



1-1-1978

# Public Entities, Officers and Employees

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## Recommended Citation

University of the Pacific; McGeorge School of Law, *Public Entities, Officers and Employees*, 9 PAC. L. J. 638 (1978).

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# Public Entities, Officers and Employees

## **Public Entities, Officers, and Employees; review and approval of development permits and environmental impact reports**

Government Code Chapter 4.5 (commencing with §65920) (new); Public Resources Code §§21080.1, 21080.2, 21080.3, 21080.4, 21083.6, 21083.7, 21100.2, 21167.2, 21167.3 (new); §§21002.1, 21080, 21080.5, 21083.5, 21104, 21105, 21151.5, 21153, 21165, 21166, 21167, 21174 (amended).

AB 884 (McCarthy); STATS 1977, Ch 1200

Support: California Manufacturers Association; Californians for Environmental and Economic Balance; Office of Planning and Research; Planning and Conservation League; State of California Chamber of Commerce

Opposition: California Air Resources Board

*Requires state agencies to compile lists that specify in detail the information required and the criteria to be applied in determining the completeness of development project applications; specifies maximum time limits that public agencies must follow in acting on development project applications; provides that the lead agency has the final and conclusive responsibility for determining whether an environmental impact report shall be required and sets maximum time limits for that determination when the issuance of a development permit is involved; specifies maximum time limits for responsible agencies to communicate to the lead agency the scope and content of the environmental information that must be included in the environmental impact report; specifies maximum time limits within which the lead agency must complete and certify an environmental impact report; declares that an environmental impact report shall be conclusively presumed to comply with the California Environmental Quality Act for purposes of responsible agencies if not challenged within the statutory period.*

### *Development Project Permits*

Article XI, Section 7 of the California Constitution makes a grant of police power, confined to local regulations and subject to general laws, to California's cities and counties. Article XI, Section 5, subdivision (a) provides charter cities with plenary power over zoning, planning, and issuance of permits for land use. This municipal home rule concept, however, does not preclude the state from regulating land use when necessary to further its interest [*CREED v. California Coastal Zone Conserv. Comm'n*, 43

Cal. App. 3d 306, 324, 118 Cal. Rptr. 315, 328 (1974)] and property owners may be required to obtain the permission of various political subdivisions before a proposed change in land use is completed.

Chapter 1200 finds and declares that there is a statewide need for expeditious decisions on applications for development project approval and for a clear understanding of the criteria upon which such decisions are to be based [CAL. GOV'T CODE §65921]. Accordingly, a new chapter has been added to the Planning and Zoning Law [CAL. GOV'T CODE §§65000-66499.58] to govern the review and approval of "development permits," a term Chapter 1200 does not define. Section 65931 of the Government Code defines "project" for purposes of the new approval scheme as "any activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." Thus, "development permit" as used by Chapter 1200 appears to encompass any entitlement for use issued by a public agency.

Various code sections refer to the timely review of permit applications, such as Section 30333.5 of the Public Resources Code, which authorizes the California Coastal Commission to remove a development permit application from any regional commission if it is not being processed in a "reasonably expeditious" manner. Prior to the enactment of Chapter 1200, however, no code provisions set definite time limits within which public agencies must act on applications for development permits.

Each state agency, which includes air pollution control districts [CAL. GOV'T CODE §65934], but excludes redevelopment agencies and local agency formation commissions [CAL. GOV'T CODE §65930], is now required by Sections 65940 and 65941 of the Government Code to compile not later than June 30, 1978, lists that must be made available to any person upon request and that specify in detail the information required and criteria to be applied in determining the completeness of applications for development project approval. Chapter 1200 further provides that any public agency must, not later than 30 days after receipt of an application, make a written determination of whether such application is complete and so notify the applicant, including in this written notification the manner in which the application can be made complete if it was found to be incomplete [CAL. GOV'T CODE §65943].

Once an application has been accepted as complete, no new or additional information may be requested of the applicant that was not required as part of the application [CAL. GOV'T CODE §65944]. Chapter 1200 specifies maximum time limits that must be followed in approving or disapproving the project [See CAL. GOV'T CODE §§65950-65957]. In establishing these time limits, Chapter 1200 has distinguished between "lead agencies,"

which have the principal responsibility for carrying out or approving a development project [CAL. GOV'T CODE §65929], and "responsible agencies," which have some, but not the primary responsibility for carrying out or approving such a project [CAL. GOV'T CODE 65933]. Subject to an extension that may not exceed 90 days upon consent of the public agency and the applicant [CAL. GOV'T CODE §65957], Section 65950 of the Government Code requires a lead agency to act on a project application within one year from the date on which it accepted the application as complete. Although a lead agency may waive the one-year time limit if a combined environmental impact report/environmental impact statement is being prepared pursuant to Section 21083.6 of the Public Resources Code, the agency must, in any event, act to approve or disapprove the project within 60 days after the combined document has been accepted [CAL. GOV'T CODE 65951]. Section 65952 of the Government Code requires a responsible agency to approve or disapprove a development project within 180 days either from the date on which the lead agency acted on the application or from the date on which the responsible agency has accepted the application as complete, whichever period of time is longer. The time limit for project approval by a responsible agency may also be extended for a period not to exceed 90 days upon consent of the responsible agency and the applicant [CAL. GOV'T CODE §65957].

Special significance is attached to the time limits established by Chapter 1200 in Section 65956 of the Government Code, which provides that the failure of a lead agency or a responsible agency to act within the required time results in automatic project approval. This sanction for not observing the time constraints set by Chapter 1200 would seem to provide more than adequate impetus for public agencies to expedite decisions on such projects.

Thus, Chapter 1200 has established the following timetable for approval of development permits: (1) not later than June 30, 1978, each state agency must compile and make available to all applicants for development permits a detailed list of the information required and criteria to be applied for project approval; (2) not later than 30 days after any public agency has received an application for a development permit, it must determine in writing whether such application is complete and indicate specifically the manner in which it can be made complete, if it was found to be incomplete; (3) a lead agency has no more than one year after receipt of a completed application to approve or disapprove the project and any responsible agencies have either 180 days from the date on which the lead agency approved or disapproved the project or 180 days from the date on which the responsible agency accepted the application as complete, whichever period of time is longer, to approve or disapprove the development project.

*Environmental Impact Reports*

Pursuant to the California Environmental Quality Act [CAL. PUB. RES. CODE §§21000-21176] [hereinafter referred to as CEQA], all public agencies are generally required to prepare an environmental impact report on any project they propose to carry out or approve that may have a significant effect on the environment [CAL. PUB. RES. CODE §§21100 (state agencies), 21151 (local agencies)] and that is of a discretionary rather than ministerial nature [See CAL. PUB. RES. CODE §21080]. Moreover, if a proposed project is not exempt from the provisions of CEQA, but would not have such impact or potential impact on the environment, a negative declaration to that effect is required [CAL. PUB. RES. CODE §21080(c)].

Chapter 1200 amends Section 21002.1 of the Public Resources Code to extend to all public agencies an express division of responsibility that formerly applied only to local agencies [CAL. STATS. 1976, c. 1312, §1.5, at —], and provides that a lead agency has responsibility for considering the effects of all activities involved in a project while a responsible agency has responsibility for only that portion of a project that it is required by law to carry out or approve [CAL. PUB. RES. CODE §21002.1(d)]. Moreover, Chapter 1200 makes clear that the lead agency, and not the various responsible agencies, has the responsibility for making the determination whether an environmental impact report or a negative declaration shall be required [CAL. PUB. RES. CODE §§21080(c), 21080.1] and provides that the determination of the lead agency shall be final and conclusive unless challenged pursuant to Section 21167 of the Public Resources Code [CAL. PUB. RES. CODE §21080.1].

Chapter 1200 also specifies certain maximum time limits within which public agencies must act when preparing environmental impact reports or reviewing the need for such reports [See CAL. PUB. RES. CODE §§21080.2, 21080.4]. If a project is one that involves the issuance of a development permit by one or more public agencies, the determination of whether an environmental impact report or a negative declaration is required must be made within 45 days from the date the lead agency accepted the project application as complete [CAL. PUB. RES. CODE §21080.2]. In the event the lead agency determines that an environmental impact report is required, each responsible agency has 45 days after receiving notice of such determination to communicate to the lead agency the scope and content of the environmental information that must be included in the environmental impact report with reference to the responsible agency's statutory responsibilities [CAL. PUB. RES. CODE §21080.4(a)]. Finally, as to those projects involving the issuance of a development permit by one or more public agencies, the lead agency, in consultation with the various responsible agencies [CAL. PUB. RES. CODE §§21104 (state agencies), 21153 (local

agencies)], must complete and certify environmental impact reports within one year, and negative declarations within 105 days, from the date on which the application was accepted as complete [CAL. PUB. RES. CODE §§21100.2 (state agencies), 21151.5 (local agencies)]. If, however, “compelling circumstances justify additional time and the project applicant consents thereto,” a reasonable time extension may be granted [CAL. PUB. RES. CODE §§21100.2 (state agencies), 21151.5 (local agencies)]. If both an environmental impact report and an environmental impact statement (pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. §§4321, 4331-4335, 4341-4347 (1970)] are required and the time to prepare the combined document would be shorter than that required to prepare each document separately, the applicant may request, and the lead agency may grant, a waiver of these time limits [CAL. PUB. RES. CODE §21083.6]. Nonetheless, since Chapter 1200 also requires a lead agency to consult with the federal agency that is to prepare the environmental impact statement and, whenever possible, use that statement in lieu of all or part of the environmental impact report [CAL. PUB. RES. CODE §§21083.5, 21083.7], it appears the the significance of the latter provisions relating to waiver of time limits may be somewhat limited.

Prior to the enactment of Chapter 1200, no subsequent report could be required of an applicant once an environmental impact report had been prepared unless substantial changes were proposed in the project or major revisions became necessary because of substantial changes in the circumstances surrounding the project [CAL. STATS. 1972, c. 1154, §16, at 2277]. Chapter 1200 adds to and clarifies these restrictions by prohibiting a lead or responsible agency from requiring a subsequent *or* supplemental environmental impact report unless: (1) substantial changes are proposed in the project; (2) major revisions become necessary because of substantial changes in the circumstances surrounding the project; or (3) “[n]ew information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available” [CAL. PUB. RES. CODE §21166].

Any action or proceeding alleging that an environmental impact report fails to comply with the provisions of CEQA must be commenced within 30 days from the date the public agency filed its notice of approval or determination to carry out the project [CAL. PUB. RES. CODE §21167(c)]. Chapter 1200 strengthens this 30-day statute of limitations by providing that if no action or processing is commenced during the 30-day period, the environmental impact report is conclusively presumed to comply with CEQA requirements “for purposes of its use by responsible agencies” unless one or more of the events described in Section 21166 occurs [CAL. PUB. RES. CODE §21167.2]. If an action or proceeding is commenced during the 30-

day period, Chapter 1200 directs the responsible agencies to assume that the environmental impact report does comply with CEQA requirements and to issue a "conditional approval or disapproval," which constitutes permission to proceed with a project only when the action or proceeding results in a final determination that the environmental impact report does comply with CEQA, according to the timetables established for development permit approval [*See* CAL. GOV'T CODE §§65950-65957]. Because Chapter 1200 does not mention lead agencies but expressly limits this conclusive presumption of compliance to purposes of the report's use by responsible agencies, it seems that a challenge for purposes of use by a lead agency would still be possible under Section 21167.2 of the Public Resources Code.

Thus, Chapter 1200 has made the following changes in environmental impact report procedures: (1) a lead agency, rather than various responsible agencies, is expressly given responsibility for considering the effects of all activities involved in a project and must make a binding determination as to whether an environmental impact report or a negative declaration is required; (2) a lead agency must determine within 45 days after it accepts an application as complete whether an environmental impact report is required after which each responsible agency has 45 days within which to communicate to the lead agency the scope and content of the environmental information that must be included in the report; (3) lead agencies must complete and certify environmental impact reports within one year from the date on which an application was accepted as complete; (4) a lead or responsible agency is prohibited from requiring a subsequent or supplemental environmental impact report once a report has been prepared, except under specified circumstances; and (5) if an environmental impact report is not challenged within the 30-day statute of limitations period, it is conclusively presumed to comply with CEQA requirements at least for purposes of its use by responsible agencies.

#### *COMMENT*

Long government delays and uncertainty in obtaining the necessary permits and approvals have been cited in the past as reasons for a business declining to locate new construction in California [*See, e.g.*, San Francisco Chronicle, April 22, 1977, at 10, col. 1 (Dow Chemical decision to abandon plans for a \$500 million petrochemical complex)]. Chapter 1200 is designed to eliminate much of the uncertainty in the application process and to expedite development project approval.

Chapter 1200 expressly delineates the responsibilities of lead and responsible agencies, assigning to the former responsibility for considering the individual and collective effects of all activities involved in a project and to the latter, responsibility for only those activities in a project that it is by law

required to carry out or approve [CAL. PUB. RES. CODE §21002.1(d)]. This limitation on the scope of a responsible agency's duties is a change from prior law [*Compare* 58 OP. ATT'Y GEN. 614, 622 (1975) (responsible agency required to consider *all aspects* of a project's environmental impact) *with* CAL. PUB. RES. CODE §21002.1(d) (responsible agencies must consider only activities they are by law required to carry out)], but would seem to promote the identified goal of Chapter 1200, which is to ensure a clear understanding of the approval process [*See* CAL. GOV'T CODE §65921], by reducing potential conflict regarding areas of jurisdiction and responsibility.

Under the guidelines adopted for the implementation of CEQA [14 CAL. ADM. CODE §§15000-15192 ("State EIR Guidelines")], public agencies have, since 1973, been required to carry out their responsibilities within a "reasonable time" [14 CAL. ADM. CODE §15054]. The legislature's addition of specific time limits in Chapter 1200 appears to provide smoother and more reliable procedures for the review and approval of development permits and environmental impact reports that should in great part alleviate the fears expressed in the past by potential developers.

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**See Generally:**

- 1) 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Real Property* §31 (environmental protection) (8th ed. 1973); §31 (Supp. 1976).
- 2) 7 PAC. L.J., REVIEW OF SELECTED 1975 CALIFORNIA LEGISLATION 467 (environmental impact reports) (1976).

## **Public Entities, Officers, and Employees; collective bargaining**

Government Code §§18850.2, 18850.3 (repealed); Chapter 10.3 (commencing with §3512) (new); §§1156, 1156.1, 1156.2, 3526, 3540.1, 3541, 18850 (amended).

SB 839 (Dills); STATS 1977, Ch 1159

(Effective July 1, 1978)

Support: California State Employees Association

Opposition: State Personnel Board

*Provides state employees with the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations; provides for the recognition of an employee organization as the exclusive representative of an appropriate unit; requires representatives of the Governor to meet and confer in good faith with employee organizations; provides for the joint preparation of a memorandum of understanding that must be presented, when appropriate, to the legislature for determination; provides for mediation to assist in reconciling a dispute regarding wages, hours, and other terms and conditions of employment; permits "mainte-*



*nance of membership” agreements under which state employees must remain members of an employee organization for a period as agreed to by the parties; vests in a Public Employment Relations Board certain broad powers and responsibilities with relation to state employees and the meet and confer process.*

Unless otherwise authorized by statute, public employees in California have no right to bargain collectively with their employing agency [City of Hayward v. United Public Employees, 54 Cal. App. 3d 761, 763, 126 Cal. Rptr. 710, 711 (1976)]. Chapter 1159 has enacted the State Employer-Employee Relations Act [CAL. GOV'T CODE §§3512-3524], providing state employees the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations [CAL. GOV'T CODE §3515]. In 1971, state employees were granted similar statutory rights to bargain collectively [*Compare* CAL. GOV'T CODE §3515 *with* CAL. GOV'T CODE §3527] and the state was required to meet and confer with representatives of the particular employee organizations upon request and consider “as fully as such [state] representatives deem reasonable,” presentations made on behalf of the employees [CAL. GOV'T CODE §3530]. Chapter 1159 has amended Section 3526 of the Government Code so that these latter provisions apply only to state employees not covered by the State Employer-Employee Relations Act [*See* CAL. GOV'T CODE §§3513(c) (state employee defined), 3526(a), (c)]. Since Chapter 1159 includes within the definition of state employee any civil service employee and the teaching staff of schools, “except managerial employees, confidential employees, those state employees regularly working outside of the state, and employees of the California Maritime Academy” [CAL. GOV'T CODE §3513(c)], it seems clear that the great majority of the state’s employees will be covered under the new collective bargaining provisions.

#### *Meet and Confer Requirement*

The scope of representation under the State Employer-Employee Relations Act is limited to wages, hours, and other terms and conditions of employment, and consideration of the merits, necessity, or organization of any service or activity provided by law or executive order is specifically excluded [CAL. GOV'T CODE §3516]. Chapter 1159 provides that the Governor or his or her representative must meet and confer in good faith with representatives of recognized employee organizations regarding matters within the scope of representation, and must consider fully such presentations as are made by the employee organization prior to arriving at a determination of policy or course of action [CAL. GOV'T CODE §3517]. “Meet and confer in good faith” is defined by Section 3517 to give “the

mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year.” This requirement, as compared to the former requirement on the state to consider the presentations of employee organizations “as fully as [the state] representatives deem[ed] reasonable” [CAL. GOV’T CODE §3530], appears to adopt for state employees more forceful “meet and confer” provisions similar to those provided for local public employees by the Meyers-Milias-Brown Act [CAL. GOV’T CODE §§3500-3510] [*Compare* CAL. GOV’T CODE §3505 *with* CAL. GOV’T CODE §3517].

Chapter 1159 also requires the state, except in cases of emergency, to give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation proposed to be adopted by the state that is directly related to matters within the scope of representation and further gives the recognized employee organizations the right to meet and confer with the administrative officials concerning such adoption [CAL. GOV’T CODE §3516.5]. In cases of emergency when the state has determined the immediate necessity of adopting such laws, rules, resolutions, or regulations without prior notice or meeting, notice and the opportunity to meet and confer must be extended at the earliest practical time [CAL. GOV’T CODE §3516.5].

All initial “meet and confer” proposals or counterproposals made by a recognized employee organization or the public employer must be presented to the other party at a public meeting and such proposals or counterproposals thereafter become a public record [CAL. GOV’T CODE §3523(a)]. Chapter 1159 then provides, except in cases of emergency, a seven-day period to enable the public to become informed and express itself on the proposals and other related issues [CAL. GOV’T CODE §3523(b)]. Thereafter, the public employer is required to hear public comment in open meeting on all matters related to the proposals [CAL. GOV’T CODE §3523(b)]. If the state determines that due to an emergency or calamity affecting the state, *which is beyond the control of the employer or employee organization*, that it must meet and confer and take action upon a proposal immediately, it may do so provided that the results of such meeting and conferring be made public as soon as reasonably possible [CAL. GOV’T CODE §3523(d)]. After the initial “meet and confer” proposals are exchanged, any subsequent proposals that are presented at a “meet and confer” session, together with any position taken thereon by the state, become a public record 48 hours after presentation if such proposals include any “substantive subject” not already presented for public reaction [CAL. GOV’T CODE §3523(c)]. Chapter 1159 does

not describe what the scope of a “subject” is for purposes of Section 3523(c), but it reasonably appears that a “subject” would include, *e.g.*, all offers and counter offers regarding computation of expenses and allowances for a group of employees, but not the determination of their seniority rights. Thus, once an issue has been identified as “on the bargaining table,” and public comment has been received, it appears that Chapter 1159 allows the parties participating in the “meet and confer” sessions to freely exchange offers and counter offers without the necessity of informing the public of each presentation and the state’s position thereon.

#### *Memorandum of Understanding*

If agreement is reached between the Governor and the recognized employee organization, Chapter 1159 provides that a written memorandum of understanding is to be jointly prepared by the parties [CAL. GOV’T CODE §3517.5]. This memorandum of understanding must be presented to the legislature for a determination of whether implementation of its provisions require the expenditure of funds or legislative action in the form of amendments to any sections of the Government Code not specifically enumerated in Section 3517.6 [CAL. GOV’T CODE §§3517.5, 3517.6. *See generally* CAL. GOV’T CODE §§13920 (rules and regulations regarding computation of pay and expenses and allowances), 13924 (determination of values and charges to be made to state employees for maintenance and other services furnished by the state), 14876 (wage formulas for skilled craftsmen)]. If the legislature determines that either of these actions are necessary, the memorandum is not to be effective without its approval; otherwise the memorandum of understanding is controlling without further legislative action [CAL. GOV’T CODE §§3517.5, 3517.6]. If, on the other hand, the Governor and the recognized employee organization fail to reach agreement after a reasonable period of time, Chapter 1159 provides for the appointment of a mediator [CAL. GOV’T CODE §3518], whose efforts toward reconciling a dispute may be made through interpretation, suggestion, and advice [CAL. GOV’T CODE §3513(d)].

#### *Representation*

Chapter 1159 provides supervisory employees [*See generally* CAL. GOV’T CODE §3522.1 (supervisory employee defined)] with the right to form, join, and participate in employee organizations of their own for representation on all matters of supervisory employer-employee relations, and provides separate procedures for governing such supervisory employer-employee relations [CAL. GOV’T CODE §§3522-3522.9]. Other state employees covered by the State Employer-Employee Relations Act may be divided into appropriate units based upon such criteria as the internal and

occupational community of interest among the employees, the effect the projected unit would have on the “meet and confer” relationships, the effect of the proposed unit on efficient operations of the employer, and the number of employees and classifications in a proposed unit [See CAL. GOV’T CODE §3521]. Possible exceptions to this general organizational scheme are that skilled craft employee groups and law enforcement employees are expressly given the right to be in a unit composed of such employees [See CAL. GOV’T CODE §§3521(b)(6), 3521.7] and that there is a statutory presumption that professional and nonprofessional employees should not be included in the same unit [CAL. GOV’T CODE §3521(c)]. In any event, state employees are secured the right to represent themselves individually in their employment relations with the public agency [CAL. GOV’T CODE §3515].

Section 3520.5 of the Government Code authorizes the state to grant exclusive recognition to employee organizations formally recognized pursuant to rules established by the Public Employment Relations Board, in which event the recognized organization is the only organization that may represent an appropriate unit in employment relations with the state [CAL. GOV’T CODE §3515.5]. Chapter 1159 also gives employee organizations the right to have membership dues, initiation fees, insurance premiums, and general assessments deducted from the employee’s salary or wages [CAL. GOV’T CODE §3515.6. *See generally* CAL. GOV’T CODE §§1156, 1156.1, 1156.2], and, significantly, allows the parties to agree to a “maintenance of membership” provision in a memorandum of understanding [CAL. GOV’T CODE §3515]. A “maintenance of membership” provision means that all employees who voluntarily are, or who voluntarily become, members of a recognized employee organization must *remain* members of that organization for a period as agreed to by the parties pursuant to a memorandum of understanding, provided that any employee may withdraw from the organization in the 30-day period prior to the expiration of the memorandum of understanding [CAL. GOV’T CODE §3513(h)]. Under prior law, a state employee was not barred from withdrawing from membership in an employee organization [See CAL. GOV’T CODE §§3525-3536]. Thus, the “maintenance of membership” provisions appear to provide employee organizations with a greater degree of stability than previously enjoyed in that now, once an employee has voluntarily become a member, he or she must remain a member in good standing for the prescribed period. Moreover, Section 3515(h), which defines “maintenance of membership” and grants employees the right within 30 days prior to the expiration of the memorandum of understanding to withdraw from an employee organization, is one of the enumerated sections of the Government Code that, when in conflict with a memorandum of understanding, will be superseded by the memorandum of understanding without further legislative action [CAL. GOV’T CODE

§3517.6]. In a statement of intent by the authors of the new law, the “maintenance of membership” provision was described as “not [to] preclude any employee from voluntarily terminating membership in any employee organization prior to the effective date of the applicable memorandum of understanding and that . . . [the] provision would thereafter apply to such employee only if such employee voluntarily becomes a member of the recognized employee organization” [JOURNAL OF THE CALIFORNIA SENATE 7098 (1977-78 Reg. Sess.)]. It appears, therefore, that the legislature intended to create a mechanism that can be very sympathetic to employee organizations who successfully bargain in “meet and confer” sessions.

#### *Public Employment Relations Board*

Chapter 1159 creates the Public Employment Relations Board that is independent of any state agency and consists of three members appointed by the Governor with the advice and consent of the Senate [CAL. GOV'T CODE §3541(a)]. The members serve alternating five-year terms, are eligible for reappointment, and may be removed only for neglect of duty or malfeasance in office [CAL. GOV'T CODE §3541(a)]. This Board is given broad powers and responsibilities under the State Employer-Employee Relations Act. For example, the Board is to receive any unfair practices charges, such as a refusal to meet and confer in good faith [CAL. GOV'T CODE §§3519(c) (unlawful state conduct), 3519.5(c) (unlawful employee organization conduct)] or the imposition or threatened imposition of reprisals on employees [CAL. GOV'T CODE §§3519(a) (unlawful state conduct), 3519.5(b) (unlawful employee organization conduct)], filed by an employee, employee organization, or employer, and is to have the discretionary jurisdiction to review and decide on the merits of any settlement or arbitration awards reached through grievance machinery established by an agreement [CAL. GOV'T CODE §3514.5(a)]. The Board also has the exclusive jurisdiction to make the initial determination as to whether the charges of unfair practices are justified, and if so, what remedy is necessary [CAL. GOV'T CODE §3514.5], and has the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take affirmative action, including but not limited to the reinstatement of employees with or without back pay [CAL. GOV'T CODE §3514.5(c)]. In addition, with regard to formally recognized organizations, the Public Employment Relations Board is required to establish reasonable procedures for petitions, for holding elections, and for determining appropriate units for exclusive recognition [CAL. GOV'T CODE §3520.5(b)]. The Board does not, however, possess authority to enforce any agreements between parties, nor may the Board issue a complaint or any charge based upon alleged violation of any such agreement unless such violation would also constitute an unfair prac-

tice under the new law [*See* CAL. GOV'T CODE §3514.5(b)]. Finally, any person who willfully resists, prevents, impedes, or interferes with any member of the Board, or any of its agents, in the performance of duties under the new law is guilty of a misdemeanor and subject to a fine not to exceed \$1,000 [CAL. GOV'T CODE §3514].

In summary, Chapter 1159 requires the state to meet and confer with the recognized employee organizations in good faith and to give reasonable written notice to each employee organization that would be affected by a proposed change in a law or regulation, so that the employee organization and administrative officials can meet and confer concerning the adoption of such proposed changes. Great latitude is allowed the parties when meeting and conferring, as is evidenced by the provisions of Chapter 1159 that recognize a memorandum of understanding as controlling in the event of a conflict with the enumerated Government Code sections. Thus, California's new collective bargaining law for state employees, the State Employer-Employee Relations Act, establishes procedures for a "meet and confer" process that parallel in many respects those of the Meyers-Milias-Brown Act, which provides a collective bargaining framework for local public employees [*Compare* CAL. GOV'T CODE §§3500-3510 *with* CAL. GOV'T CODE §§3512-3524].

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**See Generally:**

- 1) 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§407-11 (rights of public employees) (8th ed. 1974), (Supp. 1976).
- 2) Comment, *Public Sector Interest Arbitration: Threat to Local Representative Government?*, 9 PAC. L.J. 165 (1978).

### **Public Entities, Officers, and Employees; curtailment of state funds for unlawful discrimination**

Government Code §§11135, 11136, 11137, 11138, 11139, 11139.5 (new).

AB 803 (Brown); STATS 1977, Ch 972

Support: California NOW; California School Employees Association; Friends Commission on Legislation; League of Women Voters; NAACP; United Farmworkers

Opposition: Construction Industry Legislative Council

Article 1, Section 7 (due process and equal protection) and Section 8 (employment discrimination) of the California Constitution and various other provisions of California law prohibit discrimination on the basis of specified criteria [*See, e.g.,* *Murgia v. Municipal Court*, 15 Cal. 3d 286, 294, 540 P.2d 44, 49, 124 Cal. Rptr. 204, 209 (1975) (art. I, §7(a) safeguards individuals from invidious discriminatory acts of all branches of

government); CAL. CIV. CODE §51 (Unruh Civil Rights Act); CAL. HEALTH & SAFETY CODE §§35700-35745 (Rumford Fair Housing Act); CAL. LAB. CODE §§1410-1433 (California Fair Employment Practice Act)]. Prior to the enactment of Chapter 972, however, there was no specific authority for the curtailment of funding to state sponsored programs or activities that engage in discriminatory practices.

Chapter 972 has added Section 11135 to the Government Code to prohibit, under any program or activity that is directly funded by or receives any financial assistance from the state, the unlawful discrimination against, or denial of benefits to, any person “on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability.” Section 11136 has also been added to the Government Code to impose severe sanctions for the failure to observe these prohibitions. Whenever a state agency head determines that there is probable cause to believe a contractor, grantee, or local agency has unlawfully discriminated or denied benefits, Section 11136 requires that a hearing be conducted to determine whether a violation of the antidiscrimination provisions of Section 11135 has occurred. If it is determined in that hearing that a violation has occurred, the state agency that administers the program or activity must “take action to curtail” the violator’s state funding for the particular program or activity involved [CAL. GOV’T CODE §11137].

As introduced, Chapter 972 provided for the curtailment of *all* state funding to a contractor, grantee, or local agency who violated its provisions [AB 803, 1977-78 Regular Session, *as introduced*, March 7, 1977]. In an apparent effort to create an enforcement mechanism that was more flexible and less harsh, the penalty for violation has been changed to its present form, which applies only to the particular program or activity involved and seems to allow some agency discretion in the amount of funds that may be withheld from the particular project [*Compare* CAL. GOV’T CODE §11137 with A.B. 863, 1977-78 Regular Session, *as introduced*, March 7, 1977]. This latter conclusion follows from the use of the phrase “to curtail,” which means to cut off the end or any part of; to shorten, abridge, diminish, lessen, or reduce, but not to abolish [*See* *State v. Edwards*, 207 La. 506, 508, 21 So. 2d 624, 625 (1945); WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY 558].

Section 11138 of the Government Code requires each state agency that administers a program or activity that is directly funded by or receives any financial assistance from the state and that contracts for the performance of services to the public in an aggregate amount in excess of \$100,000 per year to adopt such rules and regulations as are necessary to carry out the provisions of Chapter 972. Chapter 972 also requires the Secretary of the Health and Welfare Agency, in cooperation with the Fair Employment

Practices Commission, to establish standards for determining which persons are protected by this new law and to set forth guidelines to determine which practices are discriminatory [CAL. GOV'T CODE §11139.5]. These two state agencies are further required to assist and consult with other state agencies in coordinating programs and activities to ensure that consistent policies, practices, and procedures for enforcement of the new law are achieved [CAL. GOV'T CODE §11139.5].

Although Chapter 972, by its terms, applies to all persons without regard to ethnic group identification, age, sex, or color [*See* CAL. GOV'T CODE §11135], Section 11139 of the Government Code requires an interpretation that will not frustrate the purpose of Chapter 972 or adversely affect lawful affirmative action programs. It is unclear, however, the extent to which a program or activity that receives state funding and that is designed to benefit the disabled, the aged, minorities, or women may constitutionally deny benefits to any person—minority or nonminority—solely because of his or her ethnic group identification, color, or sex [*Cf. Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 63, 553 P.2d 1152, 1171-72, 132 Cal. Rptr. 680, 699-700 (1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-811) (a racial classification intended to assist minorities, but which also had the effect of depriving those not so classified, of benefits they would have enjoyed but for their race, violated the constitutional rights of the majority)].

Thus, Chapter 972, by providing for the curtailment of state funding to a program or activity that unlawfully discriminates or denies benefits on the basis of ethnic group identification, religion, age, sex, color, or physical or mental disability, has created a potentially effective means with which to ensure that those programs and activities do not unlawfully discriminate or deny benefits. Moreover, by providing that the state agencies administering the various programs, and not the individual persons being discriminated against, have the burden of investigating and determining whether a violation of the provisions of Chapter 972 has occurred, there should be consistent enforcement of these prohibitions.