Torrance Professionals & Supervisors Association January 2018 News

Stay Vigilant! The Scope of Meet & Confer During the Term of Your Union Contract

Happy New Year! As we look to the year ahead, many public employee associations are just beginning to strategize and plan for MOU negotiations. Most MOUs are aligned with the agency's fiscal year, which is from July through June. Preparations typically begin 6 months prior to expiration (i.e. in January), with actual bargaining beginning in March or April. This coincides with the period when many agencies finalize their budgets. Bargaining for improvements prior to the formal adoption of the agency's budget is a wise choice. You want them to agree to a raise before committing in public to use funds for other endeavors. But what if your Association isn't bargaining this year? What if you have a long-term contract, or you reached agreement quickly and have already ratified a contract?

Think the coast is clear? Not so fast! There is a vast array of actions your agency may take that are still subject to the legal requirement to meet and confer with your Association. Meeting and conferring is basically the same thing as negotiating. Your agency can't just do whatever it wants, unless you let them! Under state law, your agency must notify your Association of any proposed changes in terms and conditions of employment. They also must allow for a reasonable time to meet and confer prior to implementing any changes. If your agency does provide notice, but your Association doesn't elect to meet and confer, or doesn't object to the proposals, your agency can move forward with

the changes. But if your Association objects, it is an unfair labor practice for the agency to just move forward and implement the changes. There is an exception for emergencies, but most actions require the agency to negotiate before implementing changes to your terms and conditions of employment.

What kind of actions are negotiable? All kinds. One of the most common is changes to job descriptions. If MOU negotiations covered changes to job descriptions, it would probably take forever to come to closure. That's a lot of detail to parse through. More often, an agency will propose changes to job descriptions during the term of the MOU, rather than during MOU negotiations. You don't have to agree to the changes, especially changes that are objectionable. For example, increasing certification requirements, educational requirements, or both. These may be acceptable, if your agency offers extra pay for it! Other changes may include expanded job duties. This might affect someone's ability to collect out-of-class pay for doing work that's not in the job description. The changes may include revised physical requirements, such as how much weight the employee must be able to lift or pull, at a minimum. If a member is on disability leave, and your Association agrees to, or neglects to negotiate over the changes, the new physical requirements could prevent that member from being able to come back to their old job. This may even result in your agency releasing this member from employment, claiming they can't accommodate the disability. The agency is not required to modify the job's essential functions. The best course of action, if you ever receive a proposed change to a job description, is to share it with the employees in that job class, or someone who could likely promote into that job class. And if the proposals are problematic, don't delay in notifying the agency that you want to negotiate. It's wise to run any proposed changes by your staff, who may notice minefields you might overlook.

Another common topic is changes to various workplace rules. Lately, this has included electronic communications policies, GPS policies, drug and alcohol policies, harassment and discrimination policies, shift bidding, stand by assignments, and catastrophic leave policies. If these rules are written in your MOU, you can object to any changes whatsoever, at least for the duration of your contract. If they are not part of your MOU, though, your agency most likely can change them mid-term. But they still must satisfy the meet and confer requirement. It's wise to share these proposals with professional staff as well.

And to notify the agency, in writing, of the need to negotiate specific changes that negatively affect your terms and conditions of employment.

Re-opened negotiations are subject to the same good faith requirement as MOU negotiations, even if the re-opener is limited to specific subjects. A re-opener provision in a labor contract allows either party to re-open discussions on the issues covered by the re-opener clause. For example, medical insurance, work hours (a 4-10 schedule, perhaps), personnel rules, the employer-employee relations resolution, or other specific work policies or programs.

Those who worked in the public sector during the recession might remember the days of cutbacks. Hopefully those times are well behind us. But it's worth noting that your agency must also bargain with your Association if they want to layoff or furlough employees or contract out services. Negotiations at a minimum must cover the impact to your Association. For some actions, like contracting out, you may be able to negotiate over the decision as well as the impacts. Contact staff about your rights before entering negotiations on any of these matters.

You may think that your Association doesn't have the bargaining power to force the agency to change its mind. You'd be mistaken! The current state of the law says that even mid-term changes in your working conditions – for example, the type of changes described above – are subject to the impasse procedure. This includes fact finding, a process that involves a panel of experts, one of whom is a neutral chairperson. The panel hears the dispute and issues a written recommendation to break the impasse, which must be made public. Impasse may also include state mediation, or a meeting with your agency's general manager. The ability to delay the agency's action until the impasse procedure is completed, and the freedom to take the dispute to a hopefully unbiased party, often is sufficient to get one side to act reasonably during negotiations – or even to drop a problematic proposal altogether.

Keep in mind that many proposed changes during the term of an MOU are pretty benign. First, review the proposed changes to see if they negatively affect your terms and conditions of employment. If they do, remember to speak up and demand that the agency negotiates! Write to your agency and let them know you want to meet and confer. Contact professional staff, who may be able to get your management to back off on the negative changes – either through phone or email

– without having to actually meet in person. If your agency implements the changes without negotiating, and the changes are serious, consider filing an unfair practice charge with the Public Employment Relations Board.

News Release - CPI Increases!

Each month the U.S. Department of Labor, Bureau of Labor Statistics publishes monthly consumer price index figures. The data looks back over a rolling 12-month period at how much goods and services have increased from a year ago.

These numbers are important! They're a rough measure of inflation, and elected officials and agency management often look to these numbers in determining "Cost of Living" raises. Here are the important figures you need to know:

2.2% - CPI for All Urban Consumers (CPI-U) Nationally

3.1% - CPI for All Urban Consumers (CPI-U) for the West Region

3.6% - CPI for All Urban Consumers (CPI-U) for the Los Angeles Area

2.7% - CPI for All Urban Consumers (CPI-U) for San Francisco Bay Area (one year through Oct 2017)

3.3% - CPI for All Urban Consumers (CPI-U) for San Diego Area (second half of 2016 through first half of 2017)

Legal Updates

Appellate Court – Pension System Can Recoup Overpayments Going Back 3 Years

A California appellate court ruled in favor of the California State Teachers' Retirement System (CalSTRS), in a case filed by retired teachers, over whether and how far back CalSTRS could go to recoup retirement benefits overpayments. The parties did not dispute that the School District miscalculated the teachers monthly benefit amounts, and that this went back many years. But the teachers contended that the 3-year statute of limitations barred CalSTRS from recouping prior overpayments and reducing future monthly benefits to the proper amounts, which CalSTRS did, after discovering the overpayments.

One question was when the statute of limitation begins to run. The court said it was the date that CalSTRS actually discovered, or in the exercise of reasonable diligence, should have discovered, the incorrect payment. This was when the county education office first alerted CalSTRS to the possible overpayment. The next question was when CalSTRS commences an "action" to recover payment. This was when CalSTRS filed paperwork to initiate an administrative proceeding. The gap in between was more than 3-years. But the court said this didn't bar CalSTRS from recouping overpayments. It just limited how far back CalSTRS could go to recoup them. Under the "continuous accrual theory," the statute of limitations for periodic payments, such as monthly retirement benefits, commenced with the due date of each payment. CalSTRS could recoup overpayments, but it could only go back 3-years from the date it initiated the proceedings. Payments older than this were barred by the statute of limitations.

This case is notable for the court's use of the "continuous accrual theory." The "continuing violation theory" is often cited in grievances and PERB claims where an agency argues a statute of limitations defense. Good staff may be able to get the claim heard, and won, even if there's a lengthy delay in filing a claim after learning of the violation. But even if successful, your damages will almost always be limited by the statute of limitations. It's wise not to delay in filing a claim; you want to be sure you're made whole for all your losses. But it's good to know that at least in some cases, even if you've waited too long, if the violation is continuous, you may still be able to state a claim.

The case is *Baxter v. California State Teachers' Retirement System*, 6th App. Dist. (2017).

Retired Public Employees Association News

Recently, Governor Jerry Brown has made a power play in the pension arena by filing a brief with the state Supreme Court in a case that will certainly affect public employee pensions.

The new brief reinforces the already established Public Employee Pension Reform Act of 2012, also known as PEPRA. The brief argues that faith in government hinges, in part, on responsible management of retirement plans for public workers.

Governor Brown is in favor of the appellate court rulings that upheld the PEPRA act that he put in place. They involved pension spiking as well as the ability to purchase additional airtime. He goes on to say in the brief that "air time" credits are ultimately irresponsible and are not feasible.

It appears then that the Governor is in favor of modifying the 'California Rule,' which stems back to a 1955 Supreme Court decision. The very thorough and detailed document goes on to explain:

> Ending the sale of airtime fell within the Legislature's plenary authority to enact, repeal, and modify the laws. Public employees who never purchased airtime did not have a vested contract right under section 20909, and the Legislature could modify that right without violating the contract clause.

It argues that the option to purchase airtime was not a vested contract right and that withdrawing the option to purchase airtime resulted in no material disadvantages to be offset. The Union claims that the "right was bestowed by the Legislature." The brief calls such argumentation "flawed in its premise" and "misapprehends the proper framework for analyzing vested rights."

The key that might unlock Pandora's Box will be the Supreme Court decision on CAL FIRE Local 2881 vs. California Public Employees Retirement System. With two more pending lawsuits—namely Alameda County and Marin County—this brief from Governor Brown has generated a media storm and has brought forth a flurry of coverage and editorials.

At this point in time, RPEA is closely watching the California Supreme Court for its decision as well as the two other court cases, which will be decided upon soon. The outcome of these decisions could very well overturn the 'California Rule' and open the opportunity for employer cuts to current employee benefits—some cuts could extend to retirees as well. Other threats to our pensions have come by way of the California Legislature, but our lobbyists have defeated these bills thus far. RPEA will continue to monitor this issue closely.

Since the beginning, RPEA has been actively involved in enhancing the lives of active employees and retirees. We are the only statewide association representing all PERS retirees. RPEA works tirelessly to safeguard and promote the retiree benefits of California's public employees. For more information regarding retiree pensions and health benefits or to learn more about the Retired Public Employees' Association of California, check out our website www.rpea.com

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to a Board Rep or CEA Staff at (562) 433-6983 or cea@cityemployees.net.

Question: Our Agency has an annual holiday party that starts at 3:30 in the afternoon. They close official business for this event, it's offsite, and they require you to pay to attend because its catered. Those who opt out and don't wish to attend have to stay and work. Can they do that?

Answer: There should be no stigma if you decide you do not want to attend the party. You cannot be compelled to attend the party but if you choose not to do so, you will have to work. If you do attend the party, you should be paid for the hours you are not at work.

Question: I just received a negative performance appraisal. This comes as a complete shocker because I've never done anything wrong or received any verbal or written counseling. On top of this, I believe my manager is trying to deny me a promotion. My agency is going to open up a vacancy for a position one step above mine. There's one other co-worker in my job class and I believe my Manager wants this person, not me, to get the promotion. What can I do?

Answer: You have the right to appeal or respond to a performance appraisal. Some MOUs contain an actual procedure for this, but many do not. It is important to keep your response focused on specific issues that you believe are not accurate. Include any evidence you may have to counter inaccurate statements with specific dates/times, if possible. After you submit the response to your HR department, you and your Association representative should request a meeting with HR and your supervisor to discuss the response in an attempt to have the evaluation modified or corrected.

Question: I'm in my 70s and in good health. I work in a high level professional position. I believe my agency is trying to make working here so unattractive that I quit. They are not giving me adequate resources, including staffing. They have introduced so many procedures that waste about 50% of my time jumping through unnecessary hoops. I've brought these work concerns to my managers' attention starting with my immediate supervisor and up, but none have paid attention. This used to be such a great place to work. Isn't there something that can be done?

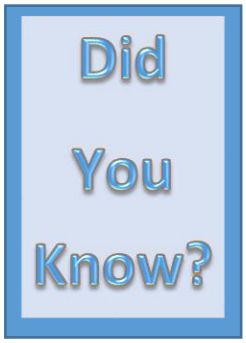
Answer: For FLSA-exempt employees (not eligible for overtime pay), overwork is a very common complaint. The first step is to identify the issues and ask for a solution. List all of your many duties and tasks and ask your manager what the priorities are. Put these priorities in rank order of importance. Also discuss what happens if certain tasks aren't performed regularly, what the consequences will be and who could pick up the work. Suggest other ways that the work can be streamlined or reorganized. If the workload is resulting in not taking lunches or breaks or creating health issues, you may have the right to file a grievance. If you have evidence that the recent changes are motivated by an improper reason (i.e. age discrimination), then document this. Call professional staff for assistance.

Question: My agency has hired so many outside consultants who are expensive and almost always are not thorough with their work. They don't care about public service and won't be around long enough to care much about the community. They are basically just double dipping, collecting a retirement check while working as a contractor. Most of the work these contractors now do used to be done by permanent employees, people who would spend their career here and would actually get to know the residents and the community. What can I do to reverse this trend? It is deeply troubling.

Answer: It is troubling, and your Association should be concerned because this can result in permanent jobs disappearing, causing your Association membership to drop, and potentially diminishing its capacity to protect your jobs, wages, and benefits. The jobs in your Association's bargaining unit belong to the Association. These positions are covered by your labor contract, the MOU, and the employer cannot give your jobs to "non-bargaining unit members" without the Association's agreement. Your Association may file a grievance over the "erosion" of your bargaining unit. Further, the agency may also be violating PERS law by not paying into the retirement system. With assistance from staff, PERS can be contacted about this potential violation.

Question: Top management (the Directors and Executives) have convinced our agency's elected officials to do a classification and compensation study. They are padding their positions and setting them up for 25% increases, while saying that the average employee is overpaid and should be Y-Rated. The thing is, these "executives" are already much more highly paid then executives in the surrounding communities that we compare to. They expect our elected officials to just rubber stamp their recommendations and not dig into the details, which probably will happen because nobody cares. I personally think it's time to go to the press. Is that allowed?

Answer: If you are active in your employees' association, you have the right to speak and take issues before the Agency's board. The press can be invited to attend an Agency meeting in which you are speaking about the issue. Public employees' right to complain about their work is protected by state law. However, an Agency cannot implement the findings of a class and comp study without negotiating an agreement with your Association. So before taking your issue public, your Association should challenge the agency's methods, its data, and even its intent with the goal of attaining the best financial outcome for your members. The job of your Association is to show that the data is wrong by locating the proper class comparisons and gather and submit data from other agencies beside the ones the Agency hand-selected. Although your Association may not have any control over the content of the study, it does have the right to negotiate the outcome.



The California Department of Industrial Relations (DIR) has a Division of Occupational Safety and Health (DOSH), better known as Cal/OSHA. The Division protects and improves the health and safety of workers all across California. This includes setting and enforcing workplace safety standards; providing outreach, education and assistance; and issuing permits, licenses, certifications, registrations, and approvals.

You may file a complaint about workplace safety and health hazards, and your name will be kept confidential unless you request otherwise. You might contact staff, first, and consider notifying management and/or filing a grievance over workplace safety issues prior to filing a complaint with Cal/OSHA. The health and safety issues that may be prevented and/or resolved internally is likely broader than what falls under the jurisdiction of CalOSHA.

CalOSHA does aggressively pursue and enforce violations when it has jurisdiction. This may include areas such as heat illness prevention, construction activities, cranes, electrical work, public works projects, ergonomics, blood borne pathogens, confined spaces, hazardous materials, asbestos, and where there has been a workplace accident. CalOSHA may also be a great resource for developing an Injury and Illness Prevention Program (IIPP), which is a basic written workplace safety program. They also have a great list of postings that employers are required to post on-site. http://www.dir.ca.gov/wpnodb.html. You can find more great information on their website, http://www.dir.ca.gov/dosh.