* Disclaimer: This index is compiled and published by staff of the L.A. City Employee Relations Board. Members of the Board itself play no part in that process. No representation is made concerning either accuracy of the index or its completeness. The index should therefore be used only for its intended purpose, i.e., as a guide to the case law of the Board.

ACCESS TO EMPLOYEES


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

ACCRETIONS TO BARGAINING UNIT, PROCESSING OF


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

ACCRETIONS, BARGAINING OBLIGATION FOLLOWING


AFFIRMATIVE DEFENSES (to normal bargaining obligation)

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


**AGENCY, PRINCIPLES OF**

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


**AGENCY SHOP FEES AS UNFAIR PRACTICE**


**APPROPRIATENESS OF UNIT** (See “Unit Appropriateness” below.)

**AUTHORITY OF BOARD**


ERO gives Board “broad power” to rectify unfair practices including restoration of the status quo ante and ordering parties to meet and confer in good faith. *Police Dept.* (1988) Dec. No. U-74. Through the July 1, 2001 enactment of MMBA section 3509, the legislature effectively removed from the trial courts initial jurisdiction of unfair practice charges. In the City of L.A., the provisions of subdivisions (a) through © of
section 3509 apply to the ERB, including that “the initial determination as to whether [a] charge of unfair practice is justified and, if so, the appropriate remedy necessary to effectuate the purposes of [the MMBA]...” Singletary et. al. v. Local 18, IBEW (2012) 212 Cal. App. 4th 32.


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

CLASS-BASED DISCRIMINATION

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

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

CONDUCT PROTECTED BY ERO


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

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


CONFIDENTIAL EMPLOYEES, DETERMINATION OF


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

CONTRACTING/TRANSFERRING OUT OF BARGAINING UNIT WORK

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


(Also see “Effects Bargaining” below.)

DEFERRAL


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

DIRECT DEALING WITH EMPLOYEES, BY MANAGEMENT


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

DISCRIMINATION /RETAIATION CLAIMS FOR PROTECTED CONDUCT

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


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


(Also see “Conduct Protected by ERO” above.)

**“EFFECTS” BARGAINING**


**EFFICIENCY OF OPERATIONS** (as Appropriate Unit Criterion)


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

EMPLOYEES UNDER BOARD’S JURISDICTION


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


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

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

EMPLOYER NEUTRALITY, REQUIREMENT OF BETWEEN COMPETING UNIONS


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

“Hands off” approach violates duty of neutrality if employer’s existing policy dictates affirmative action. Ibid.


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

(Also see “Agency, Principles of” above.)

ERO AND OTHER LEGISLATION


FAIR REPRESENTATION, DUTY OF


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

Negligent performance of “procedural or ministerial act” may be unlawful as arbitrary; union’s performance of act involving exercise of judgment is unlawfully
arbitrary only if “challenged act . . . involves a failure to raise a meritorious, substantive argument.” *Ibid.*

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


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

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

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

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


“FAVORED NATIONS” CLAUSE (in MOU)

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

GRIEVANCE PROCESSING BY MANAGEMENT


IMPASSE PROCEDURES UNDER THE ERO


(Also see “Unilateral Change by Employer” below.)

**INTERFERENCE CLAIMS**


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

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


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


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

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


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

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

INTERROGATION OF EMPLOYEES REGARDING UNION ACTIVITY


MANAGERS, UNIT PLACEMENT OF

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

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

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

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

MOOTNESS/DISCRETENESS OF ISSUE

Even if events occurring after filing of UERP claim arguably render issue(s) moot, Board may opt not to dismiss where further processing would create precedent for probable recurrence. All City Employees Assn./City of L.A. (1975) Dec. No. U-9.
Where, following filing of claim, respondent performs act nonperformance of which was purportedly unlawful, Board may dismiss claim by finding that issue involved has thereby been rendered moot. Municipal Construction Inspectors Assn. (2000) Dec. No. U-132.


NEWLY-CREATED CLASS, BARGAINING OBLIGATION FOR


NOTICE UNDER §4.850, FORM OF


PAST PRACTICE, CREATION OF

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

PEACE OFFICERS, DEFINITION OF


PREEMPTION (See “ERO and Other Legislation” above.)

PROFESSIONAL EMPLOYEES, DETERMINATION OF


State licensing not required for finding of professional status. Ibid. (Home Economist/Sr. Home Economist).
“REGULAR” EMPLOYEES (See “Employees Under Board’s Jurisdiction” above.)

RELEASE TIME TO MEET AND CONFER


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

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

REMEDIES FOR COMMISSION OF UNFAIR PRACTICES


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

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

RES JUDICATA


RETALIATION (See “Discrimination/Retaliation Claims” above.)

RETIREMENT BENEFITS BARGAINING


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


**SCOPE OF BARGAINING/MEET AND CONFER** (Also see “‘Effects Bargaining’ above.”)

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

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

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

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


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

Taking arrest authority from park rangers not mandatory bargaining subject notwithstanding relation to terms and conditions of employment because so “fundamental” that need for unencumbered decision making outweighs benefit to employer-employee relations of meeting and conferring. *Dept. of Recreation and*
Creation of voluntary training program not a mandatory bargaining subject notwithstanding indirect relation to promotability and therefore wages because employer’s need for unencumbered decision-making about such a fundamental policy decision outweighs benefit to employer-employee relations of meeting and conferring. *Dept. of Airports* (1987) Dec. No. U-70.


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


(See also “Effects Bargaining” above.)

**SCOPE OF MEET AND CONSULT UNDER ERO §4.830b**

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

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


**SEVERANCE PETITIONS**


**SEXUAL ORIENTATION DISCRIMINATION** (See “Class-Based Discrimination” above.)

**SUPERVISORS, DEFINITION/UNIT PLACEMENT OF**

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

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

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SUPERVISOR-NON-SUPERVISOR REPRESENTATION BY SAME UNION

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

SURFACE BARGAINING (aka “Bad Faith” Bargaining)


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

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

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

SURVEILLANCE OF EMPLOYEES


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

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

TIMELINESS OF UNFAIR CLAIM FILING (BOARD RULE 8.03)


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

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

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


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

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


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

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


UNILATERAL CHANGE BY EMPLOYER

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


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

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

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

UNION OFFICE, HOLDING OF


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

UNIT APPROPRIATENESS

Petitioning employee organization need not prove proposed unit is more appropriate than other possible configurations, only that proposed unit is “an” appropriate one. *City of L.A.* (1998) Dec. No. 352.
UNIT DETERMINATION OF CLASS LACKING INCUMBENTS

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

UNIT SIZE

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


WAIVER OF RIGHT TO MEET AND CONFER


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


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

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

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

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

“WEINGARTEN” (See “Right to Representation” above.)

[September 2015]