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# LEGAL UPDATE

March 13, 2019

**To: Superintendents, Member School Districts (K-12)**

**From: Sarah Hirschfeld-Sussman, Schools Legal Counsel**  
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**Subject: Board Member Role in Labor Negotiations**  
**Memo No. 07-2019**

Several of our clients have reported employees reaching out to individual board members in an effort to influence collective bargaining negotiations. This Legal Update provides guidance for board members regarding their role in the collective bargaining process, and advises board members on best practices to follow when employees or union representatives petition them about issues related to negotiations.

Our primary recommendations for board members when they are approached by employees or union representatives about negotiations are as follows:

1. Avoid *any* individual conversations about issues in negotiations because these could be misrepresented, and could even rise to the level of violating the laws governing public school employer-employee relations;
2. Refer the individual to the board as a whole by encouraging them to make their comments at the public comment portion of an upcoming board meeting;
3. Remember that the board and its bargaining representatives are a team. The board and individual board members should not be mediating between employees and the district team.

Aside from best practices, board members should understand that a typical tactic by unions in negotiations is to attempt to divide the board from its team by these individualized conversations.



## Board's Role in Negotiations

The school board as a whole is the governing body of the district and the ultimate decision-maker for any actions taken by the district. The school board designates a team to represent the district's interests during negotiations with the bargaining unit. Typically, this team consists of members of district management knowledgeable about finance, human resources and site organization, and might also include an attorney or non-attorney advocate for the school district.

To communicate its position regarding matters within the scope of representation and instruct their negotiations team accordingly, the school board is permitted by the Brown Act to meet with their negotiations representatives in closed session. (Gov. Code § 3549.1, subd. (d).) During these closed session meetings, the school board authorizes certain parameters for negotiations, including the amount of money available for negotiations, and instructs their negotiations team on the board's goals. With the board's authority and direction, the district's negotiations team meets with the bargaining unit's negotiations team and enters into tentative agreements about matters within the scope of negotiations. These tentative agreements do not become binding until they are ratified by both the school board and the bargaining unit.

**Individually, no board member has any authority in negotiations.** Rather, the board as a **whole** makes decisions, instructs the negotiations team, and ratifies any tentative agreements reached in negotiations.

## Bypassing Negotiations Teams

The Educational Employment Relations Act ("EERA") governs employer-employee relations within the public schools, and is enforced by the Public Employment Relations Board ("PERB").<sup>1</sup> Under the EERA, both the school district and the employee organization are obligated to deal with the other's chosen representative to negotiate matters within the scope of representation. This means that, for matters subject to the negotiation duty, the bargaining unit is obligated to meet and bargain with the employer's chosen representatives, and the employer is obligated to meet and bargain with the unit's chosen representatives. Neither party may circumvent the negotiations process or the designated representatives.

If the school district wants to propose a change to a term or condition of employment, the district must propose the change to the team representing the unit for the employees affected, and may not directly deal with one or more affected employees.<sup>2</sup> For example, if a unified district with an elementary, middle and high school wants to change the class size for middle school classrooms, it cannot approach the middle school teachers with a proposal and ask them for their support, input, or to sign a document indicating their agreement; the district must instead propose the change to the teacher's bargaining team representatives. Approaching the middle school teachers individually without including the union could constitute impermissible bypassing of an exclusive representative or "direct dealing" in violation of the EERA.

Likewise, the employee's exclusive representative (i.e., the union) is obligated to meet and negotiate with the employer's chosen representative(s) on matters within the scope of

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<sup>1</sup> Gov. Code §§ 3540-3549.3.

<sup>2</sup> See, e.g., *Walnut Valley Unified School District* (1981) PERB Dec. No. 160.



representation, and must avoid direct negotiations with the school board. However, employee organizations and public employees have the same statutory right to participate at public agency meetings as the general public, and have a right to represent themselves and their members at public meetings of the school board. Although bypassing an employer's authorized negotiators by attempting to bargain directly with the public employer violates the duty to bargain, a union still has the right to advocate at a public meeting of the school board regarding working conditions, even if it relates to subjects under negotiations. In fact, even comments urging that the school board become more involved in the negotiations are permitted, as long as there is no evidence that the union is attempting to undermine the employer's designated negotiator, and the union remains willing to negotiate with the representative.<sup>3</sup>

However, there are narrow circumstances in which the employee organization may violate the EERA by failing to deal directly with the employer's chosen representative, which include:

- making a proposal or counterproposal to the board instead of transmitting it to the negotiations team,
- purposefully undermining the district's negotiating team to the board,<sup>4</sup>
- refusing to meet with the negotiations team and demanding to negotiate with the board instead, or
- demanding that a board member attend negotiations.

However, because of the employee's right to participate in public agency meetings, it is very rare that PERB will find an employee or employee representative in violation of this rule when addressing the board **as a whole**.

### First Amendment Right to Petition Board Members

Members of the public, including school district employees, have a First Amendment right to "petition" elected officials, including board members.<sup>5</sup> Accordingly, an employee or a member of the community has a right to speak at a public board meeting or to privately petition an individual board member through personal conversation, emails, or telephone calls. As such, **a school district cannot prevent a district employee from reaching out to an individual school board member in private, even if the employee is discussing a subject within the scope of negotiations, such as wages, class size, or health benefits.** This circumstance, however, poses a serious risk for the Board member, as discussed below.

### Board Member Best Practices When Approached About Negotiations

When a board member is approached by an employee or a member of the public about topics currently being negotiated by the district, it is best practice for the board member to not engage with the employee. The board member should immediately refer the person to the negotiating

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<sup>3</sup> *Westminster School District* (1982) PERB Dec. No. 277.

<sup>4</sup>Undermining includes disparaging members of the negotiations team: purposefully saying things to the board in an effort to corrode the board's confidence in the negotiations team. *Westminster School District* (1982) PERB Dec. No. 277 at 11. To rise to the level of undermining, the statements must demonstrate an intent to obstruct the negotiation process.

<sup>5</sup> U.S. Const., 1st Amend. [prohibiting any law "abridging...the right of the people...to petition the Government for a redress of grievances"].



teams. The board member should also indicate to the individual their right to speak to the board as a whole at a board meeting. Individual interactions could easily be characterized as bargaining with unit members, “bypassing representatives,” or undermining the union (or the district’s negotiating team) in violation of the EERA. As such, **we recommend that board members *not* engage with the individual, and instead refer them to the appropriate bargaining team or encourage them to attend a meeting of the Board so that all members can hear their comments.**

If the individual appears to be undermining the negotiations process by either making a proposal or counterproposal to the board member instead of transmitting it to the negotiations team, or purposefully undermining the district’s negotiating team to the board member (for example by accusing the district’s team of lying), we recommend you contact legal counsel to discuss the possibility of filing an unfair labor practice charge with PERB.

### Serial Meeting Concern

If several board members are approached by the same employee or member of the public, the board member should take precautions to prevent a serial meeting, in violation of the Brown Act, from occurring.

A majority of a school board is prohibited from using “a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action” on business within its subject matter jurisdiction outside of a meeting.<sup>6</sup> A series of private meetings (known as serial meetings) by which a majority of the members of a legislative body commit to a decision or engage in collective deliberation concerning public business violates the Brown Act’s open meeting requirement.

Individual contacts or conversations between a board member and an individual does not violate the serial meeting law unless the individual communicates to a majority of board members the comments or position of any other member or members of the body.<sup>7</sup>

However, keep in mind that communications of this nature are still extremely problematic. The casual or informal expressions of an opinion by a board member can easily be misunderstood and misapplied by the receiving individual which can lead to damage in negotiations. Many times individuals do not understand that the opinion of one board member does not represent the board as a whole.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

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<sup>6</sup> Gov. Code § 54952.2, subd. (b)(1).

<sup>7</sup> Gov. Code § 54952.2, subd. (b)(2).