

*Torrance  
Professionals & Supervisors  
Association  
February 2019 News*

**PUBLIC EMPLOYMENT RELATIONS BOARD  
STRENGTHENS LEGAL RIGHTS FOR WORKERS**

Last month, the California Public Employment Relations Board (“PERB”) issued several decisions that strengthened the legal rights of California public employee unions and their members. They’ve clarified what PERB considers a “public hearing” during a bargaining impasse, and expanded protections for employees facing coercive questioning. Here’s a quick summary of the decisions and what they mean.

**“Public Hearing” Requirement:** Under the Meyers-Milias-Brown Act (“MMBA”), Gov’t Code § 3505.7, an agency must hold a “public hearing” regarding any bargaining impasse prior to implementing a last, best, and final offer (“LBFO”) on the union. In this case, the union filed an unfair practice charge alleging a violation because the city council agenda listed the matter as “Local 1 Imposition” rather than as a public hearing regarding the impasse between the parties. PERB dismissed the union’s case, but not without providing much needed guidance about what precisely the public hearing requirement entails.

PERB first noted that the MMBA does not define the “public hearing” requirement. But, according to PERB, the legislature certainly intended that the hearing be more than the agency simply “going through the motions” to streamline imposition of an LBFO. PERB said that, at a minimum, the agency must provide adequate notice to the public that it

intends to consider imposing terms and conditions on employees, and to allow public comment concerning the proposed imposition. Although the agency, in this case, did not use the magic words, the city council agenda packet clearly met these conditions.

This case is important because it's one of the first decisions from PERB to address what constitutes a "public hearing" on a bargaining impasse. If an agency wants to impose terms or conditions at the conclusion of any impasse, it must clearly notice and place the matter on the agenda for a public meeting. The notice and agenda cannot be cryptic. It must clearly state that the agency intends to consider imposing terms and conditions on employees as resolution to the bargaining impasse, and it must allow for public comment. If these conditions are *not* met, any imposed terms would be unlawful and subject to a PERB complaint unless and until the public hearing requirements are satisfied.

Anyone who has participated in a bargaining impasse can attest that management often wants to rush to imposition. These roadblocks slow down that rush to judgment and allow for the elected officials and the residents to weigh in before terms are imposed. If the union went to "fact-finding," the fact-finding panel's report must also be made public. The case is *City of Yuba City* (2018) PERB Decision No. 2603-M (December 12, 2018)

**Protection from Coercive Questioning:** As part of a disciplinary arbitration, the attorney for the agency interviewed two employees who were subpoenaed by the union. The attorney allowed both employees to bring a union representative but did not inform them that the interviews were voluntary and that if they chose to participate, the agency would not impose any consequences on their answers or refusal to answer any questions. The attorney later asked an employee if he knew why the union was calling him as a witness.

The primary issue was whether the agency's attorney should have given *Johnnie's Poultry* warnings to the employees. *Johnnie's Poultry* is a 1964 case from the National Labor Relations Board, which PERB looks to for guidance. In that case, the NLRB said that an employer or their attorney can ask to interview bargaining unit employees to prepare for an unfair labor practice hearing, but only after giving what's now called a *Johnnie's Poultry* warning. The employer must: (1) communicate the purpose of the questioning, (2) assure the employee that no reprisal will take place, and (3) obtain the employee's participation on a voluntary basis. Even with the proper warning, the employer must mitigate the danger of coercion by not prying into other union matters, and the questioning itself must not be coercive or exceed the legitimate purpose for the questioning.

In this PERB case, the agency sought to overrule the *Johnnie's Poultry* decision, citing an earlier federal appellate case that held that an employer is generally permitted to interview a union's arbitration witness under threat of discipline. PERB rejected this argument and reaffirmed the *Johnnie's Poultry* decision. PERB also held that "asking a union's arbitration witnesses if they know why they are being called necessarily inquires into the union's strategy," and is therefore illegal. Furthermore, under this decision, even if the employer gives *Johnnie's Poultry* warnings, the union can still prevail on a charge of unlawful interference if the questions nevertheless delve into a union's strategy.

This case is important because it strengthens employees' rights to be free from unlawful coercion, and to protect union strategy for arbitrations and unfair practice hearings. Don't confuse this with investigatory interviews about misconduct in the workplace, however. In those situations, the employer can interview an employee under threat of discipline. But, as you'll see below, the employee still has the right to a union representative if the questioning could reasonably lead to discipline. The case is *City of Commerce* (2018) PERB Decision No. 2602-M (December 11, 2018)

**Right to Union Representative in Investigatory Interviews:** In a trio of decisions, PERB expanded the areas in which an employee is entitled to a union representative and then strengthened the remedies when an employer violates those rights. This comes after two decisions from 2015, one holding that an employee's right to a union representative under California law is "considerably broader" than under the NLRB's *Weingarten* decision, and the other holding that an employee has a right to a union representative during the ADA interactive process (i.e. to reasonably accommodate a disability). Under longstanding federal law, known as the *Weingarten* decision, an employee has the right to a union representative during an investigatory interview in which the employee's responses could reasonably lead to their discipline (for example, if the employee is the subject of an investigation into misconduct in the workplace).

**Physical Body Searches:** The first PERB decision involves a civilian prison employee who was accused of smuggling drugs into the prison. The agency launched a criminal investigation based on an anonymous tip, and this included an invasive body search. The agency denied the employees request that a union representative be there during the search. PERB first looked to NLRB decisions holding that an employee has a right to a *Weingarten* representative before submitting to a reasonable suspicion drug test. PERB then held that, "[a]s in a drug testing situation, an invasive body search is such an unusual

and stressful situation that an employee is likely to volunteer information in an effort at self-defense, and therefore has a right to union representation even if the employer does not intend to ask questions. The right to union representation therefore attaches before an employee is invasively searched, just as it attaches before an employee takes a drug or alcohol test.” The case is *State of California (Dep’t of Corrections & Rehabilitation)* (2018) PERB Decision No. 2598-S (November 26, 2018).

*Written Statements:* An employee was questioned by his supervisor regarding his whereabouts during his work shift. The employee asked for a union representative. The supervisor responded that he wasn’t going to question the employee anymore. He placed the employee in a room and asked him to provide a written statement. The agency argued that the employee was not entitled to a *Weingarten* representative because his written statement was not an oral interview. PERB rejected that argument and held that an employee has a right to union representation before submitting a written statement as part of an investigatory interview. According to PERB, the same reasons for providing a union representative during an oral interview exists for a written statement. “These concerns may be diminished slightly in the absence of direct face-to-face questioning and verbal responses, but they are present nevertheless.” The case is *San Bernardino Community College District* (2018) PERB Decision No. 2599-E (December 5, 2018)

*Rescinding Discipline as a Remedy:* An employee accused of failing to follow his supervisor’s instructions was asked by his supervisor to draft a memo explaining his actions. The employee asked to speak with a union representative, first. The supervisor initially told the employee he did not need a union representative, but then, shortly after, decided instead to initiate an internal affairs investigation into the employee’s conduct. The employee was ultimately suspended for 5 days. As with the case above, PERB held that an employee is entitled to a union representative if he/she is asked to provide a written statement as part of an investigation. But PERB went even further on the issue of what is an appropriate remedy for a *Weingarten* violation. PERB said that a “purge order with make-whole relief” may be appropriate. In this case, the employee’s “insistence on union representation resulted in escalation of the dispute to an internal affairs matter,” and “[t]here would have been no internal affairs investigation, and no discipline, absent [the employee’s] request for representation.” PERB ordered the agency to rescind and expunge the 5-day suspension, leaving the employee with no discipline in his file for that infraction, which PERB thought deserved a counseling memo at most. The

case is *County of San Joaquin (Sheriff's Dep't)* (2018) PERB Decision No. 2619-M (December 28, 2018).

**Conclusion:** These *Weingarten* cases clearly expand an employee's right to union representation in certain settings. The request for union representation still can't be used to unreasonably delay an interview, particularly for physical body searches or time-sensitive written statements. But the cases highlight an employee's right to at least consult with a union representative prior to being searched or submitting a statement. Note that *Weingarten* does not apply every time an employee is searched or asked to submit a written statement. The written statement, for example, must be a substitution for verbal responses to questioning regarding alleged misconduct. And regardless of the form of the questioning, the employee's responses must be of a nature that could reasonably lead to discipline before the employee has a right to a union representative. But where there is a *Weingarten* violation, the remedy is now greatly improved. Even the threat of a "make-whole" remedy will likely cause an agency to significantly mitigate any proposed discipline, at least in cases where an alleged *Weingarten* violation is raised.

## Retired Public Employees Association News

December 3, 2018, marked the beginning of the 2019-20 legislative session. Legislators were sworn in and a total of 176 bills were introduced (50 – Senate, 126 – Assembly). Currently, there are 60 Democrats and 20 Republicans in the Assembly. In the Senate, Democrats hold 29 of the 40 seats. This leaves 11 Republicans in the Senate and gives Democrats a 2/3 supermajority. The membership of the California Latino Legislative Caucus made history by unanimously electing two women to lead the Caucus. Assemblymember Lorena Gonzalez (D-San Diego) will serve as Chair. Senator Maria Elena Durazo (D-Los Angeles) will serve as Vice Chair.



Of the greatest significance from recent proceedings was the introduction of H.R. 1, which gives the Committee Chairman the ability to deny a hearing for a particular bill. This change in house rules is a drastic departure from the former status quo. We will have to wait to see the impact that this new rule has on any future bills.

With the new session only weeks in, however, there are just a handful of bills of importance that RPEA is monitoring. As the session continues, there are sure to be more

that will come forward. When they do, RPEA will make sure to identify those bills and track them closely. President Al Darby and RPEA are looking forward to starting this year strong. In what is sure to be a dynamic legislative session, RPEA is in the process of reviewing the bills brought forth and watching for any that might impact your pensions.

*Since the beginning, RPEA has been actively involved in enhancing the lives of 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](http://www.rpea.com).*

## **News Release - CPI Increases!**

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. Here's this month's figures:

- 1.9% - CPI for All Urban Consumers (CPI-U) Nationally
- 3.1% - CPI-U for the West Region
- 3.2% - CPI-U for the Los Angeles Area
- 4.5% - CPI-U for San Francisco Bay Area
- 2.8% - CPI-U for San Diego Area (6 months through December 2017)

## **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 your professional staff.*

**Question:** I currently work as a supervisor, but I'm accepting a demotion to a lower level position. This is partly a result of disciplinary action brought by the Agency, and partly my own choice due to challenges managing my staff. Even though I'll make less, I'm good with it. My concern is the value of my earned vacation. Will my leave

accruals be cashed out before I'm demoted, and will they be cashed out at the higher rate? Will they be set aside in a separate bank? Or will they be converted to the lower wage scale? I'm going to be earning less, I don't also want to lose any value in the time I've already accumulated.

**Answer:** Vacation is treated differently than other forms of leave. It is considered a vested benefit. Once earned, it's yours to keep. But it's generally paid out, not at the rate you earn it, but at the rate you're making when you cash it out. It increases in value with a pay raise, and vice versa. The labor code says that, upon separation, all vested vacation shall be paid at your final wage rate, unless otherwise provided by a collective bargaining agreement. Some MOUs have vacation cash-out procedures. If you've got a cash out option available to you, it may be a good idea to cash out that vacation time at the higher value before your new pay rate kicks in. Check if there's hardship exceptions that allow for a modification of the normal rules. The subject is negotiable, though. Considering your willingness to accept the demotion, the Agency may agree to a compromise, such as allowing you to cash out your vacation before the transfer takes effect, instead of waiting for the next annual window period. Contact your staff for assistance.

**Question: My coworker has a problem! In short, he hits everyone's butts. I don't know why this is or why he thinks it's acceptable behavior. I don't think it's meant to be sexual, it's not like groping. I think, in his own mind, he does it as a form of encouragement or camaraderie. Like a high-five. But I still think it's absolutely inappropriate for**

**the workplace. It makes me uncomfortable, even when he's just doing it to others. How do I get this to stop? I don't want to personally confront him about this.**

**Answer:** This is inappropriate workplace behavior. Some employees simply do not understand this and feel a little too comfortable in their workplace. They tend to overlook other's feelings or sometimes just don't think. You could consider letting him know how it makes you feel. You could ask a colleague he trusts to share the news. Either way, most Agencies do have sexual harassment policies. A complaint to your Human Resources Manager should stop his behavior. Contact your professional representative if you need assistance.

**Question: Our Agency employs a consultant who has been making comments and telling us how we can't wear our Agency-issued hooded sweatshirts. This consultant has made several comments throughout the year to our Public Works team, such as "wearing our hoods make us look like hoodlums or gang bangers," and "people belittle those that wear hoods." He told us the hoods make him want to get scissors and cut them off. He recently approached me and a co-worker and said "I looked like a man that stole a package from his front door" because I had my hood on and it's 39 degrees outside! I'm currently fighting a**

**cold, so I'm just trying to stay warm. What can we do to get this guy to stop?**

**Answer:** Most Agencies have anti-discrimination and anti-harassment policies in place that protect employees from discrimination based on race, color, religion, sex, national origin, age, disability, or genetic information. If this comment is motivated by discriminatory animus based on one of these factors, you can file an EEO complaint. Some Agencies also have Anti-Bullying policies that lay out certain behavior that is unacceptable, even if it's not motivated by discriminatory animus. The consultant's behavior could violate this policy, too. In any event, the remedy for a violation is to get the inappropriate behavior to stop. It seems like this consultant needs to be told that his behavior is wrong, and he must stop. You have the right to work in an environment free from this type of abuse. Try talking to your Department Head about what's happening and ask that it stop. You may need to file a grievance or complaint with HR. If that fails, there are outside agencies that you can contact, like the U.S. Equal Employment Opportunity Commission (EEOC) or the California Department of Fair Employment and Housing (DFEH). Please contact your staff if you have questions.

**Question:** I heard the statewide minimum wage went up again last month. Is that true? My pay has been

**flat for years. If the minimum wage increases continue, pretty soon, I'll just be making minimum wage. Will I then be entitled to these automatic increases? Even if I get a 2% cost of living in the MOU, in dollar terms, my pay won't go up as fast as the minimum wage is increasing. Is there something I can do about this? Or do I just wait until it exceeds my current rate of pay?**

**Answer:** Yes, the statewide minimum wage went up in January to either \$11 per hour or \$12 per hour, depending on whether your employer has 25 or more employees. It is scheduled to go up \$1 per hour each January until it reaches \$15 per hour. Most full-time public sector employees make more than \$15 per hour, and the benefits (e.g. holidays, leave time, insurance and pensions) that go along with the pay are still enough for agencies to remain competitive, for now.

But wages are subject to negotiation and there is usually something that can be done. Check your MOU's expiration date. If negotiations are approaching, let your bargaining team know about your compaction issue. If the MOU doesn't expire for some time, know that, in some cases, MOUs have language for wage reopeners or ways to address classification or compaction concerns. Contact your staff for assistance.

**Question:** My boss wants to have a meeting to discuss my "sick leave usage." I take a lot of time off. But I

often have time on the books and typically only go on leave without pay for an hour or two. I also feel my usage is legally protected because the stress of the work place is one of the reasons my immune system is so weak. I've been going to the Doctor for this for the past six months. My boss knows this, and I think he's trying to get me out of here. I've emailed HR but never received a response. At one point, they set up a meeting to discuss the leave without pay, but then they cancelled. Do I need a union representative at this meeting?

**Answer:** It depends on the reason for the meeting, but it might be a good idea to bring one. If this is an investigatory meeting that might lead to discipline, yes, you should bring a representative. But it may be that they just want to discuss the attendance or sick leave policies with you. Most agencies' policies define "excessive" time off or try to minimize disruptions from unscheduled absences. They have the right to discuss

these concerns with you, even if you've got leave time still on the books.

But your sick leave usage might fall under the protections of the Family and Medical Leave Act (FMLA). This law grants eligible employees up to 12 weeks of unpaid leave during any one-year period to attend to a serious health condition. The leave can be used concurrently or intermittently. You'll need to get a note from your doctor about the condition and get it on file with HR. If you do, these absences may be protected under the law. You also suggested that your illness was due to your working conditions. If your job is making you sick, you might want to consider filing a worker compensation case, though "stress" claims are hard to prove. Contact your professional staff if you need a referral to a worker's compensation attorney.

2018 was a BIG year for developments in sexual harassment law. Multiple media headlines and protests garnered lots of attention, and the California state legislature passed several laws concerning sexual harassment in the workplace. Former Governor Jerry Brown signed many of them into law last fall, and they took effect in January. Here's a quick summary of the changes:

Did

You  
Know?

**SB 1300** – This law expressly provides that a "single incident" of sexual harassment is sufficient to create a triable issue of fact on a hostile work environment claim "if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment." It establishes that sexual harassment cases under state law are rarely appropriate for disposition on summary

judgment, meaning that many more lawsuits will now go to a jury, rather than be decided by a judge, on an employer's motion to dismiss the lawsuit. This law expressly rejects the view that workplaces can be held to different standards regarding sexual harassment, and it rejects the "stray remarks doctrine" by allowing isolated remarks, when viewed in light of other circumstances, to be evidence of harassment or discrimination. The law makes clear that employers can be held liable for sexual harassment even for actions by nonemployees (i.e., consultants or residents), and it limits the employer's ability to recover attorney's fees and costs if the employer prevails in the case, unless a court finds that the action was "frivolous, unreasonable, or totally without foundation." Finally, it limits the employer's ability to use non-disparagement agreements, confidentiality agreements, or waivers of sexual harassment claims, when offered in exchange for a raise or bonus or as a condition of employment, but it does not apply to a negotiated settlement agreement to resolve an underlying claim that is filed by the employee in court, with an administrative agency, or through an internal complaint process.

**SB 1343** – This law now requires public employers to provide at least 1-hour of sexual harassment training to *nonsupervisory employees* by January 1, 2020. If you're a supervisor, you're likely already used to taking 2 hours of sexual harassment training once every two years. This law expands the training requirement to include 1-hour of training for general employees, in addition to the 2-hours required for supervisors.

**AB 2770** – This law treats internal sexual harassment determinations and complaints as "privileged communications" if they are disclosed without malice, meaning that they cannot be used to support a defamation claim under state law.

**AB 3109** – This law prohibits and voids any contract or settlement that limits or waives a party's right to testify in a proceeding concerning alleged sexual harassment on the part of the other party to the contract where the party is required to attend the proceeding.

**SB 224** – This law adds "elected official" to a list of examples of individuals who can be subject to liability for any sexual harassment towards others in a business, service or professional relationship, such as their staff and lobbyists.

**SB 820** – This law prohibits confidentiality provisions in settlement agreements that try to limit the disclosure of factual information related to workplace sexual harassment.