

PUBLIC MEETING MINUTES

JUNE 13, 2019

10:00 a.m.

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office

1031 18th Street

Sacramento, California

Members Present

ARTHUR A. KRANTZ, Member

ERIC R. BANKS, Member

ERICH W. SHINERS, Member

LOU E. PAULSON, Member

Quorum Present? Yes

Executive Staff Present

JOSHUA GOLKA, Executive Director

MARY ANN AGUAYO, Deputy Executive Director

FELIX DE LA TORRE, General Counsel

SHAWN CLOUGHESY, Chief Administrative Law Judge

LORETTA VAN DER POL, Division Chief, State Mediation & Conciliation Service

• **Proceedings**

Meeting called to order at 10 a.m. by Member Krantz. Since April 11, 2019, the Board has been in continuous closed session to deliberate on pending cases on the Board's docket.

Member Krantz read into the record the following decision numbers: 2464a-M, 2517a-C, 2637-S, 2638, 2639, 2640-S, 2641-M, 2642-M, 2643, 2644, 2645-H, 2646-H.

Member Krantz also noted that one administrative determination has been made, Ad-473, and one request for injunctive relief remains pending, IR 766, and that the following requests for injunctive relief have been resolved: IR 773, IR 774, IR 775, IR 776.

A list of the aforementioned decisions, determinations, and resolutions can be found on PERB's website.

Motion: Motion by Member Banks and seconded by Member Shiners to close the April 11th, 2019 Public Meeting.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

- **Adoption of Minutes**

Member Krantz officially opened the Public Meeting of June 13, 2019, by asking the Board Members if they would like to discuss potential corrections to the minutes of April 11th, 2019, or move to approve it.

Motion: Motion by Member Shiners and seconded by Member Paulson to approve the minutes of the April 11th, 2019 Public Meeting.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

- **Public Comment**

No public participants requested to comment on issues outside of the agenda.

- **Executive Staff Reports**

Joshua Golka, Executive Director, welcomed Charisse Diaz, a recent hire in the San Francisco Regional Office.

Mr. Golka updated the Board regarding the State budget, stating that the Conference Committee report proposed a budget augmentation of 2.5 million dollars to PERB, subject to possible sunset, based on a determination of available resources as of December 2021.

The budget also included resources for three State agencies, including PERB, to use with respect to Asssembly Bill 378, should it be enacted into law. Assembly Bill 378 deals with childcare worker representation.

Mr. Golka stated that Assembly Bill 355, which adds the Orange County Transportation Authority to PERB's jurisdiction, has passed the Senate Labor, Public Employment and Retirement Committee and continues to move forward.

Mr. Golka stated that the proposed regulations that implements the Public Employee Communications Chapter (PECC) and the Prohibition on Public Employers Deterring or Discouraging union membership (PEDD), as well as an update to the Board's regulation on precedential decisions, will be published tomorrow, starting the 45-day public comment timeframe, which will be followed by a public hearing at the PERB Headquarters Office on July 30th at 10:00 a.m.

Mr. Golka further stated that the confirmation hearing of Member Paulson is set for Wednesday, June 19th, at 1:30 in Room 113 of the Capitol.

On June 21st, Mr. Golka will be visiting the Association of California School Administrators to present an update on PERB's activity including progress on the Case Processing Efficiency Initiative.

Mr. Golka concluded his report by thanking all staff for their hard work as the fiscal year end approaches.

- **Deputy Executive Director's Report**

Mary Ann Aguayo, Deputy Executive Director, reported that two lease negotiations are underway. One is a lease renewal for the Headquarters Office that has been in process for over one year, and a relocation effort for the San Francisco Regional Office that started in April since the current lease expires in 2021. Since leasing costs have increased significantly, a plan is in place to request funds via the budget change proposal process from the Department of Finance this Fall.

Ms. Aguayo reported that PERB is now current with Financial Information System for California. She praised the accounting staff members for their hard work in accomplishing that goal and stated that they would now be gearing up for fiscal year-end close.

Ms. Aguayo stated that salary savings are currently estimated at \$1.87 million for the fiscal year and that a request has been made to the Department of Finance to send \$1.15 million to the Architectural Revolving Fund, which would leave a projected unspent balance of \$415,000. The large balance is due to a lag in time from when new positions were authorized and budgeted to when they were actually filled.

Ms. Aguayo reported that Human Resources has concluded recruitments, and that all new positions authorized in July and January have been filled. Aside from one tech vacancy and the appointee vacancies, the remaining vacancies will be filled when the examinations now in progress have been completed.

Ms. Aguayo introduced Rebecca Chan, now a permanent hire who has been working for PERB on a limited term basis. Along with budget and accounting duties, Ms. Chan assists wherever she is needed in administration. Ms. Aguayo reported that a campaign for staff review of all policies and required training was underway. This includes development of annual training plans, which is part of a policy and procedure that rolled out over a year ago.

Ms. Aguayo then introduced Nava Nadarajah, a new IT employee, his duties, and stated that Mr. Nadarajah is leading the Cyber Security Assessment, which is due to the Department of Technology at the end of the month. Ms. Aguayo provided additional updates on Information Technology including that the Voice Over Internet Protocol, a two-year project, is now complete. Ms. Aguayo credited Andy Dang for successfully coordinating that project. Other updates include ePERB, the

case tracking system project is currently scheduled for rollout in August with a web portal front rollout in September that will include a decision-bank search feature; and a Webpage template update to accommodate accessibility compliance.

- **General Counsel's Report**

Felix De La Torre, General Counsel, reported that Office of the General Counsel received 129 new unfair practice charges during April and May, which is an increase from the 125 received in the prior two months.

Also in April and May, the General Counsel's Office completed 98 investigations, which is a slight decrease from the 121 investigations completed in February and March.

During April and May, the General Counsel's Office issued 34 complaints and dismissed 23 charges, while in the prior two months 53 complaints were issued and 27 charges were dismissed.

Case processing time decreased from a two-month average of 139 days in February and March to 127 days in April and May.

The number of litigation matters the General Counsel's Office completed decreased from 23 during February and March to 17 in April and May.

Fact-finding requests increased from ten in February and March to 14 in April and May.

The number of representation petitions decreased; 14 in February and March compared to 12 in April and May.

Mr. De La Torre stated that, since the last Board meeting, the General Counsel's Office received four requests for injunctive relief and two case filings against PERB. Mr. De La Torre then provided the details and the status on the two cases.

Member Banks expressed his appreciation to Mr. De La Torre and his staff; Member Krantz echoed the sentiment.

- **Chief Administrative Law Judge's Report**

Shawn Cloughesy, Chief Administrative Law Judge, reported that cases are being scheduled three months out from the informal date. He further stated that the focus has been on completing the older cases that have been pending; of the 37 older cases, only two remain. He foresees that, by the fiscal year end, the days of hearing will have exceeded all previous records.

Judge Cloughesy also stated that the exceptions ratio is holding at 33 percent, a substantial decrease from the 43-44 percent last year.

- **SMCS, Division Chief's Report**

Loretta van der Pol, Division Chief, introduced Sandra Poole, a newly-hired and very skilled mediator.

Ms. van der Pol then stated that SMCS is working on trend analysis that will have a graphic representation of workload peaks. The analysis will go back several years and will be presented to the Board at the August meeting.

Motion: Motion by Member Shiners and seconded by Member Banks to accept the staff reports.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

- **Old Business**

Member Krantz stated that the Old Business portion of the agenda will begin with discussion and comments on agenda item 5B, the exceptions regulations. He noted several respects in which the revised text is different from what the Board considered in April.

Public Comment

Julia Lum, attorney with Leonard Carder, expressed support and appreciation for the proposed regulations, particularly with regard to exceptions and e-filing, stating that it will really streamline the process.

Neha Shah, attorney for the California State University, Long Beach, concurred with the written comments regarding exceptions submitted by Sloan Sakai. Shah expressed particular concern about section (e), that the Board, as an appellate review panel making findings of fact, might not give the party an opportunity to properly respond.

Further, Ms. Shah expressed concern that the application of the unalleged violations doctrine seems to be evolving outside the boundaries of its original intent, which would be especially burdensome for the responding party.

Board Discussion

Member Krantz raised two issues for the Board to discuss; one, the language

involving the Board resolving issues that do not impact, affect, or change the outcome of a case, and two, the language about parties requesting to exceed the word limit on briefs and the timelines for the Board to rule on such a request.

Member Shiners stated his understanding of the regulation to mean the Board is free to disregard exceptions where, if the Board granted them, they would not affect the ultimate outcome of the case. Member Shiners stated that, in this instance, the words, *affect*, *impact*, and *change* are synonymous, and therefore, he would accept any one of the three being used in the regulation.

Member Krantz, Member Banks, and Member Paulson concurred.

Member Shiners then addressed the second issue, stating that a notification regarding timelines could be sent to the parties when a request to exceed word limits is granted, though he doesn't think the draft regulation needed further explanation.

Member Paulson expressed concern that the language remain simple and understandable for pro per parties. To that end, Member Paulson prefers the proposed draft regulation, as currently worded.

Member Shiners then spoke to an issue that was raised in the written comments submitted to the Board; Subsection (c), number (2) in the list, "in the record of another case before PERB," is unnecessary and should be deleted.

Motion: Motion by Member Shiners and seconded by Member Paulson to delete number (2), "in the record of another case before PERB," and then renumber (3) to number (2).

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

Motion: Motion by Member Krantz and seconded by Member Banks to approve submitting the proposed exceptions rulemaking package, with the amendment previously voted on, to the Office of Administrative Law in order to initiate the formal rulemaking process regarding the proposed exceptions regulation and to delegate to Member Shiners the task of ensuring that the change made conforms to the Board's discussion.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

- **New Business**

Member Krantz announced that the first item of consideration will be to review the current policy for compensating factfinding panel chairpersons.

Wendi Ross, Deputy General Counsel, detailed numerous issues regarding how

the current limits of \$1100 per day, with a four day maximum, have been inadequate. She recommended that the Board approve raising the amount to \$1300.

Ms. Aguayo recapped the staff recommendation: Effective July 1, 2019, increase the daily rate to \$1,300 for a maximum of five (5) days to fund up to 29 contracts if paid an average of 50% of the maximum allowed per contract; and to annually reassess the daily rate and maximum number of days based on additional historical information.

Member Paulson commended all staff for their hard work on this issue.

Motion: Motion by Member Paulson and seconded by Member Banks to adopt the staff's recommendation.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

Member Krantz then opened for discussion the issue of whether to submit a proposed rulemaking package to the Office of Administrative Law to initiate the formal rulemaking process regarding an amendment to PERB regulation 32155, which governs the recusal of PERB personnel.

Member Krantz summarized the changes that would be implemented by the proposed regulation if adopted.

Member Shiners expressed concern with allowing post-decision recusal motions and with having the Board decide a recusal motion rather than the individual Board Member.

Motion: Motion by Member Paulson and seconded by Member Krantz to lay the issue on the table, meaning to suspend consideration temporarily, subject to later discussion.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

Member Krantz turned the focus to item 6d, inviting Ms. van der Pol to explain the issue.

Ms. van der Pol stated that the proposed SMCS regulations are administrative in nature and intended to: assist parties in interpreting the regulations by adding cross-referencing among regulations; clarify language regarding impasse declaration and mediation; strike references to charging for representation and hearing officer services for the PUC Transit representation and unit determination cases; and clarify the facilitation services for which SMCS would be charging, specifically the facilitation of interpersonal conflict in the workplace.

Additionally, Ms. van der Pol stated that the proposed regulation would change the title of *Chief* to the more contemporary title of *Director*.

Lastly, Ms. van der Pol recommended revising the language on rates; rather than a

fixed rate, a rate annually established by the Board in a publicly noticed meeting.

Mr. De La Torre suggested that the issue on rates requires more research and discussion before submitting a proposed regulation on the matter to the Office of Administrative Law.

Motion: Motion by Member Krantz and seconded by Member Paulson to approve the proposed rulemaking package to submit it to the Office of Administrative Law in order to initiate the formal rulemaking process regarding the proposed SMCS regulations and to delegate to Board Member Shiners the task of reviewing the final package before its submittal to OAL to ensure that any change regarding the annual review of the rate conforms to the Board's discussion.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

Member Krantz announced that item 6F on the Board's agenda, which pertains to PERB's record retention policy, has been withdrawn and will be rescheduled for a later meeting.

Member Krantz turned the focus to item 6C regarding regulations governing prehearing motions and subpoenas, inviting Chief Administrative Law Judge Cloughesy to speak on the issue.

Judge Cloughesy explained the changes in the revised regulations. Judge Cloughesy gave some history on one of the issues, starting with the concern among stakeholders that there should be an earlier production date set for the receipt of documents versus having the documents presented at the first day of a formal hearing, and encompassing the timelines for filing motions.

Public Comment

Andrew Ziaja, attorney with Leonard Carder, expressed general support for the proposed regulations on subpoenas, but raised, among other issues, the Administrative Procedures Act, and the example of the Office of Administrative Hearings, as a comparator to PERB regulations.

Kristin Lindgren, attorney with Liebert Cassidy Whitmore, expressed her agreement with the written comments submitted regarding subsection (h). She also stated her concern regarding an ALJ drawing inferences based on a failure to comply with a subpoena. Ms. Lindgren asked for clarification regarding proposed subsection (e)(2), stating that the words, "otherwise invalid," as contained in the proposed regulation are unclear.

Timothy Yeung, attorney with Sloan Sakai, emphasized his concern regarding subsection (h), the regulation on drawing an adverse inference, recommending that an adverse inference must be at the request of the party seeking it, so that the opposing

party is not caught off guard by seeing it for the first time in a decision.

Judge Cloughesy then raised the point of protective orders and in-camera reviews for documents with privacy issues.

Mr. Yeung offered a rephrasing of the language for 32170(k), suggesting that it end with, "including conducting an in-camera review."

Motion: Motion by Member Paulson and seconded by Member Krantz to lay the issue on the table, meaning to suspend consideration temporarily, subject to later discussion.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

Member Krantz turned the focus to the regulation on filing requirements and invited the General Counsel to speak on the topic.

Mr. De La Torre stated that, because the ePERB system is still under development, the regulation pertaining to e-filing is probably the most incomplete package set for discussion. Currently, it's a work-in-progress that will likely take several more Board meetings before it's ready to be submitted to the Office of Administrative Law.

Mr. De La Torre then highlighted a few elements the Board can expect in the regulation: It eliminates fax filing and all other forms of non-ePERB portal filings for attorneys; pro per parties will be the only ones who can use the other forms of filings; and it will make filing semi-paperless.

Mr. De La Torre also stated that the new regulation is expected to consolidate and clarify many provisions, and address issues such as e-Sign and DocuSign, streamlining and simplifying the process of filing.

Public Comment

Mr. Ziaja expressed his firm's support of PERB adopting an eSignature regulation. He stated that his law firm, Leonard Carder, through written comments, proposed an alternative way of formulating this regulation.

Mr. Yeung pointed out that PERB's regulations allow 10-15 days after the submittal of a proof of support to raise a fraud challenge, and explained his concern that it is difficult to allege fraud when the employer does not see the proof of support .

Mr. De La Torre spoke to the timelines of filing with electronic signatures and with regard to filing injunctive relief. He reiterated that this section of the proposed regulations was a "work-in-progress."

Motion: Motion by Member Paulson and seconded by Member Shiners to remove

from the table (meaning to take up for consideration) the proposed draft regulations on recusals and the proposed draft regulations on subpoenas, motions, and authority of ALJs.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

Motion: Motion by Member Paulson and seconded by Member Banks to form a committee of Board Member Banks and Board Member Krantz to consider all comments on the regulations packages regarding filing requirements, recusal, and subpoenas, motions and authority of ALJs, and to make a recommendation to the Board no later than the October 2019 Board meeting.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

- **Meeting Adjourned.**

Member Krantz stated that, immediately upon recess, the Board will be in continuous closed session each business day until the next regularly scheduled Board meeting.

Motion: Motion by Member Shiners and seconded by Member Banks to recess the meeting to continuous closed session.

Ayes: Krantz, Banks, Shiners, Paulson

Motion Adopted - 4 to 0

APPROVED AT THE PUBLIC MEETING OF: **August 8, 2019**

Arthur A. Krantz, Board Member