LEE R. TAYLOR, individually and as a member of the San Diego County Board of Supervisors; JACK WALSH, individually and as a member of the San Diego County Board of Supervisors; JOHN DUFFY, as Sheriff of San Diego County; DAVID T. SPEER, as Chief Administrative Officer of San Diego County; WILLIAM D. WINTERBOURNE, as Director of Personnel of San Diego County; BRUCE MATLOCK, as Chief of Employee Relations of San Diego County, Respondents and Defendants.	Case No. 382748 ~~RESPONDENTS' AND DEFENDANTS' PROPOSED ALTERNATIVE~~ JUDGMENT GRANTING IN PART AND DENYING IN PART THE PEREMPTORY WRIT OF MANDATE; JUDGMENT ON COMPLAINT FOR DECLARATORY RELIEF

This matter came on regularly for hearings before this Court on August 13, 1976, and October 28, 1976, in the court-

(Deletions and handwritten additions on this text were made by Judge Louis M. Welsh on the original text.)

room of Department 21, the Honorable Louis M. Welsh, presiding, pursuant to the verified petition of the SAN DIEGO COUNTY DEPUTY SHERIFF'S ASSOCIATION and the Alternative Writ of Mandate issued by the Superior Court, County of San Diego, and served on each of the Respondents in the manner provided by law. Brundage, Williams & Zellmann and Jerry J. Williams, appeared as attorneys for Plaintiff and Petitioner, and Musick, Peeler & Garrett and Larry A. Curtis, appeared as attorneys for Defendants and Respondents.

Respondents have filed a verified answer to the petition; the Court has examined the proof offered by the parties; arguments have been presented; each party has submitted memoranda of points and authorities in support of its contentions; exhibits have been received in evidence; and the cause has been submitted for decision.

THEREFORE, IT IS ORDERED that:

1. On Petitioner's first cause of action, the petition for a peremptory writ of mandate is denied;

2. On Petitioner's second cause of action, a peremptory writ of mandate shall issue under the seal of this Court, commanding Respondents;

a) To meet and confer in good faith upon timely demand by Petitioner with authorized representatives of Petitioner concerning such proposals as Petitioner may make with respect to: 1) The relative weight to be accorded to various portions of promotional examinations for sworn classified personnel of the Sheriff's Department who are represented by Petitioner; and 2) The confidentiality of appraisal reports utilized as part of the

aforementioned examinations. A demand by Petitioner shall be deemed "timely" if made not sooner than February 1, 1977, or at such other time as the current Memorandum of Understanding between the parties shall designate as appropriate for the submission of proposals for a successor Memorandum of Understanding.

3. On Petitioner's third cause of action, a peremptory writ of mandate shall issue under the seal of this Court, commanding Respondents;

a) To cease and desist from any and all action with regard to amendments to Rule VII of the Rules of the Civil Service Commission of the County of San Diego until the Respondents have given Petitioner reasonable notice and have met and conferred in good faith with Petitioner regarding these matters;

4. On Petitioner's fourth cause of action, the petition for a peremptory writ of mandate is denied;

5. On Petitioner's fifth cause of action, the petition for a peremptory writ of mandate is denied.

6. On Petitioner's sixth cause of action, the petition for a peremptory writ of mandate is denied.

7. On Petitioner's seventh cause of action, quo warranto is the exclusive remedy, and Declaratory Relief may not issue.

8. On Petitioner's eighth cause of action, Petitioner has a right to propose changes and to meet and confer in good faith with Respondents with regard to the changes in the examination and rating procedures as specified in Paragraph 1 of this Judgment for promotion of sworn classified personnel of the Sheriff's Department;

9. On Petitioner's ninth cause of action, Petitioner has a right to receive reasonable notice and to meet and confer in good faith with Respondents with regard to amendments to Rule VII of the Rules of the Civil Service Commission of the County of San Diego, in the event that Respondents intend to take further action with respect to such amendment.

10. On Petitioner's tenth cause of action, Petitioner has no right to meet and confer in good faith with Respondents with regard to Ordinance No. 4671 (New Series);

11. On Petitioner's eleventh cause of action, Petitioner has no right to meet and confer in good faith with Respondents concerning budgetary or contractual determinations of Respondents' Board of Supervisors concerning reductions in classified personnel in the Sheriff's Department, since such reductions were not ordered by

12. On Petitioner's twelfth cause of action, Petitioner has no right to meet and confer in good faith with Respondents with regard to the Bates salary recommendation.

13. The Alternative Writ of Mandate heretofore issued in this matter is discharged.

14. All Temporary Restraining Orders heretofore issued in this matter shall be dissolved upon entry of judgment and upon issuance of the peremptory writ of mandate.

Dated: 17 DEC 1976, 1976

LOUIS M. WELSH
JUDGE OF THE SUPERIOR COURT, STATE OF CALIFORNIA

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

SAN DIEGO COUNTY DEPUTY SHERIFF'S ASSOCIATION, Petitioner and Plaintiff, vs. COUNTY OF SAN DIEGO, et al, Respondents and Defendants.	No. 382748 MEMORANDUM OF INTENDED DECISION

The San Diego County DEPUTY SHERIFF'S ASSOCIATION (D.S.A.), a "recognized employee organization," under the Meyers-Milias-Brown Act (Gov. Code §3500 et seq., herein "M.M.B." or "The Act") seeks to mandate the County of San Diego, its governing board and administrators, to "meet and confer" on the following six items which D.S.A. claims to be matters relating to employment conditions and employer-employee relations:

1. Proposed Amendments to the Charter of the County of San Diego.
2. Changes enacted in 1972 relating to the examination and

rating procedures for promoting classified employees.

3. Proposed Amendments to the Civil Service Commission Rules relating to charges by citizens against peace officers.

4. The establishment of a Citizens Review Panel to make recommendations to the Board of Supervisors ("Board") relating to handling citizen complaints and discipline of employees, including deputy sheriffs.

5. The tentative decision of the Board to terminate contracts to furnish police protection to certain cities, which would reduce the budget and personnel of the Sheriff's Department.

6. A recommendation of one Supervisor concerning salary increases, which the entire Board forwarded to the Civil Service Commission for its consideration.

The County contends that these subjects are not within the D.S.A.'s "scope of representation" as defined in M.M.B., and thus "meet and confer" procedures (i.e., full-scale negotiations) are not required. The County also argues that it has fulfilled its duty, as it sees it, under §3504.5 of the Act and Section 14(b) of its Employee Relations Policy ("Policy") by offering to "consult" with D.S.A. on each of these topics.[1] In addition, the County relies on certain affirmative defenses, namely, mootness, lack of standing, waiver, laches and inapplicability of the relief sought (mandamus).

The Court has concluded that Meyers-Milias-Brown does not create two types of conferences -- one a full-scale negotiation ("meet and confer"), the other an exchange of views ("meet" or "consult"). Section 3504.5, added in 1968, provides for the kind of notice to be

given to the employee organization so that the opportunity to negotiate (meet and confer) may be invoked. It is true that this section uses the word "meet," not "meet and confer." But a silent meeting would be worthless. Thus we can conclude that some form of communication at the meeting is expected. Nothing suggests it should be less than that required by §3505. The assumption that §§3504.5 and 3505 are mutually exclusive, imposing different standards applicable to different types of governmental action ". . . is compelled neither by statutory language nor by legislative history. §3504.5 applies to actions 'directly relating to matters within the scope of representation,' and section 3505 requires meeting and conferring on 'matters within the scope of representation.'" (Grodin, "Public Employee Bargaining in California", 23 Hastings L.J. 719, 755. See also International Ass'n. of Firefighters v. City of Pleasanton (1956), 56 C.A.3d 959, 966.)

Although I do not find the County's Employee Relations Policy to be in conflict with M.M.B.,[2] if it were, it would be superseded by the Act. A preexisting charter provision may exempt certain subject matter from labor negotiation (American Federation etc. v. County of Los Angeles (1975), 49 C.A.3d 356, Gov. Code §3500) but local regulations cannot be enacted to avoid the procedures prescribed by M.M.B. (Huntington Beach Police Officers v. City of Huntington Beach, (1976) 58 C.A.3d 492.

We now turn to a consideration of whether the six items in controversy, or any of them, are within D.S.A.'s "scope of representation" and thus negotiable or whether they pertain to the ". . . consideration

of the merits, necessity or organization of any service or activity provided by law or executive order" (§3504) and are thus excluded from "meet and confer" sessions. The Supreme Court in Firefighters Union v. City of Vallejo (1974), 12 Cal.3d 608, held that the above-quoted words from §3504 were included to forestall expansion of "wages, hours and working conditions" to include the more general managerial policy decisions. Examples of such exclusive management prerogatives are the right to discontinue an activity or service, the right to relocate an activity and the right to increase or decrease the standard of a service provided by the public agency. Such decisions may, however, give rise to negotiable questions pertaining to the timing of layoffs, workloads, distribution of personnel, safety of personnel, and so forth. The Vallejo Court recognized that negotiable and non-negotiable subjects are not always separable. With approval, the Court referred to L. A. County Employees etc. v. County of Los Angeles (1973) 33 C.A.3d 1, which held that where both negotiable and non-negotiable subjects are inextricably related, the parties should meet and confer on the relevant topics only. Under the Act "[t]here is no requirement that the Board of Supervisors give up any of its powers, or that the board or its representatives agree on anything." (Ibid. at 7.) In addressing this problem of dissecting the bargainable subjects from those within the exclusive prerogative of the governing board, Professor Grodin has said that when there is conflict concerning the negotiability of a subject, ". . . it is up to the tribunal to reconcile [it] not on the basis of abstract preconceptions of bargainable categories, but rather on the basis of the particular facts and a

weighing of the interests involved." ("California Public Employee Bargaining Revisited," 21 Cal. Publ. Emp. Rel. 2 at 11-12.)

How do these criteria resolve the problems in this case?

1. Proposed Amendments to the Charter of San Diego.

Originally, County management planned to place eight amendments to the County Charter on the June 1976 ballot for voter approval. Notice of a January 30 meeting "to discuss"[3] these proposed changes was sent to D.S.A. and other affected recognized employee organizations on January 26, 1976 (Exhibit 18).[4] The "discussion" lasted only 45 minutes because the employees' representatives expected to "meet and confer," whereas, management's representatives intended to "consult."

Some weeks later, the Board of Supervisors added a ninth proposition (Proposition "B") to the ballot, to amend Section 40 of the County Charter. No notice to "discuss," "consult" or "meet and confer" was sent concerning this proposed amendment. At the election, the voters rejected the first eight proposed amendments but adopted the ninth, Proposition B.

The dispute concerning the first eight amendments which the electorate rejected is now moot. The ninth, Proposition B, was within D.S.A.'s scope of representation and meet and confer sessions should have been held. However, the court is unable to act because the ordinance has been adopted. Irregularities in the adoption procedure can only be attacked by a proceeding in quo warranto (Oakland Improvement League v. City of Oakland, 23 C.A.3d 165; County of Santa Clara v. Hayes, 43 Cal.2d 615).[5]

Before the Amendment, Charter §40 provided that the Board of Supervisors shall prescribe salaries for County employees which are not less than the prevailing rate paid by private employers in cases where such prevailing compensation or wages can be ascertained. The amendment changed this to provide that the board shall give due consideration to several enumerated factors including the prevailing rate paid by private and public employers (Exhibit 33). The County argues that prevailing compensation for peace officers in the private sector cannot be ascertained because there is no similar occupation. D.S.A. disagrees. The question whether there is or is not a parallel between the private and public sectors is not one for unilateral determination. Obviously the Charter amendment does affect wages, a matter relating to employment conditions (§3504). This is sufficient to require notice under §3504.5 and meet and confer sessions under §3505. The County argues that the constitutional right of the Board to propose charter amendments is violated by the requirement to meet and confer. No such infringement is involved. The Board also has the constitutional right to pass ordinances and make rules and regulations. The M.M.B. does no more than require good faith negotiation and an honest effort to resolve differences by agreement. It does not compel agreement.

It is concluded that Charter §40 was improperly placed on the ballot without meet and confer sessions. However, the Court may not grant mandate and, therefore, mandate will be denied.

2. Changes in Examination and Rating Procedures for Promotion. There is little dispute between the parties concerning the

proposition that procedures used for promoting employees is a matter relating to employment conditions. Here, however, the procedures had been in effect for three years (since 1972) before D.S.A. requested the privilege to "meet and confer" (October 1975). In the meantime, the evidence clearly establishes that D.S.A. and its officers knew of the 1972 changes and in fact complied with them (Declarations of Matlock and Fusaro).

Whereas, the County failed to give the required notice under §3504.5, the employees' knowledge of the regulations and their failure to request a hearing was a waiver of their right to the prompt meeting guaranteed by §3505. This does not necessarily mean that they have waived their rights to meet and confer in the future nor does it mean that the Court should invoke the equitable doctrine of laches to forever bar their right to negotiate the subject. It is conceivable that a proposed regulation or ordinance may appear to involve no problem worthy of negotiation at the time it is suggested, but later, in practice, it will be found to be onerous or unfair. On the other hand, the County should not be put to the considerable expense of furnishing meet and confer sessions, impasse procedures and the like, at the whim of the employee. Therefore, the Court will mandate the County to meet and confer on this subject at the next regularly scheduled session, but not before.

3. Proposed Amendments to Civil Service Commission Rules.

In the Court's view, proposed amendment to Civil Service Rule VII is a matter relating to employer-employee relations (discipline) and is thus negotiable under §3505. Unlike the situation discussed

in American Federation v. County of Los Angeles (supra, p. 3), the San Diego Charter does not preempt the subject from bargaining. San Diego Charter §86 provides that the employee may be removed by an order of the appointing authority which is then reviewable by the Civil Service Commission. It also provides that a citizen "may likewise file charges against the employee . . . in the manner hereinbefore set forth, and the same procedure shall be followed by the Commission." (Exhibit 2.) The ambiguity is glaring. Either "in the manner hereinbefore set forth" is meaningless, since there is no manner set forth for filing charges or the word "charges" is to be construed as equivalent with "order" in which case all citizens become the employee's "appointing authority" -- a conclusion fraught with potential constitutional questions. In either event, "the same procedure shall be followed by the Commission" which means it shall review an order of the appointing authority.

The resolution of this ambiguity should involve the full participation of both parties affected: the public and the employees. If they can agree on an appropriate solution through negotiation, well and good. If they cannot and, after meet and confer sessions, the County adopts a rule not satisfactory to the employees, the Court can resolve the problem through Charter interpretation.

4. Citizens Review Panel.

The Court is of the opinion that the creation of this Citizens Review Panel charged with the duty to advise the Board of Supervisors concerning the effective operation of departmental procedures is within the exclusive prerogative of the Board. It is excluded from

D.S.A.'s "scope of representation," as defined in §3504. Naturally, the advice of the Review Panel may influence County government to propose changes in disciplinary procedures. If it does, such proposed changes will probably be subjects for "meet and confer" sessions. But the public representatives should not have to negotiate before creating a commission of citizens to review County governmental practices so long as direct discipline is not involved, and employee privacy is respected. Ordinance No. 4671 meets these criteria. Firefighters Union v. City of Vallejo, supra, p. 3).[6]

5. Reduction of Staff Resulting From Termination of Contracts.

Through contracts with the County, the Cities of Del Mar, Vista and San Marcos had engaged the services of the Sheriff to act as their municipal police force. As a result of a dispute over the cost to be charged for this service during the current fiscal year, the Board of Supervisors directed its staff to prepare to transfer $367,000 from the Sheriff's budget in case the County and the cities could not agree to a new contract. County management notified D.S.A. on January 13, 1976 of this contingency and stated that if it shall occur, D.S.A. will be notified and given an opportunity to discuss the impact of such a reduction in funds upon personnel (Exhibit 14).

On January 15, D.S.A. replied and requested the opportunity to meet and confer "prior to any action being initiated by your department . . ." Apparently D.S.A. meant by this that "meet and confer" sessions were needed "prior to any action regarding reductions in the budget of the Sheriff's Department . . ." (Paragraph V, Cause of Action V, of Petition.) On January 20, the Board of

Supervisors, recognizing that 38 personnel represent those serving the three cities, approved transfer of $367,820 from the Sheriff's budget to the contingency reserve and directed ". . . the Assistant CAO - Fiscal and Justice to take appropriate action, consistent with employee relation policies and procedures, which will result in the reduction of 38 personnel now authorized in the Sheriff's 1975-76 budget appropriations . . ." (Exhibits 16, 17.) The funds were never transferred and the personnel were not discharged because the contracting parties, County and cities, agreed upon a new contract.

Petitioner contends that the County had no right to "set in motion the process which would result in the termination without prior meet and confer" sessions. As the Court said in Vallejo (supra, p. 622), "To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining . . ." This may necessarily include the determination of exactly how many persons must be laid off because of the budget reduction and the cessation of service to the three cities. However, the demand for meet and confer sessions was premature.

This is illustrated in the case at bench by the fact that the question is now moot; the layoffs never occurred. Moreover, there was never any plan to order the layoffs until "appropriate action" was taken "consistent with employee relations policies . . ." Such action would have required "meet and confer" sessions concerning the "who, when and how" of the layoffs and other pertinent matters brought up by the D.S.A. Obviously, labor negotiations were not required to

precede the Board's determination as to the price it would charge to serve the three cities. It was this decision, one in the exclusive control of management, that "set in motion the process" that would have resulted in termination.

The writ will be denied on this dispute.

6. Supervisor Bates' Recommendation to Civil Service Commission.

Supervisor Bates had recommended in a letter to the Board of Supervisors, dated February 25, 1976, that the County should "hold the line" on salary increases and give a $50 per month raise to those earning $18,000 or less. The matter came before the Board on March 2, 1976 and it was referred to the Civil Service Commission for further action. Petitioner objects to this reference before holding a meet and confer session.

Again, petitioner is premature. The obligation under §3504.5 is to give notice of any "ordinance, rule or regulation . . . proposed to be adopted . . ." No decision had been made by the County to "propose" this increase for adoption. If "meet and confer" sessions were required on all "suggestions," it would constitute a frightful waste of time and resources. The Board and its members have the right to suggest a course of action as a part of the process of reaching a conclusion concerning a proposed plan. Once the plan has been agreed upon or recommended by an agency of County government and adopted by the Board, then it must be presented to the employees who will have the right to "meet and confer" if the subject is within the scope of representation. D.S.A.'s eagerness to meet and confer on suggestions before they become agreed proposals is reminiscent of

a lawyer who leaps to his feet to rebut his opponent's argument before the latter has finished his remarks. In both cases this reaction may be the product of a fear that the arbitrator will have reached a conclusion before both sides have been heard. The phenomenon is understandable but not productive. "Meet and confer" means negotiation in good faith in an effort to reach agreement. This forbids both sides from entry upon this task with closed minds.

The writ will be denied on this dispute.

DATED: 5 OCT 1976

LOUIS H. WELSH

Judge of the Superior Court

FOOTNOTES

[1] Pursuant to §3700 of the Act, and to carry out its provisions, the County's "Employee Relations Policy" was adopted in 1970 and later amended in 1971 and 1973. Section 14(a) of the Policy was drafted to comply with §3505 and Section 14(b) follows the language of §3504.5. The Policy defines "consult" in Section 2(c) to mean "communication for the purpose of presenting and obtaining views or advising of intended action." "Consult" is not defined in the Act. Section 2(n) of the Policy defines "meet and confer" in the same way it is defined in the M.M.B. -- i.e., full-scale negotiations. Section 14(b), relied upon here by the County, gives D.S.A. the right to "meet" with representatives of the County, not to "consult." The word "meet" is not defined in the Policy or in the Act. Although it is not so stated, I infer that the County distinguishes between "meet and confer" and "meet and consult." No basis for this distinction is suggested except the wording of §3504.5.

[2] The County's Employee Relations Policy may grant to its employees greater rights by permitting "consultation" in those areas where the employee organization is not entitled to "meet and confer" under M.M.B. (See §3504 of the Act, Section 6 of the Policy).

[3] "Consult" and "consultation" are defined in the Employee Relations Policy, Section 2(c). "Discuss" is not defined. See also Exhibit 20, a letter from Management to all recognized Employee Organizations inviting the latter to "meet and discuss" the Charter provisions on 2/4/76.

[4] Exhibit numbers refer to the Joint Index of all exhibits.

[5] Counsel for D.S.A. has not addressed himself to this problem.

[6] The Court is not asked to determine whether or not D.S.A. received its right to "consult" on this subject and no opinion thereon is expressed (see Policy, Section 6, Fusaro Declaration).

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1. The lengthy footnotes to this decision have been omitted as they deal primarily with elaborations on conflicts of law theory.

C.A. Decides Retroactive Pay Case

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE THIRD APPELLATE DISTRICT (San Joaquin)

SAN JOAQUIN COUNTY EMPLOYEES' ASSOCIATION, INC., Plaintiff and Respondent,

v.

COUNTY OF SAN JOAQUIN, Defendant and Appellant.

3 Civil 13978
(Sup.Ct.No.108697)
Filed: May 10, 1974

Defendant County of San Joaquin (hereinafter referred to as "County") appeals following the granting of judgment on the pleadings in favor of plaintiff San Joaquin County Employees' Association, Inc. (hereinafter referred to as "Association").

This action had its genesis in the filing of a complaint for declaratory relief by the Association seeking a determination by the court that under presently applicable statutes a public entity could lawfully agree to pay salary increases retroactive to the date of the expiration of a presently existing salary ordinance or resolution, that such retroactive payment would not constitute a gift of public funds, and that the court further decree that defendant County must meet and confer with plaintiff Association as to such retroactive salary increases in accordance with the provisions of the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.)

County's legal position is that there is no statutory authority for the payment of retroactive salary increases; that such payments are constitutionally prohibited as gifts of public money for services already rendered and paid for; that in view of the illegality of such payments no purpose would be served by meeting and conferring with the Association as to retroactive salary increases.

Preliminary to our discussion of the applicable law, no questions of fact being present, we note that plaintiff Association is a duly recognized bargaining representative of County's employees with respect to their employee-employer relations. As had been the previous custom, the Association entered into negotiations with County on about March 1, 1972. In this instance it interjected the demand that County "meet and confer in good faith" on the question of retroactive pay raises. The County for the reasons we have previously set forth refused to do so.

Both parties sought judgment upon the pleadings. The Association prevailed and County was ordered to "meet and confer" with the Association on the subject of retroactive pay raises, the court finding that County could lawfully do so, the trial court in the judgment stating: "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

"1. That an agreement between the County of San Joaquin, and a duly recognized employee organization representing any of the employees of said County to pay retroactive pay increases to said employees for services to be performed at a time when wage and salary rates are not fixed and are indefinite, said payment to be retroactive to the date on which said pay became unfixed or indefinite through expiration of the previously existing contract, memorandum of understanding, or salary plan or ordinance, is permitted by law and is within the authority of the Board of Supervisors under the provisions of Article XI Section 5 of the California Constitution. Such an agreement is not prohibited as being the payment of extra compensation under Article IV Section 17 of the California Constitution or as being a gift of public funds under Article XIII Section 25 of the California Constitution; . . . ."

While the trial court's opinion quoted above stresses the constitutional and statutory aspects of this case, we believe that the case should first be viewed in the larger context of its relationship to the Meyers-Milias-Brown Act (Gov. Code, § 3500 et seq.), with which act this litigation is inextricably involved. That act, first adopted in 1961 and amended many times since, by its terms endeavored to create a method whereby disputes regarding "wages, hours, and other terms and conditions of employment" (Gov. Code, § 3500) could be resolved, a method which was at the same time both viable and voluntary. Therefore we are constrained to interpret the act in such a manner as to create no hypertechnical impediment to either its viability or its voluntariness within the state constitutional framework.

We think it obvious that the act has drawn liberally from the experiences of private management-labor relations. Certainly the effective date of negotiated wage settlements is almost an invariable item in negotiations, and we further believe it is an accurate statement that pay raises are frequently backdated to the date of the expiration of the last contract. The Legislature, in recognition of the fact that public agencies unlike private concerns are faced with statutory budget deadlines (Aug. 30 in the case of counties, Gov. Code, § 29088), amended section 3505 of the Government Code in 1971 by adding the underlined language. Section 3505: "The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501.

and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

" 'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have 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. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance, or when such procedures are utilized by mutual consent.*"

We add that as a practical matter salary ordinances cannot be adopted until the budget is fixed.

We think it is an almost universal custom for governmental agencies to do as was done in this case to adopt their salary ordinances at the start of the fiscal year, July 1. Here the Legislature has selected the budgetary date rather than the fiscal year date as the target date for reaching an agreement negotiated between governmental agencies and employee organizations. It is wholly illogical to believe that it was intended that governmental agencies should adopt interim salary ordinances, greatly increasing accounting and other problems, for the period July 1 to August 31. We think the more logical interpretation is that the Legislature contemplated that any pay adjustments negotiated would be made retroactive to July 1, the pay of employees continuing in the interim on the previous year's schedule, just as would be the case with private labor-management agreements.

It is an incontestable fact of governmental employment practices that governmental agencies must compete in the labor market with non-governmental employers. Such competition includes not only salaries but sick leave time, vacations and numerous other conditions of employment. It has been, for instance, a judicially noticeable practice of governmental agencies to correlate vacation time allowed to the years of service by an employee. Yet when such employee was first employed by the governmental agency, no such provision existed in his employment contract. Yet we are not aware of any successful challenge to the granting of additional vacation time in recognition of extended employment as being a gift of public money. Nor are we unmindful of the fact that governmental agencies almost universally pay all or a portion of an employee's medical insurance premiums although his original employment did not provide for such a gratuity. We cite these examples only to show that in the area of employment, public agencies must compete, and if to so compete they grant benefits to employees for past services, they are not making a gift of public money but are taking self-serving steps to further the governmental agency's self-interest in recruiting the most competent employees in a highly competitive market.

In summary upon this point, we believe that the entire import of the Meyers-Milias-Brown Act is to permit as much flexibility in employee-governmental agency relations with regard to all aspects in the employer-employee milieu as a voluntary system will permit. To achieve this flexibility, the element of retroactivity is a necessary ingredient not only as to salaries but as to insurance, seniority, and a myriad of other potential points of conflict. We hold that the interpretation here sought is clearly within the contemplation of the Meyers-Milias-Brown Act.

Neither of County's twin defenses that retroactive pay is unconstitutional and also in excess of the board of supervisor's power can be sustained.

On the issue of whether retroactive pay raises are unconstitutional per se, there is a paucity of case law but the subject has been the focal point of several Attorney General opinions. These opinions were not rendered as esoteric discussions of legal philosophies. Rather they were answers given to inquiring governmental agencies confronted with the day-to-day operation of government and are therefore to be given weight as being contemporaneous administrative interpretations. (Mantzoros v. State Bd. of Equalization (1948) 87 Cal.App.2d 140; 3 Witkin, Summary of Cal. Law (7th ed.) p. 1825.) These opinions (23 Ops.Cal. Atty. Gen. 271; 33, p. 143; 39, p. 200; 47, p. 61) hold that the granting of retroactive pay raises under the circumstances recited therein did not constitute a violation of either article XIII, section 25 (forbidding gifts of public funds) or article IV, section 17 (forbidding extra compensation for past services) of the California Constitution. The Attorney General opinions rely upon the fact that in each instance the adjusted salary rates were made retroactive to a date at which the salary rates were indefinite and subject to future determination.

We have previously in our earlier discussion of the Meyers-Milias-Brown Act pointed out a similar situation. While negotiations are going on between Association and County, the question of salaries and other matters relating to employer-employee relationships remain undetermined. County's Board of Supervisors has the power to deny pay raises. The Meyers-Milias-Brown Act does not compel a governmental agency's governing body to adopt any agreement reached between the respective negotiators for the governmental agency and the representative employee organization. The power to deny such retroactive pay raises, however, does not compel the conclusion that the County(through its board of supervisors) does not have the power to grant such raises under existing laws. County was required to bargain in good faith. If in so bargaining County reached the conclusion that pay raises should be retroactive to the expiration date of the last salary ordinance, good faith required it to implement the results of negotiations between itself and the Association by making pay raises retroactive to such date.

County's second and most vigorously asserted argument is that apart from constitutional considerations there is no specific statutory authority for retroactive salary changes as is contained in Government Code section 18850 with regard

to state civil service employees. County contends that such specific statutory authorization is here required. Government Code section 18850 states in part: "The board [State Personnel Board] may make a change in salary range retroactive to the date of application for such change."

The constitutional authorization for the setting of county employees' salaries by the board of supervisors is found in article XI, section 1, of the California Constitution, which reads in part as follows: "The Legislature shall provide for county powers and an elected governing body in each county. . . . The governing body shall provide for the number, compensation, tenure, and appointment of employees."

In amplification of the above grant of power, Government Code section 23003 provides: "The county is a body corporate and politic, has the powers specified in this title, and such others necessarily implied from those expressed." Government Code section 25207 provides: "The board may do and perform all other acts and things required by law not enumerated in this part, or which are necessary to the full discharge of the duties of the legislative authority of the county government."

Entirely apart from the provisions of the Meyers-Milias-Brown Act, the above-quoted constitutional and statutory grants of power do not carry with them any limitations of power so as to deprive the board of supervisors of wide latitude in carrying out the duties mandated upon them by the Legislature. The county is a political subdivision of the state. It would seem strange indeed if the state could permit retroactive pay raises under the conditions stipulated in Government Code section 18850 to state employees and deny them to county employees. Nor do we believe any such result was intended or created by the Legislature.

We make a parallel observation with regard to the provisions in Education Code section 13602.5, which states: "If the governing board of a school district cannot comply with the provisions of subdivision (a) of Section 13602 because it is engaged in a study, which was commenced prior to the commencement of the school year, to increase the salaries and wages of persons employed by such district in positions not requiring certification qualifications, the board may, by appropriate action taken prior to the final adoption of its budget, do either of the following:

"(a) Adopt an interim salary schedule which shall be the same schedule as for the preceding year, except that increases may be granted at that time based upon increased cost-of-living indexes, and provide that the salaries and wages fixed as a result of the study shall be payable for the entire school year to include the period thereof in which the study was conducted and final board action taken.

"(b) Provide that the salaries and wages fixed as a result of the study shall be effective only for that portion of the school year, as determined by the board at the time it takes action after the study has been completed. 'Portion of the school year,' as used in this subdivision shall not be for any period of time less than the period of time remaining in the school year from the date the governing board adopts the salary schedule based on the study commenced prior to that school year."

If retroactivity of salary adjustments is a proper legislative consideration for state employees and certain educational employees, no discernible reason appears why it would not be a proper subject for negotiations pursuant to the Meyers-Milias-Brown Act. Indeed, governing bodies are mandated by Government Code section 3505 to "meet and confer in good faith" regarding wages, hours and other terms and conditions of employment with representatives of such recognized employee organizations.

We decide that the judgment of the court under the pleadings herein correctly determined that under the facts as alleged, no prohibition exists against the payment of retroactive salaries, and that defendant County has a duty to meet and confer in good faith with plaintiff Association on the issue of retroactive pay raises.

The judgment is affirmed. (*CERTIFIED FOR PUBLICATION.*)

THOMPSON, J.*

We concur:

RICHARDSON, P.J.

REGAN, J.

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* Assigned by the Chairman of the Judicial Council.

SAN LEANDRO POLICE OFFICERS ASSN. et al., Plaintiffs, Respondents and Appellants,

v.

CITY OF SAN LEANDRO et al., Defendants, Appellants and Respondents.

Civ. 35241.

Court of Appeal, First District, Division 4.

Feb. 23, 1976.

Hearing Denied April 22, 1976.

Bargaining representatives of city police and firemen, and others, brought suit against the city, and others, seeking a writ of mandate to compel city council to enact an ordinance granting claimants the same benefits as had been previously provided for other management employees of the city. The police and fire organizations also sought general damages and attorneys

SAN LEANDRO POLICE OFFICERS ASSN. v. CITY OF SAN LEANDRO

Carroll, Burdick & McDonough, Christopher D. Burdick, San Francisco, for plaintiffs.

127 Cal.Rptr.—54½

Glenn A. Forbes, City Atty., Lyle L. Lopus, Asst. City Atty., San Leandro, for defendants.

CHRISTIAN, Associate Justice.

The San Leandro Police Officers Association, Local 55 of the International Association of Firefighters, AFL–CIO, and several employees of the police and fire departments of the City of San Leandro brought this action against the City of San Leandro and several of its officers, seeking a writ of mandate to compel the city council to enact an ordinance to grant the same benefits to the claimants as had previously been provided for all other management employees. The police and fire organizations also sought general damages of $25,000 each and attorneys fees. A motion by the city for judgment on the pleadings was granted as to the causes of action seeking damages.

After trial, the court made findings and rendered a judgment for issuance of a peremptory writ of mandate; the claimants were awarded $1,500 for attorneys fees. The writ requires the city council of the City of San Leandro to enact legislation with retroactive effect granting the individual respondents the benefits of the three percent salary and benefit program previously instituted by the city council for other management employees.

Both sides have appealed.

The Police Officers Association is an unincorporated association organized pursuant to Government Code section 3508, and is the bargaining representative of the officers and men of the San Leandro Police Department within the job classifications of patrolman, sergeant, lieutenant, and captain. Local 55 is an organization organized pursuant to Labor Code sections 1960–1963, and is the bargaining representative of the officers and men of the San Leandro Fire Department within the job classifications of fireman, engineer, lieutenant, battalion chief, deputy chief, and assistance chief. The claimants who appeared individually were management-level

employees in the fire and police departments.

The city council of the City of San Leandro adopted a resolution to implement the Meyers-Milias-Brown Act.[1] The resolution designated the classifications of police lieutenant, police captain, deputy fire chief, fire battalion chief, and assistant fire chief, as "management positions." Thereafter, the city determined to create a "deferred management compensation program," under the terms of which "management employees" of the City of San Leandro, except members of the police and fire organizations, would receive a benefit amounting to approximately three percent of their base salary. The deferred management compensation program was established by the city council by the adoption of a civil service rule which was made effective retroactive to April 1, 1972.

The decision to exclude members of the police and fire organizations from the benefits of the deferred management compensation program was protested. The city manager responded in a memorandum directed to each of the affected individuals which stated in pertinent part: "The City Council feels it was made clear to you that in your choosing to be represented by your respective associations, you would not additionally be eligible for salary and benefit programs developed for management personnel not represented by formally recognized employee organizations." All of the management employees of the City of San Leandro who had elected not to be represented by an employee organization, including the chief of the fire department and the chief of the police department, have received the benefits of the city's deferred management compensation program.

During the summer of 1972, the two organizations repeatedly requested that city officials meet and confer with them on the issue of providing the benefits of the program to management employees who were members of both employee organizations. The city officials did not agree to such a meeting.

[1] The city contends that the court lacked jurisdiction to direct the city council to enact specific legislation. The general rule is that the fixing of compensation for city employees is a municipal legislative function. (Cal.Const., art. XI, § 5; *Sanders v. City of Los Angeles* (1970) 3 Cal.3d 252, 262, 90 Cal.Rptr. 169, 475 P.2d 201; *Alameda County Employees' Assn. v. County of Alameda* (1973) 30 Cal.App.3d 518, 531, 106 Cal.Rptr. 441; see also *City and County of S. F. v. Boyd* (1943) 22 Cal. 2d 685, 690, 140 P.2d 666.) However, local legislation may not conflict with statutes such as the Meyers-Milias-Brown Act which are intended to regulate the entire field of labor relations of affected public employees throughout the state. (See *Professional Firefighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 289–295, 32 Cal.Rptr. 830, 384 P.2d 158.)

The Meyers-Milias-Brown Act allows public employees to organize themselves: "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency." (Gov.Code, § 3502.) The Act protects public employees in the free exercise of choice in deciding whether to join public employee organizations: "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502." (Gov.Code, § 3506.)

[2] Under the plan adopted by the city council, all nonorganized management em-

ployees were to receive an additional three percent of their monthly salary as a "management incentive," but the benefit was withheld from those management employees who had determined to exercise their rights under the Meyers-Milias-Brown Act and join an employee organization. That action by the city interfered with and discriminated against a group of employees by reason of their decision to exercise their right to participate in employee organizations, thereby violating Government Code section 3506.

[3] Although the judgment calls for the city council to adopt certain legislation, it does not direct the city council to exercise its discretion in any particular manner. The judgment and writ must be understood as leaving it open to the city council to eliminate the discrimination by any lawful means. The city council remains free to extend or eliminate the management incentive program, but it may not discriminate among its employees for exercising their rights under the Meyers-Milias-Brown Act. It was proper to compel by means of a writ of mandate action to correct the existing unlawful practice. (Cf. *Glendale City Employees' Assn. v. City of Glendale* (1975) 15 Cal.3d 328, 343–345, 124 Cal. Rptr. 513, 540 P.2d 609.)

[4, 5] The city contends that the award of attorneys fees to the claimants was improper. Government Code section 800 provides for the payment of reasonable attorneys fees, not exceeding $1,500, to the complaining party by a public entity where it is shown in any civil action to review the results of "any administrative proceeding" that those results were arbitrary or capricious. But, "The fixing of compensation for public employees is a legislative function." (*Alameda County Employees' Assn. v. County of Alameda, supra,* 30 Cal.App.3d 518, 531, 106 Cal.Rptr. 441, 449; see also *Sanders v. City of Los Angeles, supra,* 3 Cal.3d 252, 262, 90 Cal.Rptr. 169, 475 P.2d 201.) The adoption of the resolution establishing the compensation plan did not constitute an "administrative proceeding" as specified in Government Code section 800; the award of $1,500 attorneys fees to respondents was unauthorized.

[6] The police and fire organizations cross-appeal, contending that it was error to grant a judgment on the pleadings in favor of the city on the causes of action seeking damages. A motion for judgment on the pleadings has the same purpose and effect as a general demurrer (4 Witkin, California Procedure (2d ed. 1971) Proceedings Without Trial, § 164, p. 2819), and may be granted where "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code Civ.Proc., § 430.10, subd. (e).) The organizations assert that their complaint stated a cause of action for damages upon either of two theories: (1) the refusal of appellants to meet and confer upon the question of extending the benefits of the deferred management compensation program to excluded management employees, and (2) acts of discrimination, intimidation, and coercion practiced upon those members of the police and fire organizations who were excluded from the benefits of the deferred management compensation program due solely to their membership in those organizations.

[7] Those claims cannot be reached in the present appeal. The complaint contained no allegations that claims for damages were presented to the city. No suit for damages may be brought against a public entity on causes of action for which claims are required to be presented by the Government Code until such written claims have been presented and have been acted upon or deemed to have been rejected by the appropriate administrative agency. (Gov.Code, § 945.4.) The only claims for money or damages excepted from this requirement are those listed in Government Code section 905. None of the exemptions is applicable to this case. It was proper to give judgment on the pleadings on the causes of action for money damages.

The judgment is modified by deleting the award of attorneys fees; as so modi-

fied it is affirmed. Defendants will recover costs on appeal.

Certified for publication.

RATTIGAN, Acting P. J.* and EMERSON, J.**, concur.

48 Cal.App.3d 331

[331] ORGANIZATION OF DEPUTY SHERIFFS OF SAN MATEO COUNTY INC. et al., Plaintiffs and Appellants,

v.

COUNTY OF SAN MATEO et al., Defendants and Appellants.

Civ. 33305.

Court of Appeal, First District, Division 3.

March 25, 1975.

Hearing Denied June 4, 1975.

Captain and sheriff's lieutenant petitioned for mandatory and injunctive relief against creation of bargaining representation unit composed entirely of county peace officers engaged in management. The Superior Court, San Mateo County, Melvin E. Cohn, J., found lieutenants to be management employees but granted mandatory and injunctive relief. County and Civil Service Commission appealed and captain and lieutenant cross-appealed. The Court of Appeal, First Appellate District, Good, J., held that establishing of a bargaining representation unit, which would have been composed only of county peace officers with managerial duties, would not have been unreasonable or against the public interest, that county resolution, which prohibited inclusion of management employees together with nonmanagement employees in a bargaining unit, was not unreasonable, that segregation of county law enforcement employees with managerial duties into a separate bargaining unit did not violate peace officers' rights under Myers-Milias-Brown Act provision pertaining to right of peace officers to join or participate in employee organization composed solely of such peace officers and that evidence supported finding that lieutenants were "managerial employees."

Judgment reversed with instructions.

Keith C. Sorenson, Dist. Atty., County of San Mateo, James W. Foley, Michael J. McLaughlin, Deputy Dist. Attys., Redwood City, for plaintiffs-appellants.

Carroll, Burdick & McDonough, San Francisco, for defendants-appellants.

GOOD,* Associate Justice. [333]

The Organization of Deputy Sheriffs, ODS *post*, was formed in 1970 as an organization whose membership included civil service job classifications of sheriff's deputies, sergeants, lieutenants and captains and investigators and chief inspector in the district attorney's office. It was composed entirely of peace officers. Its purpose, in addition to promoting effectiveness of law enforcement generally, was to represent sheriff's employees of rank below captain and district attorney's investigators in labor negotiations with the County of San Mateo. Captains were thus members of ODS but not represented by it.

After the passage of the Myers-Milias-Brown Act (MMB, *post*; also, code references *post* are to Government Code sections 3500 to 3510 unless otherwise stated), appellant County in August 1970, as autho- [334]

rized by section 3507,[1] promulgated Resolution 28068 to govern employer-employee relations therein. The resolution contained rules of procedure for the establishment and modification of representation units for various classifications of employment. Pursuant thereto, ODS petitioned for its recognition as the representation unit for sheriff's employees below captain and for inspectors in the district attorney's office, all of whom were peace officers as defined by Penal Code sections 830.1 and 830.3, subdivision(b). The petition was granted and a Law Enforcement Unit was established with ODS recognized as the organization representing these employees. The sheriff's captains, chief civil deputy and the district attorney's chief investigator were designated as management employees and placed in the All County Management Unit which included managerial and confidential employees in departments having nothing to do with law enforcement and was thus not composed entirely of peace officers. This unit was represented by the County Employees Association, a county-wide employee's organization.

Less than two years thereafter, ODS, upon the initiative of respondent Captain Elvander and other peace officers who were in the All County Management Unit, petitioned the Civil Service Commission to create a new Law Enforcement Management Unit to be composed entirely of peace officers and to thus remove them from representation by the All County Employees Association. They asked that ODS be recognized as their representation organization. The petition was granted but the Commission took it a step further 1336
and determined that sheriff's lieutenants had managerial duties and they were thus included in the Law Enforcement Management Unit. Before an election could be held to designate an employee's organization to represent them—a step contemplated by section 3507, subdivision (d), where regulations for such elections existed—ODS, Captain Elvander and Lieutenant Hoover (who had served on ODS' negotiating team for two years), individually and on behalf of the officers placed in the new unit, filed their petition in the superior court seeking mandate and injunction to prevent the creation of the new unit or the inclusion therein of said upper echelon employees. They sought to compel the County to continue lieutenants in the (basic) Law Enforcement Unit and to add thereto the sheriff's captains, his chief deputy and the district attorney's chief inspector.

The trial court found that the creation of two law enforcement units violated the rights of peace officers under section 3508 which in relevant part provides: ". . . the governing body may not prohibit the right of its employees who are full-time 'peace officers' . . . to join or participate in employee organizations which are composed solely of such peace officers,

1. A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500). Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502 (e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (f) access of employee organization officers and representatives to work locations (g) use of official bulletin boards and other means of communication by employee organizations (h) furnishing nonconfidential information pertaining to employment relations to employee organizations (i) such other matters as are necessary to carry out the purposes of this chapter.

Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition.

No public agency shall unreasonably withhold recognition of employee organizations.

which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization. [¶] The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section."

The mandatory and injunctive relief prayed for was granted, including a mandate that ODS be recognized as the representative for the basic law enforcement unit which, as reconstituted according to the mandate, would include both upper and lower echelons of peace officers. The court made findings and conclusions which recited the resolution's definition of "management employees"[2] and found that the Commission had "authority to find that lieutenants are management employees;" that its finding to that effect was supported by evidence both before the Commission and at trial; that lieutenants and captains were management employees and that the "county's prohibition restricting management and confidential employee's activities, 1336 expressed in section 17 [of said resolution] is valid."[3] we find nothing in the judgment itself that reduces these latter findings and conclusions to judgment either by way of declaration or order.

The County and Civil Service Commission appealed. ODS and Captain Elvander and Lieutenant Hoover cross-appealed "from that portion of the judgment . . . [which held] . . . that lieutenants in the Sheriff's Department . . . were and are 'management employees' as that term is defined" in said resolution. Although the point is not properly before us on the cross-appeal because the judgment is completely silent concerning it, the point must be discussed because for reasons explained below we have concluded that the judgment must be reversed as to that portion which prohibits appellant from designating any management and confidential employees in the sheriff's office as a separate representation unit.

MMB furnishes a sketchy and frequently vague framework of employer-employee relations for California's local governmental agencies. It has been criticized for lack of specificity, "confusing lack of clarity" and internal inconsistencies in many important areas. (Grodin, Pub. Emp. Bargaining in California, 23 H.L.J. (1972) 719, 738–739, 760; Schneider (1969) An Analysis of the Meyers-Milias-Brown Act of 1968 (1 Civil Public Employment Relations [CPER] 1) and Unit Determination, Experiments in California Local Government, (3 CPER 1).) The dispute herein arises out of the kind of vagueness and inconsistencies described by Dr. Grodin, *supra*. The basic issue presented is whether MMB's grant of authority for a public agency to designate some employees in various departments as management or confidential employees and restrict them from representing any employee organization which represents non-management or non-confidential employees (§ 3507.5)[4] was rendered inapplicable to

2. This definition is: "Management employee —Any employee having significant responsibility for formulating or administering County policies and programs and having responsibility for directing the work of subordinates through lower-level supervision."

3. The restrictions were summarized in the findings: "At all times pertinent section 17 of the employer-employee relations policy of the County of San Mateo provided that management or confidential employees who are members of an employee organization that includes as members employees who are not management or confidential employees shall not (a) serve on committees which deal with matters within the scope of representation or (b) serve as representatives of such employer organization before county management." (Compare, § 3507.5.)

4. Section 3507.5 reads:
"In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of

1337 the law enforcement branches of local governments by the provisions of section 3508 heretofore quoted and precluded the County from designating management employees therein as an appropriate bargaining unit separate from non-management employees therein.

The trial court held that "the creation of a separate [law enforcement] management unit of peace officers abridges the statutory right that the management employees have to join and participate in the Organization of Deputy Sheriffs. . . ." Although we have phrased the basic issue in a different manner by placing emphasis on the postulated inconsistency of the two sections of MMB, we are not in disagreement with the trial court's statement that the issue was whether the Civil Service Commission had the power to create the two separate bargaining units for the County's deputy sheriffs if they are opposed to being divided.

Appellant contends that MMB contemplates separate representation units determined or defined as to job classification included within an appropriate unit by the public agency and employee organizations whose right to represent such units is determined by vote of the employees "of the agency or an appropriate unit thereof." (§ 3507.) Grodin points out that the phrase "appropriate unit" is borrowed from the federal statute. Reference to standards of appropriateness established by NLRB decisions is arguably invited—an invitation accepted in Alameda County Assistant Public Defenders Assn. v. County of Alameda (1973) 33 Cal.App.3d 825, 829, 109 Cal. Rptr. 392, which cites and relies upon N. L.R.B. decisions.

Schneider at 1 CPER, pp. 12–13, *supra*, states that in the complex matter of unit determination, MMB neither requires nor prohibits such determination. The language of section 3507 as to adoption of rules and regulations is permissive. The only limitations are that they must be (a) preceded by "consultation in good faith" with employee organizations; (b) rules promulgated must be reasonable; and (c) section 3507.3 requires that professionals must be allowed the option of separate representation in an organization of similar employees—an aspect not here involved. Nor is the question of whether or not man- employees' organization if the governing damus would issue at the instance of an body refused to make any unit determination. The point is that such determination is for the agency as employer subject only to the restrictions set forth above. (Cf. 1338 Grodin, *supra*, 23 H.L.J. 741–742.)

The record herein reflects considerable consultation between the employees involved with various county officers before the Commission's hearing that resulted in the creation of the management unit that is here sought to be nullified. Evidence was taken at said hearing. It appears not to have been reported but various witnesses testified to the gist of it in court. As to such unit determination and the designation of management employees made by the Commission, the only criteria for judicial review provided by MMB is that of reasonableness. (Grodin, *supra*, 23 H.L.J. 741.)

Contrary to federal practice, by virtue of the broad definition of "public employee" in section 3501, subdivision (d), which excludes only elected officials and those appointed by the Governor, MMB extends organizational and representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy. The act is silent about their unit placement. The California Legislature thus minimized the potential or actual conflict of interest that, as men-

the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization."

tioned in NLRB v. Bell Aerospace Co. (1974) 416 U.S. 267, 271–272, 94 S.Ct. 1757, 40 L.Ed.2d 134, was the basis for the total exclusion of management employees that obtains under federal law.[5]

[1–4] Where a legislative action by a local governmental agency is attacked as unreasonable, the burden of proof is on the attacking party. Such regulations are presumed to be reasonable in the absence of proof to the contrary. (Fillmore Union High School Dist. v. Cobb (1935) 5 Cal.2d 26, 33, 53 P.2d 349; Dept. Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Board (1959) 169 Cal.App.2d 785, 792–793, 338 P.2d 50.) If reasonable minds may be divided as to the wisdom of a board's action, its action is conclusive and courts 339 should not substitute their judgment for that of the board. (Rible v. Hughes (1944) 24 Cal.2d 437, 445, 150 P.2d 455.) We are of the opinion that the reasonableness or appropriateness[6] of the unit here under attack finds support in the following considerations: (a) the existence of actual or potential conflicts of interest where management employee's loyalties may be split between the employers' interests and those of employees; (b) history of collective bargaining; (c) the greater responsibility of management employees for the efficient functioning of a department constitutes a community of interest not necessarily shared by rank-and-file employees; and, (d) lack of reason why a sheriff's office should be treated differently as to management employees than any other county office; and (e) the public interest served by a sheriff charged with vitally important functions of law enforcement, is such that if a governing agency determines that he, as the representative of the public employer, should be entitled to the undivided loyalty of his managerial and confidential employees, we cannot say this determination is either unreasonable or not in the public interest.

[5] We have noted that MMB differentiates between the designation of appropriate bargaining units and the formation of employee organizations. When the Legislature departed from the federal policy of excluding management employees and gave them organizational and representation rights, it must have been aware of the sometimes stormy developments in labor relations that gave rise to the exclusionary federal policy and practice. The trial court, in its memorandum opinion, read into the language of section 3507.5 (*supra*, p. 213), the sole purpose of restricting such employees from bargaining for the organization to which they belong. The judge stated that this was made doubly clear by the provision that "this section does not otherwise limit the right of em-

5. Grodin, *supra*, 23 H.L.J. 740, uses the phrase "inevitable conflicts of interest." Schneider, *supra*, 3 CPER 1, 16–17, postulates that in the public sector, conflict of interest between management and supervisory employees is not as clear-cut as it is in the private sector because (a) supervisorial powers are ordinarily qualified or limited by civil service and merit systems in a manner that takes supervisorial employees out of LMRA's definition; (b) all ranks of public employees share common goals and have a community of interest in the functioning of their common employer—the public as represented by the particular agency; and (c) the high proportion of professionals in both supervisory and rank-and-file positions "reinforces the cohesiveness that inheres in public employment." He also notes that in the private sector unions do not ordinarily accord membership to such employees—thus preserving historic Them vs. Us (!) separations between labor and management.

6. In the absence of any standards other than reasonableness to determine what are "appropriate units" recourse must be had to federal standards where the following factors have been considered by NLRB: Community of Interests; History of Bargaining; Desires of Employees; Nature and Organization of Business; Public Interest, etc. (18 C Business Organizations, Kheel, Labor Law § 14.-02.1.) Schneider's study, *supra*, 3 CPER, p. 4. names three criteria commonly in use in the public sector, viz.: Community of Interest; Employer's authority to bargain effectively at the level of the unit; and, the effect of a unit on the efficient operation of the public service.

ployees to be members of and hold office in an employee organization." At first reading, under section 3500, which declares MMB's purpose and intent, that right would appear to be an absolute right of employees to "join organizations of their own choice and be represented" by them. But the 1972 amendment stating that MMB was not intended to bind public agencies
1340 which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter (a clear reference to § 3507) preserves to local agencies, as employer, rule making power as to recognition of organizations and of unit determination therefor. Insofar as such rules and regulations are reasonable and are promulgated after consultation with such organizations, the "absolute" right to join and to be represented by an organization of the employee's choice is subject to such rules. City of San Diego v. American Federation of State, etc. Employees (1970) 8 Cal.App.3d 308, at p. 312, 87 Cal.Rptr. 258, at p. 261 states: "Of particular significance is the fact the employer-employee relationship in public employment is the product of law—constitutional, legislative and decisional—rather than the product of a contract as in private employment. [citations] The terms and conditions of public employment are fixed by the public through the processes of law, and acceptance of such employment requires acceptance of the processes by which the terms and conditions of employment are fixed, i. e., by law rather than contract."

The strict interpretation of section 3507.-5 adopted by the trial court is difficult to reconcile with the unit determination rights contained by necessary implication in section 3507. Section 3507.5 speaks of organizations and not units. Such view also overlooks the possibility that in giving a governmental agency the right to designate management employees and to restrict them from representing an organization that includes non-management employees, the Legislature may have intended to retain to the public employer some measure of protection against conflict of interest considerations that might arise when management employee's loyalties are split between the employer's interests and those of employees while preserving to such employees an optional right to form their own organization and thus escape the restriction of said section 3507.5.

[6–10] When reasonably possible, courts must harmonize statutes, reconcile seeming inconsistencies and construe them to give force and effect to all provision thereof. (Hough v. McCarthy (1960) 54 Cal.2d 273, 279, 5 Cal.Rptr. 668.) Courts may not add to or detract from a statute or insert or delete words to accomplish a purpose that does not appear on its face or from its legislative history.[7] (Estate of Simmons (1966) 64 Cal.2d 217, 221, 49 Cal.Rptr. 369; Pepper v. Board of Directors (1958) 162 Cal.App.2d 1, 4, 327 P.2d 928.) Administrative regulations are subject to the same rules of construction and interpretation that apply to statutes. (Lertora v. Riley (1936) 6 Cal.2d 171, 57 P.2d 140; Duke Molner etc. Liquor Co. v. Martin (1960) 180 Cal.App.2d 873, 884, 4 Cal. Rptr. 904.) In the light of these rules, we have examined sections 9, 10 and 11 of San Mateo's Resolution 28068 which provide for the establishment of representation units, their modification, and establishes criteria to be considered in the determination of modification of appropriate representation units. We find nothing unreasonable in them. The segregation of management employees into a separate bargaining unit is appropriate under standards used by N.L.R.B. heretofore discussed and under factors (b)(c)(d) and (f) of

7. Grodin, *supra*, 23 HLJ, 719 contains discerning comment on the legislative history of the act. He refers to Ross, The California Experiment: Meet and Confer for All Public Employees (CPER, Sp. Issue, June 1969) where it is suggested that the act made it through the Legislature precisely because it was ambiguous (p. 20).

[8] section 11 of said resolution. Subdivision h of said section 11 reads, "Management and confidential employees shall not be included in the same unit with non-management or non-confidential employees." A tabulation prepared by Ross * and De Gially ** for their article in 8 CPER 6 shows that eight counties (Alameda, Los Angeles, Marin, Sacramento, San Benito, San Mateo, Santa Clara and Ventura) and five cities (Berkeley, Concord, Glendale, Pasadena and Sacramento) have like unit limitations. Interpretation and application of a statute, by administrative agencies charged with its implementation, although not determinative, is an aid to construction that is entitled to weight unless it is clearly erroneous. The number of agencies that have made this segregation of management employees also argues the reasonableness thereof.

[11] Finally, we must determine whether or not the segregation of management employees who are in law enforcement into a separate unit is a prohibition of peace officers' rights under section 3508 "to join or participate in employee organizations which are composed solely of such peace officers . . . which are not subordinate to any other organization." ODS advances no reason why a sheriff's department should be treated differently as to management employees than any other department of the County. Autonomy of such organizations is required by the last phrase of section 3508. The plural use of "employee organizations" appears to recognize the possibility of the existence of more than one peace officer employee's organization within the agency.

ODS argues that section 11, subdivision h of said resolution is arbitrary, capricious and unreasonable. The argument, however, is based upon a faulty concept of what is meant by "management employees" which is viewed as a contradiction in terms. But this is confusing ownership with management. The County argues that the designation of management employees was authorized by section 3507.5 and their placement in a separate unit was authorized by section 3507 and that neither the designation nor the creation of the management unit had any effect upon these employees' right to maintain their membership in ODS, or, if they so elect, to form their own peace officers' management organization. The County acknowledges that these management employees, as an appropriate unit, are free to select ODS as their representative organization. The County's arguments are persuasive and reconcile the seeming inconsistencies between the Code sections involved.

Our decision herein does not rest upon the estoppel which the County attempts to predicate upon the fact that the action protested was initiated at the request of the officers involved. Basic elements of estoppel are missing.

[12] Respondent officers' arguments attacking the finding that lieutenants were properly designated as managerial employees overlook the testimony of the personnel director, as well as that of Lt. Hoover which described duties and authority that brought him within the definition of a management employee. The findings in this regard were supported in the record. We explain that this comment is made solely because if the involved employees were not within the definition of management then the import of the resolution and of the later modification could not be considered reasonable under section 3507.

8. These are: "b. The effect of the proposed unit on the efficient operation of County services, and sound employment relations. [¶] c. The history of employee relations in the unit, among other employees in the County, and in similar public employment and private industry. [¶] d. Similarity of duties, skills, wages and working conditions of employees . . . . [¶] f. The effect on the existing classification of dividing a single classification among two or more units.

* Prof. Econ., Mills College.

** Asst. Editor, CPER.

The judgment is reversed and the trial court is instructed to dismiss the petition. Each side will bear its own costs.

DRAPER, P. J., and HAROLD C. BROWN, J., concur.

SAN FRANCISCO FIRE FIGHTERS LOCAL 798, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, Plaintiff and Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Appellants.

Civ. 36882.

Court of Appeal, First District, Division 1.

April 9, 1976.

Rehearing Denied May 7, 1976.

As Modified June 18, 1976.

Hearing Granted July 15, 1976.

The Superior Court, City and County of San Francisco, Ira A. Brown, Jr., J., affirmed labor arbitrator's award as to conditions of employment of city firemen, and city appealed. The Court of Appeal, First District, Elkington, J., held that memorandum agreement between city and firemen, which called for binding arbitration of certain disputes was clearly unauthorized delegation of legislative power

granted to city by charter, and that any arbitration entered into pursuant to such memorandum was thus not binding on city.

Reversed.

Thomas M. O'Connor, City Atty., Milton H. Mares, Deputy City Atty., San Francisco, for defendants and appellants.

Davis, Cowell & Bowe, Philip Paul Bowe and Richard G. McCracken, San Francisco, for plaintiff and respondent.

ELKINGTON, Associate Justice.

The City and County of San Francisco and certain of its agencies and officials ("City") have appealed from a judgment of the superior court confirming an arbitrator's award. The award gave effect to a memorandum of understanding ("Memorandum") signed by San Francisco Fire Fighters Local 798, International Association of Fire Fighters, AFL–CIO ("Union"), the City's mayor, its board of supervisors, and its fire commission. The Memorandum provided for arbitration of grievances concerning "terms and conditions of employment," as established by the rules and regulations of the fire commission.

The City has chosen, by the vote of a majority of its electors, to adopt a charter ("Charter") under the provisions of the state's Constitution; the City's ordinances and regulations are subject to the restrictions and limitations of the Charter, which "shall supersede . . . all laws inconsistent therewith." (Cal.Const., art. XI, § 3a, formerly §§ 7½, 8.)

The Charter "represents the supreme law of the City and County of San Francisco, subject, of course, to conflicting provisions in the United States and California Constitutions, and to preemptive state law." (*Harman v. City and County of San Francisco*, 7 Cal.3d 150, 161, 101 Cal.Rptr. 880, 887, 496 P.2d 1248, 1255.) "[Charter] cities may make and enforce all ordinances and regulations subject only to restrictions and limitations imposed in their several charters. . . . Within its scope, such a charter is to a city what the state Constitution is to the state." (*Campen v. Greiner*, 15 Cal.App.3d 836, 840, 93 Cal.Rptr. 525, 527.)

The Charter provides that the City's chief executive shall be a mayor, who is

chosen by vote of the electorate. It also provides that the mayor shall appoint a fire commission.

Section 3.540 of the Charter states:

"The fire department shall be under the management of [the] fire commission, . . ."

The powers and duties of boards and commissions are set forth in section 3.500 of the Charter as follows:

"Each board and commission appointed by the mayor, or otherwise provided by this charter, shall have *powers and duties* as follows: (a) *To prescribe reasonable rules and regulations not inconsistent with this charter for the conduct of its affairs, for the distribution and performance of its business, for the conduct and government of its officers and employees,* . . ." (Emphasis added.)

The "terms and conditions of employment" which were the subject of arbitration in this case were established by the "rules and regulations" prescribed by the fire commission, as commanded by the Charter's section 3.500.

California's Legislature has enacted the "Meyers-Milias-Brown Act" (hereafter sometimes the "Act") which is codified as Government Code sections 3500–3510, inclusive. The Act's purpose is threefold, as follows:

"[1. To] promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations"; "[2. To] promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies"; "[3. To] strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed." (Gov.Code, § 3500.)

The Act provides, among other things, for meetings between public employee organizations and representatives of the public employer, in order to "confer in good faith regarding wages, hours, and other terms and conditions of employment . . ." (Gov.Code, § 3505.)

It is then provided:

"If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a *written memorandum of such understanding, which shall not be binding*, and present it to the governing body or its statutory representative for determination." (Gov.Code, § 3505.1; emphasis added.)

The Act further provides:

"Nothing contained herein shall be deemed to supersede the provisions of existing state law and the *charters*, ordinances, *and rules of local public agencies which establish and regulate a merit or civil service system* . . ." (Gov. Code, § 3500; emphasis added.)

The City's Charter establishes and regulates such a merit or civil service system as is contemplated by Government Code section 3500, for its employees, including its fire fighters.

The City's fire fighters, exercising the right recognized by section 3500 of the Act had elected to be represented by the Union.

In 1973 the Union and representatives of the City, pursuant to the Act, met and conferred concerning the fire fighters' employment relationship with the City. In consideration, among other things, of the Union foregoing "the right to strike," there was prepared the above-noted Memorandum, according to Government Code section 3505.1.

The Memorandum, among other things, provided:

"*Grievance Procedure*: The grievance procedure presently in effect, and utilized by the Employer and the Union, shall continue in operation for the purpose of settling disputes relating to the terms and conditions of employment in the Department; provided, however, that in the event no settlement is reached concerning any dispute, said dispute shall be subject to the impasse procedure hereinafter provided."

"[*Impasse Procedure*:] a) Pursuant to the grant of authority set forth in paragraph (d) of Section 3507 of the Government Code of the State of California, the parties agree that all unresolved issues between the parties relating to employment conditions, including grievances but excluding disciplinary proceedings, shall upon the request of either party hereto, be submitted to an impartial arbitrator for final and binding determination. Provided that before proceeding to arbitration both parties agree to meet mutually with the Mayor in order to attempt to resolve the impasse. [¶] b) The parties shall attempt to agree upon the impartial arbitrator provided for herein, but in the event they are unable to do so within five (5) days, then the American Arbitration Association shall be requested to nominate five (5) persons, all of whom shall be residents of San Francisco, qualified and experienced as labor arbitrators. If the parties cannot agree upon one (1) of the five (5) persons named to act as arbitrator, they shall strike names from the list alternately until one name remains, and said person shall then become the arbitrator. [¶] c) The decision of the arbitrator on any issue submitted as provided herein shall be final and binding on all parties. Any joint costs of arbitration shall be borne equally by the parties."

The Memorandum, as previously noted, was thereafter approved by the City's mayor, its board of supervisors, and its fire commission. *If they had the required authority* the Memorandum thus became a binding agreement between the Union and the City. (See *Glendale City Employees' Assn. v. City of Glendale*, 15 Cal.3d 328, 124 Cal.Rptr. 513, 540 P.2d 609.)

Thereafter the Union and its fire fighter members considered themselves aggrieved by 44 of the fire commission's rules and regulations relating to terms and conditions of employment. The parties again met and conferred and were able to resolve 10 of the disputed matters. But an "impasse" was reached on the remainder. These 34 rules and regulations were then submitted, under the Memorandum, to an arbitrator for his determination whether they should be continued as written, or be modified or rescinded.[1]

Among the fire commission's rules and regulations, or "terms and conditions of employment" sought to be annulled or changed by the Union were such as related to the scope of the authority of "company commanders" over fire fighters, discipline for "incompetence" and "unlawful violence," requirements of physical fitness and that fire fighters have no other gainful occupation, "prohibition against strikes" and "participation in sympathetic strikes," and the conditions under which fire fighters might be assigned and transferred.

During the ensuing arbitration proceedings the parties reached further agreement on some of the controverted matters. As to the remainder the arbitrator made his rulings; some favoring the Union, and some the City. The rulings themselves are irrelevant to our discussion for, as noted, the sole issue before us relates to the authority of the City's agencies and officials

1. The City appears at all times to have denied any power in its officials or agencies to delegate the fire commission's Charter-imposed duties to an arbitrator. It contends that the Memorandum, at least in this respect, was approved in order that a judicial determination of the issue might be obtained. No contention of bad faith, or estoppel, or the like, is made by the Union in relation to the City's stated position.

to approve the Memorandum insofar as it provided for arbitration of the fire commission's rules and regulations.

The City, for the reasons pointed out in footnote 1, *ante*, declined to honor the arbitrator's award, and the Union thereupon commenced the instant judicial proceedings in the superior court. As noted, the court thereafter entered a judgment confirming the arbitrator's award, from which judgment the appeal now before us was taken.

The basic issue in the superior court was whether the City through its mayor, board of supervisors, and fire commission, or any of them, was legally permitted to delegate to an arbitrator, the "rules and regulation" making power entrusted to the fire commission by the Charter.

The City contends that the authority of the fire commission to prescribe its own reasonable rules and regulations is made exclusive by the Charter, and that such power may not be assigned or delegated to another, such as the arbitrator of the case before us.

The Union first insists that the City's contention was "flatly rejected" by the state's Supreme Court in *Fire Fighters Union v. City of Vallejo*, 12 Cal.3d 608, 116 Cal.Rptr. 507, 526 P.2d 971 (decided October 2, 1974). But in that case the *charter* of the City of Vallejo expressly provided for arbitration when the city and its employees were otherwise unable to resolve certain disputes. The court simply gave effect to that charter provision. In the case at bench the City's Charter did not provide for arbitration of the rules and regulations in dispute, but instead placed the exclusive power and duty to formulate them in the fire commission. *Fire Fighters Union v. City of Vallejo*, supra, is wholly inapplicable to the issue before us.

We proceed with our consideration of the issue as presented by the City.

There is little disagreement over the basic principle with which we are concerned.

The rule is broadly stated in 2 McQuillin, The Law of Municipal Corporations (3d ed. 1966) section 10.39, as follows:

"[T]he principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be delegated to others, unless so authorized by the legislature or charter. ***In every case where the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate it to others, as by submitting it to arbitration.***" (Fns. omitted; emphasis added.)

[1] Relying in part on the above-quoted authority of McQuillin the high court of the state in *California Sch. Employees Assn. v. Personnel Commission*, 3 Cal.3d 139, 144, 89 Cal.Rptr. 620, 623, 474 P.2d 436, 439, asserted the same principle in this manner:

"As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates *in the absence of statutory authorization.*" (Emphasis added.)

Under this rule there can be no doubt that the fire commission, *in the absence of some higher authority*, was without power to surrender its "powers and duties" to prescribe rules and regulations to an arbitrator. Its approval of the Memorandum's arbitration provisions, insofar as they dealt with its rules and regulations governing terms and conditions of employment, was obviously without legal effect.

Another statement of the rule presently under consideration is found in *Kugler v. Yocum*, 69 Cal.2d 371, 375, 71 Cal.Rptr. 687, 689, 445 P.2d 303, 305. The court there stated:

"'The power . . . to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it. . . .' [Citations.] *Moreover, the same doctrine precludes delegation of the legisla-*

tive power of a city [citations]." (Emphasis added.)

Earlier the same principle was stated by *Chamber of Commerce v. Stephens*, 212 Cal. 607, 610, 299 P. 728, 730, as follows:

"[L]egislative or discretionary powers or trusts devolved by *charter* or law on a council or governing body, or a specified board or officer, cannot be delegated to others, . . ." (Emphasis added.)

Adverting to the principle tersely expressed in *California Sch. Employees Assn. v. Personnel Commission*, supra, 3 Cal.3d 139, 144, 89 Cal.Rptr. 620, 623, 474 P.2d 436, 439, we inquire whether there was "*statutory* [*or other legal*] *authorization*" for the delegation of power here at issue. If such an authorization existed it necessarily arose out of the mayor's and board of supervisors' approval of the Memorandum.

[2] But as we have pointed out the Charter "represents the supreme law" of the City subject only to conflicting constitutional provisions "and to preemptive state law." (*Harman v. City and County of San Francisco*, supra, 7 Cal.3d 150, 161, 101 Cal.Rptr. 880, 887, 496 P.2d 1248, 1255.) The acts and rulings, and contracts, of lesser municipal authority are subject to the "restrictions and limitations" imposed by the charter. (*Campen v. Greiner*, supra, 15 Cal.App.3d 836, 840, 93 Cal.Rptr. 525.)

Here the Charter expressly confides the formulation of the fire department's rules and regulations covering terms and conditions of employment to the fire commission. And patently, the City's mayor and board of supervisors whose authority is derived from the Charter may not reasonably, or as a matter of law, have authority to do an act, or make an agreement, in derogation of the Charter.

From what we have said, it follows that neither the City's mayor, nor its board of supervisors, nor its fire commission, had authority to approve the Memorandum's provisions for arbitration of grievances concerning the fire commission's rules and regulations.

The Union has relied, in part, on such authority as *Irwin v. City of Manhattan Beach*, 65 Cal.2d 13, 51 Cal.Rptr. 881, 415 P.2d 769, and *Kugler v. Yocum*, *supra*, 69 Cal.2d 371, 71 Cal.Rptr. 687, 445 P. 2d 303, where delegation of certain of a city council's power has been held proper.

Irwin concerned a general law (as distinguished from "charter") city which had "such powers as are 'necessarily incident to those expressly granted or essential to the declared object and purposes of the municipal corporation.'" (P. 20, 51 Cal.Rptr. p. 885, 415 P.2d p. 773.) Among those powers was the right of control over the city's streets. The city council permitted property owners, *subject to strict city supervision and detailed conditions* (see pp. 17–18, 51 Cal.Rptr. 881, 415 P.2d 769), to build a private pedestrian overpass spanning a city street between two buildings owned by them. In a taxpayer's action to cancel the permit, an issue was raised whether the city had improperly delegated its jurisdiction over the public street.

It will be noted that the city (unlike the City and its agencies of the case at bench) was in no way restricted, by charter or otherwise, in its action; it had plenary power over its streets. For that reason alone, *Irwin* is inapplicable to the issue at hand. (See *California Sch. Employees Assn. v. Personnel Commission*, supra, 3 Cal.3d 139, 144, 89 Cal.Rptr. 620, 474 P.2d 436.) But we observe further that the court there found the delegated construction work to be proper because "'ultimate control over matters involving the exercise of judgment and discretion has been retained by the public entity.'" (Pp. 23–24, 51 Cal.Rptr. p. 887, 415 P.2d p. 775.) It was stated (p. 24, 51 Cal.Rptr. p. 887, 415 P.2d p. 775.): "It is difficult to imagine how the city herein could have more completely retained ultimate control over those matters involving the exercise of judgment and discretion relative to the pedestrian overpass."

In the case before us the fire commission surrendered all "control," and all exercise of "judgment and discretion," over such of its rules and regulations as were not acceptable to the Union. *Irwin* is found inapposite to the issues presented here.

We have also considered *Kugler v. Yocum*, supra, 69 Cal.2d 371, 71 Cal.Rptr. 687, 445 P.2d 303, which concerned the City of Alhambra. Voters of that city had secured sufficient signatures to an initiative petition which would fix the pay of certain city employees at the average paid for like services by an adjoining county and city. Since the City of Alhambra's charter empowered its council to establish the employees' salaries, such a matter was properly "within the electorate's initiative power." (P. 374, 71 Cal.Rptr. 687, 445 P.2d 303.) The council refused to recognize the initiative petition, because its passage "would constitute an unlawful delegation of legislative power" (p. 375, 71 Cal.Rptr. p. 689, 445 P.2d p. 305) to the abutting public entities whose salary standards were followed. The *Kugler* court mandated the acceptance of the petition and the holding of an election thereon.

Parenthetically, here again we note that the *Kugler* city council, and hence the electorate in initiative proceedings, had plenary power over the matters in question without charter or other limitation or restriction, thus suggesting the inapplicability of that case also.

[3] In its discussion the *Kugler* court articulated other exceptions to the strict rule against delegation of a city's legislative power. They may perhaps best be stated in this fashion. (1) Before there may be such a delegation there must be sufficient standards, or "safeguards" to prevent its abuse (pp. 375–376, 380–382, 71 Cal.Rptr. 687, 445 P.2d 303). (2) Discussing a related doctrine the court stated (p. 376, 71 Cal.Rptr. p. 690, 445 P.2d p. 306.): " 'The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the "power to fill up the details" by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect. . . .' [Citation.] Similarly, the cases establish that '[w]hile the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend.' " (3) Finally the court said (pp. 376–377, 71 Cal.Rptr. p. 690, 445 P.2d p. 306): "[T]he purpose of the doctrine that legislative power cannot be delegated is to assure that 'truly fundamental issues [will] be resolved by the Legislature' and that a 'grant of authority [is] . . . accompanied by safeguards adequate to prevent its abuse.' [Citations.] This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions."

Applying these several principles the *Kugler* court found that the city's counsel could itself have made the "fundamental decision," i. e., that the city's employees' wages should be attuned to those of adjoining public entities, leaving to others the mere "implementation" of that decision. And it concluded that proper "standards" and "safeguards" had been fixed, for: "The proposed Alhambra ordinance contains built-in and automatic protections that serve as safeguards against exploitive consequences from the operation of the proposed ordinance. Los Angeles is no more anxious to pay its firemen exorbitant compensation than is Alhambra. Los Angeles as an employer will be motivated to avoid

the incurrence of an excessive wage scale; the interplay of competitive economic forces and bargaining power will tend to settle the wages at a realistic level." (P. 382, 71 Cal.Rptr. p. 694, 445 P.2d p. 310.)

[4] Adverting to the 34 items submitted to the arbitrator according to the Memorandum, we observe that under that document the delegation of authority over each of those matters was *absolute*. The City retained neither "ultimate control," nor any control, over the arbitrator's "exercise of judgment and discretion" as to any of the submitted items, contrary to the insistence of *Irwin v. City of Manhattan Beach*, supra, 65 Cal.2d 13, 51 Cal.Rptr. 881, 415 P.2d 769. "Safeguards" against abuse of the arbitrator's "exercise of judgment and discretion" were lacking. The arbitrator would not be "implementing any policy" declared by the City or its fire commission. Instead, to him would be given the "determination of policy" applicable to each of the disputed rules and regulations of the fire commission. These policy determinations would, as we have pointed out, cover such matters as the authority of "company commanders," the "right" of fire fighters to strike, disciplinary matters, the degree of "physical fitness" required, and the "conditions" of assignment and transfer of fire fighters. And finally, neither the City nor its fire commission would resolve the "truly fundamental" issues of the matters submitted to arbitration. Such a delegation of municipal authority is squarely contrary to the principles expounded by *Kugler v. Yocum*, supra, 69 Cal.2d 371, 71 Cal. Rptr. 687, 445 P.2d 303.

The Union relies heavily on certain "standards" of the Memorandum, as follows:

"The arbitrator shall base his findings, opinion and order upon the following standards: 1. The lawful authority of the Employer; 2. The interests and welfare of the public; 3. A comparison of conditions of employment of the uniformed force of the Department with the conditions of employment of other employees performing similar services and with other employees generally in public and/or private employment in comparable communities; 4. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of employment conditions through voluntary collective bargaining, mediation, fact finding, and arbitration between the parties, in the public service or in private employment."

These recitals may not reasonably be said to continue "ultimate control" over the exercise of judgment and discretion delegated to the arbitrator. Nor do the "truly fundamental issues" remain undelegated. They provide for no "implementation" of the City's policies, and the "safeguards" and other criteria of *Irwin v. City of Manhattan Beach*, supra, and *Kugler v. Yocum*, supra, are lacking. The so-called "standards" gave no validity to the Memorandum.

[5] The Union's final contention seems to be that somehow the Meyers-Milias-Brown Act legitimizes the Memorandum's arbitration procedure, even though it be contrary to the City's Charter. We find nothing to support the contention. As pointed out, the Act specifically provides that its Memorandum of understanding "shall not be binding." (Gov.Code, § 3505.1.) It becomes a binding agreement only when approved by the public entity in accordance with law, which in the case at bench would require an appropriate modification of the Charter. And, as has been pointed out, the Act (Gov.Code, § 3500) provides: "Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system . . . ."

It is noted that the "impasse" and arbitration procedure of the Memorandum purport to be pursuant to "the grant of authority set forth in paragraph (d) of Sec-

tion 3507 of the Government Code . . . . ." (See pp. 41–42, *ante*.) We observe no grant of authority for the delegation of power here at issue in paragraph (d) or elsewhere in that section of the Act. And the Union makes no contrary contention. While there seems to be no doubt that the City might have agreed, *by appropriate Charter enactment*, to the Memorandum's arbitration procedure (see *Fire Fighters Union v. City of Vallejo*, supra, 12 Cal.3d 608, 116 Cal.Rptr. 507, 526 P.2d 971), the Act nowhere permits that result by any lesser, or different, method.

For the several reasons stated the "Judgment on Award" (described as an "order" in the City's notice of appeal) entered January 15, 1975, is reversed.

SIMS, Acting P. J., and WEINBERGER, J.*, concur.

[S.F. No. 23241. In Bank. Sept. 16, 1975.]

JOHN F. SKELLY, Plaintiff and Appellant, v.
STATE PERSONNEL BOARD et al., Defendants and Respondents.

SUMMARY

After receiving a written notice from the State Department of Health Care Services terminating his employment on the grounds of intemperance, inexcusable absences and other failures, a physician with the status of a permanent civil service employee was accorded a hearing before a representative of the State Personnel Board which adopted the representative's recommendation and dismissed the physician from employment. The trial court denied the physician's application for a writ of mandate to compel the Board to set aside the dismissal. (Superior Court of Sacramento County, No. 232477, Lloyd A. Phillips, Judge.)

The Supreme Court reversed and remanded for further proceedings. Preliminarily, it was noted that the state statutory scheme regulating civil service employment confers on a permanent civil service employee a property interest in continuation of his employment and that this interest is protected by due process. Concluding, from the record, that the basis of the dismissal had been the physician's conduct in extending his alloted lunch time by five to fifteen minutes and in twice leaving his office for several hours without permission, the court held that the dismissal constituted an abuse of discretion in view of the record's failure to show that these deviations adversely affected public service. Further, it was held that provisions of the Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, relating to punitive action against a permanent employee, violate federal and state constitutional due process provisions. Thus, the dismissal had been improper as excessive punishment, and as having been effectuated under procedures which denied the physician due process. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal —Permanent Employee Status as Protected by Due Process.**—The California statutory scheme regulating civil service employment confers on an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process.

(2) **Constitutional Law § 102—Due Process—Right to Governmental Benefit as Protected by Due Process.**—A person's legally enforcible right to receive a government benefit in the event that certain facts exist constitutes a property interest protected by due process.

(3) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal—Due Process.**—Due process does not require the state to provide a permanent civil service employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, but does require, as minimum preremoval safeguards, a notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

(4) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal —Statutes—Constitutionality.**—Provisions of the State Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, concerning the taking of punitive action against a permanent civil service employee, violate the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, and of Cal. Const., art. I, §§ 7, 15.

(5) **Administrative Law § 114—Judicial Review—Limited Nature—Review of State Personnel Board's Findings.**—Inasmuch as the State Personnel Board is a statewide agency deriving its adjudicating powers from the state Constitution, the Board's factual determinations are not subject to re-examination in a trial de novo, but are to be upheld by a reviewing court if supported by substantial evidence.

[See **Cal.Jur.3d,** Administrative Law, § 287; **Am.Jur.2d,** Administrative Law, § 659.]

(6) **Civil Service § 11—Discharge, Demotion, Suspension, and Dismissal—Judicial Review—Sufficiency of Evidence.**—The State Personnel Board's findings that certain of a permanent civil service employee's absences on certain working days were due to his drinking of intoxicating liquors, rather than due to illness, were sustained by testimony of two apparently credible witnesses that they had seen him at a bar drinking on those days, and by his own testimony that at lunch on one of those days, he had consumed two martinis despite his assertions of illness.

(7) **Public Officers and Employees § 27—Duration and Termination of Tenure—Administrative Body's Discretion.**—Although an administrative body has broad discretion as to imposition of discipline it must exercise legal discretion which, in the circumstances, is judicial discretion. And in determining whether such discretion has been abused in the context of public employee discipline, the overriding consideration is the extent to which his conduct resulted in, or if repeated is likely to result in, harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of recurrence.

(8) **Civil Service § 11—Discharge, Demotion, Suspension, and Dismissal—Judicial Review—Abuse of Discretion.**—In dismissing a physician with the status of a permanent civil service employee on the basis of his extension of his alloted lunch time by five to fifteen minutes, and in twice leaving his office for several hours without permission, the State Personnel Board abused its discretion, where the record failed to show that such deviations adversely affected the public service, but did disclose that he more than made up the lost time by working during nonworking periods, and that he was informative, cooperative, helpful, extremely thorough, and productive.

COUNSEL

Loren E. McMaster and Allen R. Link for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Joel S. Primes, Deputy Attorney General, for Defendant and Respondent.

OPINION

SULLIVAN, J.—Plaintiff John F. Skelly, M.D. (hereafter petitioner) appeals from a judgment denying his petition for writ of mandate to compel defendants State Personnel Board (Board) and its members to set aside his allegedly wrongful dismissal from employment by the State Department of Health Care Services (Department).[1] In challenging his removal, petitioner asserts, among other things, that California's statutory scheme regulating the taking of punitive action against permanent civil service employees violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15, of the California Constitution.

In July 1972 petitioner was employed by the Department as a medical consultant.[2] He held that position for about seven years and was a permanent civil service employee of the state. (See Gov. Code, § 18528.)[3] About that time the Department, through its personnel officer Wade Williams, gave petitioner written notice that he was terminated from his position as medical consultant, effective 5 p.m., July 11, 1972. The notice specified three causes for the dismissal: (1) Intemperance, (2) inexcusable absence without leave, and (3) other failure of good behavior during duty hours which caused discredit to the Department.[4] It further described petitioner's alleged acts and omissions which formed the basis of these charges, and notified him that to secure a hearing in the matter, he would be required to file a written answer with the Board within 20 days, and that in the event of his failure to do so, the punitive action

[1]Petitioner also named as defendants the Department and its director.

[2]Petitioner graduated from George Washington University Medical School, Washington, D.C. in 1934. He was licensed to practice medicine in California the same year and, after a three-year residency, entered private practice in 1937, specializing in ear, nose and throat problems. During 13 of his 28 years in private practice, he taught at the University of California Medical Center. Cataract surgery and resulting nerve degeneration in his eyes forced petitioner to cease private practice in 1965. He commenced employment as a medical consultant with the State Welfare Department, which became part of the State Department of Health Care Services in 1969.

[3]Government Code section 18528 provides: "'Permanent employee' means an employee who has permanent status. 'Permanent status' means the status of an employee who is lawfully retained in his position after the completion of the probationary period provided in this part and by board rule." The "probationary period" is the initial period of employment and generally lasts for six months unless the Board establishes a longer period not exceeding one year. (Gov. Code, § 19170.)

Hereafter, unless otherwise indicated, all section references are to the Government Code.

[4]Each of these causes provides a basis for punitive action against a permanent civil service employee under section 19572, subdivisions (h), (j), and (t).

would be final. On July 12, 1972, petitioner filed an answer, and on September 15, 1972, a hearing was held before an authorized representative of the Board.

At the hearing, the Department introduced the testimony of Philip L. Philippe, Gerald R. Green and Bernard V. Moore, three successive district administrators of the Department's Sacramento office to which petitioner had been assigned. Their testimony was corroborated in part by written documents from the Department files, and disclosed the following facts: Philippe met with petitioner on November 17, 1970, to discuss the latter's unexcused absences, apparent drinking on the job and failure to comply with Department work hour requirements. This meeting was held at the insistence of several staff members who had complained to Philippe about petitioner's conduct. The doctor was admonished to comply with pertinent Department rules and regulations.

Nevertheless, despite further warnings given petitioner and efforts made to accommodate him by extending his lunch break from the usual 45 minutes to one hour, he persisted in his unexplained absences and failure to observe work hours and as a result on February 28, 1972, received a letter of reprimand and a one-day suspension.

This punitive action had little effect on petitioner who continued to take excessive lunch periods. On March 3, 1972, Gerald Green, then district administrator, and Doris Soderberg, regional administrator, met with petitioner and discussed his refusal to obey work rules, but apparently to no avail. He took lengthy lunch breaks on March 13, 14, 15 and 16. Green again met with petitioner on March 16 in an effort to resolve the problem. When asked why he had taken 35 extra minutes for lunch that day, petitioner claimed to be sick. Green responded that on the day in question he had observed the doctor drinking and talking at a restaurant and bar. Green then suggested that petitioner, for his own convenience, change from full-time to part-time status at an adjusted compensation. Petitioner declined to do so and Green admonished him that further violations of work rules would result in disciplinary action and even dismissal.

In the early afternoon of June 26, Bernard Moore, who succeeded Green as district administrator, attempted but without success to see petitioner in the latter's office. Moore found him at a local bar laughing and talking, with a drink in front of him, his hair somewhat disheveled, and his arm around a companion. Petitioner later left the bar but did not

return to his office that day. Nor did he notify Moore of his proposed absence as required by Department rules. Subsequently petitioner attempted to have Moore record his absence as "sick leave."

In his defense, petitioner testified that he had in fact been sick on the afternoon of June 26, and that after an unsuccessful attempt to telephone his wife, he had informed a co-worker that he was going home.[5] He then went to a local bar and, after requesting a friend to call his wife, remained at the bar until she picked him up. Petitioner's version of the events was corroborated by his wife, a cocktail waitress, and the friend who had placed the call. Petitioner admitted, however, that despite his illness, he had had two martinis at lunch.

Petitioner further testified that his longer lunch periods involved no more than 5 to 15 extra minutes. In justification of this, he stated that he had more than made up for the time missed by skipping his morning and afternoon coffee breaks, by working more than his allotted time over holidays and by occasionally taking work home with him. He denied having a drinking problem and stated that his alcoholic intake during working hours was limited to an occasional drink or two at lunch.

Three co-workers, including Dr. F. Audley Hale, the senior medical consultant and petitioner's immediate supervisor for 13 months, confirmed petitioner's testimony that he rarely took coffee breaks. They described him as efficient, productive and extremely helpful and cooperative, and stated that his work had never appeared to be affected by alcoholic consumption. Dr. Hale rated petitioner's work as good to superior[6] and assessed him as "our right hand man as far as information concerning ear, nose and throat problems not only for the District Office but for the Region as well." He stated that the Department definitely needed someone with the doctor's skills.

The Department introduced no evidence to show, and indeed did not claim, that the quality or quantity of petitioner's work was in any way inadequate; his failure to comply with the prescribed time schedule did not impede the effective performance of his own duties or those of his fellow workers. Although petitioner was handicapped by relatively serious sight and speech impediments, the Department did not rely upon these physical deficiencies as grounds for dismissal; nor did it appear that these difficulties affected his work performance.

[5]Moore apparently was not available at that particular time.

[6]The reports prepared during petitioner's probationary period similarly rated his work.

On September 19, 1972, the hearing officer submitted to the Board a proposed decision recommending that the punitive action against petitioner be sustained without modification. He made findings of fact in substance as follows: (1) That on February 28, 1972, petitioner suffered a one-day suspension for a four-hour unexcused absence on January 10, 1972, for excessive lunch periods on January 11 and 19, 1972, and for a lengthy afternoon break spent at a bar on February 25, 1972; (2) that despite efforts to accommodate petitioner by extending his lunch break to one hour, he continued to exceed the prescribed period by five to ten minutes for the four days following his suspension and again on March 13, 14 and 15, 1972; (3) that on March 16, 1972, petitioner took 1 hour and 35 minutes for lunch and claimed that this was due to illness when in fact he had been drinking; (4) that on the afternoon of June 26, 1972, the district administrator found petitioner at a bar during work hours, with his hair disheveled, his arm around another patron and a drink in front of him; and (5) that the petitioner's unexcused absence on June 26, 1972, was not due to illness.

The hearing officer found that these facts constituted grounds for punitive action under section 19572, subdivision (j) (inexcusable absence without leave). In considering whether dismissal was the appropriate discipline, the officer noted that "[a]ppellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work." On the other hand, he pointed out that the Department's problems with petitioner dated back to 1970, that he had been warned, formally as well as informally, that compliance with Department rules was required, and that he had nevertheless persisted in his pattern of misconduct. On this basis, the hearing officer concluded that there was no reason to anticipate improvement if petitioner were restored to his position and recommended that the Department's punitive action be affirmed. The Board approved and adopted the hearing officer's proposed decision in its entirety and denied a petition for rehearing.[7] These proceedings followed.

Petitioner urges both procedural and substantive grounds for annulling the Board's decision. As to the procedural ground, he contends that the provisions of the State Civil Service Act (Act) governing the taking of punitive action against permanent civil service employees, without

[7]The foregoing administrative actions conformed with the procedure prescribed by sections 19574-19588 for the dismissal of a permanent civil service employee.

requiring a prior hearing, violate due process of law as guaranteed by both the United States Constitution and the California Constitution. As to the substantive grounds, he attacks the Board's decision on two bases: First, he argues that the Board's findings are not supported by substantial evidence; second, he asserts that the Board abused its discretion in approving petitioner's dismissal which, he claims, is unduly harsh and disproportionate to his allegedly wrongful conduct.

I

Turning first to petitioner's claims of denial of due process, we initially describe the pertinent statutory disciplinary procedure here under attack.

The California system of civil service employment has its roots in the state Constitution. Article XXIV, section 1, subdivision (b), describes the overriding goal of this program of state employment: "In the civil service permanent appointment and promotion shall be made under a general system based on *merit* . . . ."[8] (Italics added.) (See also Assem. Interim Com. Rep., Civil Service and State Personnel (1957-1959) Civil Service and Personnel Management, 1 Appendix to Assem. J. (1959 Reg. Sess.) p. 21.) The use of merit as the guiding principle in the appointment and promotion of civil service employees serves a two-fold purpose. It at once " 'abolish[es] the so-called spoils system, and [at the same time] . . . increase[s] the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service' [citation] . . . ." (*Steen* v. *Board of Civil Service Commrs.* (1945) 26 Cal.2d 716, 722 [160 P.2d 816].) The State Personnel Board is the administrative body charged with the enforcement of the Civil Service Act, including the review of punitive action taken against employees.[9]

[8]Under the prescribed constitutional scheme, "[t]he civil service includes every officer and employee of the state except as otherwise provided in this Constitution." (Cal. Const., art. XXIV, § 1, subd. (a).) Article XXIV, section 4, lists those categories of officers and employees who are exempt from the civil service.

[9]The composition of the Board is described in article XXIV, section 2, subdivision (a), of the California Constitution as follows: "There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring."

The Board's duties are set forth in article XXIV, section 3, subdivision (a), as follows: "The Board shall enforce the civil service statutes and, by majority vote of all of its

To help insure that the goals of civil service are not thwarted by those in power, the statutory provisions implementing the constitutional mandate of article XXIV, section 1, invest employees with substantive and procedural protections against punitive actions by their superiors.[10] Under section 19500, "[t]he tenure of every permanent employee holding a position is *during good behavior.* Any such employee may be . . . permanently separated [from the state civil service] through resignation or *removal for cause* . . . or terminated for medical reasons . . . ." (Italics added.) The "causes" which may justify such removal, or a less severe form of punitive action,[11] are statutorily defined. (§ 19572.)

The procedure by which a permanent employee may be dismissed or otherwise disciplined is described in sections 19574 through 19588. Under section 19574,[12] the "appointing power"[13] or its authorized representative may effectively take punitive action against an employee by simply notifying him of the action taken.[14] (*California Sch. Employees Assn.* v. *Personnel Commission* (1970) 3 Cal.3d 139, 144, fn. 2 [89 Cal.Rptr. 620, 474 P.2d 436]; Personnel Transactions Man., March 1972.)

members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions."

[10]In the instant case, we are concerned only with provisions of the Act insofar as they govern the disciplining of permanent employees (see fn. 3, *ante*) and we limit our discussion accordingly.

[11]Section 19570 provides: "As used in this article, 'punitive action' means dismissal, demotion, suspension, or other disciplinary action." The Board has defined "other disciplinary action" to include, among other things, official reprimand and reduction in salary. (Personnel Transactions Man., March 1972.)

Section 19571 is the provision establishing general authority to take punitive action: "In conformity with this article and board rule, punitive action may be taken against any employee, or person whose name appears on any employment list for any cause for discipline specified in this article."

[12]Section 19574 provides as follows: "The appointing power, or any person authorized by him, may take punitive action against an employee for one or more of the causes for discipline specified in this article by notifying the employee of the action, pending the service upon him of a written notice. Punitive action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the effective date of the punitive action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the punitive action; (b) the effective date of the action; (c) a statement of the causes therefor; (d) a statement in ordinary and concise language of the acts or omissions upon which the causes are based; and (e) a statement advising the employee of his right to answer the notice and the time within which that must be done if the answer is to constitute an appeal."

[13]Under section 18524, "'[a]ppointing power' means a person or group having authority to make appointments to positions in the State civil service."

[14]For the procedure regulating discipline where charges against the employee are filed by a third party with the consent of the Board or the appointing power, see section 19583.5.

No particular form of notice is required. (29 Ops.Cal.Atty.Gen. 115, 120 (1957); Personnel Transactions Man., March 1972.) However, within 15 days *after* the effective date of the action, the appointing power *must* serve upon the employee and file with the Board a written notice specifying: (1) the nature of the punishment, (2) its effective date, (3) the causes therefor, (4) the employee's acts or omissions upon which the charges are based, and (5) the employee's right to appeal. (§ 19574.)[15]

Except in cases involving minor disciplinary matters,[16] the employee has a right to an evidentiary hearing to challenge the action taken against him.[17] To obtain such a hearing, the employee must file with the Board a written answer to the notice of punitive action within 20 days after service thereof.[18] The answer is deemed to constitute a denial of all allegations contained in the notice which are not expressly admitted as well as a request for a hearing or investigation. (§ 19575; see fn. 18, *ante*.) Failure to file an answer within the specified time period results in the punitive action becoming final. (§ 19575.)

[15]See footnote 12, *ante*.

In an opinion issued on March 26, 1953, the Attorney General described the "statement of causes" as follows: "Such statement of causes is not merely a statement of the statutory grounds for punitive action set forth in section 19572 but is a factual statement of the grounds of discipline which, although not necessarily pleaded with all the niceties of a complaint in a civil action or of an information or indictment in a criminal action, should be detailed enough to permit the employee to identify the transaction, to understand the nature of the alleged offense and to obtain and produce the facts in opposition [citations]." (See 21 Ops.Cal.Atty.Gen. 132, 137 (1953).)

[16]Such minor disciplinary matters generally include those cases in which the discipline imposed is suspension without pay for 10 days or less. Section 19576 describes the procedural rights of an employee subjected to this form of discipline.

[17]Section 19578 provides that "[w]henever an answer is filed to a punitive action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. Such hearing shall be conducted in accordance with the provisions of Section 11513 of the Government Code, except that the employee and other persons may be examined as provided in Section 19580, and the parties may submit all proper and competent evidence against or in support of the causes."

[18]Section 19575 describes the procedure to be followed by an employee in answering a notice of punitive action: "No later than 20 calendar days after service of the notice of punitive action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of punitive action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his appeal the punitive action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power."

In cases where the affected employee files an answer within the prescribed period, the Board, or its authorized representative, must hold a hearing within a reasonable time. (§ 19578; see fn. 17, *ante*.) As a general rule, the case is referred to the Board's hearing officer who conducts a hearing[19] and prepares a proposed decision which may be adopted, modified or rejected by the Board. (§ 19582.) The Board must render its decision within a reasonable time after the hearing. (§ 19583.)[20] If the Board determines that the cause or causes for which the employee was disciplined were insufficient or not sustained by the employee's acts or omissions, or that the employee was justified in engaging in the conduct which formed the basis of the charges against him, it may modify or revoke the punitive action and order the employee reinstated to his position as of the effective date of the action or some later specified date. (§ 19583; see fn. 20, *ante*.) The employee is entitled to the payment of salary for any period of time during which the punitive action was improperly in effect. (§ 19584.)[21]

In the case of an adverse decision by the Board, the employee may petition that body for a rehearing. (§ 19586.)[22] As an alternative or in addition to the rehearing procedure, the employee may seek review of

[19]At such hearing, the appointing power has the burden of proving by a preponderance of the evidence the acts or omissions of the employee upon which the charges are based and of establishing that these acts constitute cause for discipline under the relevant statutes. (§§ 19572, 19573.) The employee may try to avoid the consequences of his actions by showing that he was justified in engaging in the conduct upon which the charges are based. (See 21 Ops.Cal.Atty.Gen. 132, 139 (1953).)

[20]Under the terms of section 19583, "[t]he board shall render a decision within a reasonable time after the hearing or investigation. The punitive action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the punitive action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the punitive action and it may order the employee returned to his position either as of the date of the punitive action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster."

[21]Section 19584 provides: "Whenever the board revokes or modifies a punitive action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the punitive action was improperly in effect.

"Salary shall not be authorized or paid for any portion of a period of punitive action that the employee was not ready, able, and willing to perform the duties of his position, whether such punitive action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.

"From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension."

[22]Section 19586 provides in pertinent part that "[w]ithin thirty days after receipt of a copy of the decision rendered by the board in a proceeding under this article, the

the Board's action by means of a petition for writ of administrative mandamus filed in the superior court. (§ 19588; *Boren* v. *State Personnel Board* (1951) 37 Cal.2d 634, 637 [234 P.2d 981].)[23]

As previously indicated, petitioner asserts that this statutory procedure for taking punitive action against a permanent civil service employee violates due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution. His contention is that these provisions authorize a deprivation of property without a *prior* hearing or, for that matter, without any of the *prior* procedural safeguards required by due process before a person may be subjected to such a taking at the hands of the state. As it is clear that California's statutory scheme does provide for an evidentiary hearing after the discipline is imposed (§§ 19578, 19580, 19581), we view the petitioner's constitutional attack as directed against that section which permits the punitive action to take effect without according the employee any prior procedural rights. (§ 19574; see fn. 12, *ante*.)

Our analysis of petitioner's contention proceeds in the light of a recent decision of the United States Supreme Court dealing with a substantially identical issue. In *Arnett* v. *Kennedy* (1974) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633], the high court was faced with a due process challenge to the provisions of the federal civil service act, entitled the Lloyd-LaFollette Act, regulating the disciplining of nonprobationary government employees. (5 U.S.C. § 7501.) Under that statutory scheme, a nonprobationary employee may be "removed or suspended without pay only for such cause as will promote the efficiency of the service." (5 U.S.C. § 7501 (a).) The same statute granting this substantive right to continued employment absent cause sets forth the procedural rights of an employee prior to discharge or suspension.

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employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as prescribed for notice of hearing.

"Within sixty days after service of notice of filing of a petition for rehearing, the board shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this sixty-day period is a denial of the petition."

[23]Section 19588 provides: "The right to petition a court for writ of mandate, or to bring or maintain any action or proceeding based on or related to any civil service law of this State or the administration thereof shall not be affected by the failure to apply for rehearing by filing written petition therefor with the board."

The judicial review proceedings are governed by Code of Civil Procedure section 1094.5. (*Boren* v. *State Personnel Board, supra*, at p. 637.)

Pursuant to this statute and the regulations promulgated under it, the employee is entitled to 30 days advance written notice of the proposed action, including a detailed statement of the reasons therefor, the right to examine all materials relied upon to support the charges, the opportunity to respond either orally or in writing or both (with affidavits) before a representative of the employing agency with authority to make or recommend a final decision, and written notice of the agency's decision on or before the effective date of the action. (5 U.S.C. § 7501 (b); 5 C.F.R. § 752.202 (a), (b), (f).) The employee is not entitled to an evidentiary trial-type hearing until the appeal stage of the proceedings. (5 C.F.R. §§ 752.202 (b), 752.203, 771.205, 771.208, 771.210-771.212, 772.305 (c).) The timing of this hearing—*after*, rather than *before* the removal decision becomes effective—constituted the basis for the employee's due process attack upon the disciplinary procedure.

In a six to three decision, the court found the above procedure to be constitutional. However, the court's full decision is embodied in five opinions which reveal varying points of view among the different justices. As we proceed to consider petitioner's contention, we will attempt to identify the general principles which emerge from these opinions as well as from the other recent decisions of the court in the area of procedural due process and which are determinative of the matter before us.

(1) We begin our analysis in the instant case by observing that the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process. In *Board of Regents* v. *Roth* (1972) 408 U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701], the United States Supreme Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. [Fn. omitted.]" (*Id.* at pp. 571-572 [33 L.Ed.2d at p. 557].) Rather, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms." (*Id.* at p. 576 [33 L.Ed.2d at p. 560].)

Expanding upon its explanation, the *Roth* court noted: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitle-

ment to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Id.* at p. 577 [33 L.Ed.2d at p. 561].)

(2) Thus, when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (*Goldberg* v. *Kelly* (1970) 397 U.S. 254, 261-262 [25 L.Ed.2d 287, 295-296, 90 S.Ct. 1011]; see *Geneva Towers Tenants Org.* v. *Federated Mortgage Inv.* (9th Cir. 1974) 504 F.2d 483, 495-496 (Hufstedler, J. dissenting).) Applying these principles, the high court has held that a teacher establishing "the existence of rules and understandings, promulgated and fostered by state officials, that . . . justify his legitimate claim of entitlement to continued employment absent 'sufficient cause'," has a property interest in such continued employment within the purview of the due process clause. (*Perry* v. *Sindermann* (1972) 408 U.S. 593, 602-603 [33 L.Ed.2d 570, 580, 92 S.Ct. 2694]; see also *Board of Regents* v. *Roth, supra,* 408 U.S. at pp. 576-578 [33 L.Ed.2d at pp. 560-562].) And, in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, six members of the court, relying upon the principles set forth in *Roth,* concluded that due process protected the statutory right of a nonprobationary federal civil service employee to continue in his position absent cause justifying his dismissal. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); *id.* at p. 185 [40 L.Ed.2d at p. 51] (concurring and dissenting opn., Justice White); *id.* at p. 203 [40 L.Ed.2d at p. 61] (dissenting opn., Justice Douglas); *id.* at p. 211 [40 L.Ed.2d at p. 66] (dissenting opn., Justice Marshall).)

The California Act endows state employees who attain permanent status with a substantially identical property interest. Such employees may not be dismissed or subjected to other disciplinary measures unless facts exist constituting "cause" for such discipline as defined in sections 19572 and 19573. In the absence of sufficient cause, the permanent employee has a statutory right to continued employment free of these

punitive measures. (§ 19500.) This statutory right constitutes "a legitimate claim of entitlement" to a government benefit within the meaning of *Roth.* Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action.

We therefore proceed to determine whether California's statutes governing such punitive action provide the minimum procedural safeguards mandated by the state and federal Constitutions. In the course of our inquiry, we will discuss recent developments in the area of procedural due process which outline a modified approach for dealing with such questions.

Until last year, the line of United States Supreme Court discussions beginning with *Sniadach* v. *Family Finance Corp.* (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820], and continuing with *Fuentes* v. *Shevin* (1972) 407 U.S. 67 [32 L.Ed.2d 556, 92 S.Ct. 1983], and the line of California decisions following *Sniadach* and *Fuentes* adhered to a rather rigid and mechanical interpretation of the due process clause. Under these decisions, every significant deprivation—permanent or merely temporary —of an interest which qualified as "property" was required under the mandate of due process to be *preceded* by notice and a hearing absent "extraordinary" or "truly unusual" circumstances. (*Fuentes* v. *Shevin, supra,* 407 U.S. 67, 82, 88, 90-91 [32 L.Ed.2d 556, 570-571, 574-576]; *Bell* v. *Burson* (1971) 402 U.S. 535, 542 [29 L.Ed.2d 90, 96, 91 S.Ct. 1586]; *Boddie* v. *Connecticut* (1971) 401 U.S. 371, 378-379 [28 L.Ed.2d 113, 119-120, 91 S.Ct. 780]; *Adams* v. *Department of Motor Vehicles* (1974) 11 Cal.3d 146, 155 [113 Cal.Rptr. 145, 520 P.2d 961]; *Brooks* v. *Small Claims Court* (1973) 8 Cal.3d 661, 667-668 [105 Cal.Rptr. 785, 504 P.2d 1249]; *Randone* v. *Appellate Department* (1971) 5 Cal.3d 536, 547 [96 Cal.Rptr. 709, 488 P.2d 13]; *Blair* v. *Pitchess* (1971) 5 Cal.3d 258, 277 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]; *McCallop* v. *Carberry* (1970) 1 Cal.3d 903, 907 [83 Cal.Rptr. 666, 464 P.2d 122].) These authorities uniformly held that such hearing must meet certain minimum procedural requirements including the right to appear personally before an impartial official, to confront and cross-examine adverse witnesses, to present favorable evidence and to be represented by counsel. (*Brooks* v. *Small Claims Court, supra,* 8 Cal.3d at pp. 667-668; *Rios* v. *Cozens* (1972) 7 Cal.3d 792, 798-799 [103 Cal.Rptr. 299, 499 P.2d 979], vacated *sub nom. Dept. Motor Vehicles of California* v. *Rios* (1973) 410 U.S. 425 [35 L.Ed.2d 398, 93 S.Ct. 1019], new dec. *Rios* v. *Cozens* (1973) 9 Cal.3d 454 [107 Cal.Rptr. 784, 509 P.2d 696]; see also *Goldberg* v. *Kelly* (1970) 397 U.S. 254, 267-271 [25 L.Ed.2d 287, 298-301, 90 S.Ct. 1011].)

However, as we noted a short time ago in *Beaudreau* v. *Superior Court* (1975) 14 Cal.3d 448 [121 Cal.Rptr. 585, 535 P.2d 713], more recent decisions of the high court have regarded the above due process requirements as being somewhat less inflexible and as not necessitating an evidentiary trial-type hearing at the preliminary stage in every situation involving a taking of property. Although it would appear that a majority of the members of the high court adhere to the principle that some form of notice and hearing must precede a final deprivation of property (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* (1975) 419 U.S. 601, 606 [42 L.Ed.2d 751, 757, — S.Ct. —]; *Goss* v. *Lopez* (1975) 419 U.S. 565, 579 [42 L.Ed.2d 725, 737-738, — S.Ct. —]; *Mitchell* v. *W. T. Grant Co.* (1974) 416 U.S. 600, 611-612 [40 L.Ed.2d 406, 415-416, 94 S.Ct. 1895]; *Arnett* v. *Kennedy, supra,* 416 U.S. 134, 164 [40 L.Ed.2d 15, 39] (concurring opn., Justice Powell), p. 178 [40 L.Ed.2d pp. 46-47] (concurring and dissenting opn., Justice White), p. 212 [40 L.Ed.2d pp. 66-67] (dissenting opn., Justice Marshall)), nevertheless the court has made clear that "the *timing* and *content* of the notice and *the nature of the hearing* will depend on an appropriate accommodation of the competing interests involved." (*Goss* v. *Lopez, supra,* 419 U.S. 565, 579 [42 L.Ed.2d 725, 737], italics added; see also *Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415]; *Arnett* v. *Kennedy, supra,* 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43] (concurring opn., Justice Powell), p. 188 [40 L.Ed.2d pp. 52-53] (concurring and dissenting opn., Justice White).) In balancing such "competing interests involved" so as to determine whether a particular procedure permitting a taking of property without a *prior* hearing satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful. (*Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. at pp. 607-610; *Arnett* v. *Kennedy, supra,* 416 U.S. at pp. 167-171 (concurring opn., Justice Powell), pp. 188-193 [40 L.Ed.2d pp. 52-56] (concurring and dissenting opn., Justice White); see *Beaudreau* v. *Superior Court, supra,* 14 Cal.3d 448, 463-464.)

These principles have been applied by the high court to measure the constitutional validity of state statutes granting creditors certain prejudgment summary remedies. In *Mitchell* v. *W. T. Grant Co., supra,* 416 U.S.

600, the court upheld against due process attack a Louisiana statute authorizing a state trial judge to order sequestration of a debtor's personal property upon the creditor's ex parte application, noting that both the creditor and the debtor had interests in the particular property seized,[24] that the creditor's interest might be seriously jeopardized by preseizure notice and hearing,[25] and that adequate alternative procedural safeguards, including an immediate postdeprivation hearing, were accorded the debtor.[26] On the other hand, the high court struck down a Georgia statute permitting garnishment of a debtor's property pending litigation on the alleged debt "without notice or opportunity for an early hearing and without participation by a judicial officer." (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc., supra,* 419 U.S. 601, 606 [42 L.Ed.2d 751, 757].) In reaching its decision, the court emphasized that "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute." (*Id.* at p. 607 [42 L.Ed.2d at p. 757].)

This modified position of the United States Supreme Court regarding such due process questions has also extended to the form of the hearing required. In *Goss* v. *Lopez, supra,* 419 U.S. 565, the court held that Ohio public school students had a property as well as a liberty interest in their education and that they were therefore entitled to notice and hearing before they could be suspended or expelled from school. (*Id.* at pp. 574-581 [42 L.Ed.2d at pp. 734-739].) However, where the suspension was short, the court concluded that the required "hearing" need be only an informal discussion between student and disciplinarian, at which the student should be informed of his alleged misconduct and permitted to explain his version of the events. (*Id.* at pp. 581-582 [42 L.Ed.2d at pp. 738-739].) Such a procedure, the court reasoned, "will provide a meaningful hedge against erroneous action." (*Id.* at p. 583 [42 L.Ed.2d at p. 740].) On the other hand, the court carefully pointed out the limitations on its holding: "We stop short of construing the Due Process

[24]Under the terms of the statute, the trial judge could order sequestration only if the creditor proved by affidavit that he had a vendor's lien on the property and that the debtor had defaulted in making the required payments, thereby entitling the creditor to immediate possession. (*Id.* at pp. 605-606 [40 L.Ed.2d at pp. 412-413].)

[25]The court noted that the debtor might abscond with the property and that in any event the debtor's continued use thereof would decrease the property's value. (*Id.* at pp. 608-609 [40 L.Ed.2d at pp. 413-415].)

[26]The creditor was required to post a bond to cover the debtor's potential damages in the event of a wrongful taking. At the postdeprivation hearing which was immediately available to the debtor, the creditor had the burden of making a prima facie showing of entitlement to the property. If he failed to do so, the debtor was entitled to return of his property and to an award of any damages. (*Id.* at pp. 606-610 [40 L.Ed.2d at pp. 412-415].)

Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." (*Id.* at p. 583 [42 L.Ed.2d at p. 740].)

Our present task of determining the requirements of due process under the particular circumstances of the case at bench is made easier by the Supreme Court's decision in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, upholding against constitutional attack the statutory procedure for the disciplining of nonprobationary federal civil service employees. Initially, we note that the rationale adopted by the plurality opinion of Justice Rehnquist, joined by the Chief Justice and Justice Stewart, would obviate the need for any balancing of competing interests. This rationale would apparently permit a state to narrowly circumscribe the procedures for depriving an individual of a statutorily created property right by simply establishing in the statute a procedural mechanism for its enforcement. (*Id.* at pp. 153-155 [40 L.Ed.2d at pp. 32-34].) In such instances, it is reasoned, the individual "must take the bitter with the sweet," that is, the substantive benefit of the statute together with the procedural mechanism it prescribes to safeguard that benefit. (*Id.* at pp. 153-154 [40 L.Ed.2d at pp. 32-33].) Under this rationale, it is arguable that California's procedure for disciplining civil service employees would withstand petitioner's due process attack, since the substantive right of a permanent state worker to continued employment absent cause (§ 19500) may be "inextricably intertwined [in the same set of statutes] with the limitations on the procedures which are to be employed in determining that right . . . ." (*Id.* at pp. 153-154 [40 L.Ed.2d at p. 33].)

However, this theory was unequivocally rejected by the remaining six justices and indeed described by the dissenters as "a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process. [Fn. omitted.]" (See Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66]; see also Justice

Powell's concurring opn. at pp. 165-167 [40 L.Ed.2d at pp. 39-41], and Justice White's concurring and dissenting opn. at pp. 177-178, 185 [40 L.Ed.2d at pp. 46-47, 51].)

Where state procedures governing the taking of a property interest are at issue, all six justices were of the view that the existence of the interest is to be determined in the first place under applicable state law, but that the adequacy of the procedures is to be measured in the final analysis by applicable constitutional requirements of due process. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 185 [40 L.Ed.2d p. 51] (concurring and dissenting opn., Justice White), p. 211 [40 L.Ed.2d p. 66] (dissenting opn., Justice Marshall).) "While the legislature may elect not to confer a property interest in . . . [civil service] employment [fn. omitted], it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 185 [40 L.Ed.2d at p. 51], and Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66].)

In *Arnett*, the remaining six justices were of the opinion that a full evidentiary "hearing must be held at some time before a competitive civil service employee may be *finally* terminated for misconduct." (*Id.* at p. 185 [40 L.Ed.2d at p. 51], italics added (concurring and dissenting opn., Justice White); see also, Justice Powell's concurring opn. at p. 167 [40 L.Ed.2d at pp. 40-41], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) The question then narrowed to whether such a hearing had to be afforded *prior* to the time that the *initial* removal decision became effective. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 186 [40 L.Ed.2d at pp. 51-52] (concurring and dissenting opn., Justice White), p. 217 [40 L.Ed.2d at pp. 69-70] (dissenting opn., Justice Marshall).)

In resolving this question, the above justices utilized a balancing test, weighing "the Government's interest in expeditious removal of an unsatisfactory employee . . . against the interest of the affected employee in continued public employment." (*Id.* at pp. 167-168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 188 [40 L.Ed.2d at pp. 52-53], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) On one side was the government's interest in "the maintenance of employee efficiency and discipline. Such factors are essential if the Government is

to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [Fn. omitted.]" (*Id.* at p. 168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at pp. 193-194 [40 L.Ed.2d at pp. 55-56] and Justice Marshall's dissenting opn. at pp. 223-225 [40 L.Ed.2d at pp. 73-74].)

Balanced against this interest of the government was the employee's countervailing interest in the continuation of his public employment pending an evidentiary hearing: "During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him. [Fn. omitted.] Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful. [Fn. omitted.] And in many States, . . . a worker discharged for cause is not even eligible for unemployment compensation. [Fn. omitted.]"[27] (*Id.* at pp. 219-220 [40 L.Ed.2d at p. 71] (dissenting opn., Justice Marshall); see also, Justice White's concurring and dissenting opn. at pp. 194-195 [40 L.Ed.2d at pp. 56-57] and Justice Powell's concurring opn. at p. 169 [40 L.Ed.2d at p. 42].)

The justices reached varying conclusions in resolving this balancing process. Justice Powell, joined by Justice Blackmun, concluded that the federal discharge procedures comported with due process requirements. In reaching this result, however, he emphasized the numerous preremoval safeguards accorded the employee as well as the right to compensa-

[27]Under California law, "[a]n individual is disqualified for unemployment compensation benefits if the director finds that . . . he has been discharged for misconduct connected with his most recent work." (Unemp. Ins. Code, § 1256.) Thus, a state civil service employee who has been discharged for cause may be disqualified from receiving unemployment compensation in some circumstances.

tion guaranteed the latter if he prevailed at the subsequent evidentiary hearing: "The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§ 771.208 and 772.305; 5 U.S.C. § 5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful. [Fn. omitted.]" (*Id.* at p. 170 [40 L.Ed.2d at p. 42].)

Justice White, concurring in part and dissenting in part, agreed that due process mandated some sort of preliminary notice and hearing, and similarly "conclude[d] that the statute and regulations provisions to the extent they require 30 days' advance notice and a right to make a written presentation satisfy minimum constitutional requirements." (*Id.* at pp. 195-196 [40 L.Ed.2d at p. 57].)[28]

Justice Marshall, joined by Justices Douglas and Brennan, dissented, apparently adhering to the "former due process test" requiring an "unusually important governmental need to outweigh the right to a prior hearing."[29] (*Id.* at p. 222 [40 L.Ed.2d at pp. 72-73], quoting from *Fuentes* v. *Shevin*, *supra*, 407 U.S. at p. 91, fn. 23 [32 L.Ed.2d at p. 576]; see also Justice Marshall's dissenting opn. at pp. 217-218, 223 [40 L.Ed.2d at pp. 69-70, 73].) Finding that the government's interest in prompt removal of an unsatisfactory employee was not the sort of vital concern justifying resort to summary procedures, the dissenters concluded that a nonprobationary employee was entitled to a full evidentiary hearing prior to discharge, at which he could appear before an independent, unbiased decisionmaker and confront and cross-examine adverse witnesses. (*Id.* at pp. 214-216, 226-227 [40 L.Ed.2d at pp. 67-69, 74-75].)

[28]Justice White's dissent was based upon his view that the employee in *Arnett* had not been accorded an impartial hearing officer in the pretermination proceeding, which he found was required by both due process and the federal statutes. (*Id.* at p. 199 [40 L.Ed.2d at p. 59].)

[29]Justice Douglas also wrote a separate dissenting opinion in which he concluded that the employee in *Arnett* had been fired for exercising his right of free speech, and therefore that the discharge violated the First Amendment to the United States Constitution. (*Id.* at pp. 203-206 [40 L.Ed.2d at pp. 61-63].)

Applying the general principles we are able to distill from these various opinions, we are convinced that the provisions of the California Act concerning the taking of punitive action against a permanent civil service employee do not fulfill minimum constitutional demands. **(3)** It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

California statutes governing punitive action provide the permanent employee with none of these prior precedural rights. Under section 19574, the appointing power is authorized to take punitive action against a permanent civil service employee by simply notifying him thereof. The statute specifies no particular form of notice, nor does it require advance warning. Thus, oral notification at the time of the discipline is apparently sufficient. (See 29 Ops.Cal.Atty.Gen. 115, 120 (1957), and Personnel Transactions Man., March 1972.) The employee need not be informed of the reasons for the discipline or of his right to a hearing until 15 days *after* the effective date of the punitive action. (§ 19574.) It is true that the employee is entitled to a full evidentiary hearing within a reasonable time thereafter (§ 19578), and is compensated for lost wages if the Board determines that the punitive action was improper. (§ 19584.) However, these postremoval safeguards do nothing to protect the employee who is wrongfully disciplined against the temporary deprivation of property to which he is subjected pending a hearing. **(4)** Because of this failure to accord the employee any prior procedural protections to "minimize the risk of error in the initial removal decision" (*Arnett* v. *Kennedy, supra,* 416 U.S. at p. 170 [40 L.Ed.2d at p. 42] (concurring opn., Justice Powell), we hold that the provisions of the State Civil Service Act, including in particular section 19574, governing the taking of punitive action against a permanent civil service employee violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of article I, sections 7 and 15 of the California Constitution.

Defendants fail to persuade us to the contrary. Relying upon cases which antedate *Arnett* v. *Kennedy, supra,* 416 U.S. 134, defendants first contend that we must apply a different and less stringent standard of due

process in judging the state's exercise of a "proprietary" as opposed to a "regulatory" function. Where the state is acting as an "employer," so the argument goes, the balancing process must be more heavily weighted in favor of insuring flexibility in its operation; therefore, due process is satisfied as long as a hearing is provided at some stage of the proceedings. The Supreme Court's decision in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, adequately disposes of this argument. In view of our extensive analysis of this decision we need not say anything further except to observe that nowhere in that case does any member of the high court advocate the distinction advanced by defendants.

Defendants further contend that emergency circumstances may arise in which the immediate removal of an employee is essential to avert harm to the state or to the public. Adverting to section 19574.5,[30] which permits the appointing power to order an employee on leave of absence for a limited period of time, defendants argue that situations not covered by this statute but necessitating similar prompt action may conceivably arise under section 19574 (see fn. 12, *ante*). In answering this argument, we need only point out that section 19574 is not limited to the extraordinary circumstances which defendants conjure up. (*Sniadach* v. *Family Finance Corp., supra,* 395 U.S. 337, 339 [23 L.Ed.2d 349, 352]; *Randone* v. *Appellate Department, supra,* 5 Cal.3d at pp. 541, 553; *Blair* v. *Pitchess, supra,* 5 Cal.3d at p. 279.) Indeed, the instant case presents an example of the statute's operation in a situation requiring no special protection of the state's interest in prompt removal. (*Sniadach, supra,* 395 U.S. at p. 339 [23 L.Ed.2d at p. 352].) Thus, since the statute "does not narrowly draw into focus those 'extraordinary circumstances' in which [immediate action] may be actually required," we remain convinced that the California procedure governing punitive action fails to satisfy either federal or state due process standards. (*Randone* v. *Appellate Department, supra,* 5 Cal.3d at p. 541.)

[30]Section 19574.5 provides: "Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

"If punitive action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

"If punitive action is taken on or before the date such leave is terminated, the punitive action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the punitive action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the punitive action."

II

(5) (See fn. 31.) Having determined that the procedure used to dismiss petitioner denied him due process of law as guaranteed by both the United States Constitution and the California Constitution, we proceed to examine under the well established standards of review[31] the Board's action taken against petitioner. Petitioner first contends that the Board's findings are not supported by substantial evidence. Specifically he disputes the Board's determination that his absences on March 16 and June 26, 1972, were due to his drinking rather than to illness.

(6) The findings challenged are based upon the testimony of two apparently credible witnesses, Gerald Green and Bernard Moore, who stated that they personally observed petitioner at a bar drinking on the dates in question. With respect to the June 26th incident, petitioner himself testified that he had consumed two martinis at lunch, despite his illness. Clearly this evidence is sufficient to support the Board's findings with respect to the cause of petitioner's absences on these two occasions.

III

Petitioner finally contends that the penalty of dismissal is clearly excessive and disproportionate to his alleged wrong. We agree.

Generally speaking, "[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion." (*Magit* v. *Board of Medical Examiners* (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816]; see also *Nightingale* v. *State Personnel Board* (1972) 7 Cal.3d 507, 514-516 [102 Cal.Rptr. 758, 498 P.2d 1006]; *Harris* v. *Alcoholic Bev. etc. Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 400 P.2d 745]; *Martin* v. *Alcoholic Bev. etc. Appeals Bd.* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513, 362 P.2d 337].) (7) Nevertheless, while the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, "it does not have absolute and unlimited power. It is bound to exercise legal

[31]The Board is "a statewide administrative agency which derives [its] adjudicating power from [article XXIV, section 3, of] the Constitution . . . [; therefore, its factual determinations] are not subject to re-examination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence. [Citations.]" (*Shepherd* v. *State Personnel Board* (1957) 48 Cal.2d 41, 46 [307 P.2d 4]; see also *Strumsky* v. *San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35-36 [112 Cal.Rptr. 805, 520 P.2d 29].)

discretion, which is, in the circumstances, judicial discretion." (*Harris, supra,* citing *Martin, supra,* and *Bailey* v. *Taaffe* (1866) 29 Cal. 422, 424.) In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, "[h]arm to the public service." (*Shepherd* v. *State Personnel Board, supra,* 48 Cal.2d 41, 51; see also *Blake* v. *State Personnel Board* (1972) 25 Cal.App.3d 541, 550-551, 554 [102 Cal.Rptr. 50].) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (*Blake, supra,* at p. 554.)

(8) Consideration of these principles in the instant case leads us to conclude that the discipline imposed was clearly excessive. The evidence adduced at the hearing and the hearing officer's findings, adopted by the Board, establish that the punitive dismissal was based upon the doctor's conduct in extending his lunch break beyond his allotted one hour on numerous occasions, generally by five to fifteen minutes, and in twice leaving the office for several hours without permission. It is true that these transgressions continued after repeated warnings and admonitions by administrative officials, who made reasonable efforts to accommodate petitioner's needs. It is also noteworthy that petitioner had previously suffered a one-day suspension for similar misconduct.

However, the record is devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service.[32] To the contrary, the undisputed evidence indicates that he more than made up for the excess lunch time by working through coffee breaks as well as on some evenings and holidays. With perhaps one or two isolated exceptions,[33] it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties.

Dr. Hale, senior medical consultant and petitioner's immediate supervisor for about 13 months, rated his work as good to superior, compared it favorably with that of other physicians in the office, and described him as efficient, productive, and the region's "right hand man" on ear, nose and throat problems. Two other employees who worked with petitioner testified that he was informative, cooperative, helpful,

[32]Mr. Green testified on cross-examination that there was some latitude with respect to the hours kept by professional people in the office, as long as they worked 40 hours per week and received Green's approval.

[33]Apparently, petitioner's unexcused absence on the afternoon of June 26, 1972, inconvenienced Moore who wished to see him on a routine business matter.

extremely thorough and productive. No contrary evidence was presented by or on behalf of the Department of Health Care Services.

In his proposed decision, adopted by the Board, the hearing officer stated: "Appellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work. [¶] Consideration of appellant's age, his physical problems, the lack of any apparent affect on his work and sympathy for the man and his family are all persuasive arguments in favor of finding that appellant be given just one more chance." In testifying, petitioner apologized for his conduct and promised to adhere strictly to the rules if given another opportunity to do so.

Our views on this issue should not be deemed, nor are they intended, to denigrate or belittle administrative interest in requiring strict compliance with work hour requirements. The fact that an employee puts in his 40 hours per week by rearranging his breaks to suit his personal convenience is not enough. An administrator may properly insist upon adherence to a prescribed time schedule, as this may well be essential to the maintenance of an efficient and productive office. Nor do we imply that an employee's failure to comply with the rules regulating office hours may not warrant punitive action, possibly in the form of dismissal, under the appropriate circumstances. Indeed, in the instant case, a less severe discipline is clearly justified; and we do not rule out the possibility of future dismissal if petitioner's transgressions persist.

However, considering all relevant factors in light of the overriding concern for averting harm to the public service, we are of the opinion that the Board clearly abused its discretion in subjecting petitioner to the most severe punitive action possible for his misconduct.

In sum, we conclude that the dismissal of petitioner was improper for two reasons: First, the procedure by which the discharge was effectuated denied him due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and article I, sections 7 and 15, of the California Constitution; second, the penalty of dismissal was clearly excessive and disproportionate to the misconduct on which it was based.

Therefore, upon remand the trial court should issue a peremptory writ of mandate directing the State Personnel Board to annul and set aside its

decision sustaining without modification the punitive action of dismissal taken by the State Department of Health Care Services against petitioner John F. Skelly, M.D., and to reconsider petitioner's appeal in light of this opinion.[34]

The judgment is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Molinari, J.,* concurred.

[34]As petitioner has heretofore been accorded a full evidentiary hearing in this matter, it is unnecessary for the Board to order the Department to reinstitute new proceedings against him in order to impose an appropriate discipline in respect to the conduct involved herein.

*Assigned by the Chairman of the Judicial Council.

Supreme Court Rules on Vallejo Arbitrability Case

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

FIRE FIGHTERS UNION, LOCAL 1186, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, Plaintiff and Appellant,

v.

CITY OF VALLEJO, et al., Defendants and Appellants.

S.F. 23098
Super Ct. No. 53187
Filed: Oct. 2, 1974

In this case of first impression we must delineate the function of the court in interpreting a provision for arbitration in a city charter affecting public employees. Specifically we are asked, prior to the arbitration proceeding itself, to reconcile clauses which substantively overlap: a provision that grants city employees the right to bargain on "wages, hours and working conditions" but withholds that right as to matters involving the "merits, necessity or organization of any governmental service." As we shall explain, our attempt now to define the issues of arbitration so that they assume the shape of rigid categories would be to reach premature judgments without benefit of the factual foundations of an arbitral record and to impede the arbitration process itself. We therefore largely leave to the arbitrators the moulding and resolution of the issues, subject to the proviso that neither party may be bound by a decision in excess of the arbitrators' jurisdiction.

In 1971, during negotiations between representatives of the City of Vallejo and the Fire Fighters Union as to the terms of a new contract, the parties failed to agree on 28 issues. Pursuant to the process prescribed in the city charter, they submitted the disputed matters to mediation and fact finding. When these procedures failed to effect a resolution, the city agreed to submit 24 of the issues to arbitration but contended that four other issues, namely, "Personnel Reduction," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure," involved the "merits, necessity or organization" of the fire fighting service and did not come under the arbitrable provisions. The city refused to accept the recommendations of the fact finding panel with respect to these issues or to submit them to arbitration.

On December 22, 1971, prior to the scheduled hearing before the board of arbitrators, the Fire Fighters Union filed a complaint in the Solano Superior Court seeking mandate to compel the city to submit the four disputed issues to arbitration. The court found for the union on all the issues, stating: "[T]he evidence introduced here supports findings that the issues 'Reduction of Personnel,' 'Vacancies and Promotions,' 'Schedule of Hours' and 'Constant Manning Procedures,' are related to 'wages, hours and conditions of employment' . . . . [W]hile the issues might also apply to the exclusionary language 'but not on matters involving the merits, necessity or organization of any service or activity provided by law,' to so hold would be to defeat the overriding purpose of the Meyers-Milias-Brown Act and section 809 of the Vallejo charter, namely to provide peace and harmony with the city's public safety employees. The court cannot engage in judicial legislation and write into the Vallejo charter words or meaning that are not there." The court therefore ordered that a peremptory writ of mandate issue directing the city to proceed to arbitration on the disputed issues.[1] The city appeals.

The present controversy therefore involves an interpretation of the Vallejo City Charter provisions which govern public employee contract negotiations. The provisions for multilevel resolution of disputes at issue were drafted by a board of freeholders for incorporation in a new city charter in response to a strike by city police and fire fighters in July of 1969. These proposals, with the exception of a provision for final binding arbitration, were accepted by the city council and embodied in section 809 of the city charter. Section 809 sets up a "system of collective negotiating" and provides that city employees shall have the right to "negotiate on matters of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law. . . ." The section further provides that if the parties cannot reach agreement, they must submit successively to mediation and fact finding.[2]

The arbitration provisions rejected by the city council were submitted to the citizens of Vallejo in a referendum in 1970 and approved. The electorate added to the city charter section 810 which provides that if representatives of the city and its employees do not reach agreement after the report of the fact finding committee under section 809, the issues upon which they fail to agree shall be submitted to binding arbitration.[3]

The scope of bargaining provision in the Vallejo City Charter in large measure parallels that set out in the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510).[4] Government Code section 3504 reads: "The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Therefore, interpretation of the scope of bargaining language in the Vallejo charter necessarily bears upon the meaning of the same language in the Meyers-Milias-Brown Act.[5]

In the instant case, as we have stated, we are called upon to render a preliminary decision as to the scope of the arbitration. The arbitration process, however, is an ongoing one in which normally an arbitrator, rather than a court, will narrow and define the issues, rejecting those matters over which he cannot properly exercise jurisdiction because they fall exclusively within the rights of management. As Professor Grodin has observed: ". . . collective bargaining and issues arbitration are together a dynamic process, in which the positions of the parties and their interaction with the arbitrator is in a state of constant flux. Proposals get modified and non-

negotiable positions become negotiable as the parties sort out their priorities, develop understanding of the implications of their positions, and perceive alternative solutions which they may not previously have considered. To determine what is arbitrable and what is not against this changing context is a bit like trying a balancing act in the middle of a rushing torrent." (Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts* (1974) Cal. Pub. Employee Rel. No. 21, p. 17.)

To a large extent the rendition of the definitions involved in this case will be welded by the facts developed in arbitration itself. We put the proposition in these words in Butchers' Union Local 229 v. Cudahy Packing Co. (1967) 66 Cal.2d 925, 938: "Because arbitration substitutes for economic warfare the peaceful adjudication of disputes, and because controversy takes on ephemeral shapes and unforeseeable forms, courts do not congeal arbitration provisions into fixed molds but give them dynamic sweep." We therefore must be careful not to restrict unduly the *scope* of the arbitration by an overbroad definition of "merits, necessity or organization." Nor does this cautious judicial approach expose the city to an excessive assertion of the arbitrators' jurisdiction; the city council *after* the rendition of the award may reject any award that invades its authority over matters involving "merits, necessity or organization" since the charter itself limits the scope of the arbitration decision to that which is "consistent with applicable law."[6]

With this caveat in mind, we approach the specific problem of reconciling the two vague, seemingly overlapping phrases of the statute: "wages, hours and working conditions," which, broadly read could encompass practically any conceivable bargaining proposal; and "merits, necessity or organization of any service" which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion.

In attempting to reconcile these provisions, we note that the phrase "wages, hours and other terms and conditions of employment" in the MMBA was taken directly from the National Labor Relations Act[7] (hereinafter NLRA). (See Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 749.) The Vallejo charter only slightly changed the phrasing to "wages, hours and working conditions." A whole body of federal law has developed over a period of several decades interpreting the meaning of the federal act's "wages, hours and other terms and conditions of employment."

In the past we have frequently referred to such federal precedent in interpreting parallel language in state labor legislation. Thus, for example, in England v. Chavez (1972) 8 Cal.3d 572, 576, we determined the reach of the California Jurisdictional Strike Act in part by reference to judicial construction of similar language in the National Labor Relations Act. Similarly, in Petri Cleaners, Inc. v. Automotive Employees, Etc., Local No. 88 (1960) 53 Cal.2d 455, 459, we referred to judicial interpretation of the "interfere with, restrain and coerce" language in section 8(a)(1) and (2) of the NLRA to aid us in interpreting the meaning of "interfered with, dominated or controlled" in Labor Code section 1117.

The origin and meaning of the second phrase – excepting "merits, necessity or organization" from the scope of bargaining – cannot claim so rich a background. Apparently the Legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions.

Although the NLRA does not contain specific wording comparable to the "merits, necessity or organization" terminology in the city charter and the state act, the underlying fear that generated this language – that is, that wages, hours and working conditions could be expanded beyond reasonable boundaries to deprive an employer of his legitimate management prerogatives – lies imbedded in the federal precedents under the NLRA. As a review of federal case law in this field demonstrates, the trepidation that the union would extend its province into matters that should properly remain in the hands of employers has been incorporated into the interpretation of the scope of "wages, hours and terms and conditions of employment."[8] Thus, because the federal decisions effectively reflect the same interests as those that prompted the inclusion of the "merits, necessity or organization" bargaining limitation in the charter provision and state act, the federal precedents provide reliable if analogous authority on the issue.

The City of Vallejo objects to the use of NLRA precedents because of the alleged differences between employment relations in the public and private sectors. Although we recognize that there are certain basic differences between employment in the public and private sectors,[9] the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions.[10] We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter.

We now turn to an analysis of the specific bargaining proposals which are at issue here.

1. *Schedule of Hours*

The issue of Schedule of Hours by which the union proposed a maximum of 40 hours per week for fire fighters on 8-hour shifts and 56 hours per week for fire fighters on 24-hour shifts is clearly negotiable and arbitrable despite the city's argument that it involves the "organization" of the fire service. The Vallejo charter provides explicitly that city employees shall have the right to bargain on matter of wages, *hours* and working conditions; furthermore, working hours and work days have been held to be bargainable subjects under the National Labor Relations Act. In Meat Cutters v. Jewel Tea (1965) 381 U.S. 676, 691 the United States Supreme Court held that the limitation of butchers' work hours to the period of 9 a.m. to 6 p.m. was a mandatory

subject of bargaining. The city cites no authority to the contrary. Accordingly, we conclude that Schedule of Hours is a negotiable issue.

2. *Vacancies and Promotions*

The union's Vacancies and Promotions proposal concerns fire fighters' job security and opportunities for advancement and therefore relates to the terms and conditions of their employment. (Cf. District 50, United Mine Workers, Local 13942 v. N.L.R.B. (4th Cir. 1966) 358 F.2d 234.) Similar proposals for union hiring hall arrangements have been held to involve terms and conditions of employment under the National Labor Relations Act and to constitute mandatory subjects of bargaining. (N.L.R.B. v. Tom Joyce Floors, Inc. (9th Cir. 1965) 353 F.2d 768, 771.)

The city contends that this proposal may not apply to appointment or promotion to the position of deputy fire chief. Although the Vallejo charter does not contain any provision for determining the proper bargaining unit, supervisory or managerial employees are routinely excluded from the bargaining units under the National Labor Relations Act (N.L.R.B. v. Gold Spot Dairy, Inc. (10th Cir. 1970) 432 F.2d 125; see N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc. (1974) ____ U.S. ____ [94 S.Ct. 1757]; by analogy, we conclude that under the charter the union can claim no right to bargain as to supervisory positions.

We are presented with no facts which disclose whether the deputy fire chief's duties are supervisory; his title alone does not constitute a sufficient basis for excluding him from the bargaining unit. We therefore conclude that this issue should be submitted to the arbitrators who will hear the facts which will enable them to determine whether the deputy fire chief's duties are indeed supervisory. If so, the union's Vacancies and Promotions proposal does not apply to him or his position because he is not a member of the bargaining unit.

3. *Constant Manning Procedure*

An examination of this issue illustrates the wisdom of judicial self-restraint in attempting pre-arbitral definitions of the scope of arbitration. Apparently the union originally sought to add one engine company and to increase the personnel assigned to the existing engine companies. If these union demands required the building of a new fire house or the purchase of new equipment, they could very well intrude upon management's role of formulating policy. In view of the union's counterclaim that such a station and equipment were necessary for the safety of the men, this issue could have presented a complex problem. But the very flow of the proceedings washed away these questions because the union altered its position and accepted the recommendation of the fact finding committee "that the manning schedule presently in effect be continued without change during the term of the new Memorandum of Agreement." Hence we do not face the problem of whether the construction of a new fire house and the purchase of new equipment would intrude upon managerial prerogatives of policy making.

Although the city challenges even the limited status quo version of the manpower issue, contending that the fact finding ruling involves the "merits" and "organization" of the fire department and is therefore excluded from the scope of bargaining, we cannot conclude at this stage that the manpower proposal is necessarily nonarbitrable.

The city argues that manpower level in the fire department is inevitably a matter of fire prevention policy, and as such lies solely within the province of management. If the relevant evidence demonstrates that the union's manpower proposal is indeed directed to the question of maintaining a particular standard of fire prevention within the community, the city's objection would be well taken.

The union asserts, however, that its current manpower proposal is not directed at general fire prevention policy, but instead involves a matter of workload and safety for employees, and accordingly falls within the scope of negotiation and arbitration. Because the tasks involved in fighting a fire cannot be reduced, the union argues that the number of persons manning the fire truck or comprising the engine company fixes and determines the amount of *work* each fire fighter must perform. Moreover, because of the hazardous nature of the job, the union also claims that the number of persons available to fight the fire directly affects the *safety* of each fire fighter.

Insofar as the manning proposal at issue does in fact relate to the questions of employee workload and safety, decisions under the National Labor Relations Act fully support the union's contention that the proposal is arbitrable. First, the federal authorities uniformly recognize "workload"[11] issues as mandatory subjects of bargaining whose determination may not be reserved to the sole discretion of the employer. (See, e.g., Gallencamp Stores Co. v. N.L.R.B. (9th Cir. 1968) 402 F.2d 525, 529, fn. 4.) Thus, for example, in Beacon Piece Dyeing & Finishing Co., Inc. (1958) 121 N.L.R.B. 953, 954, 956, the National Labor Relations Board held that an employer could not unilaterally increase an employee's workload by assigning to him the operation of an extra machine. Similarly, the courts have recognized rules and practices affecting employee safety as mandatory subjects of bargaining since they indirectly concern the terms and conditions of his employment. (N.L.R.B. v. Gulf Power Company (5th Cir. 1967) 384 F.2d 822.)

Moreover, a recent California public employment case, Los Angeles County Employees Assn. Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1, affords additional support for the union's position. In interpreting the scope of bargaining language in the Meyers-Milias-Brown Act – language which, as pointed out earlier, largely parallels the scope of negotiation provision under the Vallejo City Charter – the *Los Angeles County Employees* court held that the county was required to negotiate with the union with respect to the size of the caseloads carried by social service eligibility workers. Because the caseload, i.e., "workload," of the social workers effectively determined the number of these workers needed to service the recipients of aid, bargaining over the size of caseloads in *Los Angeles County Employees* was in reality comparable to bargaining over "manning" levels.[12] In the case before us, the union claims that the fire fighters, like the Los Angeles social workers, are essentially demanding a particular workload but have framed their demand in terms of "manning," that is the number of people available to fight each fire.

Given the parties' divergent characterizations of the instant manpower proposal, either one of which may well be accurate, we believe the proper course must be to submit the issue to the arbitrators so that a factual record may be established. The nature of the evidence presented to the arbitrators should largely disclose whether the manpower issue primarily involves the workload and safety of the men ("wages, hours and working conditions") or the policy of fire prevention of the city ("merits, necessity or organization of any governmental service"). On the basis of such a record, the arbitrators can properly determine in the first instance whether or not, and to what extent, the present manpower proposal is arbitrable.

Furthermore, the parties themselves, or the arbitrators, in the ongoing process of arbitration, might suggest alternative solutions for the manpower problem that might remove or transform the issue. Indeed, the union in the instant case has already abandoned one position and assumed another. These are the elements and considerations that argue against preliminary court rulings that would dam up the stream of arbitration by premature limitations upon the process, thwarting its potential destination of the resolution of the the issues. Hence we hold that the charter provision as to "merits, necessity or organization" of the service does not at this time preclude the arbitration of the union proposal that the manning schedule presently in effect be continued for the term of the new agreement.

4. *Personnel Reduction*

Finally, the union advanced a Personnel Reduction proposal which would require that the city bargain with the union with respect to any decision to reduce the number of fire fighters. Under the proposal, any reduction would be on a least-senority basis, and no new employees could be hired until all those laid off were given an opportunity to return. The city objects to that part of the proposal requiring bargaining on a decision to reduce personnel and contends that any such matter is not negotiable because it involves the merits, necessity or organization of the fire fighting service.

A reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service.

Thus cases under the NLRA indicate that an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the *timing* of layoffs and the *number* and *identity* of the employees affected. (N.L.R.B. v. United Nuclear Corporation (10th Cir. 1967) 381 F. 2d 972.) In some situations, such as that in which a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and lay off employees is subject to bargaining. (Fibreboard Corp. v. Labor Board (1964) 379 U.S. 203.) The fact, however, that the decision to lay off results in termination of one or more individuals' employment is not *alone* sufficient to render the decision itself a subject of bargaining. (N.L.R.B. v. Dixie Ohio Express Co. (6th Cir. 1969) 409 F.2d 10.)

On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal.

Our conclusion that the issues of Personnel Reduction, Vacancies and Promotions, Schedule of Hours and Constant Manning Procedure, except as limited above, involve the wages, hours or working conditions of fire fighters and are negotiable requires in the context of this suit that the City of Vallejo submit these issues to arbitration. We in no way evaluate the merit of the union proposals, but hold only that under the Vallejo charter they are arbitrable.

Such a result comports with the strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration. We have declared that state policy in California "favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization." (Posner V. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 180.) In this case the voters of the City of Vallejo similarly declared that they consider arbitration to be the most appropriate means of resolving labor disputes. Through section 810 the citizens of Vallejo delegated to a board of arbitrators the power to render a final and binding decision in labor disputes "to the extent permitted by law" after considering "all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition."[13]

At the same time Vallejo voters provided that any employee who participated in a strike against the city should be automatically terminated. (§ 810.) Thus, the employee's *quid pro quo* for this no-strike provision consisted of the arbitrability of all disputes (see Boys Market v. Clerks Union (1970) 398 U.S. 235); the arbitration and no-strike provisions were interdependent. Any interpretation of the Vallejo charter which improperly failed to require arbitration on the full range of negotiable issues would not only erroneously curtail arbitration but would invite the very labor strife which the charter provisions seek to prevent.

For the foregoing reasons we dispose of the issues as follows: (1) The Schedule of Hours proposal must be submitted to arbitration in full. (2) The proposal as to Vacancies and Promotions is arbitrable. The arbitrators shall additionally hear the facts to determine whether the position of deputy fire chief is a supervisory one and thus excluded from the bargaining unit. If so, the Vacancies and Promotions proposal cannot apply to the deputy fire chief position. (3) The proposal that the manning schedule presently in effect be continued without changes during the term of the new agreement is arbitrable to the extent that it affects the working conditions and safety of the employees. (4) As to Personnel Reduction the proposal to reduce personnel is arbitrable only insofar as it affects the working conditions and safety of the remaining employees. Matters of seniority and reinstatement included in the Personnel Reduction proposal are arbitrable.

We affirm the judgment as herein modified and remand the case to the superior court with directions to issue a writ of mandamus requiring the City of Vallejo to proceed to arbitrate the issues of "Reduction of Personnel," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure" in accordance with this opinion. Each party shall bear its own costs on appeal.

TOBRINER, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.
CLARK, J.

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[1]The court rejected the union's contention that the California Arbitration Act, Code of Civil Procedure section 1280, et seq., applied to this dispute, holding that it had no jurisdiction under the arbitration act and could not issue an order to arbitrate. The court upheld the writ of mandate to compel the city to arbitrate, however, because the union had no other plain, speedy and adequate remedy. Since the union did not initially seek an order to arbitrate under section 1281.2 of the act, but proceeded in the superior court with a petition for writ of mandate, we need not resolve the issue of the applicability of the California Arbitration Act.

[2]Section 809 provides: "Consistent with applicable law, the City Council shall by ordinance provide a system of collective negotiating to include:

"a. It shall be the right of City employees individually or collectively to negotiate on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law, or on any matter arising out of Sections 803(n) or 803(o) of this Charter.

"b. The City Council shall direct the City Manager and/or his designated representative(s) to negotiate in good faith with recognized employee organizations.

"c. Agreements reached between City representatives authorized in (b) above and the representatives of recognized employee organizations shall be submitted in writing to the City Council for its approval, modification, or rejection.

"d. There shall be established a timetable for the total process of collective negotiations, including mediation and fact finding, as herein provided, which will, if successful, assure a final agreement between the parties no less than 45 days before the end of the current fiscal year.

"e. If, after a period of time to be set forth in the ordinance, no agreement can be reached between City representatives authorized in (b) above and the representatives of recognized employee organizations or if the City Council refuses to ratify the agreement arrived at or modifies such agreement in any manner unacceptable to said employee organizations, the parties shall request the State Conciliation Service, or other available impartial third-party mediation service mutually acceptable to the parties, to provide a mediator in accordance with its usual procedures.

"f. If no agreement between the parties has been reached within 10 days after the date for start of mediation, a fact-finding committee of three shall be appointed to deal with the disputed issues. One member of the fact-finding committee shall be appointed by the City Council, one member shall be appointed by the recognized employee organization, and those two appointed shall name a third, who shall be the chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation service. The fact-finding committee shall make public its report, with recommendations, within 30 days. The Council shall then promptly consider and act upon the report."

[3]Section 810 provides: "Consistent with applicable law, the ordinance adopted by the Council under Section 809 shall in addition include a requirement that if the parties do not reach agreement within 10 days after the report and recommendations of the fact-finding committee, the issues shall be submitted to arbitration. The Board of Arbitrators shall be composed of three persons; one appointed by the City Council, one appointed by the recognized employee organization, and those two appointed shall appoint a third, who shall be chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation Service. No member of the fact-finding committee shall be a member of the Board of Arbitrators. The arbitrators shall consider all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition. To the extent permitted by law, the decision of a majority of the Board of Arbitrators shall be final and binding upon the parties. The cost of arbitration shall be borne equally by all parties.

"The Council shall also provide in said ordinance that any employee who fails to report for work without good and just cause during negotiations or who participates in strike against the City of Vallejo will be considered to have terminated his employment with the City, and the Council shall have no power to provide, by reinstatement or otherwise, for the return or reentry of said employee into the City service except as a new employee who is employed in accordance with the regular employment practices of the City in effect for the particular position of employment."

[4]The Meyers-Milias-Brown Act [hereinafter MMBA] applies to all local government employees in California. It provides for negotiation ("meet and confer") and mediation but not fact-finding or binding arbitration. (Gov. Code, §§ 3505 and 3505.2.)

[5]The meaning of the scope of bargaining language in the Vallejo charter does not differ from the meaning of such language in the MMBA because of the existence of dispute resolution provisions in the charter not present in the MMBA. The essential difference between the bargaining rights afforded Vallejo employees and those afforded local government employees in general under the MMBA relates only to the *remedies* available when negotiation breaks down and *not* to the scope of negotiation required.

The charter provides that "[i]t shall be the right of City employees . . . to *negotiate* on *matters* of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity. . . ." (Emphasis added.) If no agreement is reached on *these matters*, they must be submitted to mediation, then fact-finding, then arbitration. The matters which are submitted to the three levels of dispute resolution are those upon which the parties *negotiate* but do not reach agreement. There is nothing in either section 809 or 810 which can be interpreted to exclude any matters which are subject to negotiation from subsequent submission to mediation, fact-finding and arbitration. Therefore interpretation of the scope of negotiation under the Vallejo charter is necessarily an interpretation of the scope of arbitration.

[6]California authorities establish that after an arbitration decision has been rendered, judicial review is available to determine whether the arbitrators have exceeded their powers. (See, e.g., Morris v. Zuckerman (1968) 69 Cal.2d 686, 691; National Indemnity Co. v. Superior Court (1972) 27 Cal.App. 3d 345, 349; Firestone Tire & Rubber Co. v. United Rubber Workers (1959) 168 Cal.App.2d 444, 449; Flores v. Borman (1955) 130 Cal.App.2d 282, 287; Drake v. Steen (1953) 116 Cal. App.2d 779, 785.)

[7]The NLRA provides that "to bargain collectively is . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . ." (29 U.S.C. 158(d)).

[8]Thus federal cases have held an employer need not bargain about a decision to shut down one of its plants for economic reasons (N.L.R.B. v. Royal Plating & Polishing Co. (3d Cir. 1965) 350 F.2d 191), nor about a decision based on economic considerations alone to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner (N.L.R.B. v. Transmarine Navigation Corp. (9th Cir. 1967) 380 F.2d 933). Furthermore, a decision to relocate the employer's plant to another location for economic reasons has been held "clearly within the realm of managerial discretion" and not subject to bargaining on the union's demand (N.L.R.B. v. Rapid Bindery, Inc. (2d Cir. 1961) 293 F.2d 170, 176).

[9]See generally Shaw & Clark, *Practical Differences Between Public & Private Sector Collective Bargaining* (1972) 19 U.C. L.A.L.Rev. 867; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Report of the Western Assembly on Collective Bargaining in American Government (1972) pp. 4-5; *Project: Collective Bargaining and Politics in Public Employment* (1972) 19 U.C.L.A.L.Rev. 887.

[10]The Assembly Advisory Council on Public Employee Relations reached the same conclusion after studying arguments of alleged differences between the public and private sectors. (Final Rep., p. 139, March 15, 1973.) Furthermore, we applied private sector precedent in interpreting another aspect of the MMBA in Social Workers' Union, Local 535 v. Alameda Welfare Dept. (1974) 11 Cal. 3d 382.

[11]In the private sector employees rarely seek higher "manning" levels but instead usually frame similar demands in terms of reducing "workload." In one case, however, a union did phrase its proposal in "manning" terms, demanding an increase in the number of employees assigned to operate a specific 10-inch mill. The National Labor Relations Board found the proposal to constitute a mandatory subject of bargaining. (Timken Roller Bearing Co. (1946) 70 N.L.R.B. 500, 504-505, revd. on other grounds /6th Cir. 1947) 161 F.2d 949.)

[12]The city argues that the *Los Angeles County Employees* case is distinguishable from the instant matter because it only concerned the "negotiability" of the caseload issue and not its "arbitrability." As noted above (see fn. 5, *supra*), however, under the charter provision at issue in this case, the *scope* of negotiation and the *scope* of arbitration are identical.

[13]An amicus has contended that the disputed issues are not arbitrable because submission of them to arbitration constitutes an unconstitutional delegation of legislative power. Arbitration of public employment disputes has been held constitutional by state supreme courts in State v. City of Laramie (Wyo. 1968) 437 P.2d 295 and City of Warwick v. Warwick Regular Firemen's Ass'n (R.I. 1969) 106 R.I. 109, 256 A.2d 206.

To the extent that the arbitrators do not proceed beyond the provisions of the Vallejo charter there is no unlawful delegation of legislative power.

D

TAB D

INITIAL SCOPE OF BARGAINING INTERPRETATIONS UNDER THE EDUCATIONAL EMPLOYMENT RELATIONS ACT

Under the Educational Employment Relations Act apparent statutory limitations were placed upon the scope of bargaining.[1] As a result a lively debate has begun among practitioners as to the meaning of these limitations, and whether or not they permit the parties voluntarily to exceed them.[2] Where resolution of this question is not possible at the bargaining table, the appropriate action for the aggrieved party to take in a matter affecting scope is to file a "refusal to negotiate charge" against the responsible party. In this way the matter will be brought to the EERB and a ruling will be made.

The first three refusal-to-negotiate decisions rendered by Board's hearing officers are included in this tab and reprinted with the permission of the EERB General Counsel. Unless appealed to and ruled upon by the Board itself, a hearing officer's decision does not have value as formal precedent. However, if the decision is not appealed it is then issued as an order of the Board. Of the three recommended decisions in this tab, the ruling in Saddleback Valley Educators Association was so ordered for enforcement.

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[1]See Sec. 3543.2, EERA, TAB E.

[2]See CPER, No. 32 (March 1977), Joseph Herman, "Scope of Representation under the Rodda Act: Negotiable and Non-Negotiable Issues"; and Donald H. Wollett, "Public Employees: Villians or Victims?"

While different hearing officers may interpret evidence differently, there is no assurance, lacking EERB rulings, that similar cases will necessarily be ruled on in identical fashion. Nevertheless, the parties can expect Board hearing officers to rely upon similar standards with regard to other precedents. In this context, it is interesting to note that in all three of these cases the hearing officers referred to court rulings under the National Labor Relations Act and/or the Meyers-Milias-Brown Act in their decisions.

STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

SADDLEBACK VALLEY EDUCATORS ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-9
vs.	)	
SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT,	)	EERB Decision No. HO-U-1
Respondent.	)	

Pursuant to California Administrative Code Sections 35029 and 35030, no exceptions having been filed in the above-captioned matter, the recommended decision of the hearing officer is hereby declared the final decision of the Board itself, to wit:

Upon the foregoing findings of facts, conclusions of law, and the entire record in this case, and pursuant to Government Code Section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Saddleback Valley Unified School District, its Board members, superintendent and representative shall:

1. CEASE AND DESIST FROM:

   (a) failing to meet and negotiate in good faith upon request with the exclusive representative of the certificated employees with regard to matters within the scope of representation;

   (b) imposing or threatening to impose reprisals on employees, or in any manner interfering with, restraining, or coercing employees because of their exercise of rights guaranteed by the Educational Employment Relations Act.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

   (a) make whole the certificated employees for the loss of pay suffered by them by paying to eligible certificated employees step and column increases as provided for in the 1976-77 salary schedule adopted by the Saddleback Valley Unified School District and continue to pay salaries pursuant to that schedule for the remainder of the 1976-77 school year;

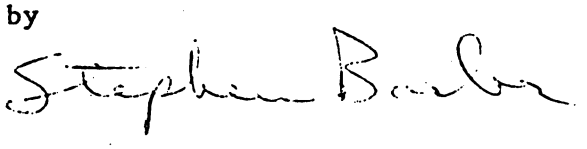
(b) prepare and post at all of its schools and work sites for 20 working days in conspicuous places, including all locations where notices to certificated employees are customarily posted, copies of this order;

(c) at the end of the posting period, notify the Los Angeles Regional Director of the Educational Employment Relations Board of the action it has taken to comply with this order.

It is further ordered that the charge shall be dismissed with respect to any unfair practices which are alleged and have not been found to be violations of the Act.

Educational Employment Relations Board

by



STEPHEN BARBER
Executive Assistant to the Board

2/28/77

The basis of the respondent's motion to dismiss is that the EERB lacks jurisdiction to hear and to decide unfair practice actions occurring prior to July 1, 1976. The respondent contends that the action allegedly aggrieving the SVEA occurred on June 28, 1976. The respondent further claims that Chapter 421 of the Statutes of 1976 [2/] is invalid since that statute is an ex post facto law. The motion to dismiss is disposed of in accordance with the findings and conclusions below.

ISSUES

1. Whether the Educational Employment Relations Board has jurisdiction to decide this case.

2. If the Educational Employment Relations Board has jurisdiction, whether the respondent violated Government Code sections 3543.5 (a), (b), (c), or (e).

FINDINGS OF FACT

Saddleback Valley Unified School District is located in Orange County.

2/ Senate Bill 1471, effective July 10, 1976, states that Sections 3543.5 and 3543.6 (unfair practice provisions of the EERA) "shall become effective April 1, 1976." In explaining the purpose of this bill, the Legislative Counsel wrote: "This bill...would change the operative date of the provisions specifying unlawful practices of a public school employer and an employee organization...from July 1, 1976 to April 1, 1976."

There are approximately 700 teachers employed by the District.

On April 1, 1976 the charging party, Saddleback Valley Educators Association, petitioned the respondent, Saddleback Valley Unified School District, for recognition as the exclusive bargaining representative for all of the certificated employees of the respondent. On May 17, 1976 the respondent recognized the SVEA as the exclusive representative of a unit consisting of certificated employees.

At the June 28, 1976 regular school board meeting, the respondent adopted the 1976-77 salary schedule which was identical to the salary schedule for the 1975-76 school year. This salary schedule provided for step and column increases for additional years of experience, graduate semester units earned and additional credential or degree earned. The school board then passed a resolution prohibiting credit for advancement on the adopted schedule unless the exclusive representative agreed to sign a school board-prepared agreement.

By letter dated July 1, 1976 Mr. John Cooper, III, the Assistant to the Superintendent for Staff Negotiations, notified the SVEA bargaining representative of the school board's action. That letter, addressed to Mr. William Mecham, the SVEA's president and bargaining representative, and the above-referred to agreement, read as follows:

> Dear Mr. Mecham:
>
> At its last regular meeting of June 28, 1976, the Board of Education adopted the attached salary schedule for 1976-77. We call to your attention the provision of their action which requires that you sign the enclosed Agreement, without amendment or change, by August 1, 1976, in order for members of the bargaining unit which you represent to receive credit for advancement on the adopted salary schedule.

In absence of the filing by your organization in the Office of the Superintendent of a duly executed copy of this Agreement on or before August 1, 1976, no member of the exclusive unit which you represent will be entitled to receive any greater salary than that which they received on the salary schedule for 1975-76.

If you have any questions regarding the above, please refer them to my office.

Very truly yours,

/s/ John L. Cooper III

John L. Cooper III
Board's Representative

AGREEMENT

I,_____,
authorized representative of the Saddleback Valley Educators Association/CTA/NEA, the exclusive representative of the certificated employees of the Saddleback Valley Unified School District, do hereby agree for and on behalf of the Association that in consideration of the District adopting a salary package for the 1976-1977 School Year prior to July 1, 1976, that the Association agrees that no items bargained for under the provisions of SB 160 during the 1976-1977 School Year shall become effective prior to July 1, 1977, except for procedural matters relating to conducting of meeting and negotiating sessions, and ancillary procedural matters as outlined in Government Code 3543.1 (b) and (c) and other matters of mutual consent.

The SVEA declined to accept the imposed conditions and the first pay warrants for the 1976-77 school year, issued October 1, 1976, showed the employees' salaries identical to the previous year.

CONCLUSIONS OF LAW

Jurisdiction of the Educational Employment Relations Board

The respondent argues, in its motion to dismiss, that SB 1471[3/] is an ex post facto law and therefore any exercise of jurisdiction by the EERB regarding unfair practices occurring prior to July 1, 1976 is unlawful. It is found that the respondent's actions complained of by the charging party occurred on or after July 1, 1976 and accordingly, any arguments in this case regarding the retroactivity of SB 1471 are moot.

Respondent's reliance on the fact that the school board took its action on June 28, 1976 is misplaced. The respondent's actions in this case are not viewed separately, but are examined in the aggregate. See GMAC v. NLRB, 476 F. 2d. 850, 82 LRRM 3093 (1st cir. 1973). The school board's actions were of a continuing nature, commencing June 28, 1976, the date of the school board resolution, to July 1, 1976, the date the offer of agreement was officially communicated to the charging party by the school board's representative, to August 1, 1976, the date the charging party was required to accept the respondent's offer, to October 1, 1976, the date the effect of the respondent's resolution was reflected in the employees' pay warrants.

Further, if any date is to be considered critical, reasonableness commands that it should be the date the employer's negotiating representative communicates the employer's position to the employee organization. Since the action of the employer in this case was communicated to the charging party on July 1, 1976 by Mr. John L. Cooper, III, who was the Assistant to the Superintendent for Staff Negotiations and the school board's representative,

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3/ See footnote 2.

it is reasonable that the charging party and the certificated employees relied on his communication as constituting the offer of the school district. It is this July 1, 1976 letter and offer of agreement which is the subject matter of the unfair practice charge. The date of the decision by the school board to make the offer is irrelevant.

For all the foregoing reasons the Educational Employment Relations Board has jurisdiction to hear and decide this case.

Section 3543.5(a)

Section 3543.5(a) makes it unlawful for a public school employer to:

> Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

This section parallels Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act.[4/] In Fire Fighters Union v. City of Vallejo, 12 Cal. 3d 608 (1974), the California Supreme Court held that, in interpreting language in a California statute cognizance should be taken of the decisions of the National Labor Relations Board interpreting identical or similar language in the National Labor Relations Act. Therefore, the decisions of the NLRB and the federal courts have been considered in reaching the conclusions herein.

4/ 29 U.S.C. §158(a)(1) and 158(a)(3).

At the June 28, 1976 regular meeting the school board adopted a salary schedule for the 1976-77 school year which was identical to the 1975-76 salary schedule. Included was a base salary figure with increased wages for: (1) Graduate semester units; (2) Years of experience; and (3) Additional credential or degree. The school board then passed a resolution that no member of the certificated unit that the charging party represents will receive a higher salary during the 1976-77 school year than during the 1975-76 school year, unless the charging party executed an "agreement" drafted by the respondent. The agreement stipulated that the charging party would relinquish its right to represent employees in negotiations for the 1976-77 school year "in consideration of" the respondent paying the employees in accordance with the salary schedule. When the charging party failed to sign the agreement before the mandated time, the certificated employees lost any increase due them pursuant to the adopted salary schedule. This "take-it-or-else" posture by the respondent was a patent reprisal against the employees and an interference of their right to be represented by an employee organization.

The employees suffer economic hardship since the additional year of teaching experience, compensated in 1975-76, results in no increase of wages. Likewise, any certificated employees who completed additional educational units or obtained an advanced degree during the last year were not given credit in accordance with the adopted salary schedule.

The respondent argues that the school board's actions were meant to preserve the status quo. The respondent believes that continuing to pay the

identical salary as in the previous year will accomplish that. Clearly, such is not the case. In order to maintain the status quo, it is necessary to continue paying employees in a like manner, not a like amount.

It is no defense to an unfair practice charge that the employer is confused regarding the lawful course of action to take or if the employer believes its action to be correct. Thomas Markets, 191 NLRB 371, 77 LRRM 1457 (1971). In The Udylite Corp., 183 NLRB 163, 76 LRRM 1850 (1971), the NLRB stated:

> Respondent's contention in its brief that it was legally obligated to halt all merit increases during negotiations is misplaced. It overlooks the critical fact that in such decision to discontinue it acted unilaterally and arbitrarily, with an undercutting effect upon the Union concerning a mandatory bargaining subject. 183 NLRB at 170

The withholding of regularly scheduled step and column increases is a coercive tactic designed to penalize the employees for having union representation, Armstrong Cork Co. v. NLRB, 211 F. 2d. 843, 33 LRRM 2789 (1954), and tends to weaken and discredit the SVEA as the exclusive bargaining representative of the certificated employees of the respondent, Satilla Rural Electric Membership Corp., 137 NLRB 387, 50 LRRM 1159 (1962).

The respondent's conduct described herein undermines the collective bargaining process and constitutes a patent violation of Government Code section 3543.5(a).

Section 3543.5(c)

The public school employer is required by Government Code section

3543.3 to meet and negotiate with and only with the representatives of the exclusive representative of an appropriate unit upon request with regard to matters within the scope of representation. Section 3543.5(c) makes it an unfair practice for the public school employer to:

> Refuse or fail to meet and negotiate in good faith with an exclusive representative.

When examining a situation where the employer allegedly participated in negotiations without the requisite good faith, it is not within the province of the Educational Employment Relations Board to pass on the desirability of the terms of the collective bargaining agreement. Rather, the examination focuses upon the good faith of the proposals advanced. See The Udylite Corp., supra.

The entire concept underlying the statutory requirement that the parties meet and negotiate in good faith is a difficult one. What constitutes "good faith," in terms of the employer's duty under Section 3543.5(c) and the employee organization's duty under Section 3543.6(c) to meet and negotiate in good faith, is not easily identifiable.

Originally, under the National Labor Relations Act, the duty imposed upon the employer was merely to "bargain collectively with representatives of his employees." There was no explicit requirement that the employer bargain in good faith. The National Labor Relations Board, however, almost immediately added this requirement. See Atlas Mills, 3 NLRB 10, 1LRRM 60 (1937).[5/]

5/ The NLRB states: "Collective bargaining is something more than the mere meeting of an employer with the representatives of his employees; the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground." 1 NLRB Ann. Rep. page 4-5 (1936).

Following the United States Supreme Court decisions in NLRB vs. Jones and Laughlin Steel Corp. 301 US 1, 1 LRRM 703 (1937) and National Licorice Co. vs. NLRB, 309 US 350 6 LRRM 674 (1940) Congress added the requirement that the parties "confer in good faith." (29 USC § 158(d)).

Thus, NLRB and federal court cases define and give meaning to the term "good faith." A fortiori, decisions of the NLRB and the federal courts have been considered in reaching the conclusions herein. (See Firefighters Union vs. City of Vallejo, supra).

Proposals by the employer that suggest abandonment of previously granted benefits without any justification may illustrate bad faith bargaining. Register Publishing Co., 44 NLRB 834, 11 LRRM 93 (1942). The same is true for employers offering predictably unacceptable economic proposals. Borg-Warner Corp., 198 NLRB 726, 80 LRRM 1790 (1972); Sweeney & Co., Inc., 176 NLRB No. 27, 71 LRRM 1197 (1969).

Bad faith bargaining may also be shown by employer proposals that contain conditions to which no union could possibly agree. The NLRB in The Udylite Corp. found a violation of the duty to meet and negotiate in good faith when the employer proposed a management rights clause which in effect demanded that the union abdicate its representative status. The NLRB held at 183 NLRB 175 that:

> Any construction of Respondent's...proposal readily reveals a rejection of the collective-bargaining principle in that it demands an abdication by the Union of its meaningful representative status. (Indeed, the unilateral actions of Respondent earlier described appear to conform with this approach...) Respondent must have been aware that the Union, or any self-respecting union, could not accept such a contract provision or justify it to the employees it is statutorily required to represent.

The last requirement of subjective good faith in negotiating is that the employer not adopt a "take-it-or-leave-it" attitude combined with an unbending firmness that is unalterable. A "take-it-or-leave-it" proposal is evidence that the employer is bargaining and communicating as though the exclusive representative did not exist. Tomco Communications, 220 NLRB No. 87, 90 LRRM 132, (1975); NLRB v. General Electric Co., 418 F. 2d 736, 72 LRRM 2530 (1969); McLane Co., 166 NLRB 1036, 65 LRRM 1729 (1967).

As discussed previously, the respondent initially acted to maintain the status quo by continuing the existing salary schedule into the next year. The fact that a proposal merely embodies existing practices, is not, in itself, sufficient to show bad faith. The respondent, however, then made any earned increases in wages dependent upon the SVEA's agreeing to negotiate on no terms for the 1976-77 school year. The respondent's "offer" to the charging party to allow the employees to remain on the adopted salary schedule while surrendering its negotiation rights for a full school year was clearly surface bargaining. See General Motors Acceptance Corporation, 196 NLRB 137, 79 LRRM 1662 (1972), aff'd, 476 F. 2d 850, 82 LRRM 3093 (1973). It is difficult to believe that the employer in good faith could have supposed that its proposal had the slightest chance of acceptance by the SVEA, or even that it might advance the negotiations by affording a basis of discussion.

The respondent's "take-it-or-else" attitude constitutes a refusal to meet and negotiate in good faith and a violation of Government Code section 3543.5(c).

Section 3543.5(b)

Section 3543.5(b) makes it unlawful for a public school employer to:

> Deny to employee organizations rights guaranteed to them by this chapter.

One of the rights guaranteed to the charging party, as the exclusive representative, is the right to meet and negotiate with the employer with regard to matters within the scope of representation. (See Section 3543.3). Having found a violation of Section 3543.5(c), a violation of section 3543.5(b) also exists.

Section 3543.5(e)

Section 3543.5(e) makes it unlawful for a public school employer to:

> Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

On or about June 8, 1976, the SVEA gave notice to the respondent that it felt the parties were at impasse. The SVEA notified the EERB by letter. The EERB determined that the parties were not at impasse and notified them in July, 1976.

Based on the administrative determination that the parties did not reach impasse, there was no cause for the respondent to use the impasse procedures. No violation of Government Code section 3543.5(e) exists.

REMEDY

Government Code section 3541.5(c) provides that the EERB shall have the power to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice

and "to take such affirmative action...as will effectuate the policies of this chapter."

The conduct of the employer in this case is of such an egregious nature that merely to order cease and desist of the unfair practice would be ineffective. Affirmative action in the nature of a "make-whole" remedy is appropriate in this case.

In adopting the 1976-77 salary schedule, identical to the 1975-76 schedule, the respondent's intention was to maintain the status quo. The respondent then conditioned the effectuation of the terms of the salary schedule(step and column increases) by its "take-it-or-else" "offer of agreement". It appears that requiring the respondent to adhere to the terms of its adopted salary schedule is the proper remedy to order in this case.[6/]

ORDER

Upon the foregoing findings of facts, conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Saddleback Valley Unified School District, its Board members, superintendent and representative shall:

6/ It should be noted that past cases in California indicate that a school board may not lower salaries fixed by its salary schedule after the beginning of the school year. See City and County of San Francisco v. Cooper, 13 C.3d 898, 930 (1975). Refusing to grant step and column increases to eligible employees, as provided for in the salary schedule is, in effect, a lowering of salary.

1. CEASE AND DESIST FROM:

(a) failing to meet and negotiate in good faith upon request with the exclusive representative of the certificated employees with regard to matters within the scope of representation;

(b) imposing or threatening to impose reprisals on employees, or in any manner interfering with, restraining, or coercing employees because of their exercise of rights guaranteed by the Educational Employment Relations Act.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) make whole the certificated employees for the loss of pay suffered by them by paying to eligible certificated employees step and column increases as provided for in the 1976-1977 salary schedule adopted by the Saddleback Valley Unified School District and continue to pay salaries pursuant to that schedule for the remainder of the 1976-77 school year;

(b) prepare and post at all of its schools and work sites for 20 working days in conspicuous places, including all locations where notices to certificated employees are customarily posted, copies of this order;

(c) at the end of the posting period, notify the Los Angeles Regional Director of the Educational Employment Relations Board of the action it has taken to comply with this order.

It is further ordered that the charge shall be dismissed with respect to any unfair practices which are alleged and have not been found to be violations of the Act.

Pursuant to Title 8, Cal. Adm. Code §35029, this recommended decision and order shall become the final decision and order of the Board itself on February 24, 1977 unless a party files a timely statement of exceptions. See 8 Cal. Adm. Code §35030.

Dated: February 10, 1977.

JEFF PAULE
Hearing Officer

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
	)	
SONOMA COUNTY ORGANIZATION OF PUBLIC EMPLOYEES,	)	
	)	
Charging Party,	)	Unfair Case No. SF-CE-3
	)	
vs.	)	
	)	
SONOMA COUNTY OFFICE OF EDUCATION,	)	
	)	
Respondent.	)	RECOMMENDED DECISION
	)	

Appearances: Doty & Renkow by Peter M. Renkow, for Sonoma County Organization of Public Employees.

V. T. Hitchcock, Deputy County Counsel, for Sonoma County Office of Education.

Elaine Grillo Canty, Attorney for Amicus Curiae, California School Personnel Commissioners' Association in support of Respondent.

Before Ronald E. Blubaugh, Hearing Officer.

STATEMENT OF CASE

On June 3, 1976, the Sonoma County Board of Education (hereafter "Board") recognized the Sonoma County Organization of Public Employees (hereafter SCOPE) as the exclusive representative of a unit of classified employees of the Sonoma County Office of Education.

Subsequent to that date, the parties commenced bargaining for a contract. On July 15, 1976, SCOPE filed an unfair practice charge against the Sonoma County Office of Education (hereafter "employer" or "respondent")

contending a violation of Government Code Section 3543.2 and 3540(h).[1/] Because the parties have reached an agreed statement of facts, the allegations and responses in the original charge and answer are summarized here in only the most cursory manner. In brief, SCOPE alleged that the employer refused to meet and negotiate about the salaries of individual job classifications of employees within its unit. The employer denied this and affirmatively defended on the theory that those matters were within the domain of the district personnel commission and that the board was precluded from bargaining about them by the Education Code.

An informal conference was held on this matter on November 23, 1976. A second informal conference was set for December 10, 1976. However, prior to the start of that conference the parties worked out a set of stipulated facts. The parties waived notice requirements and a formal hearing was commenced immediately. The hearing was continued to March 8, 1977, when the parties argued the case orally, on the record.

In their agreed statement of facts, the parties give the following narrative of the events which led up to the charge which was filed with the Educational Employment Relations Board:

1/ Government Code Section 3543.2 details the scope of representation in meeting and negotiating. There is no Government Code Section 3540(h). SCOPE apparently intended to allege a violation of Government Code Section 3540.1(h) which is the definition of "meeting and negotiating." This is technically an improper statement of the charge. All parties, however, have treated this case as if there were an allegation that the employer violated Government Code Section 3543.5(c) by refusing to bargain over matters contained in Government Code Section 3543.2. Because there was no objection to the manner in which the charge was filed and because all parties have treated it as cited above, the hearing officer will do the same.

On June 3, 1976, SCOPE submitted to the respondent a comprehensive statement of proposals upon which to commence the meet and negotiate process. On June 17, 1976, the Board of Education responded to SCOPE's proposals and formally indicated the appointment of Dick Bacon, chief spokesman, and Don Boriolo and Fred Walton, additional members of the Board's negotiating team. Dick Bacon is... (the employer's) chief deputy superintendent. Don Boriolo is the program manager of the Sonoma County Regional Occupation Program. Fred Walton is the personnel director in the Sonoma County Office of Education. He is also the executive director of the Personnel Commission.

Sometime after June 3, 1976, the representatives of SCOPE were made aware of the fact that the Personnel Commission was scheduled to meet and consider for possible approval a salary study which analyzed the salary schedule and the placement thereon of the various non-supervisory job classifications. The study also contained a proposal for the realignment of reclassification of some of the various positions on the wage schedule. The study and reclassification proposal were compiled by Fred Walton.

The representatives of SCOPE requested that the respondent's negotiating team meet and negotiate regarding the salaries of individual job classifications prior to any action being taken by the Board of Education or the Personnel Commission.

These requests to meet and negotiate on the subject of wages for individual job classifications were denied by the negotiating team of the Board of Education. They expressed to the SCOPE representatives that changes in the salary relationships between job classifications or salary ranges of individual classifications were the exclusive purview of the Personnel Commission and beyond the scope of negotiations as outlined in the Rodda Act. All other matters were agreed to....

and the parties signed a memorandum of understanding about those matters.[2/]

The stipulated facts of the parties are adopted as findings of fact by the hearing officer.

STATEMENT OF THE ISSUES

1. Does Government Code Section 3540 preempt from the scope of representation all matters within the purview of Personnel Commissions as outlined in Education Code Section 13701 et seq.?

2/ On September 13, 1976 the parties to this dispute signed a "Memorandum of Understanding" covering the non-supervisory classified employees unit. Paragraph two of that understanding declares in part that "the parties to this agreement acknowledge that this agreement constitutes the result of meeting and negotiating in good faith as prescribed by Chapter 10.7, Section 3540 et seq. of the Government Code of California and further acknowledge that all matters upon which the parties reached agreement are set forth herein." In the fifth paragraph of that agreement (which is numbered 3 by the parties), there is the following statement:

> Provided that the Employee Relations Board, (or if District chooses, a court of competent jurisdiction including all appellant rights) confirm the right of SCOPE to meet and negotiate and the obligation of the District to meet and negotiate regarding salary ranges or salaries of individual classifications, the District agrees to meet and negotiate in good faith on salary inequities or prevailing wage matters forthwith.

No party has raised the issue that the September 13, 1976 agreement made the unfair practice charge moot. Paragraph two of the agreement would seem to indicate that there was no unfair practice charge remaining. Paragraph five evidences an intent to keep the issue alive. Federal precedent indicates that the signing of a contract by a party which has filed an unfair labor practice does not automatically moot the charge. See General Electric Co., 163 NLRB 198, 64 LRRM 1312 (1967). Additionally, the parties have agreed in their stipulation of facts involving the instant case that the September 13, 1976 agreement provides "for a determination of this dispute through the appropriate legal and administrative channels." In an appropriate case it would be necessary to consider the question of mootness. But because of the stipulation of the parties, the hearing officer will not attempt to consider that issue in the instant case.

2. Are the wages for individual job classifications a subject which has been preempted from the scope of representation in personnel commission districts by Education Code Section 13719?

3. Did the employer commit an unfair practice by refusing to bargain with SCOPE about a matter within the scope of representation?

THE RELATIONSHIP BETWEEN THE EDUCATIONAL EMPLOYMENT RELATIONS ACT AND THE MERIT SYSTEM

The merit system is a form of administering personnel relations for non-certificated employees in a school district or a county superintendent of schools office.[3/] In merit system districts the school boards relinquish certain powers and responsibilities to a personnel commission. Among the duties of a personnel commission are the classification[4/] of employees and

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3/ Provisions relating to the creation and operation of the merit system applicable to this case are set forth in Education Code Sections 13701 et seq.

4/ As noted by counsel for the California School Personnel Commissioners' Association in a helpful amicus brief, the term "classification" has an accepted meaning even though it is not explained in the California codes. Kaplan, in The Law of Civil Service, defines it on page 120 as follows:

> The term "classification of positions"...in most jurisdictions... relates to the assembling of positions according to duties, functions and responsibilities so that similar positions may be assigned similar titles and embraced within the same class descriptive of the functions of the class of positions. The purpose of such classification is to provide uniform standards, uniform pay scales and an orderly means of controlling and regulating the status of incumbents. It contemplates fixing titles of positions relative to duties and functions, allocating positions to their proper classes so that all positions with the same titles may be in the same class, and allocation of the classes of positions to their respective salary grades or schedules according to a devised or designed pay plan.

This definition is recited with approval by the attorney general in the only reported authority construing the meaning of Education Code Section 13719, 54 Ops. Atty. Gen. 77, 81.

positions,[5] prescription of rules binding on the governing board designed to insure the selection and retention of employees on the basis of merit [6] and the recommendation of a salary schedule for classified employees.[7]

Legislation originally authorizing the creation of merit systems in California school districts was enacted in 1935. [8] It was the same year that the United States Congress enacted the National Labor Relations Act covering employees in private industry, a time long before any anticipation that public school employees in California would ever engage in collective bargaining.

In the more than 40 years since the two statutes were enacted, a great deal of law and tradition has developed about the separate systems of collective bargaining and civil service. With the enactment of the Educational Employment Relations Act in 1975, the California Legislature introduced collective bargaining into the public school system. How collective bargaining and the merit system shall operate together in the framework of a single employer is a matter of first impression. The initial source of guidance on this question must come from Government Code Section 3540 which declares in part:

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[5] Education Code Section 13712.

[6] Education Code Sections 13713 and 13714.

[7] Education Code Section 13719.

[8] Statutes 1935, Chapter 618, Section 1.

> ...Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.[9/]

In the instant case the employer has declined to bargain with SCOPE about the salaries of individual job classifications within the unit.[10/] SCOPE contends that the employer is obligated by the E.E.R.A. to engage in bargaining about the salaries paid to individual job classifications. The employer defends on the theory that Education Code Section 13719 removes from the Board the power to change the relationships among classes as established by the personnel commission.[11/]

To resolve this apparent conflict, SCOPE urges attention to the legislative purpose expressed in the E.E.R.A. Citing Government Code Section 3540, SCOPE notes that the purpose of the statute is to "improve

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9/ SCOPE reads the case of Los Angeles City and County Employees Union v. Los Angeles City Board of Education, 12 C.3d 851 (1974) as holding that "it is the governing board and not the (personnel) commission which has the power to fix and pay wages and salaries." (SCOPE's opening brief at page 6.) The hearing officer does not find the decision applicable to the instant case. In Los Angeles City and County Employees Union, the court does not consider the meaning of the final sentence of Education Code Section 13719. It is that sentence which is the key to the instant case.

10/ It is important to note that the employee organization did not seek to bargain over the subject of classification. There is some precedent from the National Labor Relations Board to indicate that the classification of jobs is a mandatory subject of bargaining under federal law. See Latin Watch Co., 156 NLRB 203, 61 LRRM 1021. Whether that precedent would be followed in California and, if followed, its effect on merit system districts, are issues not presented in the instant case. According to the stipulated facts, the instant case involves a refusal to bargain about "the salaries of individual job classifications." This opinion, therefore, does not consider what would happen if an employee organization sought to bargain over job classifications established by a personnel commission.

11/ See Page 8.

employer-employee relations and provide a uniform basis for regulating employment relations with public school employers." This, SCOPE continues, should lead to a construction of the statutes which applies uniformly among all school districts regardless of whether or not they have adopted the merit system. SCOPE would accomplish uniformity by reading the Act to allow collective bargaining agreements to supersede any rules and regulations of a personnel commission.

The employer argues that under Government Code Section 3540 the Educational Employment Relations Act does not supersede the sections of the Education Code which relate to personnel commissions. The employer reasons that the legislature took "pains" to protect the functions of the merit system and that conflicts between the merit system and the E.E.R.A. must be resolved in favor of the merit system.

11/ Government Code Section 3543.5(c) makes it unlawful for an employer to "refuse or fail to meet and negotiate in good faith with an exclusive representative." Government Code Section 3543.2 fixes the scope of representation at "matters relating to wages, hours of employment, and other terms and conditions of employment." It is admitted in the stipulation that the employer refused to bargain over the wages paid to individual job classifications. This is a prima facie violation of the Act. SCOPE argues that nothing more need be considered. According to SCOPE, if the legislature had intended to limit negotiations over "wages" between exclusive representatives and employers with personnel commissions it would have done so with some specific language. SCOPE points to the definition of "terms and conditions of employment" in Section 3543.2 and notes that there is no similar limiting definition of "wages." Therefore, reasons SCOPE, the legislature intended no limit on bargaining about wages. But this reading of the statute ignores the respondent's principal defense, namely that Government Code Section 3540 specifically provides that the E.E.R.A. shall not supersede the Education Code. A tribunal interpreting a statute cannot be blind to all the provisions of that statute because it must be presumed that in enacting a statute every provision was inserted for a purpose and that nothing was done in vain. Select Base Materials v. Board of Equalization (1959) 51 C.2d 640, 645; Reimel v. Alcoholic Beverages, etc. Appeals Bd. (1967) 256 C.A. 158, 167.

Amicus argues that personnel commissions have been given a great deal of legal independence from school boards. The commissions have independent management powers and authority to serve as a check on school boards and the E.E.R.A. does not change that relationship. Amicus places heavy reliance on Education Code Section 13719 as a bar to negotiations about the placement of individual positions on the salary schedule. Amicus contends that SCOPE's reading of the E.E.R.A. would give governing boards in personnel commission districts power which they did not formerly have.

The parties have cited a number of authorities as guides for the interpretation of statutes.

In attempting to devine the meaning of Government Code Section 3540, it is helpful to note that the language contained therein is not entirely original to the E.E.R.A. The Winton Act [12/] had similar language [13/] but an important addition was made with the enactment of Government Code Section 3540. As quoted above, the newer section, after reciting an intention not to supersede other laws and regulations, continues as follows:

> ...so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

12/ Former Education Code Section 13080 et seq.

13/ Former Education Code Section 13080 read in part:

> It is the purpose of this article to promote the improvement of personnel management and employer-employee relations within the public schools in the State of California.... Nothing contained herein shall be deemed to supersede other provisions of this code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations....

From this addition, one can infer that while the legislature clearly intended that the E.E.R.A. should not preempt certain existing laws and practices, it also clearly intended that some of those practices should not block collective agreements. The challenge, however, is to decide which matters are excluded from the reach of the E.E.R.A.

A division of the applicable part of Government Code Section 3540 suggests the legislature intended that:

1. Nothing in the E.E.R.A. shall supersede the Education Code;

2. Nothing in the E.E.R.A. shall supersede the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide other methods...so long as the rules and regulations or other methods...of the public school employer do not conflict with lawful collective agreements.

Under this reading, the Education Code will supersede all negotiated contracts while rules and regulations of a public school employer may be preempted by a lawful contract. In an appropriate case it would next be necessary to decide whether the statutory reference to "the rules and regulations...of the public school employer" includes the rules and regulations of a personnel commission. In the instant case, however, such an inquiry is not necessary because of Education Code Section 13719. The section is specifically applicable to SCOPE's demand that the employer bargain.

The final inquiry, therefore, must concern the meaning of that code section.

INDIVIDUAL JOB CLASSIFICATIONS AND EDUCATION CODE SECTION 13719

Under the analysis above, nothing in the E.E.R.A. shall supersede any specific provision of the Education Code. Therefore, the scope of bargaining can be no greater than the authority of the respondent under the Education Code. Citing Education Code 13719, respondent takes the position that with respect to job classifications it has no authority to change the relationships between job categories. Thus, respondent continues, it has no obligation to bargain on the matters which SCOPE has demanded to bargain.

Education Code Section 13719 [14/] is a troubling collection of sentences. There is no reported court decision which construes the meaning of that section. The sole guide is a 1971 opinion of the California Attorney General.[15/] (The opinion describes the final sentence of this section as "terse and difficult to interpret" and suggests that "legislative clarification would be helpful.") The conclusion of the attorney general is that the first three sentences of the section evidence legislative intent "to repose ultimate control over wages and salaries in the governing board rather than in the

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14/ Education Code Section 13719 reads as follows:

> The commission shall recommend to the governing board salary schedules for the classified service. The governing board may approve, amend, or reject these recommendations. No amendment shall be adopted until the commission is first given a reasonable opportunity to make a written statement of the effect the amendments will have upon the principle of like pay for like service. No changes shall operate to disturb the relationship which compensation schedules bear to one another, as the relationship has been established in the classification made by the commission.

15/ 54 Ops. Atty. Gen. 77. SCOPE argues that this opinion by the attorney general should be given little weight because it was authored prior to the enactment of the E.E.R.A. However, the E.E.R.A. did not purport to change Education Code Section 13719. Because Education Code Section 13719 is controlling in this case, it is necessary to look at the only reported authority interpreting that section.

personnel commission."[16/] However, that authority is limited by the restriction in the final sentence of the section.

Under the attorney general's interpretation, other parties than the personnel commission may make recommendations to the governing board about salary schedules. The board can adopt these recommendations so long as they "do not operate to disturb the relationship which salary schedules bear to one another, as that relationship has been established in the classification made by the commission."[17/]

The opinion then continues with this key observation:

> ...This classification relationship may not be disturbed by action of the governing board in making changes in the compensation schedules; however, we do not view such relationships as being necessarily "disturbed" if the governing board decreases or increases the salary differential between two non-equal positions, so long as each remains effectively higher or lower as such relative relationships have been established by the personnel commission classification. [18/]

The following hypothetical example will illustrate what the opinion holds. Suppose a particular county superintendent of schools employs data processing workers, business office workers, audio-visual technicians, clerical workers and custodians. Suppose further that the highest paid of these classifications is that of the data processing employees who receive salaries that are roughly five percent higher than those paid to business office workers. Suppose further that the business office workers earn salaries ten percent higher than the audio-visual technicians who in turn earn salaries

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[16/] 54 Ops. Atty. Gen. 77, 84.

[17/] 54 Ops. Atty. Gen. 77, 85.

[18/] 54 Ops. Atty. Gen. 77, 85.

five percent higher than the clerical workers who in turn earn salaries three percent higher than the custodians. Finally, suppose the county superintendent operates under the merit system and the relationship between the above classifications were set by the personnel commission.

Under the attorney general's opinion, the county board of education would be able to change the gap between the data processing workers and business office workers from five percent to six percent. It could change the gap between the business office workers and the audio-visual technicians from ten percent to seven percent. However, the board of education would be prohibited from decreasing the salaries of the business office workers so much that they then tumble beneath the salaries paid to the audio-visual technicians.[19/]

In summary, the attorney general would allow changes in the size of the salary differential between the various job classifications. The prohibition is against changes which would lift a classification which formerly was lower paid above one which formerly was higher paid..

19/ The hypothetical illustration above is somewhat simplified from what would occur in actual practice. Typically, most parties negotiate over benchmark classifications. Other similar jobs are grouped around the benchmarks. What the attorney general's opinion would allow an individual school board to do in a given case would be determined according to whether the personnel commission had classified all jobs. If the commission had classified all jobs and fixed the relationship of each job to every other job, the attorney general would not allow any job to be moved above or below any other job within the district. If the commission had only established the relationship of the benchmark positions in each job family, the attorney general presumably would allow changes in relationship of the non-benchmark jobs with each other, so long as there was no change in their relationship to the benchmark positions fixed by the personnel commission.

While opinions of the attorney general do not have the same authority as decisions by a court, they are given considerable weight when the attorney general has issued an interpretation of a statute and the legislature has subsequently taken no action. In one case involving a code section which the attorney general had previously interpreted, the court wrote:

> It must be presumed that the aforesaid interpretation has come to the attention of the Legislature, and if it were contrary to the legislative intent that some corrective measure would have been adopted in the course of the many enactments on the subject in the meantime. (Meyer v. Board of Trustees, 195 C.A. 2d 420 at 432 (1961)).20/

The attorney general's opinion above-discussed was issued nearly six years ago in May of 1971. The legislature made numerous changes in the statutes involving the merit system during the 1972, 1973, 1974 and 1975 sessions. It left unmodified Education Code Section 13719. For that reason the hearing officer will therefore adopt the attorney general's interpretation of Section 13719.

Applying that interpretation to the facts of the instant case, it is clear that the Sonoma County Board of Education had the authority to make some modifications in the salaries paid to individual job classifications.

It is undisputed that the employer refused to bargain about this subject. Therefore, the employer has violated Government Code Section 3543.5(c) by refusing to bargain over a matter within the scope of representation.

20/ In People v. Union Oil Co., 268 C.A. 2d 566 (1968), the court noted the importance of the passage of time following the publication of an opinion by the attorney general. The court held that "the lapse of time since the first announcement of that view supports the inference that, if it were contrary to legislative intent, some corrective measure would have been adopted," 268 C.A. 2d 566, 571. See also California State Employees Association v. Trustees of Cal. State Colleges, 237 C.A. 2d 530 (1965).

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, and pursuant to Government Code Section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Sonoma County Board of Education, superintendent and representative shall:

A. CEASE AND DESIST FROM:

Failing to meet and negotiate in good faith upon request with the exclusive representative of the classified employees with regard to salaries paid to individual job classifications;

Except that the employer shall be under no obligation to bargain about proposals which would change the relationships of the individual jobs as established by the personnel commission.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Prepare and post at its headquarters office for twenty (20) working days in a conspicuous place at the location where notices to classified employees are customarily posted, a copy of this order;

2. At the end of the posting period, notify the San Francisco Regional Director of the Educational Employment Relations Board of the action it has taken to comply with this order.

Pursuant to Title 8, Cal. Admin/ Code 35029, this recommended decision and order shall become the final decision and order of the Board itself on April 1, 1977 unless a party files a timely statement of exceptions. See 8 Cal. Admin. Code 35030.

Dated March 18, 1977.

Ronald E. Blubaugh

Ronald E. Blubaugh
Hearing Officer

EDUCATIONAL EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of the FULLERTON UNION HIGH SCHOOL DISTRICT PERSONNEL AND GUIDANCE ASSOCIATION, Charging Party, vs. FULLERTON UNION HIGH SCHOOL DISTRICT, Respondent.	)	Unfair Case No. LA-CE-28 RECOMMENDED DECISION

Appearances: Thomas C. Agin, Director, California Pupil Services Labor Relations, for Fullerton Union High School District Personnel and Guidance Association.

Lee T. Paterson, Paterson & Taggart, for Fullerton Union High School District.

Before Franklin Silver, Hearing Officer.

STATEMENT OF THE CASE

On September 27, 1976 the Fullerton Union High School District Personnel and Guidance Association (hereafter "Association" or "charging party") filed an unfair practice charge against the Fullerton Union High School District (hereafter "District" or "respondent") alleging a refusal to meet and negotiate in good faith in that the District unilaterally determined the location of negotiating sessions and refused to negotiate counselor and psychologist caseloads. On October 11, 1976 the District filed an answer denying that it had committed an unfair practice and a motion to dismiss the charge on the grounds that it had not been alleged that

an impasse existed.[1/] An informal conference was conducted on November 16, 1976, but no resolution of the matter was reached and the case was set for hearing. The parties subsequently submitted a stipulation of facts to be considered in lieu of a hearing, and this decision is based upon the stipulated facts and briefs submitted by the parties.

SUMMARY OF STIPULATED FACTS

The District is located in Orange County. It has an average daily attendance of approximately 15,000, with seven high schools and one continuation school. The District has 1,175 employees, 670 of whom are certificated personnel, 7 of whom are psychologists, and 29 of whom are counselors. The Association was recognized as exclusive representative of all counselors and psychologists in the District on May 17, 1976. On July 28, 1976, the parties agreed to ground rules for negotiations including a rule stating that the location of negotiating sessions was subject to negotiation. Representatives of the parties agreed that a negotiating session would be held on September 18, 1976 in the District's board room. At the September 18 meeting, no agreement was reached as to the location of the next meeting, but at least nine subsequent meetings were held at the board room or the Superintendent's conference room. After September 18, the Association did not propose any other location for negotiations.

At the September 18 meeting, and at various times thereafter, the District's representative refused to negotiate the issues of psychologist and counselor case-

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1/ The motion to dismiss was not preserved at the time stipulated facts were submitted and is not urged in the District's brief. Accordingly, it is not addressed herein.

loads, stating, according to the stipulated facts, that these matters were "not within the scope of negotiations set forth in Government Code Section 3543.2." [2/] During the course of negotiations the Association has made use of copying facilities and clerical assistance made available by the District. As of the date that the stipulated facts were submitted, impasse had not been declared and the parties were continuing to meet and negotiate.

The stipulated facts of the parties are adopted as the findings of fact by the hearing officer.

ISSUES TO BE DETERMINED

1. Did the District fail to meet and negotiate in good faith by unilaterally determining the site for negotiations?

2. Did the District fail to meet and negotiate in good faith by foreclosing discussion of counselor and psychologist caseloads?

CONCLUSIONS OF LAW

1. Site for Negotiations

The Association initially contends that the District has demonstrated bad faith by failing to agree to a site for bargaining other than the District's board room. Assuming that such a failure to reach agreement might in a proper case be grounds for finding that an unfair practice had been committed, the facts in the present case will not support such a finding. After the initial bargaining

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[2/] All statutory references hereafter are to the Government Code unless otherwise noted.

session the Association did not propose an alternative site. The facts do not indicate that the District refused to consider alternative sites nor that it unreasonably opposed any suggestions of alternative sites. Under these circumstances, this aspect of the charge must be dismissed.

2. Refusal to Negotiate over Caseloads

The central question in this case is whether the District was required to negotiate over psychologist and counselor caseloads. Section 3543.2 of the Educational Employment Relations Act (hereafter "Act") defines the scope of representation as follows:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7 and 3548.8. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

Initially, it is contended that caseloads for counselors and psychologists are analogous to class size for teachers, and that since the latter is specifically enumerated as being within the scope of representation, it may be reasonably inferred that the legislature intended to include caseloads as well.

While there is an inherent logic to the proposition that caseloads should be as fully negotiable as class size, the statutory language in this respect is unambiguous and limits the subjects of meeting and negotiating to wages, hours, and those items specifically enumerated under terms and conditions of employment. This limitation is plainly set forth by the first sentence of Section 3543.2, which states that the scope of representation "shall be limited...." The statutory language, therefore, does not permit an interpretation of the term "class size" beyond its plain and ordinary meaning.

Although the term "caseload" is not listed as a term or condition of employment, it may well be that certain aspects of a discussion of caseloads will involve wages, hours, or other enumerated terms and conditions of employment such as evaluation procedures. It would seem that a fruitful discussion of hours of employment might of necessity involve a discussion of the caseloads to be serviced within those hours, and it could well be that salary proposals, such as a proposal for premium pay, would be related to caseloads. To completely foreclose discussion of caseloads before determining whether this subject relates to matters within the scope places an artificial limitation on negotiations not contemplated by Section 3543.2.

This approach to the problem of caseloads is similar to that taken in Los Angeles County Employees Association, Local 660 v. County of Los Angeles, 33 C.A. 3d 1 (1973). There the court was confronted with the question of whether the size of caseloads for social workers was within the scope of representation of the Meyers-Milias-Brown Act, defined broadly as "wages, hours, and other terms and conditions of employment" (Sections 3504, 3505), or whether caseloads were outside the scope under the exception stated in Section 3504 reserving to management "consideration of the merits, necessity, or organization of any service or activity

provided by law or executive order." The county argued that consideration of the size of caseloads would necessarily impinge upon the manner in which the county fulfilled its statutory responsibility in determining eligibility for public assistance, and that therefore this subject fell outside the scope. The court noted that all management decisions might plausibly affect both areas of mandatory service to the public and working conditions of public employees, and held that the county must at least engage in limited negotiations over caseloads:

> Section 3505 requires the governing body of the public agency, or its representatives, to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment...." There is no reason why the public agency cannot discuss those aspects of the caseload problem, even though the "merits, necessity, or organization" of the service must be outside the scope of the required discussion. Whether such limited discussion is likely to be fruitful is nothing the public agency should prejudge. 33 C.A. 3d at 5. 3/

In the context of the Educational Employment Relations Act, the requirement to meet and negotiate in good faith includes a willingness to consider the possible relationship between matters not specifically enumerated as being within the scope of representation and those subjects which are clearly within scope. This means that when a subject arises in the course of meeting and negotiating, the employer cannot simply refuse to discuss that subject on the grounds that it does not literally fall within the scope of representation. If, after discussion,

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3/ See also, Fire Fighters Union v. City of Vallejo, 12 C. 3d 608 (1974), in which the California Supreme Court refused to limit prematurely the scope of arbitration, which under the Vallejo City Charter was coextensive with the scope of representation, although the city contended that certain union proposals, including one for constant manning procedures, i.e. workload, were outside the scope of arbitration because they involved the "merits, necessity or organization" of the fire fighting service and were therefore reserved to management. Thus, the Court indicated that the management rights provision in the Meyers-Milias-Brown Act, while acting as a limitation on the manner in which a negotiating dispute may ultimately be resolved, does not prevent a discussion of subjects which have ramifications beyond the scope of representation.

it is apparent that the exclusive representative is making a proposal which does not relate to any of the enumerated subjects within the scope or representation, it is then appropriate for the employer to take the position that the proposal is outside scope and that it will not negotiate over the proposal.[4/]

Insofar as a discussion of psychologist and counselor caseloads might relate to subjects within scope of representation, the refusal of the District to negotiate caseloads on the ground that this subject was outside the scope of negotiations set forth in Section 3543.2 constitutes a refusal to meet and negotiate in good faith in violation of Section 3543.5(c), and derivatively Subsection (b).

[4/] Section 3543.2, in addition to defining the scope of representation, provides that the exclusive representative of certificated personnel has the "right to consult" over, among other things, the "definition of educational objectives." This provision comports with the preamble (Section 3540) which states that the purpose of the Act is "to promote the improvement of personnel management and employer-employee relations within the public school systems of California...and to afford certificated employees a voice in the formulation of educational policy." It is quite likely that a discussion of the size of caseloads would be relevant to consultation over educational objectives. Cf. San Juan Teachers Association v. San Juan Unified School District, 44 C.A. 3d 232, 247-8 (1974).

The District contends that under Section 3543.2 there is no category of permissive subjects of bargaining such as exists under the National Labor Relations Act. See NLRB v. Wooster Division of the Borg-Warner Corp., 356 U.S. 342, 42 LRRM 2034 (1958). Arguably, however, the right to consult creates an obligation which has some elements similar to permissive subjects of bargaining. The facts presented do not indicate whether the Association requested to "consult" over caseloads, and, if so, how the District responded. Therefore, it is not necessary to determine the extent of the obligations imposed on an employer when requested to consult over subject matter which is outside the scope of representation.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record of this case, it is hereby ordered:

I. The unfair practice charge by the Fullerton Union High School District Personnel and Guidance Association that the Fullerton Union High School District refused to meet and negotiate in good faith by unilaterally determining the site for negotiations is dismissed.

It is further ordered that:

II. The Fullerton Union High School District, its Board members, superintendent and representatives shall:

A. CEASE AND DESIST FROM:

Refusing to meet and negotiate in good faith with the Fullerton Union High School District Personnel and Guidance Association with regard to psychologist and counselor caseloads insofar as these may relate to subject matter within the scope of representation;

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Prepare and post at each of its schools and work sites for twenty (20) working days in conspicuous places, including all locations where notices to employees are customarily posted, copies of this order; and

2. At the end of the posting period, notify the Los Angeles Regional Director of the Educational Employment Relations Board of the action it has taken to comply with this order.

Pursuant to Title 8, California Administrative Code Section 35029, this recommended decision and order shall become the final decision and order of the Board itself on April 18, 1977 unless a party files a timely statement of exceptions. See Title 8, California Administrative Code Section 35030.

Dated: April 4, 1977.

Franklin Silver
Hearing Officer

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TAB E

Selected Bibliography

Text of three Public Employee Bargaining Statutes:

Meyers-Milias-Brown Act

George Brown Act

Educational Employment Relations Act

THE SCOPE OF BARGAINING IN PUBLIC SECTOR NEGOTIATIONS

A Selected Bibliography

Anderson, Arvid. "The Impact of Public Sector Bargaining: an Essay Dedicated to Nathan P. Feinsinger." Wisconsin Law Review, Vol. 1973 (1973), 986-1025

California Assembly. Advisory Council on Public Employee Relations. Report and Proposed Statute of the California Assembly Advisory Council on Public Employee Relations. (Sacramento), March 15, 1973.

Cebulski, Bonnie G. "Some Recent Trends in Local Government Agreements." California Public Employee Relations, No. 26 (September 1975), 52-56

Collins, Alice. "Bagley v. City of Manhattan Beach: What It Means and What It Will Mean." California Public Employee Relations, No. 31 (December 1976), 2-12

"Compulsory Arbitration in Vallejo: An Experiment in Dispute Settlement." California Public Employee Relations, No. 13 (June 1972), 21-49

"Construing City Charter Provisions Designed to Resolve Public Employee Labor Disputes." California Law Review, Vol. 63 (January 1975), 254-266

Edwards, Harry. "The Emerging Duty to Bargain in the Public Sector." Michigan Law Review, Vol. 71 (April 1973), 885-934

Gallagher, James. "San Bernardino County's Experiment with Final-Offer Issue-by-Issue, Advisory Med-Arb." California Public Employee Relations, No. 31 (December 1976), 23-29

Grodin, Joseph R. "California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts." California Public Employee Relations, No. 21 (June 1974), 2-20

Grodin, Joseph R. "Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts." Hastings Law Journal, Vol. 23 (March 1972), 719-762

Helburn, I.B. "The Scope of Bargaining in Public Sector Negotiations: Sovereignty Reviewed." Journal of Collective Negotiations in the Public Sector, Vol. 3 (Spring 1974), 147-166

Mabee, Richard. "A California County Moves Into the Mainstream of Labor Relations." California Public Employee Relations, No. 23 (December 1974), 36-41

Poyer, Bruce. "Good Faith in Collective Bargaining: Private Sector Experience With Some Emerging Public Sector." California Public Employee Relations, No. 2 (August 1969), 1-20

Prasow, Paul and others. Scope of Bargaining in the Public Sector--Concepts and Problems. Washington, D.C., U.S. Government Printing Office, 1972.

Ross, Marion and Clara Stern. "Binding Grievance Arbitration in California Public Jurisdictions." California Public Employee Relations, No. 24 (March 1975), 16-24

Sabghir, Irving. The Scope of Bargaining in Public Sector Collective Bargaining: A Report Sponsored by the New York State Public Employment Relations Board. Albany, State University of New York, 1970.

"A Symposium on the Scope of Bargaining Problem." California Public Employee Relations, No. 16 (March 1973), 2-16

"A Symposium on the Supreme Court's Vallejo Decision." California Public Employee Relations, No. 24 (March 1975), 2-15

Vial, Don. "The Scope of Bargaining Controversy: Substantive Issues v. Procedural Hangups." California Public Employee Relations, No. 15 (November 1972) 2-26

Weitzman, Joan Parker. The Scope of Bargaining in Public Employment. New York, Praeger Publishers, 1975.

CALIFORNIA

There are three public employee bargaining statutes on the books in the State of California which cover state and local government employees, public school employees, and firemen. Another statute gives county employees the right to review their job performance or grievance records. In addition, Governor Ronald Reagan has issued an executive order calling for governor's representatives to meet and confer with representatives of state civil service employees and nonacademic college and university employees on the need for and amount of general salary increases, inequity adjustments, and general benefits. The local public employee law permits local public agencies to establish their own methods of administering employer-employee relations, and many California cities and counties have adopted such charters, ordinances, or rules. Los Angeles county employees bargain under an ordinance adopted in September 1968, while Los Angeles municipal employees are covered by a labor relations ordinance effective February 1971. San Francisco city and county employees received bargaining rights under an ordinance adopted in October 1973. Full texts of the state laws, the executive order, and the three ordinances follow:

Public Employees

Secs. 3500 to 3510 of the Government Code deal with the organizational and bargaining rights of public employees. These sections were added by Ch. 1964, L. 1961, as amended by Ch. 64, L. 1970, by Ch. 254, L. 1971, by H.B. 1107, L 1971, and as last amended by Ch. 858, L. 1972, effective March 7, 1973.

Sec. 3500. It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies. Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer employee relations nor is it intended that this chapter be binding upon those public agencies which provide procedures for the administration of employer-employee relations in accordance with the provisions of this chapter. This chapter is intended, instead to strengthen merit, civil service and other methods of administering employer - employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed. (As amended by Ch. 1390, L. 1968)

Sec. 3501. As used in this chapter:

(a) "Employee organization" means any organization which includes employees of a public agency and which has as one of its primary purposes representing such employees in their relations with that public agency.

(b) "Recognized employee organization" means an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency. (As added by Ch. 1390, L. 1968)

(c) Except as otherwise provided in this subdivision, "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not. As used in this chapter, "public agency" does not mean a school district or a county board of education or a county superintendent of schools or a personnel commission in a school district having a merit system as provided in Chapter 3 (commencing with Sec. 13580) of Division 10 of the Education Code or the State of California. (As amended by Ch. 254, L. 1971)

ED. NOTE: Private nonprofit corporation operating hospital facility owned by and leased from city is not "public agency" within meaning of Sec. 3501(c) of the Meyers-Millias-Brown Act, which requires public agencies to meet and confer with representatives of their employees. (Service Employees v. Roseville Hospital, 80 LRRM 2098, Cal CtApp, March 27, 1972)

For other rulings, see LR ▶ 42.10, 100.01.

(d) "Public Employee" means any person employed by any public agency including employees of the fire departments and fire services of counties, cities, cities and counties, districts, and other political subdivisions of the state excepting those persons elected by popular vote or appointed to office by the Governor of this State. (As amended by Ch. 254, L. 1971, effective December 1, 1971)

ED. NOTE: Officers and "attaches" of the municipal court are employees of such municipal court and generally are subject to the provisions of the Meyers-Milias-Brown Act, the state attorney general ruled. It was further ruled that such officers and "attaches" "may be considered county employees for specific purposes where it would be impractical to hold the municipal court as their employer." Because of their "hybrid employment status," such attaches "may maintain communication under the act with either the municipal court or county on employer-employee matters depending on the nature of the subject matter under discussion and the status of individual or group of employees." With regards to such employees' wages, no clear cut means of settling disputes is established. (Attorney General Opinion No. CV 73-39, issued August 7, 1973)

(e) "Mediation" means effort by a impartial third party to assist in reconciling a dispute regarding wages, hours and other terms and conditions of employment between representatives of the public agency and the recognized employee organization or recognized employee organizations through interpretation, suggestion and advice. (As added by Ch. 1390, L. 1968 and as reenacted by Ch. 254, L. 1971)

Sec. 3502. Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

Sec. 3503. Recognized employee organizations shall have the right to represent their members in their employment relations with public agencies. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the public agency. (As amended by Ch. 1390, L. 1968)

Sec. 3504. The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. (As amended by Ch. 1390, L. 1968)

Sec. 3504.5. Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by such governing body, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or such boards and commissions and shall give such recognized employee organization the opportunity to meet with the governing body or such boards and commissions.

In cases of emergency when the governing body or such boards and commissions determine that an ordinance, rule, resolution or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body of such boards and commissions shall provide such notice and opportunity to meet at the earliest practicable time following the adoption of such ordinance, rule, resolution, or regulation. (As added by Ch. 1390, L. 1968)

Sec. 3505. The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have 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. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation or ordinance, or when such procedures are utilized by mutual consent. (As amended by H. B. 1107, L. 1971)

ED. NOTE: County employees unions are entitled to writ of mandamus compelling county government to negotiate size of caseloads of social workers employed by Department of Public Social Services, since size of such caseloads is a "condition of employment" and therefore a mandatory subject for bargaining under Sec. 3505. (County of Los Angeles v. Employees Assn., 83 LRRM 2916, Cal Ct App, June 20, 1973)

For other rulings, see LR ▶100.02

A board of supervisors, the state attorney general ruled, "may not meet in executive session to review and decide upon the position it will take when such board conducts 'meet and confer' sessions without the use of a designated representative." The board, however, may appoint from its membership members to act as its designated representative with whom it may meet and confer in executive session. (Attorney General Opinion No. CV 73 46, issued May 1, 1974)

Sec. 3505.1. If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination. (As added by Ch. 1390, L. 1968)

Sec. 3505.2. If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations. (As added by Ch. 1390, L. 1968)

Sec. 3505.3. Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation. (As added by Ch 1390, L. 1968)

Sec. 3506. Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

Sec. 3507. A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).

Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency

or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Sec. 3502 (e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (f) access of employee organization officers and representatives to work locations (g) use of official bulletin boards and other means of communication by employee organizations (h) furnishing nonconfidential information pertaining to employment relations to employee organizations (i) such other matters as are necessary to carry out the purposes of this chapter. (As amended by H. B. 1339, L. 1971)

Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition. (As added by H. B. 1339, L. 1971)

No public agency shall unreasonably withhold recognition of employee organizations. (As amended by Ch. 254, L. 1971)

Sec. 3507.1. In the absence of local procedures for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute shall be submitted to the Department of Conciliation of the Department of Industrial Relations for mediation or for recommendation for the resolving of the dispute.

Sec. 3507.3. Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consistent of such professional employees. In the event of a dispute on the appropriateness of a unit of representation for professional employees, upon request of any of the parties, the dispute shall be submitted to the Division of Conciliation of the Department of Industrial Relations for mediation or for recommendation for resolving the dispute.

"Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists. (Sec. 3507.3, as amended by Ch. 858, L. 1972, effective March 7, 1973)

ED. NOTE: State certified appraisers should not be considered "professional employees" within meaning of Sec. 3507.3, (Attorney General Opinion No. CV 73/247, issued March 14, 1974)

Sec. 3507.5. In addition to those rules and regulations a public agency may adopt pursuant to and in the same manner as in Section 3507, any such agency may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the public agency and restricting such employees from representing any employee organization, which represents other employees of the public agency, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization. (As added by A.B. 278, L. 1969)

Sec. 3508. The governing body of a public agency may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws or local ordinances, and may by resolution or ordinance adopted after a public hearing, limit or prohibit the right of employees in such positions or classes of positions to form, join or participate in employee organizations where it is in the public interest to do so; however, the governing body may not prohibit the right of its employees who are full-time "peace officers," as that term is defined in Ch. 4.5 (commencing with Sec. 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization

The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section.

Sec. 3509. The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees.

ED. NOTE: Section 3510 of the Code is repealed, and Section 3511 is amended and renumbered by Ch. 254, L. 1971, effective December 1, 1971, to read (see below):

Sec. 3510. This chapter shall be known and may be cited as the "Meyers-Milias-Brown Act."

STATE EMPLOYEES

Following are Secs. 3525 to 3536 relating to state employees' right to bargain and organize, as added to Division 4 of Title 1 of the Government Code, by Ch. 254, L. 1971, and as last amended by S. B. 315, L. 1972, effective 61 days after adjournment of the Legislative session.

Sec. 3525. (Purpose). It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations between the State of California and its employees by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with the state. Nothing contained herein shall be deemed to supersede the provisions of existing state law which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the state.

Sec. 3526. (Definitions). As used in this chapter:

(a) "Employee organization" means any organization which includes employees of the state and which has as one of its primary purposes representing its members in employer-employee relations.

(b) The provisions of this chapter apply only to the State of California. The "State of California" as used in this chapter means such state agencies, boards, commissions, administrative officers, or other representatives as may be designated by law.

(c) "Public employee" means any person employed by the state, including employees of fire departments or fire services of the state, excepting those persons elected by popular vote or appointed to office by the Governor of this state.

Sec. 3527. (Right to Organize). Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organi-

zations and shall have the right to represent themselves individually in their employment relations with the state.

Sec. 3528. (Representation). Employee organizations shall have the right to represent their members in their employment relations, including grievances, with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf or through his chosen representative in his employment relations and grievances with the state. (As amended by S. B. 315, L. 1972, effective 61 days after adjournment of the Legislative session.)

Sec. 3529. (Scope). The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment.

Sec. 3530. (Duty to meet, confer). The state by means of such boards, commissions, administrative officers or other representatives as may be properly designated by law, shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

Sec. 3531. (Limitations). The state and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against state employees because of their exercise of their rights under Section 3527.

Sec. 3532. (Rules, regulations). The state may adopt reasonable rules and regulations for the administration of employer-employee relations under this chapter.

Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the state (b) verifying the official status of employee organization officers and representatives (c) access of employee organization officers and representatives to work locations (d) use of official bulletin boards and other means of communication by employee organizations (e) furnishing nonconfidential information pertaining to employment relations to employee organizations (f) such other matters as are necessary to carry out the purposes of this chapter.

For employees in the state civil service, rules and regulations in accordance with this section may be adopted by the State Personnel Board.

Sec. 3533. (Professional employees). Professional employees shall not be denied the right to be represented separately from nonprofessional employees by a professional employee organization consisting of such professional employees.

"Professional employees," for the purposes of this section, means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers and the various types of physical, chemical, and biological scientists.

Sec. 3534. (Restriction). In addition to those rules and regulations the state may adopt pursuant to and in the same manner as in Section 3532, the state may adopt reasonable rules and regulations providing for designation of the management and confidential employees of the state and restricting such employees from representing any employee organization, which represents other employees of the state, on matters within the scope of representation. Except as specifically provided otherwise in this chapter, this section does not otherwise limit the right of employees to be members of and to hold office in an employee organization.

Sec. 3535. (Enforcement). The state may, in accordance with reasonable standards, designate positions or classes of positions which have duties consisting primarily of the enforcement of state laws, and may by resolution adopted after a public hearing, limit or prohibit the right of employees in such positions or classes of positions to form, join or participate in employee organizations where it is in the public interest to do so; however, the state may not prohibit the right of its employees who are full-time "peace officers," as that term is defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2 of the Penal Code, to join or participate in employee organizations which are composed solely of such peace officers, which concern themselves solely and exclusively with the wages, hours, working conditions, welfare programs, and advancement of the academic and vocational training in furtherance of the police profession, and which are not subordinate to any other organization.

The right of employees to form, join and participate in the activities of employee organizations shall not be restricted by the state on any grounds other than those set forth in this section.

Sec. 3536. (Enactment). The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees.

Public School Employees: Bargaining Rights

Full text of the public educational employer-employee relations act, extending organization, representation, and collective bargaining rights to public school employees, creating the Educational Employment Relations Board, and requiring fair representation of employees, as enacted by Ch. 961, L. 1975, effective July 1, 1976 (unless otherwise indicated), and as amended by S. B. 1471, L. 1976, effective July 1, 1976. Ch. 961 L. 1975 also repealed Secs. 13080 to 13090 of the Education Code (Winton Act), effective July 1, 1976.

Article 1—General Provisions

Sec. 3540. [Declaration of policy]— It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

It is the further intention of the Legislature that nothing continued in this chapter shall be construed to restrict, limit, or prohibit the full exercise of the functions of any academic senate or faculty council established by a school district with respect to district policies on academic and professional matters, so long as the exercise of such functions do not conflict with lawful collective agreements.

It is the further intention of the Legislature that any legislation enacted by the Legislature governing employer-employee relations of other public employees shall be incorporated into this chapter to the extent possible. The Legislature also finds and declares that it is an advantageous and desirable state policy to expand the jurisdiction of the board created pursuant to this chapter to cover other public employers and their employees, in the event that such legislation is enacted, and if this policy is carried out, the name of the Educational Employment Relations Board shall be changed to the "Public Employment Relations Board."

Sec. 3540.1. [Definitions]—As used in this chapter:

(a) "Board" means the Educational Employment Relations Board created pursuant to Section 3541.

(b) "Certified organization" or "certified employee organization" means an organization which has been certified by the board as the exclusive representative of the public school employees in an appropriate unit after a proceeding under Article 5 (commencing with Sec. 3544).

(c) "Confidential employee" means any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations.

(d) "Employee organization" means any organization which includes employees of a public school employer and which has as one of its primary purposes representing such employees in their relations with that public school employer. "Employee organization" shall also include any person such an organization authorizes to act on its behalf.

(e) "Exclusive representative" means the employee organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.

(f) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.

(g) "Management employee" means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board.

(h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Sec. 3543.7, shall not be subject to subdivision 2 of Sec. 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

(i) "Organizational security" means either:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him, as a condition of continued employment, if he does join, to maintain his membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his obligation to the employee organization within a period of 30 days following the expiration of a written agreement; or

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

(j) "Public school employee" or "employee" means any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

(k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

(l) "Recognized organization" or "recognized employee organization" means an employee organization which has been recognized by an employer as the exclusive representative pursuant to Article 5 (commencing with Sec. 3544).

(m) "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Article 2—Administration

Sec. 3541. [Educational Employment Relations Board created]—(a) There is in state government the Educational Employment Relations Board which shall be independent of any state agency and shall consist of three members. The members of the board shall be appointed by the Governor by and with the advice and consent of the Senate. One of the original members shall be chosen for a term of one year, one for a term of three years, and one for a term of five years. Thereafter terms shall be for a period of five years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired

term of the member whom he suceeds. Members of the board shall be eligible for reappointment. The Governor shall select one member to serve as chairperson. A member of the board may be removed by the Governor upon notice and hearing for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the board shall not impair the right of the remaining members to exercise all the powers of the commission, and two members of the board shall at all times constitute a quorum.

(c) Members of the board shall hold no other public office in the state, and shall not receive any other compensation for services rendered.

(d) Each member of the board shall be paid an annual salary of $36,000. In addition to his salary, each member of the board shall be reimbursed for all actual and necessary expenses incurred by him in the performance of his duties, subject to the rules of the State Board of Control relative to the payment of such expenses to state officers generally.

(e) The board shall appoint an executive director and such other persons as it may from time to time deem necessary for the performance of its functions, prescribe their duties, fix their compensation and provide for reimbursement of their expenses in the amounts made available therefor by appropriation. The executive director shall be a person familiar with employer-employee relations. He shall be subject to removal at the pleasure of the board. The board may employ a general counsel to assist it in the performance of its functions under this chapter. A person so employed may, independently of the Attorney General, represent the board in any litigation or other matter pending in a court of law to which the board is a party or in which it is otherwise interested. (Sec. 3541, effective January 1, 1976)

Sec. 3541.3. [Powers and duties of board]—The board shall have all of the following powers and duties:

(a) To determine in disputed cases, or otherwise approve, appropriate units.

(b) To determine in disputed cases whether a particular item is within or without the scope of representation.

(c) To arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and certify the results of the elections.

(d) To establish lists of persons broadly representative of the public and qualified by experience to be available to serve as mediators, arbitrators, or factfinders. In no case shall such lists include persons who are on the staff of the board.

(e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.

(f) Within its discretion, to conduct studies relating to employee-employer relations including the collection, analyses, and making available of data relating to wages, benefits, and employment practices in public and private employment, and, when it appears necessary in its judgment to the accomplishment of the purposes of this chapter, recommend legislation. The board shall report to the Legislature by February 15th of each year on its activities during the immediately preceding calendar year. The board may enter into contracts to develop and maintain research and training programs designed to assist public employers and employee organizations in the discharge of their mutual responsibilities under this chapter.

(g) To adopt, pursuant to Ch. 4.5 (commencing with Sec. 11371) of Part 1 of Division 3 of Title 2, rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.

(h) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction.

(i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necssary to effectuate the policies of this chapter.

(j) To bring an action in a court of competent jurisdiction to enforce any of its orders decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

(k) To delegate its powers to any member of the board or to any person appointed by the board for the performance of its functions, except that no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it and except that a decision to refuse to issue a complaint shall require the approval of two board members.

(l) to decide contested matters involving recognition, certification, or decertification of employee organizations.

(m) To consider and decide issues relating to rights, privileges, and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.

(n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter. (Sec. 3541.3(a) to (n), effective January 1, 1976)

Sec. 3541.4. [Penalty]—Any person who shall willfully resist, prevent, impede or interfere with any member of the board, or any of its agents, in the performance of duties pursuant to this chapter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than $1,000.

Sec. 3541.5. [Unfair practice charges]—The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effec-

tuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint or the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

(b) The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

(c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Article 3—Judicial Review

Sec. 3542. [Limitation on judicial review]—(a) No employer or employee organization shall have the right to judicial review of a unit determination except: (1) when the board in response to a petition from an employer or employee organization, agrees that the case is one of special importance and joins in the request for such review; or (2) when the issue is raised as a defense to an unfair practice complaint.

(b) Any charging party, respondent, or intervenor aggrieved by a decision or order of the board in an unfair practice case, except a decision of the board not to issue a complaint in such a case, shall have the right to seek review in a court of competent jurisdiction. Additionally, the board shall have the right to seek enforcement of any decision or order in a court of competent jurisdiction. The findings of the board on questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Once the record of the case has been filed with the court of competent jurisdiction, its jurisdiction shall be exclusive and its judgment final except that it shall be subject to appeal to higher courts in this state.

Article 4—Rights, Obligations, Prohibitions, and Unfair Practices

Sec. 3543. [Rights of employees]—Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Sec. 3544.1 or certified pursuant to Sec. 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Secs. 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response. (Sec. 3543, effective April 1, 1976)

Sec. 3543.1. [Rights of employee organizations]—(a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Sec. 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

(b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exer-

cise of the rights guaranteed by this chapter.

(c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

(d) All employee organizations shall have the right to have membership dues deducted pursuant to Secs. 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative. (Sec. 3543.1, effective April 1, 1976)

Sec. 3543.2. [Scope of representation]—The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Sec. 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Sec. 3546, and procedures for processing grievances pursuant to Secs. 3548.5, 3548.6, 3548.7, and 3548.8. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

Sec. 3543.3. [Exclusive representation]—A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

Sec. 3543.4. [Prohibited representation]—No person serving in a management position or a confidential position shall be represented by an exclusive representative. Any person serving in such a position shall have the right to represent himself individually or by an employee organization whose membership is composed entirely of employees designated as holding such positions, in his employment relationship with the public school employer, but, in no case, shall such an organization meet and negotiate with the public school employer. No representative shall be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in a management position or a confidential position. (As amended by S. B. 1471, L. 1976, effective July 1, 1976)

Sec. 3543.5. [Unlawful practices]—It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteeed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Sec. 3548).

Sec. 3543.6. [Unlawful practices—employee organization]—It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Sec. 3543.5.

(b) Impose of threaten to impose reprisals on employees, to discriminate against employees or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Sec. 3548).

Sec. 3543.7. [Good faith negotiations]—The duty to meet and negotiate in good faith requires the parties to begin negotiations prior to the adoption of the final budget for the ensuring year sufficiently in advance of such adoption date so that there is adequate time for agreement to be reached, or for the resolution of an impasse.

Article 5—Employer Organization, Representation, Recognition, Certification, and Decertification

Sec. 3544. [Majority representation]—An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by such organization and asking the

public school employer to recognize it as the exclusive representative. The request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall include proof of majority support on the basis of current dues deduction authorizations or other evidence such as notarized membership lists, or membership cards, or petitions designating the organization as the exclusive representative of the employees. Note of any such request shall immediately be posted conspicuously on all employee bulletin boards in each facility of the public school employer in which members of the unit claimed to be appropriate are employed. (Sec. 3544, effective April 1, 1976)

Sec. 3544.1. [Representation elections; challenges]—The public school employer shall grant a request for recognition filed pursuant to Sec. 3544 unless:

(a) The public school employer desires that representation election be conducted or doubts the appropriateness of a unit. If the public school employer desires a representation election, the question of representation shall be deemed to exist and the public school employer shall notify the board, which shall conduct a representation election pursuant to Sec. 354.7, unless subdivision (c) or (d) apply; or

(b) Another employee organization either files with the public school employer a challenge to the appropriateness of the unit or submits a competing claim of representation within 15 workdays of the posting of notice of the written request. The claim shall be evidenced by current dues deductions authorizations or other evidence such as notarized membership lists, or membership cards, or petitions signed by employees in the unit indicating their desire to be represented by the organization. If the claim is evidenced by the support of at least 30 percent of the members of an appropriate unit, a question of representation shall be deemed to exist and the public school employer shall notify the board which shall conduct a representation election pursuant to Sec. 3544.7, unless subdivisions (c) or (d) of this section apply; or

(c) There is currently in effect a lawful written agreeement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement; or

(d) The public school employer has, within the previous 12 months, lawfully recognized another employee organization as the exclusive representative of any employees included in the unit described in the request for recognition. (Sec. 3544.1, effective April 1, 1976)

Sec. 3544.3. [Petition for representation election]—If, by January 1 of any school year, no employee organization has made a claim of majority support in an appropriate unit pursuant to Sec. 3544, a majority of employees of an appropriate unit may submit to a public school employer a petition signed by at least a majority of the employees in the appropriate unit requesting a representation election. An employee may sign such a petition though not a member of any employee organization.

Upon the filing of such a petition, the public school employer shall immediately post a notice of such request upon all employee bulletin boards at each school or other facility in which members of the unit claimed to be appropriate are employed.

Any employee organization shall have the right to appear on the ballot if, within 15 workdays after the posting of such notice, it makes the showing of interest required by subdivision (b) of Sec. 3544.1.

Immediately upon expiration of the 15-workday period following the posting of the notice, the public school employer shall transmit to the board the petition and the names of all employee organizations that have the right to appear on the ballot. (Sec. 3544.3, effective April 1, 1976)

Sec. 3544.5. [Determination of representation]—A petition may be filed with the board, in accordance with its rules and regulations, requesting it to investigate and decide the question of whether employees have selected or wish to select an exclusive representative or to determine the appropriateness of a unit, by:

(a) A public school employer alleging that it doubts the appropriateness of the claimed unit; or

(b) An employee organization alleging that it has filed a request for recognition as an exclusive representative with a public school employer and that the request has been denied or has not been acted upon within 30 days after the filing of the request; or

(c) An employee organization alleging that it has filed a competing claim of representation pursuant to subdivision (b) of Sec. 3544.1; or

(d) An employee organization alleging that the employees in an appropriate unit no longer desire a particular employee organization as their exclusive representative, provided that such petition is supported by current dues deduction authorizations or other evidence such as notarized membership lists, cards, or petitions from 30 percent of the employees in the negotiating unit indicating support for another organization or lack of support for the incumbent exclusive representative. (Sec. 3544.5, effective April 1, 1976)

Sec. 3544.7. [Representation hearings]—(a) Upon receipt of a petition filed pursuant to Sec. 3544.3 or 3544.5, the board shall conduct such inquiries and investigations or hold such hearings as it shall deem necessary to order to decide the questions raised by the petition. The determination of that board may be based upon the evidence adduced in the inquiries, investigations, or hearing; provided that, if the board finds on the basis of the evidence that a question of representation exists, or a question of representation is deemed to exist pursuant

to subdivision (a) or (b) of Sec. 3544.1, it shall order that an election shall be conducted by secret ballot and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast. There shall be printed on each ballot the statement: "no representation." No voter shall record more than one choice on his ballot. Any ballot upon which there is recorded more than one choice shall be void and shall not be counted for any purpose. If at any election no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted. The ballot for the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(b) No election shall be held and the petition shall be dismissed whenever:

(1) There is currently in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, or unless the request for recognition is filed less than 120 days, but more than 90 days, prior to the expiration date of the agreement; or

(2) The public school employer has, within the previous 12 months, lawfully recognized an employee organization other than the petitioner as the exclusive representative of any employees included in the unit described in the petition. (Sec. 3544.7, effective April 1, 1976)

Sec. 3544.9. [Fair representation of every employee]—The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

Article 6—Unit Determinations

Sec. 3545. [Determination of appropriate unit]—(a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

(2) A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district and shall not be represented by the same employee organization as employees whom the supervisory employees supervise.

(3) Classified employees and certificated employees shall not be included in the same negotiating unit. (Sec. 3545, effective April 1, 1976)

Article 7—Organizational Security

Sec. 3546. [Organizational security agreement]—Subject to the limitations set forth in this section, organizational security, as defined, shall be within the scope of representation.

(a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with the rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

(b) An organizational security arrangement which is in effect may be rescinded by a majority vote of the employees in the negotiating unit covered by such arrangement in accordance with rules and regulations promulgated by the board.

Sec. 3546.5. [Records of financial transactions]—Every recognized or certified employee organization shall keep an adequate itemized record of its financial transactions and shall make available annually, to the board and to the employees who are members of the organization, within 60 days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by a certified public accountant. In the event of failure of compliance with this section, any employee within the organization may petition the board for an order compelling such compliance, or the board may issue such compliance order on its motion. An employee organization required to file financial reports under the Labor-Management Disclosure Act of 1959 covering employees governed by this chapter shall be exempt from the requirements of this section.

Article 8—Public Notice

Sec. 3547. [Presentation of proposals at public meeting]—(a) All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.

(b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal

at a meeting of the public school employer.

(c) After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.

(d) New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.

(e) The board may adopt regulations for the purpose of implementing this section, which are consistent with the intent of the section; namely that the public be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives.

Article 9—Impasse Procedures

Sec. 3548. [Impasse; mediation]—Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable. If the board determines that an impasse exists, it shall, in no event later than five working days after the receipt of a request, appoint a mediator in accordance with such rules as it shall prescribe. The mediator shall meet forthwith with the parties or their representatives, either jointly or separately, and shall take such other steps as he may deem appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. The services of the mediator, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be provided by the board without cost to the parties. Nothing in this section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure and in the event of such agreement, the board shall not appoint its own mediator, unless failure to do so would be inconsistent with the policies of this chapter. If the parties agree upon their mediation procedure, the cost of the services of any appointed mediator, unless appointed by the board, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.

Sec. 3548.1. [Fact-finding panel]—If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel. 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 board shall, within five days after such selection, select a chairman of the factfinding panel. The chairman designated by the board shall not, without the consent of both parties, be the same person who served as mediator pursuant to Sec. 3548.

Sec. 3548.2. [Powers of fact-finding panel; recommendations]—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 such other steps as it may deem appropriate. For the purpose of such 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. The several departments, commissions, divisions, authorities, boards, bureaus, agencies, and officers of the state, or any political subdivision or agency thereof, 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.

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) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the public school employee-employer.

(4) 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 and with other employees generally in public school employment in comparable communities.

(5) The consumer price index for goods and services, commonly known as the cost of living.

(6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalizaiton benefits; the continuity and stability of employment; and all other benefits received.

(7) Such other facts, not confined to those specified in paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making such findings and recommendations.

Sec. 3548.3. [Costs of panel to be borne by board]—If the dispute is not settled within 30 days after the appointment of the panel, or upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recom-

mendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within 10 days after their receipt. The costs for the services of the panel chairman, including per diem fees, if any, and actual and necessary travel and subsistence expenses shall be borne by the board. Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred costs for the panel member selected by each party, shall be borne by such party.

Sec. 3548.4. [Continuing mediation]—Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Sec. 3548 from continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Sec. 3548.3.

Sec. 3548.5. [Procedures for final and binding arbitration]—A public school employer and an exclusive representative who enter into a written agreement covering matters within the scope of representation may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application, or violation of the agreement.

Sec. 3548.6. [Agreement to submit disputes to binding arbitration]—If the written agreement does not include procedures authorized by Sec. 3548.5, both parties to the agreement may agree to submit any disputes involving the interpretation, application, or violation of the agreement to final and binding arbitration pursuant to the rules of the board.

Sec. 3548.7. [Judicial relief]—Where a party to a written agreement is aggrieved by the failure, neglect, or refusal of the other party to proceed to arbitration pursuant to the procedures provided therefor in the agreement or pursuant to an agreement made pursuant to Sec. 3548.6, the aggrieved party may bring proceedings pursuant to Title 9 (commencing with Sec. 1280) of Part 3 of the Code of Civil Procedure for a court order directing that the arbitration proceed pursuant to the procedures provided therefor in such agreement or pursuant to Sec. 3548.6.

Sec. 3548.8. [Enforcement of awards]—An arbitration award made pursuant to Sec. 3548.5, 3548.6, or 3548.7 shall be final and binding upon the parties and may be enforced by a court pursuant to Title 9 (commencing with Section 1280) of Part 3 of the Code of Civil Procedure. (As amended by S. B. 1471, L. 1976, effective July 1, 1976)

Article 10—Miscellaneous

Sec. 3549. [Prohibition]—The enactment of this chapter shall not be construed as making the provisions of Sec. 923 of the Labor Code applicable to public school employees and shall not be construed as prohibiting a public school employer from making the final decision with regard to all matters specified in Sec. 3543.2.

Nothing in this section shall cause any court or the board to hold invalid any negotiated agreement between public school employers and the exclusive representative entered into in accordance with the provisions of this chapter.

Sec. 3549.1. [Exemptions]—All the proceedings set forth in subdivisions (a) to (d), inclusive, shall be exempt from the provisions of Secs. 965 and 966 of the Education Code, the Bagley Act (Article 9 (commencing with Sec. 11120) of Ch. 1 of Part 1 of Division 3) and the Ralph M. Brown Act (Ch. 9 commencing with Sec. 54950) of Part 1 of Division 2 of Title 5, unless the parties mutually agree otherwise:

(a) Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization.

(b) Any meeting of a mediator with either party or both parties to the meeting and negotiating process.

(c) Any hearing, meeting, or investigation conducted by a factfinder or arbitrator.

(d) Any executive session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives. (Sec. 3549.1, as amended by S. B. 1471, L. 1976, effective July 1, 1976)

Sec. 3549.3. [Severability]—If any provisions of this chapter or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this chapter or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

COUNTY EMPLOYEES

Every county employee shall have the right to inspect and review any official record relating to his or her performance as an employee or to a grievance concerning the employee which is kept or maintained by the county; provided, however, that the board of supervisors of any county may exempt letters of reference from the provisions of this section. The contents of such records shall be made available to the employee for inspection and review at reasonable intervals during the regular business hours of the county. The county shall provide an opportunity for the employee to respond in writing, or personal interview, to any information about which he or she disagrees. Such response shall become a permanent part of the employee's personal record. The employee shall be responsible for providing the written responses to be included as part of the employee's permanent personnel record. This section does not apply to the records of an employee relating to the investigation of a possible criminal offense. (Sec. 31011, as added by Ch. 315, L. 1974, effective January 1, 1974)

Firefighters

Text of Sections 1960 through 1963 of the Labor Code.

Sec. 1960. Neither the State nor any county, political subdivision, incor-

porated city, town, nor any other municipal corporation shall prohibit, deny or obstruct the right of firefighters to join any bona fide labor organization of their own choice.

Sec. 1961. As used in this chapter, the term "employees" means the employees of the fire departments and fire services of the State, counties, cities, cities and counties, districts, and other political subdivisions of the State.

Sec. 1962. Employees shall have the right to self-organization, to form, join, or assist labor organizations to present grievances and recommendations regarding wages, salaries, hours, and working conditions to the governing body, and to discuss the same with such governing body, through such an organization, but shall not have the right to strike, or to recognize a picket line of a labor organization while in the course of the performance of their official duties.

ED. NOTE: California city is entitled to injunction restraining firemen's union from striking, since public employees in state do not have right to strike, and because a strike would be irreparably damaging to city's inhabitants. (City of Sacramento, etc. v. International Association of Fire Fighters Local 522, AFL-CIO, etc., et al., California Superior Court, October 19, 1970)

Sec. 1963. The enactment of this chapter shall not be construed as making the provisions of section 923 of this code [p. 14:217] applicable to public employees.

ED. NOTE: The California Attorney General has stated: "Recognizing that the field encompassing the right of individual workmen to be free to organize and join labor unions is a matter of more than strictly local concern, sections 1960 through 1963 guaranteeing that right to firefighters will prevail over conflicting laws of chartered as well as unchartered cities and counties." (Attorney General Opinion, No. 59/270, May 20, 1960)

Governor's Policy on State Employer-Employee Relations

By virtue of the authority vested in me as Governor of the State of California, I hereby proclaim the following Policy on State Employer-Employee Relations to be the official policy of the Executive Department of the State of California applicable to state civil service employees and nonacademic employees of the state colleges and University of California. (February 23, 1971, Ronald Reagan, Governor)

Declaration of Policy

It is the purpose of this Policy:

1. To strengthen employer-employee relations, to promote cooperative relationships, and to achieve mutual understandings by providing for full communication between representatives of the state and employee organizations on matters of mutual interest which affect employer-employee relations; and

2. To enhance the general effectiveness of each departmental grievance procedure as a means of identifying and resolving individual employee complaints within the discretion of departmental management.

It is not the intent of the Policy to modify in any way the role of the State Personnel Board in annually reporting to the Governor and the Legislature on the status of state employees' salaries and benefits. Nor is it intended to alter the relationship between the Personnel Board and employee organizations which represent their members in the board's annual salary review and recommendation process.

Meet-and-Confer Relationship

A representative of the Governor will meet and confer in good faith with representatives of employee organizations to arrive, if possible, at a mutual understanding on the following matters: (1) the need for and amount of a general salary adjustment; (2) the total amount of any special inequity salary adjustments; and (3) general employee benefits.

In meeting and conferring with employee organization representatives, the Governor's representative will be the Secretary, Agriculture and Services Agency, or his designee. He will be provided staff support services from other organizations, as needed.

To meet and confer in good faith connotes an open and mutually trusting approach in exchanging views and discussing alternatives. It also connotes a genuine effort on the part of both parties to attempt to reach a mutual understanding.

Matters excluded from this meet-and-confer in good faith relationship include working conditions; merit system and related matters such as the examination, selection, recruitment hiring, appraisal, training, retention, promotion, assignment, disciplining or transfer of employees; directing, deploying, and utilizing the work force classification plan and salary determination for individual classes; mission, purposes, objectives, and organization of the State; and facilities, methods, means, and number of personnel required to conduct state programs.

The appropriate appointing power will consult upon request with employee organization representatives in order to exchange information and views on salary matters and employee benefits limited to a particular organizational, occupational, professional, or other specific grouping of employees. The purpose of this consultation is solely to exchange views and discuss alternatives.

The Governor's representative will meet and confer in good faith upon request with official representatives of any employee organization which has complied with State Personnel Board rules on employer-employee relations. The amount of time and degree of effort expended to achieve a mutual understanding by the Governor's representative in meeting and conferring with employee representatives will be commensurate with the number of members and the diversity of membership of the employee organization involved.

A state employee who is an official representative of an employee organization may use a reasonable amount of state time, as determined by his appointing power, without loss of compensation or other benefits for formally meeting and conferring with the Governor's representative on matters within the scope of representation.

Mutual Understanding

If, as a result of meeting and conferring in good faith, the Governor's representative and employee organization representatives achieve a mutual understanding, a written memorandum of understanding shall be prepared. The Governor's representative shall present the memorandum of understanding for final approval by the Cabinet before signing the memorandum. Similarly, the employee organization representatives will provide appropriate assurance that the memorandum reflects the views of the organization's membership before signing the memorandum. As appropriate, matters included in these approved and signed memoranda shall be submitted to the Legislature either as part of the Governor's budget or as recommended legislation. The Governor will support before the Legislature those matters which have been recommended for adoption as a result of the memoranda of understanding.

If, after meeting and conferring in good faith, the Governor's representative and the employee organization representatives are unable to achieve a mutual understanding, the Governor's representative shall prepare a memorandum describing the area and extent of difference between his position and that of the employee organization representatives. Such memoranda will be made available to interested groups and individuals.

Departmental Employer-Employee Relations

As a part of the general effort to enhance the employer-employee relations process in state service, every departmental director and all subordinate managers are encouraged to provide a favorable climate for effective employee representation within their particular organization. This entails a continuation of past practices as well as renewed efforts to facilitate and give meaning to the meet-and-confer process at all levels throughout each department. Managers must recognize that they are the focal point for effective employer-employee relations within the department. Managers must be alert to employee relations problems and seek a satisfactory solution which reflects the needs of the public, the employees, and the state.

As the immediate representative of management, the supervisor has a significant responsibility for employee relations in the day-to-day operations of the organization. It is this relationship between the supervisor and employee which is basic to the attainment of an overall suitable working climate. A supervisor's effectiveness in communicating with employees, in providing fair and equitable treatment to employees and their representatives, in establishing suitable working conditions, and in recognizing and attempting to resolve employee complaints will make a positive contribution to maintaining good employee relations in his organization. Good employee relations make a significant contribution to employee job satisfaction and morale.

Concomitant with department management's accountability for employee relations is the responsibility for training of supervisory staff in this specific area. Departments should provide training for their supervisory staff on such subjects as interpersonal communication, motivation, leadership, and similar human relations skills as well as in the rights and obligations of management, employees, and employee organizations under applicable employer-employee relations law and rules.

Grievance Procedure

For state civil service employees, formalized grievance procedures exist as a means of resolving problems which arise in the work situation. Supervisors and managers should view grievances, not as an irritant, but as an opportunity to deal with a complaint, real or imagined, of an employee. Moreover, grievances should be resolved at the lowest feasible level in the department and in the most expeditious manner possible.

For certain types of grievances, even though the employee elects to use the departmental grievance procedure and the appointing power denies the grievance, the employee currently has a right of appeal to the State Personnel Board. Illustrative of these appealable grievances are: position classification; layoff procedure; merit salary adjustment denial; sick leave denial; performance appraisal; and transfer.

For other types of grievances, the appointing power is currently the final level of review. Essentially, these are grievances over working conditions and related matters within the appointing power's discretion. In order to strengthen the grievance resolution process, a level of review beyond the appointing power is warranted under certain conditions.

This extradepartmental level of review will provide an independent review of the grievance, including a new assessment of the facts, as appropriate, of the particular situation. Accordingly, an employee who is not satisfied with the decision on his grievance by his appointing power may, within ten days after receiving such decision, request in writing that the appropriate agency secretary review and act on his grievance. After reviewing the nature of the grievance, the agency secretary will determine if he should accept and decide the grievance. If he does not accept the grievance, he will so advise the employee in writing. In such case, the decision of the appointing power is final. If the agency secretary accepts the grievance he will issue a written decision within 20 days of receipt of such grievance.