



The Duty to Meet and Confer and Police Reform

Areas of Police Reform

- **Use-of-force policies:** revising and creating standards governing when and how officers can apply force.
- **Performance Evaluation and Discipline:** changes in how officers' performance is evaluated and the consequences and procedures for disciplining misconduct.
- **Shift in Services:** changing what officers are responsible for. Sometimes it is assigning new responsibilities and sometimes it is removing them.
- **Training:**
- **Oversight:** increasing transparency in the police departments and increasing civilian participation.

Meyers-Milias-Brown Act

Purpose is to

1. Promote full communication between public employers and employees.
2. Improve personnel management and employer-employee relations.

Requires public employers to meet and confer in good faith with unions over matter that are within the scope of *representation*.

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The Scope of Representation

Government Code section 3504:

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

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The Scope of Representation Cont'd

The Supreme Court has observed this definition of the scope of representation employs two vague, seemingly overlapping phrases.

The first phrase—“wages, hours, and other terms and conditions of employment”—if broadly read “could encompass practically any conceivable bargaining proposal,” while the second phrase—“merits, necessity, or organization of any service”—could, if expansively interpreted, “swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion.”

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The Scope of Representation Cont'd

To resolve this ambiguity, the California Supreme Court has held that “to require an employer to bargain, its action or policy must have ‘a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.’” (*Claremont Police Officers Assn. v. City of Claremont* (2006) 39 Cal.4th 623, 631.)

The second phrase protects an agency from having to bargain over management decisions.

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Management Decisions

Management decisions are policy decisions that lie at the core of entrepreneurial control or are fundamental to the basic direction of the enterprise.

Examples:

- *Changing the policy regarding a police officer's use of deadly force.*
- *Permitting a member of the citizen's police review commission to attend police department hearings regarding citizen complaints and sending a department member to review commission meetings.*

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The Claremont Test

Claremont Police Officers Assn. v. City of Claremont

- Police Department implemented a temporary program to assess whether police officers were engaging in racial profiling during traffic. The program required officers to fill out a form that took approximately two minutes during each traffic stop.
- The police officer's association argued that the city must first meet and confer.
- In *Claremont*, the program was not subject to meet and confer because there were not adverse effects on the wages, hours, or working conditions of the police officers.

Claremont Test Cont'd

1. Does the action have “a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees.” If not, there is no duty to meet and confer.
2. Does the “significant and adverse effect arise from the implementation of a fundamental managerial or policy decision.” If not, there is a duty to meet-and-confer.
3. If both factors are present, the court applies a balancing test. The action “is within the scope of representation only if the employer’s need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.” In balancing the interests, a court may also consider whether the “transactional cost of the bargaining process outweighs its value.”

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A Complicating Factor

- MMBA says that PERB’s jurisdiction does not apply to police officers
- However, in 2019, PERB held that associations representing police officers could file PERB charges (*Orange County Sheriffs*)
- PERB’s take on the scope of bargaining is considerably broader than the courts (see e.g. *IOLERO*)
- Significant likelihood that PERB’s assertion of jurisdiction in this area is wrong – but issue has yet to be litigated

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Effects

Agencies must negotiate over effects of a management decision when those effects are within the scope of representation.

Examples of bargainable effects include effects on:

- Compensation
- Discipline
- Safety
- Promotional Opportunities
- Training

For instance: an employer has the right unilaterally to decide that a layoff is necessary, it must bargain about such matters as the timing of the layoffs and the number and identity of employees affected.

Application to 5 Police Reform Issues

- Use of Force
- Performance Evaluation and Discipline
- Shifts in Services
- Training
- Oversight

Use of Force

- One of the strongest management decisions recognized by the courts given its importance to the public.
- A 2018 Court of Appeal decision (*San Francisco Police Officers' Assn. v. San Francisco Police Co* (2018) 27 Cal. App. 5th 676) went so far as to imply that the management decision might be so significant that it precludes effects bargaining.
- However, the City in the case had already reached an agreement with the union on training and discipline.

Performance Evaluation and Discipline

- Generally considered matters that are within the scope of representation.
 - *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 817—policy enacted by a city, subjecting firefighters to discipline for washing their cars during work hours, was a disciplinary rule subject to meet and confer.

Investigations

- PERB and Courts have recently diverged on pre-investigative issues.
 - In the *ALADS* court case, an order prohibiting deputies from consulting with legal counsel and/or labor representatives in groups prior to investigatory interviews was arguably not a working condition and a management decision that was not outweighed by the benefit to bargaining. (See *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles* (2008) 166 Cal.App.4th 1625.)

Investigations

- In the *Orange county* court case, the police chief ordered the withdrawal of pre-interview access to the investigative file to deputies possibly subject to discipline and the court ruled that the Sheriff's order did not significantly and adversely affect wages, hours, or working conditions within the meaning of the MMBA. (See *Association of Orange County Deputy Sheriffs v. County of Orange* (2013) 217 Cal.App.4th 29.)
- In the *IOLERO* PERB case, the review board was authorized to conduct independent investigation of Sheriff's office employees and recommend discipline, subpoena records or testimony in investigations, review an officer's discipline record, and observe investigative interviews. (See *County of Sonoma* (2021) PERB Decision No. 2772-M.)

Shift and Services

- Contracting out usually viewed as a management decision like layoffs, but the benefit to labor relations can outweigh the public entities managerial interests. (See *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 120.)
 - Cutting costs weighs against agencies' managerial interest.
 - Genuine concern about the types of services—e.g. responding to mental-health calls—likely weigh in favor of the managerial interest.
- Transferring bargaining unit work out of the bargaining unit is fully bargainable

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Training

- Can be a matter within scope given that impacts hours and wages.
 - (See *Department of Corrections and Rehabilitation, Ventura Youth Correctional Facility* (2010) PERB Decision No. 2131-S, holding that policies relating to an employer's mandatory online training were within the scope of representation.)
- May be a subject of effects bargaining in the police setting – e.g. effects of changes in use of force policies

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- A managerial interest *sometimes*. (Berkeley Police Assn. v. City of Berkeley (1977) 76 Cal. App. 3d 931.)
- However, PERB found recently (IOLERO) that, applying the Claremont test, many forms of oversight weigh in favor of labor relations so they are subject to meet and confer.
 - Policies involving Body Worn Cameras.
 - Direct contact of complainants and witnesses ensuring the completeness and fairness of investigations.
 - Direct access to sources of investigative evidence.
- Where PERB has found action not within scope, it has still found bargainable effects. (Rio Hondo Community College District (2013) PERB Decision No. 2313)