RENNE SLOAN HOLTZMAN SAKAI LLP
Public Law Group™

Navigating the Mandatory Fact-Finding Process Under AB 646

A Public Law Group™ White Paper

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I. INTRODUCTION

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

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

The statute may have a significant impact on labor relations and some commentators have argued that it will "fundamentally change" bargaining under the MMBA. However, many public entities, including all of California's public schools, have managed collective bargaining under fact-finding for years. Careful planning and thoughtful execution will allow California's local public entities to integrate fact-finding into the existing meet and confer process with limited impact. Nonetheless, the statute's vague and inconsistent language leaves many questions unanswered as to how this new process will really work. Navigating through the process will impact the timing of negotiations because it can potentially add 50-80 days, or more, to the process of reaching either agreement or the point at which an employer could unilaterally implement its last best offer if no agreement is reached.

In this white paper, we provide a summary of the terms of AB 646 and the changes it makes to current law. We then address the likely resolution of some of the inconsistent provisions of the law and make specific recommendations on how to deal with the terms of this law, including one version of a model local rule to be adopted under Government Code section 3507 to address timing issues and the scope of impasse procedures. In the absence of local rules, PERB's planned emergency regulations on fact-finding will likely control your agency's impasse resolution procedures.

II. HOW DOES AB 646 CHANGE EXISTING LAW?

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

[1] Although the Legislature uses the term "factfinding," most commentators have used the term "fact-finding," in accord with Webster's Dictionary. We use the more accepted spelling in this white paper.

[2] Govt Code § 3505.2.

– again, either mandatory or optional,[3] and a handful of local charters provide for interest arbitration as a method for resolving disputes. These variations are examples of how local agencies over the years have exercised local control by deciding, after meeting and consulting with affected employee organizations, what impasse processes work best given local conditions and history.

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

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

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

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

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

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

[6] Govt. Code §3540, et seq.

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

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

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

III. LEGISLATIVE HISTORY

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

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

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

AB 646 was opposed by numerous city, county, and special district representatives, who protested that it would impose significant increased costs on agencies for a process that will be triggered at the sole discretion of unions. Additionally, the opposition raised serious concerns that the bill would delay the conclusion of negotiations, inevitably create more adversarial relations rather than promote settlement, and undermine a local agency's authority to establish local rules for resolving impasse. Notwithstanding these concerns, Governor Brown signed AB 646 on October 9, 2011, without comment.

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

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

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

IV. HOW FACT-FINDING WORKS

A. What is Fact-Finding?

The fact-finding process under AB 646 is very similar to that under the EERA and the HEERA. It is also similar to the interest arbitration procedures followed by a handful of California's charter cities and counties.[13] While none of those statutes provide explicit guidance on the conduct of the hearings, the parameters of fact-finding have been well-developed over the years.[14] In general, the fact-finding panel hears evidence on the negotiations issues in dispute and provides findings and recommended terms for settlement. Under AB 646, hearings must start within 10 days of the chairperson's appointment by PERB. Once convened, the panel is to conduct an investigation, hold hearings and issue subpoenas for those purposes.

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

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

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

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

B. Fact-Finding Criteria

The bill specifies criteria to be considered by the panel, including comparability in wages, health care benefits, and retirement benefits.[15] AB 646 requires the fact-finding panel to evaluate the parties' positions using the following specific criteria:[16]

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the fact-finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, other excused time, insurance, pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Our experience has shown that comparability is generally afforded significant weight, meaning that local public agencies will now have to consider the expense and time required to manage a comparability study as part of the negotiations process.[17] In addition, employers should prepare, as a key component of any fact-finding presentation, a financial report analyzing the financial condition of the employer and the impact of union proposals on the agency's ability to deliver public services. The oft-neglected criteria of the agency's financial ability and the public interest have a substantial role to play in any fact-finding. The agency must have a strong handle on its fiscal condition, with a view towards anticipated revenues and expenditures during the next several years. Taken together, the financial condition of the employer and the overall

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[15] The criteria are virtually identical to those established under the EERA. (See Govt. Code § 3548.2.)

[16] Govt. Code § 3505.4(d).

[17] Comparability is the key factor relied on by many arbitrators, and will likely carry great weight in a fact-finding process. (See *City of San Jose* (Cossack 2007) [Awarding enhanced retirement benefit based on comparability]; *City of Modesto* (Brand 2002); *City of San Luis Obispo* (Goldberg 2008) [awarding 32.82% wage increases over 3 years].) Will Aitchison's treatise on interest arbitration dedicates four chapters, nearly a third of the book, to issues of comparability. (See Aitchison, *supra* note 13, at pp. 31-120.)

compensation of employees can be used together to provide significant leverage for an agency's proposals.

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

C. Findings and Recommendations – The Panel's Report

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

D. Post Fact-Finding: Agreement or Implementation

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

V. ADJUSTING NEGOTIATIONS STRATEGY IN LIGHT OF AB 646

A. Negotiations Preparation

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

B. Negotiations Timelines

A majority of public agencies hope to have new contracts in place by July 1 of each year and plan their negotiations schedule accordingly, including the time necessary for the public adoption process. The potential for fact-finding will now add at least 50-80 days to the timeline, assuming that fact-finders will be available to conduct hearings in the timeframe set forth by the statute. In the first year of this new process, availability of fact-finders during the critical window of time before the end of the fiscal year could be a challenge.

Fact-finding timeline example

Mediation (if parties mediate)*	+30 days
Panel member selection after a union requests fact-finding*	+5 days
Panel chairperson appointed by PERB	+5 days
Time before hearing must begin	+10 days
Findings issued (if no settlement and no agreed-upon extension, 30 days from appointment of chairperson)	+20 days
Earliest possible implementation date (assumes public hearing could be held same day)	+10 days
Total minimum additional time for full process	**+80 days**

**This timeline assumes the parties mediate and the union requests fact-finding at the end of the 30-day period. See below for a discussion regarding mediation and the lack of deadline by which the union must request fact-finding.*

Assuming a governing body has the opportunity to meet in open and closed session on the first and third Wednesday of each month, and assuming that 80 days is an optimistic timeline, employers should conservatively plan on an additional 90-100 days, or about 14 weeks. Here's what the negotiations timeline might look like for a June 30, 2012 expiration:

2012 hypothetical timeline

November 2011	Begin negotiations preparation, including developing support for financial case and conducting comparability study
Early January 2012	Begin negotiations
March 7, 2012	Date by which parties should substantially complete good faith bargaining in order for the employer's team to request authority to declare impasse
March 14, 2012	Date by which parties should reach agreement or impasse (if including mediation)
March 14-April 14	Mediation

April 14-June 6	Fact-finding
June 20, 2012	Last day for governing body to adopt new MOU or implement LBFO for effective date of July 1

VI. PROBLEM AREAS: WHETHER TO MEDIATE, & TIMING OF FACT-FINDING REQUESTS

A. Mediation is Likely not Required

The first line of the new provision, section 3505.4(a) starts out as follows:

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

Despite the opening phrase "if *the* mediator…," there is no provision in the bill requiring the parties to go to mediation. As first introduced, the bill mirrored the EERA's requirement for mandatory mediation as well as fact-finding. The mediation requirement was later removed from the bill, but the reference to mediation preceding fact-finding remained in the legislation, creating ambiguity and contradiction.

We believe the legislative history clearly shows that AB 646 does not require mediation. However, without mediation, there is no clear trigger for fact-finding. Therefore, we recommend that every local public agency identify such a trigger (either mediation or something else) in its local rules.

B. Lack of Explicit Time Limit Within Which the Union Must Request Fact-finding

When the earlier version of the bill required mediation, it also allowed an employee organization to request fact-finding only once a mediator had been unsuccessful at resolving the dispute within 30 days of appointment. When the Legislature removed mandatory mediation from the bill, it failed to clarify that a union can request fact-finding when the parties are at impasse and opt not to go to mediation. And in no versions of the bill did the Legislature define a time period within which a union had to request fact-finding.

Even absent mediation by mutual agreement or pursuant to local rule, fact-finding remains a mandatory impasse procedure, if requested by the employee organization. But whether or not mediation occurs, there is *no provision* to ensure that fact-finding is requested in a timely manner.

Under a technical reading of the statute, a union may argue that absent fact-finding, the employer cannot implement a last best offer. Given the lack of a time by which the union must request fact-finding, it is possible that some unions will attempt to avoid unilateral implementation by failing to request fact-finding and then alleging that the employer is in violation of the statute if it attempts to impose. However, we believe that such an approach

would ultimately fail, because it would violate California Constitution Article XI, Section 1(b), which forbids the Legislature from interfering with a local governing body's determination of the number, compensation, tenure and appointment of employees.[18]

Nonetheless, agencies hoping to avoid being a test case may consider the following options:

1. ***Local Rules.*** Amend local rules (ideally before AB 646 takes effect on January 1). Provide notice to unions and an opportunity for them to meet and consult over revised local rules governing the timing and process for mediation and fact-finding.

2. ***PERB Regulations.*** PERB will likely adopt emergency regulations prior to January 1 that may address many of the open issues. To the extent PERB regulations fill a gap in an agency's local rules, PERB's rules will apply.[19]

3. ***Address it in Ground Rules.*** In negotiating ground rules with employees at the beginning of bargaining, consider adopting timelines for achieving agreement or impasse, for determining whether to use mediation, and perhaps even timelines for going through the fact-finding process.

4. ***Include Reasonable Notice Prior to Implementation to Support a Waiver Argument.*** If after impasse an employer gives reasonable notice of the date for a public hearing on the impasse and subsequent date of imposition of the employer's last, best, and final offer, there is a strong argument that the employee organization will have waived its right to request fact-finding if it fails to do so prior to the date of the public hearing.

VII. DRAFT MODEL LOCAL RULE

AB 646 does not abrogate the right of local public agencies to adopt rules and regulations for the administration of employer-employee relations, including rules involving impasse resolution procedures.[20] Agencies have an opportunity to draft local rules to conform local agency impasse procedures to AB 646 and to establish specific timelines for negotiations, mediation, and fact-finding. The adoption of strict timelines would ensure sufficient time for the parties to negotiate in good faith and reach impasse prior to beginning mediation; set a specific deadline for ending mediation and beginning fact-finding; and require the fact-finding panel to issue a report in time for the agency to adopt changes before the expiration of the contract. For simplicity, the model rule uses a June 30 date to represent the expiration of the contract, end of the budget year, and deadline for completion of the impasse process.

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[18] See *County of Riverside v. Superior Court* (2003) 30 Cal.4th 278, 285 (holding that mandatory interest arbitration was an unconstitutional interference with the County's exclusive authority to establish compensation for employees).

[19] See Govt. Code § 3509(a); *County of Siskiyou/Siskiyou County Superior Court* (2010) PERB Decision No. 2113.

[20] Govt. Code § 3507.

The draft model local rule presented here represents only one possible version. Other options could be sufficient for your agency's purposes, including something as simple as a rule providing an employer option to request fact-finding. In addition, the model rules provide for mandatory mediation to remove the potential ambiguity in the statute. However, since the statute does not specifically require mediation, your agency may choose not to include those provisions. Therefore, we recommend that you carefully consider your agency's needs and contact labor counsel before deciding on a course of action.

Although AB 646 does not specifically require the completion of fact-finding before an employer can adopt rules pursuant to section 3507, there remains some risk that PERB could require completion of fact-finding under section 3505.7. While we continue to believe, absent a specific timeline for fact-finding, that such a conclusion would be unconstitutional, it may be some time before the courts settle that issue. Because the introduction of fact-finding compressed the timeline for negotiations, we recommend that every agency revise its EERR before January 1, 2012. Please remember that section 3507 requires that you provide your unions notice and an opportunity to consult before adopting local impasse rules. In addition, these model rules may conflict with some of your existing rules. Now may be a good time for a complete review of your Employer-Employee Relations Resolution.

Model Local Rules

Model Language	***Commentary***
Update or create a definitions section:	*Most local rules already include a definitions section. However, local agencies adopting new rules covering fact-finding need to ensure that the definitions section includes definitions for Impasse, Mediation, and Fact-finding.*
Bargaining Timelines and Impasse Resolution Procedures 1. In consideration of the strong public interest in the equitable and efficient resolution of disputes over the wages, hours, and working conditions of public employees, these rules establish specific timelines for the completion of bargaining and any necessary impasse resolution procedures. All deadlines contained herein may be waived by mutual agreement.	
2. The provisions of this section shall apply only so long as state law requires the parties to proceed to fact-finding (as currently required by Section 3505.4 and 3505.5).	*This section is important to protect your agency in the event that AB 646 is found unconstitutional or a future*

Model Language	*Commentary*
	legislature strikes fact-finding from the books. In the absence of this language, a local agency could be bound to continue fact-finding based on its local rules even if fact-finding was no longer required by state law.
3. Initiation of Bargaining. The parties shall begin the meet and confer process no later than January 5 of the budget year in which the parties' memorandum of understanding (MOU) expires.	*The January timeframe may need to be adjusted for compliance with the actual expiration date of your MOU. Check current language in MOUs which may include a provision to start negotiations at a set time later than the proposed new rule.*
4. Declaration of Impasse. Either party may declare impasse and invoke impasse procedures by submitting to the other a written declaration of impasse, together with a statement in detail of its position on all disputed issues.	
5. Mediation When Fact-Finding Has Been Waived. If the parties have AGREED in writing to waive fact-finding, the following timelines for mediation shall apply. All date references are to the year in which the current MOU expires.	*Mandatory mediation removes the potential ambiguity in the new bill, enables statutory timelines to be met, and could provide an incentive for employee organizations to waive fact-finding.*
a. Once the parties have reached the point where further negotiations would be futile, either party may declare an impasse.	***Note** that a set time by which agreement or impasse must be reached will not excuse bad faith or surface bargaining.*
b. Once either party has declared impasse, the parties shall proceed to mediation. Prior to mediation the parties shall exchange statements of their positions on all disputed issues.	
c. As soon as either party declares impasse, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible.	
d. If neither party has declared impasse by May 1, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon	*This rule is intended to permit mediation without the need for a declaration of impasse. In this case, mediation becomes an*

Model Language	*Commentary*
as possible, but no later than the week of May 15.	*extension of bargaining.*
e. Mediation shall be concluded no later than June 15.	
6. Mediation Plus Fact-Finding. If the parties have NOT AGREED to waive fact-finding, the following timelines for mediation and fact-finding shall apply.	*By including mandatory fact-finding in the local rules, the local agency regains the ability to trigger fact-finding and maintains control over the timing of impasse procedures, rather than leaving this important decision solely in the hands of the employee organizations.*
a. Once the parties have reached the point where further negotiations would be futile, either party may declare an impasse.	
b. Once either party has declared impasse, the parties shall proceed to mediation. Prior to mediation the parties shall exchange statements of their positions on all disputed issues.	
c. As soon as either party declares impasse, the employer shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible.	
d. If neither party has declared impasse by March 15, the City shall notify the California State Mediation & Conciliation Service that the parties have failed to reach agreement and shall schedule a mediator as soon as possible, but no later than April 1.	
e. If the mediator is unable to effect settlement by April 30, the parties shall proceed to fact-finding.	
7. Fact-finding	
a. Selection of fact-finding panel chairperson	*Pre-selection of a fact-finder can avoid the problem of getting stuck with a PERB-appointed chairperson who cannot meet the statutory timeline. Pre-selection can also encourage employee organizations to evaluate early in the negotiations process whether to waive fact-finding.*
i. On or before February 15, the parties shall mutually agree on and pre-designate a fact-finding chairperson who will certify that he or she will start the fact-finding proceedings within 10 days of notification by the parties. If the parties are unable to mutually agree, the parties shall mutually request that the California State Mediation & Conciliation Service provide a list of seven (7) qualified fact-finders, and the parties will select a fact-finder from this list who will certify that he or she will start the fact-finding hearing within 10 days of notification by the parties. The parties shall confirm the pre-designated chairperson no later	

Model Language	*Commentary*
than March 1.	
ii. If the mediator has been unable to effect agreement within thirty days after appointment and in any event, no later than May 1, the parties shall request that PERB appoint a chairperson for the fact-finding panel. If PERB cannot confirm that the appointed chairperson can begin the fact-finding proceedings within ten (10) days of appointment, the parties shall proceed to fact-finding with the pre-designated chairperson.	
b. Fact-finding Criteria	
i. No later than the first meeting of the fact-finding panel, the Finance Director shall prepare a report on the employer's financial condition, including projections of revenues and expenditures going forward at least three (3) fiscal years.	
ii. In assessing comparability, the fact-finding panel shall consider the wages and benefits paid by private employers as well as public employers.	
iii. The fact-finding report must include specific consideration of the impacts of any recommendation which will result in an increased cost to the employer, including the impact of that additional expense on the ability of the employer to continue to provide services.	
c. Fact-finding report	
i. To the extent the fact-finding panel makes findings and recommendations, those findings and recommendations shall be made on an issue-by-issue basis.	*Requiring the panel to address each issue in controversy may create a longer and more detailed report. However, it ensures that the report addresses each of the parties' proposals*
ii. The fact-finding panel shall limit its findings and recommendations to issues that fall within mandatory subjects of bargaining, unless the parties mutually agree, in writing, to submit issues that are non-mandatory subjects.	
iii. If the dispute is not settled within thirty (30) days of the chairperson's appointment, the panel shall make findings of fact and advisory recommendations for terms of settlement. The	

Model Language	*Commentary*
fact-finding panel shall submit a written report including findings of fact and recommended terms of settlement to the parties no later than June 10. iv. The parties shall maintain the confidentiality of the fact-finders' report for a period of ten (10) days. If the parties have not reached agreement within that time, the employer shall make the report public. d. Costs. Each party shall bear its own costs for mediation and fact-finding, including the costs of their advocates. Any costs for the mediator, neutral fact-finder, facilities, court reporters, or similar costs shall be shared by the parties. 8. Council Action. On or after the date the employer has released the fact-finders' report to the public, or upon conclusion of mediation if the parties waived fact-finding, the Council may hold a public hearing on the impasse and implement the terms of its last best and final offer.	

VIII. TEXT OF THE NEW STATUTE

[*Prior section 3505.4 was repealed; portions of 3505.4 are now in new 3505.7. There is no provision numbered 3505.6*]

3505.4.(a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization

benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

3505.7. After any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last,

best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.