Public Involvement in Union Negotiations Under the Educational Employment Relations Act

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Center for Education Policy and Law • University of San Diego
A non-partisan, university-based educational research center

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A. First Question Presented

To what extent may members of the public—i.e. those who are neither unionized school employees nor managing school board members—conduct negotiations between a union and management?

Brief Answer

Under Section 3543.3 of the Educational Employment Relations Act (EERA), members of the public may serve as the management’s negotiators.

Answer

In negotiations between a union and management, Section 3543.3 of the EERA permits management to designate a representative to serve as its negotiator. This designated representative “may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code.” It is uncertain whether an agreement between a union and management that members of the public could not serve as negotiators would be enforceable under the EERA.

Several Public Employment Relations Board (PERB) decisions refer to management’s right to conduct negotiations through a representative. PERB Decision No. 125 reiterates that a public school employer “or its designate” shall meet with the exclusive representatives of employee organizations. In PERB Decision No. 48, PERB noted, “Private strategy sessions between the employer and its negotiator are authorized by Government Code §3549.1(d).” In PERB Decision No. 97, PERB held that public school employers are responsible for the actions of their representatives under the law of agency.

While members of the public may participate in the negotiation process on behalf of management, the school district must maintain ultimate authority to negotiate with its employees. In International Federation of Professional & Technical Engineers v. Bunch, the voters adopted

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1 Cal Gov’t Code §3540 et seq.
2 An attorney general opinion from 1965 opines that nothing in that Education Code prevents a union from having persons other than its members from being members of the negotiating team. Attorney General Opinion (1965) 47 Op. Atty. Gen. 60. The one-page opinion concerns a provision of the Education Code—Section 13085—this has been deleted in light of the enactment of the EERA in 1975.
5 PERB stated, “That the Legislature contemplated this chain of authority is indicated by its reference to representatives of the public school employer found in sections 3543.3 . . . of the EERA.” Antelope Valley Community College District v. California School Employers Association and Its Chapter 374 (1979) PERB Decision No. 97, pages 11-12.
a proposition which amended the city charter to authorize the City of San Francisco to bargain collectively over wages and benefits with City employee organizations. A California’s court of appeal agreed with a trial court ruling that this proposition divested the school district of collective bargaining power and conflicted with the legislative intent, evident in Section 3540 et. seq. of the EERA, that school employees negotiate with a “District representative.”

B. Second Question Presented

To what extent must the public be kept informed of proposals and agreements during the bargaining process?

Brief Answer

Sections 3547 and 3547.5 of the EERA provide for informing the public at only certain stages of negotiations. PERB requires school districts to follow certain guidelines when “sunshining” proposals.

Answer

a. When Informing the Public is Required

The EERA provides for public participation in only certain portions of the bargaining process. The statute states that “All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.” Thus, the employer has the responsibility to hold the public meeting, and negotiating proposals from both sides must be presented. The same is true for subjects that surface after negotiations have begun. In the words of the statute, “New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.”

The Supreme Court of California has explained the scope of public participation under Section 3547 of the EERA as follows:

Initial contract proposals made by both sides must be presented at a public meeting and thereafter become matters of public record. The public must be allowed a reasonable time to become informed of the proposals and to express its

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7 International Federation of Professional and Technical Engineers v. Bunch, 40 Cal.App.4th 670, 675 (1995). However, the Court of Appeal reversed the trial court’s decision: because the issues litigated were arguably protected or prohibited by the EERA, PERB had exclusive jurisdiction over the matter. The courts have only appellate, as opposed to original, jurisdiction to review PERB's decisions.
9 Cal. Gov’t Code § 3547(a).
10 Cal. Gov’t Code § 3547(d).
views at a public meeting prior to commencement of employer-employee negotiation. Any new subject introduced into the collective bargaining process must be made public within 24 hours and the public must be informed of any votes cast upon the subject by the employer. (§ 3547) Thus, although the public is excluded from actual negotiating sessions (§ 3549.1), its opportunity to be fully informed and to express its views is preserved.\(^{11}\)

If one or more members of the public who reside in the district believe these provisions have been violated either because public disclosure did not occur or because of the way in which the proposals or subjects are phrased or presented, they may complete an Unfair Labor Practice Charge (UPC) form available on the PERB website: www.perb.ca.gov. The description of the complaint must be stated in specific terms on section 6(d) of the form with any relevant materials attached. The form is then to be returned to PERB for consideration and processing.\(^{12}\)

Upon conclusion of negotiations, the statute requires that before the district enters into a written agreement with the union, the major provisions of the agreement “including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent years” shall be disclosed at a public meeting of the public school employer.\(^{13}\)

Actual negotiations between management and the union are not similarly open to public involvement. PERB made this conclusion in PERB Decision No. 48E: “Having provided for public disclosure essentially only at the opening and close of negotiations, it must be assumed that the Legislature did not intend that the intermediate portions of the negotiations process be subject to public scrutiny.”\(^{14}\)

PERB Decision 48E further explains why these intermediate negotiating sessions are not viewed as being open to the public, even when a member of the public serves on the negotiating team for the school board. Section 3549.1 specifically exempts negotiations conducted by the school board itself from open meeting requirements, and “there is no reason why a different result should obtain when the board conducts negotiations through a representative as permitted by Government Code §3543.3.”\(^{15}\)

However, the EERA does provide that the parties may mutually agree that meetings and negotiation sessions between a public school employer and a recognized or certified employee organization may be open the public.\(^{16}\) The same is true of any executive session of the public school employer or between the public school employer and its designated representative “for


\(^{12}\) Kemerer conversation with PERB attorney Yaron Partovi, 9/24/09.

\(^{13}\) Cal. Gov’t Code § 3547.5.


\(^{16}\) Cal. Gov’t Code § 3549.1.
the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives.”\(^{17}\)

b. How Meaningful Public Involvement is Protected: Requirements for School Districts

The EERA requires school boards to “sunshine” initial proposals, meaning that the proposals “shall be presented at a public meeting of the public school employer and thereafter shall be public records.”\(^{18}\) “It is the school district's obligation to fulfill the ‘sunshine’ requirement and its failure to do so is itself an indicia of bad faith bargaining.”\(^{19}\) In its decisions, PERB has interpreted Section 3547 et seq. to impose several requirements on school boards regarding the sunshining of initial proposals.

**Definition.** School boards may not follow an unduly restrictive definition of “initial proposal” as used in EERA Section 3547. In PERB Decision No. 527, PERB ruled against the school district and held that the its passage of a resolution adopting a position which expressly dealt with the subject of wages, but was labeled a mere “philosophical position,” was in fact a part of the district's statement of its initial bargaining position and should have been sunshined.\(^{20}\)

**Development.** Initial proposals presented to the public must be sufficiently developed to allow the public to comprehend them. An initial proposal simply stating the subject matter to be negotiated, for example “wages,” does not adequately inform the public of the issues to be bargained. However, PERB has also found that the actual dollars and cents cost of a proposal need not be presented to the public.\(^{21}\) Additionally, PERB has held that when the actual cost of a proposal is not subject to calculation in advance, Section 3547.5 is satisfied when the public is notified of the issue to be negotiated.\(^{22}\)

**Specificity.** If an initial proposal is not specific as written, PERB has held that an oral clarification at a public meeting may be sufficient to cure any defects or insufficiencies in the proposal.\(^{23}\)

**Notification.** A school district must place notification on the agenda of its public meeting that it intends to present its initial proposals at that meeting.\(^{24}\)

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\(^{17}\) Cal. Gov’t Code § 3549.1.

\(^{18}\) Cal Gov’t. Code § 3547.


\(^{20}\) Howard O. Watts v. Los Angeles Community College District (1998) PERB Decision No. 527, page 3. PERB concluded, “We find that the Los Angeles regional representative applied an unduly restrictive definition of ‘initial proposal’ as used in EERA section 3547 when he stated that, to be such, a proposal must be couched in specific language which would permit a concrete counterproposal.”


Availability. The EERA requires that all initial proposals be presented at a public meeting and, thereafter, become public records. Beyond this, however, there is no requirement that any copies of proposals be made available at subsequent meetings. 25

Amendments. A school district must present any amendments of initial proposals at public meetings. If the amendment changes the initial proposal, the school district should also provide a reasonable time thereafter to enable the public to become informed and have an opportunity to express itself regarding such proposals. 26

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