ERB DECISION INDEX

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ACCESS TO EMPLOYEES

Blanket prohibition of e-mail system use for employee-union communication without prior management approval interferes with protected conduct. *Dept. of Water and Power* (2001) Dec. No. U-147.

Since topics are within mandatory scope of bargaining, although bulletin board and mail box access not required by ERO, where union has obtained such rights by contract, withdrawal thereof is derivative ERO violation. *Police Dept.* (2008) Dec. No. U-199.

ACCRETIONS TO BARGAINING UNIT, PROCESSING OF

Where job classification historically unrepresented, accretion will not be approved in absence of petitioner's submission of authorization cards from majority of affected employees. *City of L.A.* (2004) Dec. Nos. 448 & 449 (implementing Board Rule 2.06).

Where unit appropriateness not at issue, newly-created class will be accreted even if no employee(s) yet hired into class. *City of L.A.* (2004) Dec. Nos. 443 & 444. (But see "Unit Determination of Class Lacking Incumbents" below.)

ACCRETIONS, BARGAINING OBLIGATION FOLLOWING

Bargaining obligation regarding issues unique to newly created class arises upon accretion, not when general negotiations commence. *Dept. of Personnel/City Administrative Officer*. (2008) Dec. No. U-195.

AFFIRMATIVE DEFENSES (to normal bargaining obligation)

Example of when change at issue de minimis. (Respondent's increase in budget to fund additional LAPD officer assistance to transportation investigators in "bandit taxicab" enforcement resulted in no material change to latter employees' responsibilities.) *Dept. of Transportation* (2008) Dec. No. U-190, citing *Farrell*.

Change at issue so "fundamental" as to outweigh benefit to employer-employee relations of meeting and conferring. *Dept. of Recreation and Parks* (2001) Dec. No. U-143, citing *San Jose Peace Officers' Assn*.

Bargaining would be futile because department's absence of discretion. *Dept. of Water and Power* (1993) Dec. No. U-105; *Dept. of Public Works,* et al. (2001) Dec. No. U-148.

AGENCY, PRINCIPLES OF

Union animus of supervisor/manager may be imputed to employer solely upon showing that supervisor/manager was acting within scope of his/her authority. *Dept. of Recreation and Parks* (1990) Dec. No. U-89.

Because ERO gives managers same rights to representation as other employees, that manager approaches subordinates about representation is not per se evidence of unlawful employer favoritism of one union over another. *L.A. World Airport*s, *et al.* (2009) Dec. No. U-212.

That supervisor/manager possesses same ERO rights as his/her subordinates does not insulate employer from liability for supervisor/manager's unlawfully motivated conduct vis-a-vis those subordinates. *Dept. of Recreation and Parks* (1993) Dec. No. U-97. And see *City Administrative Office* (2004) Dec. No. U-170 (issuance of memo touting benefits of affiliation of one employee organization with another by managers identifying themselves by their city title).

Acceptance by principal of benefits of acts of another may constitute ratification of such acts so as to create an agency rendering principal responsible for those acts. *Library Dept.* (2000) Dec. No. U-131.

AGENCY SHOP FEES AS UNFAIR PRACTICE

Failure to comply with procedural requirements of *Hudson* while collecting agency fees is per se violation of nonmembers' ERO rights. *Engineers & Architects Assn.* (1994) Dec. No U-109.

APPROPRIATENESS OF UNIT (See "Unit Appropriateness" below.)

AUTHORITY OF BOARD

Because determination of whether employee is manager per ERO is in Board's discretion, department head's inclusion of employee on "management team" not dispositive. *City of L.A.* (1974) Dec. No. 12.

Board need not defer consideration of question before it simply because issue may later become moot. *City of L.A.* (1985) Dec. No. 197.

ERO gives Board "broad power" to rectify unfair practices including restoration of the status quo ante and ordering parties to meet and confer in good faith. *Police Dept. (1988)* Dec. No. U-74. Through the July 1, 2001 enactment of MMBA section 3509, the legislature effectively removed from the trial courts initial jurisdiction of unfair practice charges. In the City of L.A., the provisions of subdivisions (a) through © of

section 3509 apply to the ERB, including that "the initial determination as to whether [a] charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of [the MMBA]..." *Singletary et. al. v. Local 18, IBEW* (2012) 212 Cal. App. 4th 32.

Board's jurisdiction over union's relationship with unit members extends only to acts affecting employees' relationship with their department. *Int'l. Union of Police Assns.* (2004) Dec. No. U-172.

BAD FAITH BARGAINING (See "Surface Bargaining" below.)
BYPASSING EXCLUSIVE REPRESENTATIVE (See "Direct Dealing With Employees" below.)

CLASS-BASED DISCRIMINATION

Prima facie case does not require that protected class was "sole or dominant" reason for adverse action, only that it be "a" reason. *Police Dept.* (2007) Dec. No. U-188.

Since prima facie test for both is similar, just as adverse action following conduct protected by the ERO does not, without more, establish unlawful motive, mere fact employee and supervisor have different sexual orientation does not establish unlawful motive. *Office of the City Attorney* (2009) Dec. No. U-211.

CONDUCT PROTECTED BY ERO

Insubordinate conduct unprotected. *Dept. of Public Works* (2004) Dec. No. U-174.

Feigning illness unprotected, even if in support of union. *Dept. of Airports* (1988) Dec. No. U-77.

Protesting change in policy to require employees to use their own tools is protected. *Dept. of Public Works* (1991) Dec. No. U-90.

Because ERO guarantees employees right of self-representation, scope of protected conduct not limited to concerted activity so such self advocacy as employee's complaint about his/her performance evaluation is protected. *Dept. of Transportation* (1991) Dec. No. U-93.

Questions about possible workplace safety hazards and whether employees will be paid if evacuation necessary is protected. *Ibid*.; *Dept. of Public Works* (2002) Dec. No. U-156.

Wearing of union insignia is protected. *Harbor Dept.* (1997) Dec. No. U-126.

Board of Rights "defense representative" service is protected. *Police Dept.* (1989) Dec. No. U-87.

CONFIDENTIAL EMPLOYEES, DETERMINATION OF

To be confidential, employee must regularly assist person(s) determining management negotiations/grievance disposition policy in manner which would prejudice management's position if information prematurely shared with union. *City of L.A.* (1984) Dec. No. 190.

Merely providing factual or statistical information to those determining management negotiations/grievance handling policy does not render employee confidential. *Ibid*.

CONTRACTING/TRANSFERRING OUT OF BARGAINING UNIT WORK

Decision to contract out unit work, as distinguished from effects thereof, must be bargained only where: motivated solely by economics; consistent with respondent's traditional practice; similar in kind and degree to that practice; and no demonstrable adverse impact on unit members. *Dept. of Finance* (2009) Dec. No. U-210.

Unilateral contracting out of work traditionally performed by unit members which affects matters within scope violates good faith bargaining obligation "even when only a portion of the work is taken away from the unit." *Library Dept.* (2000) Dec. No. U-131; *L.A. World Airports* (2001) Dec. No. U-144.

(Also see "Effects Bargaining" below.)

DEFERRAL

Board's sending of unfair practice claim to hearing evinces disinclination to defer dispute to arbitration. *Harbor Dept.* (1997) Dec. No. U-126.

DE MINIMIS DOCTRINE (See "Affirmative Defenses" above and "Scope of Meet and Confer" below.)

DIRECT DEALING WITH EMPLOYEES, BY MANAGEMENT

Holding employee meetings at which input is sought about matters within scope of bargaining is unlawful bypassing of Board-certified union. *Harbor Dept.* (2009) Dec. No. U-208.

DISCRIMINATION CLAIMS BASED ON MEMBERSHIP IN PROTECTED CLASS (See "Class-Based Discrimination" above.)

DISCRIMINATION /RETALIATION CLAIMS FOR PROTECTED CONDUCT

Although ERO §4.860 does not expressly proscribe discrimination in reprisal for protected conduct, such prohibition implicit. *Dept. of Recreation and Parks* (1995) Dec. No. U-115, citing *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 CA3d 416.

Factors from which unlawful motive may be inferred include disparate treatment, inadequate justification and departure from established practice. *Ibid*, citing *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 CA3d 533.

Unlawful motive may be inferred from absence of rational basis for adverse action. *Dept. of Public Works* (2002) Dec. No. U-155.

Involuntary transfer of employee day after filing grievance creates "clear inference" of retaliation for such protected conduct. *Dept. of Transportation* (1989) Dec. No. U-82.

Unlawful motive established by management threat that failure to drop shift schedule change grievance would result in transfer of desirable work to non-unit employees. *L.A. World Airports* (2001) Dec. No. U-144.

Claimant's prima facie case rebuttable by respondent showing that disputed adverse action would have been taken even absent employee's protected conduct. *Dept. of Water and Power* (2001) Dec. No. U-141.

Ostensibly benign form of discrimination does not create absolute defense for substantively unlawful conduct. *Chief Administrative Office/Engineers & Architects Assn.* (2004) Dec. No. U-170. (Informing employer of employees' alleged misconduct unlawful even though done in response to request for particularization of unfair practice claim.)

In "dual motive" cases, prima facie case established if charging party proves that although adverse action taken partly for legitimate reason(s), protected conduct also a "substantial motivating factor." *Dept. of Public Works* (2002) Dec. No. U-159, citing *NLRB v. Transportation Mgmt. Corp.* (1983) 462 U.S. 393.

(Also see "Conduct Protected by ERO" above.)

"EFFECTS" BARGAINING

Management decisions so "fundamental" as to be outside scope but whose effect must still be bargained: removing unit members from Risk Management Program (*Fire Dept.* [1994] Dec. No. U-107); implementation of new custodial program (*Dept. of General Services* [1994] Dec. No. U-108); layoffs (*Community Development Dept.* [2006] Dec. No. U-182); centralization of employee discipline (*Dept. of Water and Power* [2007] Dec. No. U-187).

EFFICIENCY OF OPERATIONS (as Appropriate Unit Criterion)

Wage, fringe benefit, holiday and pension disparities resulting from charter provisions decreeing separate management authority may overcome similarity in other community of interest factors. *City of L.A.* (1974) Dec. No. 17.

ELECTIONS, EFFECT OF UNFAIR PRACTICES ON

Employer's providing unit members' names and home addresses to employee organization seeking to decertify incumbent union and allowing 26 supervisors/managers to use their job titles to distribute memo to subordinates advocating support for decertification petitioner so taints employee free choice as to require dismissal of decertification petition and discarding of impounded ballots. *City of LA.* (2004) Dec. No. 442.

EMPLOYEES UNDER BOARD'S JURISDICTION

Non-permanent employees working only for duration of specific project not covered by ERO. *City of L.A.* (1974) Dec. No. 17.

"Construction exempt" employees hired from union hiring hall not within Board's authority. *City of L.A.* (1975) Dec. No. 27.

Because "regular" employee as used in ERO must be read as compatible with MMBA and NLRA, term excludes only those hired for short periods or having irregular work schedules. *City of L.A.* (1985) Dec. No. 197.

"Daily rated" employees exempt from ERO coverage. *Dept. of Water and Power* (2000) Dec. No. U-134.

Touchstone for ERO coverage is whether employee is appointed to position of "undefined or long duration." *Dept. of Recreation and Parks* (2003) Dec. No. U-165.

[Note: Dec. No. U-165 references *City of L.A.* (1980) Dec. No. 145 in which the Board majority held Paramedic Trainees not to be "regular employees" under the ERO. The majority's rationale was such employees were "non-permanent" because incumbents in the class did not serve a Civil Service probationary period nor did they otherwise possess seniority rights. Pursuant to a court order, in Dec. No. 187 (1984), the Board vacated that holding and accepted a stipulation by the parties that Paramedic Trainees could be accreted to an existing bargaining unit. Consistent with such vacature, the Board has since unanimously declined to follow Dec. No. 145's "non-permanent status" test while determining ERO coverage for crossing guards (Dec. No. 197), part-time exempt employees of Recreation and Parks (Dec. No. U-165) and Airport Guides (Dec. No. U-222).]

EMPLOYER NEUTRALITY, REQUIREMENT OF BETWEEN COMPETING UNIONS

Where employees already represented, duty attaches upon filing of valid decertification petition. *L.A. World Airports, et al.* (2009) Dec. No. U-212.

Employer not required to give competing union same access rights granted to incumbent union. *Ibid*, citing *Detroit Medical Center* (2000) 331 NLRB 878.

Neutrality obligation during representation campaign requires maintenance of status quo regarding matters within scope. *Police Dept.* (1983) Dec. No. U-56.

"Hands off" approach violates duty of neutrality if employer's existing policy dictates affirmative action. *Ibid.*

Even if unintentional, sufficiently widespread employer acts or omissions inconsistent with status quo may create impression of unlawful assistance toward one employee organization to the detriment of another. *City of L.A.* (1983) Dec. No. U-53.

Supervisors' urging subordinates to replace their union while acting as City agent an unfair practice. *Dept. of General Services* (1995) Dec. No. U-119.

Employer's providing unit members' names and home addresses to employee organization seeking to decertify incumbent union and allowing 26 supervisors/managers to use their job titles to distribute to subordinates memo advocating support for decertification petitioner violation of duty of neutrality. *City Administrative Office* (2004) Dec. No. U-170.

(Also see "Agency, Principles of" above.)

ERO AND OTHER LEGISLATION

Certified employee organization's entitlement to information necessary to perform representational duties exceeds, or at least exists independently from, its rights under California Public Records Act. *Dept. of Water and Power* (2002) Dec. No. U-158.

Also see *Dept. of Water and Power* (1993) Dec. No. U-105 (federal law preemption) and *Dept. of Public Works* (2001) Dec. No. U-148 and *Dept. of Water and Power* (2002) Dec. No. U-160 (city charter preemption).

Certain published cases interpreting state collective bargaining legislation irrelevant to interpretation of ERO because of ERO's exclusive representation scheme as amended. *L.A. City Supervisors & Superintendents Assn.* (1987) Dec. No. U-71.

FAIR REPRESENTATION, DUTY OF

DFR claims under ERO to be decided on basis of "arbitrary, discriminatory or bad faith" *Vaca* standard. *SEIU Local 347* (2000) Dec. No. U-133.

"Arbitrary" means, in the circumstances, "so far outside a wide range of reasonableness as to be irrational." "Discriminatory" means not treating similarly-situated employees in same way. "Bad faith" means "conscious doing of a wrong because of dishonest purpose or immorality" as evidenced by acting or omitting to act "out of hostility or ill will." *Ibid.*

Negligent performance of "procedural or ministerial act" may be unlawful as arbitrary; union's performance of act involving exercise of judgment is unlawfully

arbitrary only if "challenged act . . . involves a failure to raise a meritorious, substantive argument." *Ibid.*

DFR extends to Civil Service proceedings only if MOU so requires. *Ibid.*

Requiring bargaining unit employees who are not members of employee organization to individually contract with organization to obtain representation in disputes with employer violates DFR. *Municipal Construction Inspectors Assn., et al.* (1982) Dec. No. U-44.

Failure to adequately inform bargaining unit members who are not members of employee organization of information relevant to challenging agency fee violates DFR. *Engineers & Architects Assn.* (1994) Dec. No. U-109.

Board's jurisdiction over union's relationship with unit members extends only to acts which affect employees' relationship with their department, impair access to the Board or involve "unacceptable methods of union coercion such as physical violence." *Int'l. Union of Police Assns., et al.* (2004) Dec. No. U-172.

Failure to conduct general membership vote on affiliation with another employee organization not a per se violation of DFR. *Ibid.*

Removal from office of elected officials not a per se violation of DFR. *Ibid.*

Employee organizations given broad discretion to initiate bargaining proposals and make concessions in furtherance of interests of their membership as a whole. *Engineers & Architects Assn.* (2004) Dec. No. U-173.

"FAVORED NATIONS" CLAUSE (in MOU)

Existence of such clause requires management to provide beneficiary employee organization with documentation revealing relevant information about bargaining unit(s) represented by other employee organization(s). *Dept. of Water and Power* (2002) Dec. No. U-158.

GRIEVANCE PROCESSING BY MANAGEMENT

Skepticism about arbitrability of grievance does not constitute valid defense for refusal to process according to negotiated procedure. *Community Development Dept.* (2005) Dec. No. U-177.

IMPASSE PROCEDURES UNDER THE ERO

Unilateral implementation of bargaining proposals prior to exhaustion of ERO's impasse procedures is per se unfair practice. *Police Dept.* (1988) Dec. No. U-74, citing *PERB v. Modesto City Schools* (1982) 136 Cal.App.3d 881; *Dept. of Water and Power* (1989) Dec. No. U-77; *Fire Dept.* (2001) Dec. No. U-145.

Factfinding not discrete procedure but rather "continuation" of bargaining process. *Police Dept.* (2005) Dec. No. U-178, citing *Moreno Valley Unified School Dist. v. PERB* (1983) 142 Cal.App.3d 191.

Mere fact members of union bargaining team not anticipated to testify in factfinding hearing does not justify failure to grant release time pursuant to ERO §4.845. *Chief Administrative Office* (2006) Dec. No. U183.

(Also see "Unilateral Change by Employer" below.)

INTERFERENCE CLAIMS

Unlawful motive not an essential element of. *Egs., Police Dept.* (1989) Dec. No. U-79; *Police Dept.* (1999) Dec. No. U-128; *Dept. of Water and Power* (2001) Dec. No. U-147.

Such claims to be decided not on subjective perceptions of employees but on objective standard of whether conduct at issue reasonably tended to interfere, restrain or coerce employees in exercise of ERO rights. *Dept. of Recreation and Parks* (1993) Dec. No. U-97.

Being union officer does not vest employee with special rights to engage in union activity during work time. *Ibid.*

Individual employee need not be given same access to percipient witnesses to grievance events as certified employee organization. *Dept. of Public Works* (2002) Dec. No. U-154.

Threatening disciplinary action for filing "frivolous" grievances unlawfully interferes with protected conduct. *Dept. of Personnel* (1993) Dec. No. U-99.

Forcibly taking telephone from shop steward doing lawful union business interferes with protected conduct. *Dept. of Public Works* (2001) Dec. No. U-146.

Providing unit member names and addresses to employee organization other than Board-certified representative interferes with protected conduct. *City Administrative Officer* (2004) Dec. No. U-170.

Holding work time staff meeting to allow employee organization to discuss merits of that organization versus another interferes with protected conduct. *Ibid.*

Conditioning time off to engage in employee organization activities on disclosure of operationally unnecessary information interferes with protected conduct. *Personnel Dept.* (2005) Dec. No. U-180.

Absent valid affirmative defense, failing or refusing to adhere to mandatory provisions of contractual grievance procedure interferes with protected conduct.

Dept. of Public Works (2001) Dec. No. U-146; *Dept. of Public Works* (2001) Dec. No. U-150; *Dept. of Public Works* (2003) Dec. No. U-162.

Showing delay is common where multiple grievances are filed is a valid defense to failure to strictly adhere to contractual timelines. *Dept. of Public Works* (2003) Dec. No. U-167.

Skepticism about arbitrability of grievance does not constitute valid defense for refusal to process it according to negotiated procedure. *Community Development Dept.* (2005) Dec. No. U-177.
Employer bears burden of proving that employee cannot be released from work to serve on union bargaining team. *Dept. of Building & Safety* (1994) Dec. No. U-111.

Because of need to ensure process' integrity, prohibiting employees from discussing during personnel investigation events related thereto was valid business decision constituting legitimate defense for respondent's conduct. *Police Dept.* (2004) Dec. No. U-169.

(Also see "Access to Employees" and "Agency Shop Fees as Unfair Practice" above.)

INTERROGATION OF EMPLOYEES REGARDING UNION ACTIVITY

Interrogation not unlawful if done to investigate unfair practice claim and employee given *Johnnie's Poultry* assurances. *L.A. City Employees Retirement System* (2009) Dec. No. U-203.

MANAGERS, UNIT PLACEMENT OF

ERO requirement that managers be in separate unit from non-managers does not also require all managers to be in same unit. *City of L.A.* (1972) Dec. No. 3.

Primary function of all managers overrides whatever distinct community of interest may be possessed by those with "craft oriented background." *City of L.A.* (1976) Dec. No. 45.

MEET AND CONFER UNDER ERO §4.830a v. MEET AND CONSULT UNDER §4.830b

Whereas duty to meet and confer satisfied by attempting to resolve issue(s) through making responses thereto and utilizing ERO's impasse procedures, duty to meet and consult satisfied merely by offering union opportunity to present written or verbal input. *Dept. of Recreation and Parks* (1993) Dec. No. U-97.

MOOTNESS/DISCRETENESS OF ISSUE

Even if events occurring after filing of UERP claim arguably render issue(s) moot, Board may opt not to dismiss where further processing would create precedent for probable recurrence. *All City Employees Assn./City of L.A.* (1975) Dec. No. U-9.

Where, following filing of claim, respondent performs act nonperformance of which was purportedly unlawful, Board may dismiss claim by finding that issue involved has thereby been rendered moot. *Municipal Construction Inspectors Assn.* (2000) Dec. No. U-132.

Voluntary resignation from higher-level assignment claimant awarded on interim basis but allegedly not permanently appointed to for unlawful reasons renders such issue discrete from other purported adverse actions and therefore not continuing violation of ERO. *Dept. of Water and Power* (2006) Dec. No. U-184.
Respondent action between filing and adjudication of unfair charge which provides remedy analogous to what claimant could have obtained from Board renders underlying allegation moot. *Housing Dept.* (2009) Dec. No. U-209.

NEWLY-CREATED CLASS, BARGAINING OBLIGATION FOR

Employer may not lawfully insist on deferral of bargaining over newly-created class until negotiations over successor MOU. *Personnel Dept.* (2008) Dec. No. U-195.

NOTICE UNDER §4.850, FORM OF

Mailing of notice to claimant's address of record, to which claimant had previously assented, sufficient to meet §4.850 duty. *Bd. of Pension Commissioners* (1989) Dec. No. U-80.

PAST PRACTICE, CREATION OF

To become employment condition which may not be altered unilaterally, practice cannot be "brief or sporadic," but must have "existed for such a period of time as to become a legitimate expectation of employees." *Police Dept.* (1991) Dec. No. U-91.

PEACE OFFICERS, DEFINITION OF

Security officers spending no more than 20 percent of their time performing traditional law enforcement duties like deterrence, surveillance, investigations, arrest and detention not "full-time peace officers" and therefore not entitled to separate unit. *City of L.A.* (1991) Dec. No. 285. Also see *City of L.A.* (1982) Dec. No. 161.

PREEMPTION (See "ERO and Other Legislation" above.)

PROFESSIONAL EMPLOYEES, DETERMINATION OF

State licensure insufficient to render class professional. *City of L.A.* (1974) Dec. No. 23.

State licensing not required for finding of professional status. *Ibid*. (Home Economist/Sr. Home Economist).

"REGULAR" EMPLOYEES (See "Employees Under Board's Jurisdiction" above.)

RELEASE TIME TO MEET AND CONFER

Right not limited to "yearly negotiations over the terms of the Memorandum of Understanding for the succeeding year." *Library Dept.* (1980) Dec. No. U-26.

Right not limited to employee's own department but extends to his/her employee organization's bargaining with all city departments. *Dept. of Building and Safety* (1994) Dec. No. U-111.

Right not limited to face to face negotiations but extends to factfinding hearings where employee has "intimate knowledge of the work place . . . not within the expertise of [union's] advocate." *Chief Administrative Office* (2006) Dec. No. U-183.

REMEDIES FOR COMMISSION OF UNFAIR PRACTICES

"Standard" remedy for unlawful unilateral change is both a bargaining order and restoration of the status quo ante. *Chief Administrative Office/Dept. of Bldg. & Safety* (2006) Dec. No. U-185.

Failure to vest chief negotiator with bargaining authority for seven months does not itself amount to conduct so egregious as to require assessment of litigation and bargaining preparation costs. *City Administrative Officer* (2009) Dec. No. U-201.

Assuming *arguendo* ERB vested with such authority, since successful completion of probationary period cannot be assumed even absent unlawful motive, appropriate remedy for retaliatory termination does not include order that offended employee be deemed to have passed probation. *Dept. of Transportation* (2009) Dec. No. U-202.

RES JUDICATA

Cannot be applied in absence of "exact identity of parties, issues, and causes of action or claims." *Police Dept.* (2000) Dec. No. U-139.

RETALIATION (See "Discrimination/Retaliation Claims" above.)

RETIREMENT BENEFITS BARGAINING

Modification of retirement benefits lawful without agreement of Board-certified union where "majority of the members of LACERS" represented by other unions approved of modification as set forth in relevant language of all MOUs. *City of L.A.* (2012) Dec. No. U-216.

RIGHT TO REPRESENTATION ("Weingarten")

Employee not entitled to union representation at meeting held solely to administer discipline; but where employer also seeks evidence in support of disciplinary action or attempts to have employee admit to misconduct, representation must be granted upon request. *Fire Dept.* (1995) Dec. No. U-118.

Inquiry at inception of investigatory meeting whether union representation needed sufficient to trigger right to representation. *Dept. of General Services* (2006) Dec. No. U-181.

SCOPE OF BARGAINING/MEET AND CONFER (Also see "'Effects Bargaining" above.)

To be within scope, management decision at issue (1) must have a "significant and adverse effect" on unit members' wages, hours or working conditions and (2) cannot involve a "fundamental managerial or policy decision." If those two prongs of test satisfied, issue becomes whether employer's need for "unencumbered decision making in managing its operations outweighed by the benefit to employer-employee relations of bargaining over the effects." *L.A. World Airports* (2015) Dec. No. U-222.

Substantial effect existed where elimination of 20 hour per week positions meant more than 50 Airport Guides forced to either quit or pass civil service exam. *Ibid.*

A management action affecting "wages, hours and other terms and conditions of employment" but which also "directly affect[s] the amount of work that can be accomplished or the nature and extent of the services which can be provided" (i.e., "merits, necessity or organization") is within scope only insofar as "the benefit to employer-employee relations of bargaining about the action in question" outweighs such "a fundamental managerial or policy decision." *Dept. of Water and Power* (1993) Dec. No. U-98, citing *Teamsters, Local 216 v. Farrell* (1986) 41 Cal.3d 651.

"Fundamental policy decision" requiring unit members to do some training of and make themselves available to work with non-unit employees once per month had "virtually no impact" on their wages, hours or working conditions and therefore outweighed benefit to employer-employee relations of bargaining. *Dept. of Transportation* (2008) Dec. No. U-190, citing *Farrell*.

Even absent "immediate impact" on unit members, bargaining required where unit adversely effected by transfer of work out of it. *Office of Finance* (2009) Dec. No. U-210, citing *Farrell*.

Increase in amount of work required of non-unit employees with "overlapping jurisdiction" over services at issue does not compel bargaining with unit members. *Ibid.*

Taking arrest authority from park rangers not mandatory bargaining subject notwithstanding relation to terms and conditions of employment because so "fundamental" that need for unencumbered decision making outweighs benefit to employer-employee relations of meeting and conferring. *Dept. of Recreation and*

Parks (2001) Dec. No. U-143, citing *San Jose Peace Officers' Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935.

Creation of voluntary training program not a mandatory bargaining subject notwithstanding indirect relation to promotability and therefore wages because employer's need for unencumbered decision-making about such a fundamental policy decision outweighs benefit to employer-employee relations of meeting and conferring. *Dept. of Airports* (1987) Dec. No. U-70.

No obligation to meet and confer concerning matters over which employer has no discretion. *Dept. of Water and Power* (1993) Dec. No. U-105 (federal law); *Dept. of Public Works, et al.* (2001) Dec. No. U-148 (city charter amendment).

Procedures concerning promotion of unit members to positions outside bargaining unit not within scope. *Police Dept.* (1995) Dec. No. U-116.

Consolidation of multiple classes into single new class within scope only insofar as can be shown to affect wages, hours and other terms and conditions of employment. *Chief Administrative Office* (1996) Dec. No. U-120.

Reassigning work from unit class to classification represented by different employee organization within scope. *L.A. World Airports* (2001) Dec. No. U-149.

Even absent loss of bargaining unit positions, management action resulting in reduction in work available to bargaining unit within scope. *Fire Dept.* (1989) Dec. No. U-81.

Limitations on e-mail use for employee-union communication within scope. *Dept. of Water and Power* (2001) Dec. No. U-147.

Choice of health insurance plans and benefits within scope. *Dept. of Water and Power* (2000) Dec. No. U-135.

Adoption of dress code within scope. *Harbor Dept.* (1997) Dec. No. U-126; *Chief Administrative Office/Dept. of Building & Safety* (2006) Dec. No. U-185.

Payment of mileage for use of personal vehicle on city business within scope. *Dept. of Water and Power* (1995) Dec. No. U-113.

Implementation of disciplinary system for employees failing or refusing random drug test within scope. *Dept. of Water and Power* (1993) Dec. No. U-105.

Rotation of employee assignments within scope. *Dept. of Recreation and Parks* (1993) Dec. No. U-97; *Dept. of General Services* (2001) Dec. No. U-140.

Bonus award and other incentive programs "substantially tied" to employee performance within scope. *Dept. of Water and Power* (1993) Dec. No. U-102.

Employee organization access to employer's telephone and mail system within scope. *Office of the City Clerk/Chief Administrative Office* (2005) Dec. No. U-179.

Because of potential impact on employee discipline, change in policy for mandatory Employee Assistance Program referrals within scope. *Dept. of Water and Power* (1992) Dec. No. U-95.

Because of affect on terms and conditions of employment, procedure for filling of vacancies in new promotional class within scope. *Fire Dept.* (2001) Dec. No. U-145.

Because of affect on terms and conditions of employment, utilization of video surveillance system within scope. *Dept. of Public Works* (2002) Dec. No. U-159.

(See also "Effects Bargaining" above.)

SCOPE OF MEET AND CONSULT UNDER ERO §4.830b

Scope is "Any ordinance, rule, resolution or regulation;" in other words, "matters of structure, administration and authority" as distinguishable from "more esoteric day-to-day conditions of work place and the details of the employment relationship" subsumed within the meet and confer obligation. *Dept. of Recreation and Parks* (1993) Dec. No. U-97.

Rotation of employee assignments within scope of meet and confer rather than scope of meet and consult. *Ibid*.

Decision to implement custodial "team cleaning" system within scope of meet and consult obligation. *Dept. of General Services* (1994) Dec. No. U-108.

SEVERANCE PETITIONS

Because of full-time peace officers' statutory right to unit exclusive to them, carving out unit of such employees from broader unit including non-peace officers appropriate. *City of L.A.* (1982) Dec. No. 161.

SEXUAL ORIENTATION DISCRIMINATION (See "Class-Based Discrimination" above.)

SUPERVISORS, DEFINITION/UNIT PLACEMENT OF

Although ERO does not define "supervisor," Board accepts parties' stipulation that term refers to employee who has "authority to exercise independent judgment in effectively recommending the hiring, transferring, laying off, promotion, discharge, assignment, rewarding, evaluating, disciplining or adjusting of grievances of other employees." *City of L.A.* (1972) Dec. No. 1.

Absence of ERO direction expresses legislative intent that Board itself is to determine whether supervisors and non-supervisors should be included in same unit. *Ibid*.

Potential for conflict and efficiency of organization considerations require that in disputed cases supervisors should not be included in same unit as employees they supervise. *City of L.A.* (1972) Dec. Nos. 1, 2 and 3 (1973) Dec. Nos. 4, 5 and 6.

SUPERVISOR-NON-SUPERVISOR REPRESENTATION BY SAME UNION

Although Board has historically declined to place supervisors and employees they supervise in same unit, Board has not also disfavored representation of those groups by same employee organization in separate units. *City of L.A.* (1991) Dec. No. 279.

SURFACE BARGAINING (aka "Bad Faith" Bargaining)

Standard for assessing whether party has met and conferred in good faith is totality of conduct. *Chief Administrative Office* (2002) Dec. No. U-157.

Indicators of unlawful intent include irrational repudiation of agreements, making of regressive proposals, delaying tactics. *Ibid*.

No per se right to formally meet and confer via mere filing of accretion petition; such right does not attach until Board has ordered accretion. *Community Development Dept.* (2006) Dec. No.U-182.

(Also see "Remedies for Commission of Unfair Practices" above.)

SURVEILLANCE OF EMPLOYEES

Standard for resolving questions of surveillance not subjective belief of affected employees but rather whether employer's actions reasonably created impression of surveillance. *Chief Administrative Office/Dept. of Building & Safety* (2006) Dec. No. U-185.

TIMELINESS OF PETITION TO AMEND CERT., ADD/DELETE CLASSES FROM UNIT

Employee organization may not petition to modify bargaining unit between date of election in which majority of unit members vote to decertify that organization and date of certification of election results. *City of L.A.* (1978) Dec. No. 85 (interpreting Board Rule 2.06).

TIMELINESS OF UNFAIR CLAIM FILING (BOARD RULE 8.03)

In unilateral change case, 90-day time limit begins running not on effective date of change but when claimant has actual or constructive notice thereof. *Planning Dept.* (2008) Dec. No. U-194, overruling, *sub silencio*, *Police Dept.* (1991) Dec. No. U-91.

Information from Chief Administrative Officer's "clearinghouse" that contract with private entity under consideration does not constitute actual or constructive notice of unilateral change. *Dept. of Finance* (2009) Dec. No. U-210.

Time limit for filing unilateral change claim does not begin running until union given "sufficient notice" to allow for "meaningful response." *Police Dept.* (2000) Dec. No. U-139.

Tolling of 90-day time limit appropriate where management misrepresented that policy revisions given the union were non-substantive. *Dept. of Water and Power* (1992) Dec. No. U-95.

Employee organization's practice of having clerical employee file policy revisions provided by management without review of professional staff does not toll 90-day time limit. *Ibid*.

Management representative's assurance to charging party that newly-installed surveillance cameras would be used only to prevent vandalism tolled 90-day time limit to date charging party discovered cameras would also be used to document employee misconduct. *Dept. of Public Works* (2002) Dec. No. U-159.

Because 90-day time limit for filing unfair claims created not legislatively but by Board rule, that time limit not a statute of limitations and therefore not jurisdictional. *Convention Center* (2003) Dec. No. U-164.

Pursuing substance of unfair claim through ODCR, DFEH, NLRB, etc. may toll Rule 8.03's 90-day time limit. *Ibid*.

Although irremediable, allegedly unlawful acts committed beyond Board's 90-day time limit may nevertheless be used to prove improper motive for adverse action taken within 90 days of claim filing. *Dept. of Water and Power* (2006) Dec. No. U-184.

Each service fee unlawfully collected from nonmembers constitutes separate violation for purposes of charge timeliness. *Engineers & Architects Assn.* (1994) Dec. No. U-109.

Continuing violation exists if unlawful acts "sufficiently similar in kind; occurred with reasonable frequency; and have not acquired a degree of permanence" so time limits begin running only when employee "on notice that litigation, not informal conciliation, is the only alternative." *Office of the City Attorney* (2009) Dec. No. U-211.

Voluntary resignation from higher-level assignment claimant awarded on interim basis but allegedly not permanently appointed to for unlawful reasons renders such issue discrete from other purported adverse actions and therefore not continuing violation of ERO. *Dept. of Water and Power* (2006) Dec. No. U-194.

UNILATERAL CHANGE BY EMPLOYEE ORGANIZATION

Willfully and unreasonably obtaining arbitrator's approval, over employer's objection, of delays beyond explicit time periods of parties' expedited arbitration procedure is unlawful unilateral change. *Dept. of Water and Power* (2001) Dec. No. U-151.

UNILATERAL CHANGE BY EMPLOYER

Unilateral changes to matters within scope of bargaining made prior to exhaustion of ERO's impasse procedures are unlawful unless employer can show that time was of the essence or that certified employee organization was given notice of employer's intended action and willingness to bargain sufficiently in advance to allow for "reasonable time" for conclusion of that process. *Police Dept.* (1988) Dec. No. U-74, citing *PERB v. Modesto City Schools* (1982) 136 Cal.App.3d 881.

Unilateral cancellation of scheduled arbitration hearing over union's objection and without arbitrator's approval is unlawful repudiation of MOU's grievance and arbitration provisions. *Police Dept.* (2009) Dec. No. U-205.

Once having bargained and participated in statutory impasse procedures in good faith, unless factfinding has resulted in substantial change in union's pre-impasse position, employer free to implement something consistent with its final offer. *Police Dept.* (2005) Dec. No. U-178.

(Also see "Impasse Procedures Under the ERO", "Past Practice, Creation of," "Remedies for Commission of Unfair Pratices", "Scope of Meet and Confer" and "Timeliness of Unfair Claim Filing" above.)

UNILATERAL CHANGE, REMEDY FOR (See "Remedies for Commission of Unfair Practice" above.)

UNION OFFICE, HOLDING OF

Statutory prohibition of "representing" of nonconfidential employees by confidential employees does not also proscribe the latter's holding of office in union representing nonconfidential employees. *All City Employees Assn./City of L.A.* (1975) Dec. No. U-9.

Board's authority over the holding of union office extends only to restrictions affecting employees' relationship with their department, access to the Board or "unacceptable methods of union coercion such as physical violence." *Int'l Union of Police Assns., et al.* (2004) Dec. No. U-172.

UNIT APPROPRIATENESS

Petitioning employee organization need not prove proposed unit is more appropriate than other possible configurations, only that proposed unit is "an" appropriate one. *City of L.A.* (1998) Dec. No. 352.

UNIT DETERMINATION OF CLASS LACKING INCUMBENTS

Because best measure of duties of class is actual performance thereof by incumbent(s), in disputed case unit placement will not be made solely on basis of class specifications. *City of L.A.* (1974) Dec. No. 17 (see Principal Clerk Stenographer).

UNIT SIZE

Proposed unit consisting of one class of ten positions, only eight of which are filled, inappropriate as fragmentary where class not shown to have unique community of interest. *City of L.A.* (1974) Dec. No. 26.

Notwithstanding "Board's general predilection for larger units," unit of eight DWP nurses appropriate based on their status as professional employees of department with different wage, fringe benefit, holiday and pension structures from council-controlled departments. *City of L.A.* (1977) Dec. No. R-69, implicitly citing *City of L.A.* (1974) Dec. No. 17.

WAIVER OF RIGHT TO MEET AND CONFER

Failure to demand to meet and confer after receipt of reasonable notice of changes in matters within scope of bargaining constitutes waiver of right to do so. *Bd. of Pension Commissioners* (1989) Dec. No. U-80; *L.A. World Airports* (2002) Dec. No. U-152.

Request to meet and confer so general as to be uncognizable as solicitation to bargain over effects of layoff decision rather than layoff decision itself equates to demand to bargain over nonmandatory subject, thereby resulting in waiver. *Community Development Dept. (2006)* Dec. No. U-182.

No waiver for failure to request to bargain over matter employer has already opined to be outside scope. *Dept. of Water and Power* (2002) Dec. No. U-160.

No waiver for failure to accept employer's proposed meeting dates where offer did not also include expression of intent to rescind prior unlawful act. *Administrative Office/Dept. of Building & Safety* (2006) Dec. No. U-185.

Zipper clause providing that MOU "constitutes full and entire understanding of the parties regarding all . . . demands and proposals" does not constitute "clear and unmistakable" waiver of right to meet and confer concerning proposed changes to matters within scope of bargaining. *Dept. of Water and Power* (1989) Dec. No. U-77.

Clause reserving to management "exclusive right . . . to determine the methods, means and personnel by which operations are to be conducted" does not constitute "clear and unmistakable" waiver of right to meet and confer concerning proposed

changes to matters within scope of bargaining. *Ibid; Dept. of Water and Power* (1993) Dec. No. U-105.

Contract article providing that "Management shall give the Union an opportunity to consult with Management prior to placing . . . new [work] rules or changes in such existing rules into effect" cannot be said to express "clear and unmistakable" intent of parties to substitute right to meet and consult for right to meet and confer. *Harbor Dept.* (1997) Dec. No.U-126.

"WEINGARTEN" (See "Right to Representation" above.)

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