

EERA NEGOTIABILITY

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Collective Bargaining Under EERA

The Educational Employment Relations Act of 1976 (EERA) established collective bargaining in California's public schools (K-12) and community colleges. Codified in Government Code Sections 3540-3549.3, EERA is administered by the Public Employment Relations Board (PERB).

Collective bargaining under EERA ultimately involves negotiation of a collectively bargained agreement (CBA) intended to promote peaceful labor relations in the workplace. When combined with the Education Code and board policies, the CBA is intended to provide a framework for the working relationship among the public school employer, exclusive representative, and bargaining unit employees.

Under EERA, if there is a conflict between a CBA and the Education Code, the Education Code prevails; if there is a conflict between a CBA and a public school employer's rules and/or regulations, the CBA will prevail.

EERA was intended to provide a foundation to govern labor relations within public schools. To this end, EERA:

- Recognizes the rights of public school employees to form, join, and participate in the activities of employee organizations on all matters involving employee-employer relations.
- Permits employees to represent themselves individually regarding their employment where there is no exclusive bargaining representative.
- Requires the public school employer to deal with the exclusive bargaining representative upon recognition or certification.
- Allows employees to present grievances directly to the public school employer without involvement of the exclusive representative.

(Govt. Code Section 3543(a) and (b))

Establishing the Bargaining Relationship

EERA establishes procedures for recognition or selection of an exclusive representative. An employee organization may become an exclusive representative by filing a Representation Petition (Petition) with the public school employer alleging that a majority of employees in the proposed unit wish to be represented by the employee organization. (Govt. Code Section 3544(a))

Concurrently, the Petition and a proof of majority support must be filed with PERB. Proof of majority support may be established by signed membership cards, authorization cards, current dues deduction forms, and other acceptable evidence determined by PERB.

The public school employer is required to post certain information after receiving a Petition and provide PERB with an alphabetical list of employees in the proposed unit. The request for recognition must be granted unless:

- The appropriateness of the unit is in question.
- Another employee organization challenges the Petition or files a petition to intervene.
- There is a CBA in place (contract bar).
- Another employee organization was recognized or certified within the previous 12 months.

(Govt. Code Section 3544.1)

Once PERB determines adequate proof of majority support, the public school employer has 15 days to respond to the Petition. If the public school employer does not grant recognition, the employee organization may petition PERB for an investigation and election. (Govt. Code Section 3544.5)

There are also procedures for employees to request recognition of an employee organization. (Govt. Code Section 3544.3)

Bargaining Obligation

The public school employer and exclusive representative have a mutual obligation to negotiate (bargain) in good faith on the request of either party with the intent to reach an agreement on matters within the scope of representation. Therefore, it is unlawful for a public school employer to:

Refuse or fail to meet and negotiate in good faith with an exclusive representative. Knowingly providing an exclusive representative with inaccurate information, whether or not in response to a request for information, regarding the financial resources of the public school employer constitutes a refusal or failure to meet and negotiate in good faith. (Govt. Code Section 3543.5(c))

Government Code Section 3543.6(c) makes it unlawful for the exclusive representative to refuse to bargain in good faith.

Scope of Representation

EERA establishes that the scope of representation includes "matters relating to wages, hours of employment, and other terms and conditions of employment." (Govt. Code Section 3543.2(a)(1)) "Terms and conditions of employment" is defined to include:

- Health and welfare benefits
- Transfer and reassignment policies
- Class size
- Organizational security
- Layoff of probationary certificated employees (Ed. Code Section 44959.5)
- Alternative compensation or benefits for employees adversely affected by pension limitations (Ed. Code Section 22316)
- Leave
- Safety conditions of employment
- Evaluation procedures
- Grievance procedures

Notwithstanding certain Education Code provisions, EERA permits the public school employee and exclusive representative to negotiate:

- Causes and procedures for discipline other than dismissal (Ed. Code Section 44944)
- Layoff of certificated employees for lack of funds (Ed. Code Section 44955)
- Payment of additional compensation based on criteria other than years of training and years of experience (Ed. Code Section 45028)
- A salary schedule based on criteria other than a uniform allowance for years of training and years of experience (Ed. Code Section 45028)

All other matters are reserved to the discretion of the public school employer.

In Anaheim Union High School District (1981) PERB Dec. No. 177, PERB established a test for negotiability. A subject is negotiable if it is enumerated in Government Code Section 3543.2 or if:

- It is logically and reasonably related to wages, hours, or one of the enumerated terms and conditions of employment;
- The subject is of such a concern that conflict is likely to occur and collective bargaining can resolve the conflict; and,
- The public school employer's obligation to negotiate would not significantly abridge its freedom to exercise managerial rights necessary to carry out the district's mission.

Other Negotiable Subjects of Bargaining

Based on the "Anaheim" factors and other PERB and court decisions, the following are some of the additional topics that are considered mandatory subjects of bargaining (not an exhaustive list):

- Overtime
- Extra-duty pay
- Severance pay
- Uniforms
- Vehicle expense and travel
- Tuition reimbursement
- Types of benefits
- Vacation
- Lunch/yard duty
- Prep time
- Rest and meal periods
- Time clocks
- Work schedules
- Caseloads

- Level of benefits
- Work calendars
- Holidays
- Release time
- Leaves
- Subcontracting
- Personnel files
- Promotions
- Rules of conduct
- Retirement
- Seniority
- Past practices

"Effects" Bargaining

Matters not within the scope of representation or meeting the Anaheim factors for negotiability are non-negotiable decisions. However, where the effects of the non-negotiable decision will impact matters within the scope of representation, the public school employer must bargain over the "effects" of the decision. While non-negotiable decisions are not subject to bargaining, a public school employer may not implement the decision without first providing notice to the exclusive representative and an opportunity to bargain the effects. County of Santa Clara (2013) PERB Decision No. 2321-M.

Once informed of the public school employer's intent to implement a non-negotiable decision, the exclusive representative must demand to bargain. In Rio Hondo Community College Dist. (2013) PERB Dec. No. 2313, PERB reiterated that the exclusive representative must: (1) clearly make a demand to negotiate, (2) make it clear that the exclusive representative seeks to negotiate over the effects of a decision (and not the decision), (3) focus its demand to bargain on areas that are subject to negotiation under the law, and (4) clearly indicate the negotiable areas of bargaining.

Laying off employees is the most common trigger for effects bargaining. The exclusive representative has the right to negotiate the effects of the layoff on its unit members. In this regard, the exclusive representative must clearly identify the negotiable areas of impact (i.e., subjects that are within the scope of the representation) and demand to bargain over the effects of the decision (as opposed to the decision itself).

Examples of other non-negotiable decisions that require effects bargaining include use of security cameras, use of GPS devices on district vehicles, and changing to a new report card system.

Good/Bad Faith Bargaining

The public school employer and exclusive representative are required to meet and confer in good faith. In determining good faith, PERB and the courts look at the "totality of the circumstances" and assess whether there was an effort to reach an agreement or if there was an effort to frustrate the bargaining process. (Pajaro Valley Unified School District (1978) PERB Dec. No. 51) Reaching an agreement on issues demonstrates good faith bargaining. Indicia of bad faith bargaining includes:

- Surface bargaining (going through the motions with no effort to resolve differences).
- Failure to make a proposal or offer counterproposals.

- Dilatory tactics (failure to meet within a reasonable period after a demand to bargain, canceling meetings, no-show at meetings)
- Conditional bargaining (conditioning agreement on non-mandatory subjects of bargaining)
- Unilateral changes in mandatory subjects of bargaining
- Bypassing the exclusive representative (direct dealing with employees)
- Failure to provide notice of a sunshine proposal to the exclusive representative
- Regressive bargaining (making a proposal that moves the parties further apart, reneging on a tentative agreement, withdrawing a proposal)

Unilateral Actions Generally Prohibited

Generally, it is unlawful for an employer to take any form of unilateral action which would change or affect a mandatory subject of bargaining. A change in a mandatory subject of bargaining may take place only after the employer has given the exclusive representative notice of the proposed change and a reasonable and meaningful opportunity to bargain. To this end, effective January 1, 2015, EERA was amended to require a public school employer to:

" . . . give reasonable written notice to the exclusive representative of the . . . intent to make any change to matters within the scope of representation . . . for purposes of providing the exclusive representative a reasonable amount of time to negotiate with the public school employer regarding the proposed changes." (Govt. Code Section 3543.2 (a)(2))

After receiving notice of a proposed unilateral change, the exclusive representative may request to bargain or inform the employer that the demand to bargain is rejected. If the exclusive representative requests the opportunity to bargain, the duty to bargain continues until the parties have reached an agreement or have reached impasse and, in addition, have exhausted mandatory impasse resolution procedures. Failure to comply with these obligations constitutes a "per se" violation of EERA unless the public school employer can establish an exception to the general rule.

Exceptions

While efforts are made to address known concerns during negotiations, there are unforeseen matters that may arise during the term of the CBA and may require a change in the working relationship. As previously noted, changes to matters within the scope of representation are normally the result of negotiations between the public school employer and the exclusive representative. However, there are times when a public school employer wants to unilaterally make a change in working conditions (i.e., without negotiating the change with the exclusive representative). While the preferred and legally required approach is to negotiate the proposed change, there are a number of legally recognized defenses to a public school employer's unilateral action, including:

- Waiver
- Bargaining History
- Expiration of the CBA
- Management Rights Clause
- Business Necessity
- Exhaustion of Impasse Procedures

Waiver

The exclusive representative may waive its right to negotiate a proposed change in two ways. First, the exclusive representative may agree to waive its right to bargain during the term of agreement (contract waiver). Second, the exclusive representative may fail to request negotiations over a proposed change after notice from the employer and reasonable opportunity to negotiate before implementation of the proposed change.

A contract waiver normally requires specific language in the agreement that clearly and unmistakably waives the right to bargain over a change on a specific matter. In Los Angeles Community College Dist. (1982) PERB Dec. No. 252, the public school employer argued that the zipper clause and shift differential clauses in the CBA constituted a contract waiver and therefore its unilateral elimination of a shift was lawful. PERB disagreed, finding that a contract waiver may be established where there is an express waiver or reservation of the right to management. As to the zipper clause, PERB found that it did not vest in the public school employer the right to take unilateral action on matters not in the CBA. The zipper simply foreclosed the requirement to negotiate on negotiable matters during the term of the CBA.

The exclusive representative's inaction may also constitute a waiver of the right to bargain. First, however, the public school employer must offer written notice of the proposed unilateral action and a reasonable opportunity to meet. PERB found a waiver where the public school employer provided notice to the exclusive representative of a change to board policy that would impact concerted activities of bargaining unit employees. While the exclusive representative and public school employer discussed the proposed change to board policy, a formal demand to bargain was not made. Santee Elementary School District (2006) PERB Dec. No. 1822.

Management Rights Clause

PERB has found a waiver where the management rights clause reserves to the public school employer the right to take specific unilateral action. A management rights provision vesting in the public school employer to "contract out work" was found to constitute an unequivocal waiver by the exclusive representative. Barstow Unified School District (1997) PERB Dec. No. 1138.

Bargaining History

Conduct in negotiations may constitute a waiver of the right to bargain. A waiver may be found where a subject was fully discussed during negotiations and the matter was consciously explored by the parties. The statements during negotiations must demonstrate that the exclusive representative is allowing the public school employer to have complete authority over the subject. Desert Sands Unified School District (2010) PERB Dec. No. 2092.

Business Necessity

A compelling business or operational necessity may justify a public school employer's unilateral action. The necessity must be actual, unavoidable, and the result of a matter outside the control of the public school employer. Further, the timing must require action by the public school employer before negotiations could occur. An anticipated shortfall in funding is not sufficient to establish business necessity.

In *Calexico Unified School District* (1983) PERB Dec. No. 357, the public school employer froze salary and step/column in order to achieve a balanced budget prior to the start of school. The public school employer asserted that despite the unilateral freeze, it remained willing to discuss salary in formal negotiations. PERB found the public school employer's unilateral freezing of salaries and step/column during negotiations unlawful and not justified by business necessity. Similarly, speculation over the impact of Proposition 13 was determined by both the courts and PERB to be an inadequate reason to engage in unilateral action. *San Mateo Community College District* (1979) PERB Dec. No. 94.

Expiration of Prior Contract

Upon expiration of a CBA, the duty to bargain requires the public school employer to maintain the status quo without taking unilateral action as to wages, hours, or other working conditions until the parties negotiate an agreement or exhaust impasse procedures. There are, however, certain contractual provisions (that are solely a product of the contract itself) form an exception to this general rule of status quo (i.e., provisions that relate to the employee organization's statutory rights, management rights clauses, zipper clauses, and no strike clauses).

Exhaustion of Impasse Procedures

A public school employer may not unilaterally implement a change to a matter within the scope of representation during the pendency of impasse procedures. Once impasse procedures are exhausted, the public school employer can implement changes to matters within the scope of representation provided the changes are reasonably "comprehended" within the impasse proposals. PERB found a violation of EERA where the post-impasse changes had not been offered at the table. *Modesto City Schools* (1983) PERB Dec. No. 291.