WHAT DOES IMPASSE MEAN?

I. Definition of Impasse

Government Code section 3540.1(f) defines impasse as: "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile."

II. Steps in Process

A. Determination of when the parties are in impasse

Neither party may unilaterally determine that they are at impasse, rather a single party "declares" that the parties are at impasse and then requests PERB to appoint a mediator. The other party may challenge that declaration, with PERB making the final determination if impasse exists.

When a unilateral request is filed, a Board agent or regional attorney will contact the responding party to ascertain their position regarding the request. Once PERB determines that an impasse exists, the case is referred to the State Mediation and Conciliation Service (now a part of PERB) for the assignment of a mediator. Note: as a practical matter, PERB will often err on the side of determining the parties are at impasse.

Once impasse is determined by PERB it suspends the duty to bargain on those items currently in impasse until impasse is broken by one party changing its position and moving towards the other.

B. Mediation

The parties may mutually select a mediator or ask PERB to assign a mediator. There are advantages and disadvantages to each. If the parties mutually select a mediator, they are both responsible for the costs. If PERB selects the mediator from CSMCS, there is no costs to the parties. Parties also may contact CSMCS and request a mediator in the normal course of their negotiations.

C. ***Fact-finding***

If mediation is unsuccessful, and no earlier than 15 days, the parties then participate in fact-finding. This requires the mediator to "certify" the parties for factfinding to PERB, and then have a party request PERB to appoint a fact-finder. Fact-finding includes a report and presentation before the fact-finding "panel." The panel is made up of a neutral, a union appointee and a district appointee (so the decision is functionally made by the neutral member).

The neutral member is appointed by PERB (free to the parties), or in the alternative is mutually selected by the parties. As with the mediator, if the parties mutually select a fact-finder, they bear the costs.

Fact-finding requires each party to make both a written and live presentation to the fact-finding panel. At the conclusion of the hearing, the panel will issue a report.

The criteria for fact-finding include the following:

1. State and federal laws that are applicable to the employer.
2. Stipulations of the parties.
3. The interests and welfare of the public and the financial ability of the public school employer.
4. Comparison of the wages, hours, and conditions of employment involved in the fact-finding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.
5. The consumer price index for goods and services, commonly known as the cost of living.
6. 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.
7. Any other facts, not confined to those specified in items (1) through (6), which are normally or traditionally taken into consideration in making the findings and recommendations. Government Code section 458.2(b)

D. ***Fact-finding report***

At the conclusion of fact-finding, the fact-finder will issue a private report and recommendations to the parties. The parties have one more chance to negotiate prior to the report being made public, and they have an obligation to consider the report in good faith. After 10 days, the District must publicize the report and recommendations. This can be a powerful tool for the prevailing party. The report is non-binding on the parties.

Sample reports may be found at: http://www.perb.ca.gov/factdecisions.aspx

E. Conclusion of impasse (after the report is publicized)

UF — At the conclusion of impasse, the union may strike over the District's failure to meet its demand in negotiations.

NOCCCD — The converse of the union's right to strike is the District's right to implement its "Last, best, and final offer" (LBFO).

1. The District may not impose an offer worse than the last offer it brought to the impasse proceeding.

2. Any concession by a party "breaks" impasse and restarts the obligation to negotiate, even if the concession happens post-impasse.

3. The District may not impose a waiver at the conclusion of impasse. For example, the District may not impose a term for its LBFO (such as a 1% increase each year, for three years), and then refuse to negotiate during that imposed term. State of California (Department of Personnel Administration) (2010) PERB Dec. No. 2130-S. Similarly a district may not implement a zipper clause limiting negotiations to a set number of issues (Rowland USD) Thus, even in those instances, the duty to negotiate continues.

III. When a Union may strike

Strikes are not expressly prohibited by the EERA, although in some instances they may constitute an unfair labor practice by a union. Typically, a union may only strike at the conclusion of the entire impasse process. Almost all collective bargaining agreements have a "no strike" clause that prohibits striking during the life of the contract, and the right to strike pre-impasse is limited, as it is a presumptive unfair labor practice as bad faith bargaining or bad faith participation in impasse.

There are two exceptions to this rule:

A. Strike preparation

a. In Sweetwater Union High School District (2014) PERB Order No. IR-58, PERB held that a Union's strike consideration and strike preparation, prior to the conclusion of impasse did not violate the EERA.

b. Such conduct may lawfully include: Strike authorization votes and meetings to urge such a vote, informational picketing, and publicizing the dispute (letters to the editor, emails to faculty and the college community.)

B. ***An "Unfair Practice Strike"***

a. In California Nurses Association (2010) PERB Decision No. 2094-H, PERB held that a strike prior to the conclusion of impasse may be legal (although it is presumptively an unfair labor practice, which is rebuttable by the union), and is not a per se violation, if:

1. the employer committed an unfair practice; and
2. the employer's unfair practice provoked the strike.

b. Even if an employer commits unfair practices, a strike to force economic concessions prior to impasse remains unlawful. The Union has the burden to prove (as a question of fact) that its strike was provoked by the District's unfair labor practices. Rio Hondo Community College District (1983) PERB Decision No. 292

IV. Impasse strategy

A union's strategy for impasse will vary greatly on whether the District's LBFO offer failures to provide sufficient benefits or other items requested by the union (such as not agreeing to a requested salary step increase). In the former case, the Union will challenge any request by the district for fact-finding and continue to seek further negotiations. In the latter case, there are benefits to both continuing negotiations and seeking impasse.