

**COLLECTIVE BARGAINING AND IMPASSE  
PROCEDURES UNDER THE  
EDUCATIONAL EMPLOYMENT  
RELATIONS ACT**

Ellen J. Shadur  
Chaka C. Okadigbo  
Burke, Williams & Sorensen  
Los Angeles, California

Prepared for the School of Law in California Seminar

April 12, 2004  
Anaheim, California

**A. INTRODUCTION.**

The collective bargaining process in California public schools and community college districts is controlled by the Educational Employment Relations Act (“EERA”), which is set forth in *Government Code* §3540 *et seq.* Under the *Government Code*, the Public Employment Relations Board (“PERB”) is responsible for overseeing EERA compliance.

Collective bargaining aims to yield an agreement between the employer and the union and to ensure that the bargaining process is conducted in good faith. Key aspects of the collective bargaining process involve the parties’ duty to bargain in good faith, the subjects that must be negotiated (topics within the “scope of bargaining”), and impasse procedures, which become operative when the parties cannot reach agreement.

**B. THE SCOPE OF BARGAINING**

**1. Mandatory Subjects of Bargaining**

*Government Code* §3543.2 states the topics that are within the scope of representation and hence which must be bargained. The scope of representation is defined as “matters relating to wages, hours of employment, and other terms and conditions of employment.” (*Ibid.*) Items that fall within the “scope of representation” include:

**a. Wages**

- (1) Overtime Pay
- (2) Extra-Duty Pay

By way of example, summer school, stipends for coaching sports supervision, special education, journalism, yearbook, drama, reading, vocal music, department chair stipends, and band-related extra duty are all negotiable because they are included within the term wages.

- (3) Special Achievement Awards

This includes performance incentive awards for certificated staff in underachieving schools.

- (4) Severance Pay
- (5) Employee Uniforms, Equipment and Supplies, as long as they are job related.

- (6) Vehicle, Travel Expenses, and Parking Fees
- (7) Employee Property Loss
- (8) Tuition Reimbursement
- (9) Timing and Method of Payment
- (10) Salary Classification Systems
- (11) Payroll Deductions

**b. Health and Welfare Benefits**

- (1) Types of Benefits
  - i. health insurance;
  - ii. vision care insurance;
  - iii. dental insurance;
  - iv. tax-deferred annuities
- (2) Benefit Plan Administration, if the change has a “material or significant effect or impact on the actual benefits received by employees.” (*State of California Department of Forestry & Fire Prevention* (1998) 22 PERC ¶29083.)
- (3) Level of Benefits, including proposals to increase benefits beyond the levels established by law.

**c. Hours of Work**

- (1) Generally

Work hours are within the scope of representation. The phrase “hours of work” has been interpreted as encompassing: distribution of workdays in a week, days worked per year, the hours of work on particular days, teacher instructional hours, vacations and holidays, extra hours assignments, breaks and duty free time during the day, assignment of special duties, and shift schedules. The subject of employee work hours is different from student instructional time. The length of the school day for students is a management prerogative not directly related to the length of the teachers’ workday, and is therefore outside the scope of representation. But, when a modification of the student instructional day affects another mandatory subject of bargaining, e.g. amount of preparation time, work load, or the length of the workday, then the matter is negotiable.

(2) Calendar

The calendar is negotiable insofar as it relates to work of employees, including beginning and ending dates of work, length of work year, holiday dates, summer vacation, and the beginning and ending times of the workday. Unilateral adoption of a tentative calendar can be a violation if the calendar is intended to apply to both students and to employee workdays or when bargained holidays are changed. Nevertheless, districts can adopt a tentative calendar while continuing to negotiate employee workdays with the exclusive representative.

(3) Holidays

(4) Standby or Waiting Time

(5) Released Time

(6) Vacation and Leaves

(7) Preparation Time

(8) Rest Time and Breaks

(9) Schedules and Shift Assignments

(10) Daily Hours of Work

(11) Distribution of Workdays in a Week

(12) Days Worked Per Year

(13) Modification of Work Hours (vacant or occupied positions)

(14) Rest Time and Breaks

(15) Time Clocks and Sign Out Policies

(16) Assignment of Special Duties

(17) Teacher Instructional Hours

(18) Extra Hours Assignments

(19) Standby or Waiting Time

(20) Call-back or Call-in Time

d. Reorganization

This is outside the scope of representation as it is a managerial prerogative.

e. Classification and Reclassification

The decision to create or abolish a job classification is within managerial

prerogative and therefore not negotiable. But management must negotiate the effects of such decisions that affect subjects within the scope of representation. Adopting a new title for an existing job classification is negotiable.

f. Work Load, Staffing Levels, and Work Assignments

Generally, the direction of the work force and determination of what work is to be performed by employees is a managerial prerogative and is not subject to bargaining. However, the employer's discretion applies only to tasks reasonably understood to fit within the duties of the classification as established in the job description. Also, certain procedural aspects of staffing and bidding procedures are negotiable, e.g., the bidding procedures for established bus routes. (*California Department of Transportation* (1983) 7 PERC ¶14295.)

(1) Staffing Levels

This is generally a managerial prerogative and therefore not a mandatory subject of bargaining.

(2) Staffing Practices and Bidding Procedures

These generally are managerial prerogatives.

(3) Class Size and Caseload

(4) Assignment of Duties

(5) Emergency Assignments

Bargaining unit employees are entitled to negotiate the position that they not be called upon to perform duties of other employees who are engaging in strikes or work stoppages. (*California Department of Personnel Administration* (1987) 12 PERC ¶19014.)

(6) Faculty Service Areas

g. Evaluations, Personnel Files, and Public Complaints

g. Promotions, Vacations, Transfers and Reassignments

h. Discipline

(1) Rules of Conduct

(2) Incompatible Activities

(3) Causes and Procedures for Discipline

Short of termination, the discipline of K-12 employees is negotiable under *Government Code* §3543.2(b). In the absence of mutual agreement, *Education Code*

§44944 governs procedures for disciplinary actions taken against certificated employees.

i. Hiring and Retirement

(1) Hiring

Generally, the employer has complete discretion in making employment decisions as long as no law is violated.

(2) Retirement

Alternative compensation or benefits for employees adversely affected by pension limitations set forth in *Education Code* §22316 are within the scope of negotiations under EERA.

j. Seniority

To the extent that seniority serves as a basis for employment decisions, it is negotiable under EERA. (*San Mateo City School District* (1984) 8 PERC ¶15021.)

k. Layoffs and Reduction in Hours

The decision to layoff does not have to be bargained, but the effects of the decision on matters falling within the scope of representation must be negotiated. The employer must afford the union timely notice and the opportunity to bargain the effects of the layoff decision. But the employer can unilaterally implement a layoff decision prior to completion of impasse procedures if: (1) the exclusive representative is given notice and an opportunity to bargain (typically a 2 month time frame); (2) the employer faces an immutable deadline imposed by law or can state an important managerial interest that would be jeopardized by delay in implementation; and (3) the employer negotiates in good faith both before and after implementation. (*Compton Community College District* (1989) 13 PERC 20057.) A decision to reduce hours or the work year itself must be bargained.

l. Safety

m. Training

Proposals to provide training are negotiable if related to safety, promotional opportunities, or job performance.

n. Grievances

o. Removal or Transfer of Bargaining Unit Work

See comments earlier in section 2(e) about exceptions to general rule that

removal and transfer is a bargainable topic.

- p. Organizational Security
- q. Nondiscrimination Proposals
- r. Past Practices

Proposals aiming to incorporate specific past practices on items that fall within the scope of representation are negotiable. (*San Mateo City School District* (1984) 8 PERC ¶15021.)

## **2. The “Anaheim Test”**

The scope of bargaining not only encompasses wages, hours and “terms and conditions of employment,” but also matters *relating* to those topics. PERB set forth a test for determining whether a particular subject is within the scope of representation in the *Anaheim Union High School District* case. This decision and the test it established was approved by the California Supreme Court in *San Mateo City School Dist. v Public Employment Relations Bd.*

Under the Anaheim test, a subject is negotiable if it is either an item listed in *Government Code* §3543.2 or if all three of the following apply:

- It is logically and reasonably related to wages, hours, or an enumerated term and condition of employment;
- The subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of the collective negotiations is the appropriate means of resolving the conflict; and

The employer’s obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district’s mission.

## **C. THE DUTY TO BARGAIN IN GOOD FAITH.**

EERA imposes on both the employer and the union a mutual obligation to bargain in “good faith.” (*Government Code* §§3543.5 and 3543.6)

### **1. Definition of Good Faith Bargaining.**

Good faith generally requires the parties to arrive at the negotiating table with “open and fair minds and with the purpose of reaching agreement. The parties are obliged to make some reasonable effort in some direction to compose [their]

differences.” (*Bridgestone/Firestone* (1995) 1995 NLRB GCM LEXIS 23, \*31 [quoting *NLRB v. Herman Sausage Co.* (5<sup>th</sup> Cir. 1960) 275 F.2d 229, 231.])<sup>1</sup>

Although a party must retain an open mind and a desire to reach agreement, it can still insist on its initial bargaining position. In fact, PERB has determined that the “[a]damant insistence on a bargaining position is not necessarily refusal to bargain in good faith ... ‘The obligation to bargain in good faith does not require the yielding of positions fairly maintained.’” (*Oroville High School District* (2002) 26 PERC ¶33083 [quoting *NLRB v. Herman Sausage Co.*, supra, 275 F.2d 229].) However, the line between lawful adamant insistence on a bargaining position and going through the motions without a desire to reach agreement may be hard to establish.

When a party is accused of failing to meet its obligation to bargain in good faith, PERB resorts to either of two analytical methods to determine whether good faith is present – the *per se* test or the “totality of the circumstances” test.

## **2. Per Se Violations of the Duty to Bargain in Good Faith.**

Generally, PERB resorts to the “totality of the circumstances” test when reviewing whether an employer or union has violated the duty to bargain in good faith. But some acts have such a potential to frustrate negotiations that PERB has characterized them as *per se* violations. A *per se* violation is alone enough to establish bad faith and the subjective intent of the violating party is immaterial. (*Pajaro Valley Unified School District* (1978) 2 PERC ¶2107.) Examples of *per se* violations include:

### **a. Outright Refusal to Negotiate.**

An outright refusal to negotiate on a matter that is within the “scope of representation” (where bargaining is required) is a *per se* violation of the duty

---

<sup>1</sup> The NLRB best stated the objective and purposes of the requirement of bargaining in good faith in *General Electric Company* (1964) 150 NLRB 192, 268:

[T]he negotiating parties must approach bargaining with a mind accessible to persuasion; that they must follow procedures increasing the prospects of a negotiated agreement; that they must regard all proper issues before them as issues to be resolved through the processes and procedures of collective bargaining; that they must be willing ‘to discuss freely and fully their respective claims and demands, and, when these are opposed to justify them on reason’ and that they must be willing at least to consider and explore with an open mind compromise proposals or other possible solutions of their differences in an effort to find a mutually satisfactory basis for agreement.” (citing *NLRB v. Insurance Agents International Association, AFL-CIO (Prudential Ins. Co.)* 361 U.S. 477, 485-488.)

to bargain in good faith. (See, e.g. *Fremont Network* (1993) 17 PERC 24140 [union's refusal to negotiate on district's proposal when proposal substantively addressed matters within the scope of negotiation was per se violation of duty to bargain in good faith].) Most commonly, the dispute between the employer and the union centers on whether a matter is within the scope of representation. If a matter is outside the scope of representation, then an outright refusal to negotiate does not violate the duty to bargain in good faith.<sup>2</sup> These instances are rare.

b. Unilateral Change in Terms and Conditions of Employment.

The most common *per se* allegation that an employer faces is the claim that it unilaterally changed a policy without affording the union the opportunity to bargain. If an employer makes a unilateral change in an established, negotiable practice before impasse proceedings have concluded, the employer has committed a *per se* violation of its obligation to negotiate in good faith. To prevail on a claim of unilateral change, the union must establish that: (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) the change in policy concerns a matter within the scope of representation. (*Grant Joint Union High School District* (1982) 6 PERC 13064.)

Unilateral implementation claims against unions are rare. However, if a union violates aspects of the collective bargaining agreement that involve mandatory subjects of bargaining and if it has done so on more than one occasion, an employer can allege a unilateral implementation *per se* charge, as long as it establishes the criteria set forth above. One such example is the allegation that by consistently distributing written communications to

---

<sup>2</sup> See, e.g. *Davis Joint Unified School District* (1984) 9 PERC 16045 [finding that school district did not engage in bad faith by refusing to negotiate on topics outside scope of representation.]

bargaining unit members without providing a copy beforehand to the school principal, as required by the collective bargaining agreement, a union has unilaterally implemented a new policy. PERB has issued a complaint on the basis of this charge, which is currently set for hearing in *Centinela Valley Union High School District v. Centinela Valley Secondary Teachers Association* (Unfair Practice Charge No.: LA-CE 1157-E.)

c. Insisting to Impasse on Non-mandatory Subjects of Bargaining.

“A per se violation results when a party attempts to force the other side to yield on a subject about which it does not have an obligation to bargain. (*Oroville Union High School District* (2002) 26 PERC ¶33083.)

d. Failure to Execute a Written Agreement that Has Been Ratified.

As part of duty to bargain in good faith, *Government Code* §3540.1(h) requires written memoranda of understanding or written agreement to be executed, but such written documents are only binding after the employer or union has ratified them.<sup>3</sup> Failure to execute such written agreements after verbal agreements have been reached at the bargaining table is a per se violation of the duty to bargain in good faith.

e. Removal of Bargaining Unit Work.

If an employer removes work from a bargaining unit by transferring the work to other employees outside the unit or by subcontracting the work to non-employees, it has committed a *per se* violation. But not all transfers of work out of a bargaining unit are negotiable decisions. For example, when unit and non-unit employees traditionally perform overlapping duties, an employer can alter the distribution of those duties between unit and non-unit employees unless the transfer of work results in reducing the work hours of the unit member that used to perform the work. Similarly, if as a result of an

---

<sup>3</sup> *Government Code* §3540.1(h) in relevant part reads: "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation **and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties** and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of time not to

employer's removal of work unit employees stop performing the transferred work, then the employer has committed a per se violation.

f. Bypassing the Exclusive Representative.

When an employer bargains directly with bargaining unit employees instead of their union representatives, it violates its duty to bargain in good faith. The duty to negotiate with the exclusive representative applies not only to negotiations but also to administering the agreement, including the grievance procedure. (*Government Code* §3543.3 states the employer's obligation to meet and negotiate only with the exclusive representative over matters within the scope of representation)

g. Refusal to Provide Information.

An employer is obligated to provide information requested by a union that relates to the union's duty, as exclusive representative, to represent its unit members. The employer must provide the requested information or must adequately state reasons for noncompliance. If compliance would be burdensome, the employer is excused from providing the requested information.

h. Conditioning Proposals on a Waiver of Rights.

A *per se* violation results when a party insists to impasse on the withdrawal of pending grievances and unfair practice charges. (*Lake Elsinore School District* (1986) 11 PERC ¶18022). Similarly, insisting that a union waive its statutory right to represent unit members in the grievance process is a *per se* violation. (*South Bay Union School District v. Public Employment Relations Board* (1991) 228 Cal.App.3d 502, 507.)

**3. Indicia of Bad Faith Bargaining.**

In non *per se* cases, PERB reviews the composite history of bargaining sessions to determine whether a party has negotiated in good faith. (*Fremont-Newark* (17 PERC ¶24140.) This review has been dubbed "the totality of the circumstances test." (*Id.*; see, also *South Bay Union School* (1990) 14 PERC ¶21118.)

Certain types of non *per se* conduct assist PERB in reviewing allegations of bad faith. Each conduct is considered an indicative of bad faith, but none alone is

---

exceed three years. (italics added for emphasis)

sufficient to constitute bad faith. Examples of such conduct include:

a. Surface Bargaining/Shadow Boxing.

The term “surface bargaining” is often used to describe non *per se* findings of bad faith. It exists when “a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement.” (*Muroc Unified School District* (1978) PERB Dec. No. 80, 3 PERC ¶10004.) Examples of surface bargaining include:

(1) Rejecting or Withdrawing Proposals.

Simply rejecting proposals and offering no counter-proposals or tendering counter-proposals well after negotiations have begun is indicative of bad faith, especially if no rationale is provided in support of the rejecting party’s position. (*See generally Oakland Unified School District* (1981) 5 PERC ¶12149; *Fitzgerald Mills Corporation* (1961) 133 NLRB 877, \*\*8 .)

(2) Adopting a “Take It or Leave It”  
Attitude Towards Negotiations.

“Entering negotiations with a “take-it-or-leave-it” attitude violates the duty to bargain because it amounts to merely going through the motions of negotiations.” (*Temple City Unified School District* (1987) 11 PERC ¶18118; citing *General Electric Co.* (1964) 150 NLRB 192, 194 57 LRRM 1491, *enforced*, 418 F.2d 736 72 LRRM 2530.)

It is critical to determine whether conduct exemplifies a “take it or leave it” posture or whether it is more appropriately characterized as hard bargaining. Although the line between hard bargaining and a “take it or leave it” attitude can be unclear, “take it or leave it” cases seem to involve: (1) the presentation of a proposal, and (2) the absolute refusal to budge from the proposal, regardless of significant concessions made by the opposing side, to the extent that agreement on the proposal is possible only through capitulation by the other side. (*See, e.g. Duarte Unified School District* (1983) 7 PERC ¶14064 [party made no effort to resolve differences with opposing side, remained adamant on all issues of negotiation, and virtually adopted “take it or leave it attitude”].)

(3) Dilatory Tactics.

Missed or cancelled meetings together with recalcitrance in the scheduling of

meetings constitutes evidence of bad faith.<sup>4</sup> Likewise, setting strict time limits on, limiting the frequency of, and delaying meetings evinces bad faith.<sup>5</sup>

(4) Conditioning Agreement On Economic Matters Upon Prior Agreement on Non-economic Subjects.

Conditioning agreement on economic matters upon prior agreement on non-economic subjects is "antithetical to good faith bargaining" and shows a mind-set against reaching agreement. (*Fremont Unified School District*, (1980) 4 PERC ¶11118; *Federal Mogul Corp.* (1974) 212 NLRB 950 87 LRRM 1105, 1106, *enforced*, 524 F.2d 37, 91 LRRM 2207.)

(5) Insistence on Ground Rules Before Negotiation of Substantive Issues.

Insistence on ground rules before negotiation of substantive issues is an indicative of bad faith (*Oroville Union High School District* (2002) 26 PERC 33083.)

(6) The Commission of Other Unfair Labor Practices.

“The commission of other unfair labor practices which show unlawful motivation also has been held as evidence of surface bargaining.” (*Grenada Elementary School District* (1984) 8 PERC ¶15133); *see also Temple City Unified School District* (1987) 11 PERC ¶18118 [citing example of making threats during bargaining as being the type of “other unfair labor practice” that is indicative of surface bargaining].)

(7) Negotiators Lacking Sufficient Authority.

The duty to bargain includes the obligation to appoint a negotiator with “real authority to negotiate and carry on meaningful bargaining regarding fundamental

---

<sup>4</sup> *See, e.g. Grenada Elementary School District* (1984) 8 PERC ¶15133.

<sup>5</sup> *See e.g. United Association of Journeymen & Apprentices, etc.* (1968) 171 NLRB 1607 [union’s severe limitation of time, duration and frequency of meetings, dilatory tactics in refusing to state decisions on contract proposals without consulting attorney, and failure to reply to employer’s letter seeking resumption of negotiations were some of the factors demonstrating bad faith]; *Teamsters, Local 612* (1975) 215 NLRB 789 [a union’s two month delay in meeting with employer was an unlawful refusal to bargain notwithstanding union’s defense that its representatives were preoccupied with national negotiations, since party to negotiations may not interpose busy schedule as an excuse for failure to meet and confer at reasonable intervals].)

issues.” (*Wycoff Steel, Inc.* (1991) 303 NLRB 517.) The failure to invest a bargaining representative with full authority to reach agreement is an indicia of bad faith. (*See, e.g. Grenada Teachers Association* (1984) 8 PERC ¶15133.) Note, however, that under EERA, the designated bargaining representative is not technically required to have authority to enter into binding agreements at the bargaining table. This is because *Government Code* §3540.1(h) mandates that agreements reached at the bargaining table be formally accepted by the employer and the exclusive representative before it becomes binding. Still, PERB requires a bargaining representative to exercise a good faith effort to secure ratification of a tentative agreement that he or she has entered into. (*Kern High School District* (1998) 22 PERC ¶22094.)

(8) Injecting Significant New Proposals At An Advanced Stage of Negotiations.

Evidence of bad faith is present when a bargaining team injects significant new proposals at an advanced stage of negotiations and expects more concessions from the opposing side than it has previously demanded (*See, e.g. Greensboro Printing Pressmen and Assistants’ Union No. 319* (1976) 222 NLRB 893, 893, 897.).

(9) Reneging on Tentative Agreements.

Reneging on a tentative agreement is indicative of surface bargaining (*Fremont-Newark Community College District* (1993) 17 PERC 24140.) Furthermore, to not entrust a negotiator with the authority to enter into tentative agreements is indicative of bad faith. (*See, e.g. Compton School District* (1989) 13 PERC 20076.)

**D. IMPASSE PROCEDURES**

**1. Mediation**

Impasse is defined as a point in negotiations “at which [the parties’] differences in positions are so substantial or prolonged that future meetings would be futile.” (*Government Code* §3540.1(f).) When the parties are unable to reach an agreement on issues being negotiated, one or both of the parties may ask PERB to declare that the parties are at “impasse” and appoint a mediator. PERB’s role in the mediation process is to determine whether the parties are at impasse, not to directly

mediate a contract dispute. When a unilateral impasse declaration request is filed, PERB considers several factors in deciding whether to declare impasse – (1) the number and length of bargaining sessions; (2) the extent to which the parties presented and discussed counter-proposals; (3) the extent to which the parties reached tentative agreements on negotiated issues; and (4) the extent to which issues remain unresolved. (8 *Cal. Code Regs.*, tit. 8 §32793(c).)

If PERB determines that an impasse exists, the matter is referred to the State Mediation and Conciliation Service for the assignment of a mediator. The mediator then contacts the parties to schedule a mediation session. The mediator’s goal is to persuade the parties to come to a mutually acceptable agreement.

Parties can mutually agree to a mediation process different from that stated in EERA. (*Government Code* §3548.)

## **2. Factfinding**

Under EERA, if a mediator is unable to bring about a settlement of the dispute within 15 days of appointment, the mediator can refer the dispute to factfinding for resolution. (*Government Code* §3548.1(a).) The factfinding process is conducted by a panel composed of three members. (*Government Code* §3548.1(a).) PERB selects the chairman and each of the parties selects one member.

The factfinding panel conducts a hearing during which each party makes a presentation defending its bargaining position. The hearing is informal in nature and concludes with the panel making findings and advisory recommendations for settlement. EERA sets out specific criteria that factfinder must consider in making findings. These are:

- (1) state and federal laws that are applicable to the employer;
- (2) the parties’ stipulations;
- (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 of the employees involved in the factfinding proceeding 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 (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 paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

The objective of impasse procedures, be it mediation or factfinding, is to yield agreement by the parties. Therefore, the parties often continue to negotiate during the factfinding process. ERRA imposes on the parties the duty to participate in good faith in the statutory impasse procedures. (*Government Code* §3545.5(e), 3543.6(d).) Where the parties are unable to reach agreement prior to the conclusion of the factfinding process, the neutral chairperson prepares a report of the panel's findings of fact and recommendations for settlement. The partisan members of the panel are given an opportunity to concur with or dissent from the report, and/or to attach a separate statement of dissent or concurrence.

The recommendations are advisory, but the public school employer must make public the findings and recommendations within 10 days of receipt. The employer must also negotiate if there is anything to negotiate. If no agreement is reached, the employer has the right to make the final decision on all matters within the scope of representation. Therefore, the employer can unilaterally implement its "last, best, and final offer" at the conclusion of impasse proceedings.