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Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts

By JOSEPH R. GRODIN*

The California Legislature has clearly been attempting to reconcile by selective innovation the divergent elements inherent in public employer-employee relations including the acknowledged distinctions in the status and obligations of public and private employees, as well as the various occupations and professions represented by public employment.

California Fed'n of Teachers v. Oxnard Elementary Schools.1

In 1961 California became one of the first states in the nation to recognize through a statute of general application the emerging concept of public employee bargaining.2 It was a rather limited recognition to be sure; the Brown Act3 gave public employees little more than the right to join or not to join employee organizations,4 and the right of employee organizations to be heard on employment matters affecting their members.5 The statute left many questions unanswered and provided no machinery for interpretation or enforcement. Still, it was a beginning and one might have expected, given such a head

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2. The first was Wisconsin in 1959. There are now thirty-six states which make statutory provision for public employee labor relations. Seidman, State Legislation on Collective Bargaining by Public Employees, 22 Lab. L.J. 13 (1971) [hereinafter cited as Seidman].


5. Id. §§ 3503-05 (West 1966), as amended, (Supp. 1971).
start, that California would have by now developed a comprehensive, intelligible, and forward looking legislative framework for labor relations in the public sector. Sadly, none of those adjectives apply.

One problem with the present statutory scheme is its fragmentation. At the time the Brown Act was adopted, special legislation already existed concerning labor relations for firefighters\(^6\) and employees of various transit districts.\(^7\) The firefighters legislation merely protected organizational rights, but the transit district statutes provided for full collective bargaining with, in some cases, the right to strike.\(^8\) The Brown Act applied to all employees of state and local government, but left the previous legislation intact. In 1965 the legislature removed school district employees from coverage under the Brown Act and adopted a separate statute, the Winton Act, governing their labor relations.\(^9\) That act, in turn, distinguished between certificated and classified employees, and contained separate provisions applicable to each. Finally, in 1968 the legislature adopted the Meyers-Milias-Brown Act,\(^10\) which substantially revised the Brown Act in the di-

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6. **CAL. LABOR CODE** §§ 1960-63 (West 1971), added by Cal. Stat. 1959, ch. 723, § 1, at 2711-12, protects the right of firefighters (state and local) to form, join, or assist labor organizations of their own choice, and to present and discuss with the governing body grievances and recommendations regarding wages, hours and working conditions. The statute also declares that firefighters "shall not have the right to strike, or to recognize a picket line of a labor organization while in the course of the performance of their official duties." **Id.** § 1962.

7. *E.g.*, **CAL. PUB. UTIL. CODE** §§ 25051-52 (West 1965), added by Cal. Stat. 1955, ch. 1036, § 2, at 1960-61, covers employees of the Alameda-Contra Costa Transit District and provides for bargaining in good faith with the representative chosen by a majority of the employees within an appropriate unit (as determined by the state conciliation service, in the event of a dispute) and for voluntary arbitration of unresolved bargaining disputes. **CAL. PUB. UTIL. CODE**, App. 1, §§ 3.6(b)-(g) (West 1965), contains similar, but more elaborate, provisions concerning the Los Angeles Metropolitan Transit Authority.

8. *See* Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960) (holding the protection of "concerted activities" under the Los Angeles Metropolitan Transit Authority Act to include the right to strike. An Alameda County Superior Court's decision to the same effect under the Alameda-Contra Costa Act (which provides for "collective bargaining" but does not mention "concerted activities") is currently on appeal. Alameda-Contra Costa Transit Dist. v. Amalgamated Transit Union, Div. 192, 1 Civ. No. 29,201 (Ct. App., 1st Dist., filed Dec. 15, 1970).


rection of the private sector collective bargaining model. The amendments, however, were made applicable only to employees of local governments, leaving the labor relations of state employees subject to the provisions of the original 1961 statute.\footnote{11} In 1971 the separation between state and local employees was formalized through the codification of applicable provisions into separate statutes, the designation “Meyers-Milias-Brown Act” being reserved for the statute applicable to employees of local governments.\footnote{12}

This statutory melange produces curious results. All firefighters continue to be covered by the pre-1961 legislation;\footnote{13} in addition, firefighters employed by local governments enjoy the protection of the Meyers-Milias-Brown Act.\footnote{14} State firefighters, however, are subject to the more primitive provisions based on the Brown Act.\footnote{15} Employees of a local transit district in some cases have the right to strike,\footnote{16} but city employees or employees of a municipal utility district in the same area do not.\footnote{17} A school board may recognize and bargain with a single employee organization on behalf of its classified employees, but if there is more than one employee organization representing certificated employees, it must bargain with the organizations jointly through a certificated employee council.\footnote{18} Many of the statutory distinctions appear to be the product of ad hoc political compromises, unsupported by any rational policy.\footnote{19}

A similar lack of thoughtful planning is reflected in the sub-

\footnote{13. See note 6 supra.}
\footnote{16. See note 8 supra.}
\footnote{17. See text accompanying notes 176-78 infra.}
stance of the individual statutes. They have grown like topsy, amend-
ment superimposed upon amendment without apparent attention either
to careful drafting or to the development of a coherent philosophy.
This is particularly true of the Meyers-Milias-Brown (MMB) Act, the
focus of this article. Unquestionably, the act constitutes an improve-
ment over the Brown Act in many ways, and it must be given par-
tial credit for stimulating the adoption by many local governments
of fairly progressive collective bargaining procedures and relationships.20
The development is uneven, however, and in large measure reflects
the political vectors of a particular community rather than the imple-
mentation of statutory principles.21 In cities and counties where labor
is politically strong, patterns of recognition and bargaining tend to
approximate the model which exists in the private sector.22 Where
labor is politically weak, the de facto situation shows little change
from before the statute.23 When questions arise as to what may be
required of a local government, or of an employee organization, the
statute provides little guidance.

The MMB Act has given rise to a considerable volume of litiga-
tion, but there are few appellate decisions to date. In order to deter-
mine what is happening to the statute in litigation, the author has ex-
amined files from some eighteen cases which resulted in opinions or
orders by superior courts. While there are undoubtedly cases which
are not included, the sample is probably representative of the problems
which have reached the courts and of the ways in which courts have
attempted to grapple with them in the context of the statutory lan-
guage. An analysis of the statute in the light of the decided cases,
together with the little available legislative history and the background
of local labor relations practices, forms the substance of this article.
The article's format is as follows:

20. The best description of the act in operation is contained in the series of publi-
cations by the Institute of Industrial Relations, University of California, Berkeley, called
"California Public Employee Relations" [hereinafter cited as CAL. PUB. EMPL. REL.].
For an early reaction by local governments to adoption of the act see Ross, The Cali-
fornia Experiment: Meet and Confer for All Public Employees, CAL. PUB. EMPL. REL.
Special Issue 1 (June 1969) [hereinafter cited as Ross]. For a more recent survey of
local implementation see Ross & DeGialluly, Implementation of the Meyers-Milias-Brown
Act by California's Counties and Larger Cities, 8 CAL. PUB. EMPL. REL. 6 (March 1971)
[hereinafter cited as Ross and DeGialluly].
22. E.g., LOS ANGELES CITY EMPLOYEE REL. ORDINANCE Nos. 141, 527, establish-
ing a local employee relations board, in 8 CAL. PUB. EMPL. REL. 64 (March 1971).
23. This is particularly true in the case of special districts, often remote from the
normal political process. See text accompanying notes 114-19 infra.
I. The Preamble: Confusion Anticipated

The preamble to the MMB Act (section 3500) states that one of the act's purposes is to improve personnel management and employer-employee relations in the public sector by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies.24

This tribute to uniformity is then followed by language declaring:

Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.25

The issue posed by the qualifying language in section 3500 is not one of legislative power, for it has been held that labor relations are matters of statewide concern, subject to governance by general law in contravention of local regulation even by chartered cities.26 Rather

25. Id. (emphasis added).
26. International Ass'n of Fire Fighters v. City of Palo Alto, 60 Cal. 2d 295, 298,
the issue is one of legislative intent—whether and to what extent the qualifying language reflects a willingness on the part of the legislature to permit local regulation of covered subjects. Read literally, the language could be taken to mean that everything in the statute is permissive only, and that nothing is binding upon any local government which decides by charter, ordinance, or rule that it would prefer to act in a contrary manner. But it is doubtful that legislative permission would be necessary in order to enable a local government to do the things which the statute permits or requires.\textsuperscript{27} Moreover, a purely non-pre-emptive interpretation would leave a local government free to adopt rules prohibiting employees from joining unions, to decline recognition to any organization, and to refuse to meet or confer with recognized organizations on matters pertaining to employment relations—in short, to undercut the very purposes which the act purports to serve. Such an interpretation is inconsistent with the general objectives of the statute as declared in the preamble and with the mandatory language which appears in many of the sections.\textsuperscript{28} If a purely permissive interpretation must be rejected, what does the qualifying language mean?

In general, the legislative intent behind the portion referring to merit or civil service systems is easy enough to discern—the legislature wanted to protect such systems to some extent (though precisely to what extent is not clear) against the pressures generated by the emerging bargaining process.\textsuperscript{29} Possibly the reference to “other methods of

\begin{itemize}
\item[\textsuperscript{27}] Obviously a local governmental body needs no statutory authority in order to adopt a policy of protecting rights of public employees to organize, nor to accord recognition to or enter into discussions with employee organizations. To the extent that the act is interpreted as authorizing binding agreements otherwise precluded (see text at note 168 infra) a permissive interpretation may be appropriate. It is noteworthy, however, that in 1957, four years prior to adoption of the Brown Act, there were at least twenty-three collective bargaining agreements in effect between local governments and employee organizations in California, covering approximately 5,000 employees. See \textit{Ross & DeGialluly, supra note 20 at 7-11.}
\item[\textsuperscript{28}] \textit{E.g., CAL. GOV'T CODE \S\S 3505, 3505.1, 3505.3, 3506, 3507, 3507.3, 3508 (West 1966), as amended, (Supp. 1971).}
\item[\textsuperscript{29}] It is probable that the language reflects in large measure the views of the independent civil service-type associations, and particularly the California State Employees Association, concerned with preservation of the civil service merit system. See views of Walter Taylor, Attorney for CSEA, in \textit{Proceedings—The Meyers-Millas-Brown and Winton Acts: Major Legal Issues} 48-9 (Institute of Industrial Relations, University of California, Berkeley) (Jan. 12, 1971) [hereinafter cited as \textit{Proceedings}].
\end{itemize}
administering employer-employee relations" runs in the opposite di-
rection: the Brown Act, in which the quoted language first appeared,
established a minimal level of communication between employers and
employee organizations, stopping short of requiring bargaining on the
private sector model. Yet, at the time of its passage, a number of
local governments were engaging in bargaining,\(^\text{30}\) and the reference
to "other methods" may have been intended to make clear that the
statute would not invalidate more advanced levels of employer-or-
gerization relationships. On that basis, the quoted language might
be read as protecting those labor relations "methods" which are con-
sistent with, and effectuate the declared purposes of, the statute as a
whole.\(^\text{31}\) Such an interpretation is at least consistent with the decisions
to date,\(^\text{32}\) and it will be assumed for purposes of the ensuing discussion.

The issue of the relationship between the act and civil service functions, as well as
the general issue of pre-emption, was raised in San Mateo County Employees Ass'n v.
County of San Mateo, Civil No. 142834 (San Mateo Super. Ct., Feb. 27, 1969). Plain-
tiff challenged the county's unilateral steps to contract out the operation of food depart-
ments in the county hospital on the ground that the county was under an obligation to
meet and confer with respect to that decision. The county contended that because its
charter gave the county board of supervisors authority to hire independent contractors,
reserving to the Civil Service Commission the power "to request" that any position be
filled by a civil service appointee, state law could not apply.

It relied, in that regard, upon Pearson v. County of Los Angeles, 49 Cal. 2d 523, 319
P.2d 624 (1957). The court, in rejecting the county's argument, stated: "The Court
however sees no conflict between the decision in Pearson and the ruling here to be made.
In fact, there is support for the Court's determination by reason of the following state-
ment in Pearson: 'It is settled that local rules or regulations as to matters which a
county is constitutionally empowered to regulate by charter supersede general State laws
on the subject, except as to matters of statewide concern where the State has occupied
the field.'

"It is the opinion of this Court that with respect to the procedural standards of
public employee-public employer relations the State has now occupied the field." (em-
phasis partially added). Memorandum Decision and Order Granting Temporary Injunc-

30. Ross, supra note 20, at 7-11.
31. Section 3502 protects also the right of employees to "represent themselves in-
dividually in their employment relations with the public agency." CAL. GOV'T CODE
§ 3502 (West 1966).
32. The only appellate decision which has discussed the issue is itself nearly as
cryptic as the statute. In Ball v. City of Coachella, 252 Cal. App. 2d 136, 60 Cal. Rptr.
139 (1967), a police chief claimed he had been dismissed for union activity in violation
of the Brown Act. The court rejected the city's argument for local control based on the
qualifying language in section 3500 by saying: "The argument is without merit. The
quoted provision was obviously included to avoid any possible construction that the
statute was intended to supplant any existing civil service system, merit plan, or other lo-
cal regulations dealing with employer-employee relations." Id. at 143, 60 Cal. Rptr. at
143. Interpretation of the case is complicated by the fact that at the time of dismissal
section 3508 of the act authorized a public agency, acting by resolution or ordinance, to
prohibit law enforcement officers under certain circumstances from joining employee or-
II. Organizational Rights of Employees

Section 3502 of the Government Code states that public employees have the right (and the right to refuse) 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. Section 3506 declares that public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

The protection accorded by these sections is qualified for specified categories of employees. Section 3507.5 provides that local public agencies may adopt rules preventing management and confidential employees from serving in a representative capacity for an employee organization which includes other employees, but the section does not otherwise limit the right of such employees to be members of and to hold office in an employee organization. Section 3508 presently provides that the governing body of a public agency may, in accordance with "reasonable standards," limit or prohibit the right organizations "where it is in the public interest to do so." Cal. Stat. 1961, ch. 1964, § 1, at 4143, as amended, CAL. GOV'T CODE § 3508 (West Supp. 1971). The court conceded that the city could have precluded union activities by the police chief if it had acted pursuant to formal rule. 252 Cal. App. 2d at 142 n.2, 60 Cal. Rptr. at 142 n.2. Thus, the court's reference to "other local regulations dealing with employer-employee relations" may have been intended to refer to that possibility. However, other portions of the opinion suggest strongly that in the absence of an enabling provision such as then contained in section 3508 a public agency could not limit the activities protected by section 3502. Indeed, section 3508 itself provided that: "The right of employees to form, join, and participate in the activities of employee organizations shall not be restricted by a public agency on any grounds other than those set forth in this section." After the dismissal of Ball, section 3508 was amended to the effect that full time peace officers could not be prohibited from joining organizations composed entirely of peace officers. Cal. Stat. 1965, ch. 285, § 1, at 1286. See text accompanying notes 37-40 infra.

33. Id.
34. Id. § 3506.
35. Referring to both Government Code sections 3500-09 and Labor Code sections 1960-63, the California Supreme Court has stated: "The total effect of all this legislation was . . . to create uniform fair labor practices throughout the state." Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 294-95, 384 P.2d 158, 169, 32 Cal. Rptr. 830, 841 (1963).
36. See text accompanying notes 89-93 infra for discussion of bargaining units for supervisors. The last sentence of section 3507.5, precluding limitation of the right to join and hold office, was added in 1969. See Cal. Stat. 1969, ch. 1389, § 1, at 2834.
37. See note 32 supra. The term "peace officer" is defined in CAL. PENAL CODE § 830 (West 1970).
of law enforcement officers to form, join or participate in employee organizations "where it is in the public interest to do so." The same section provides that "peace officers" may not be prevented from joining or participating in autonomous employee organizations composed solely of peace officers, and that the right of employees to form, join, and participate in the activities of employee organizations shall not be restricted "on any grounds other than those set forth in this section." Only a few local governments have adopted restrictive rules pursuant to section 3508.

There are certain differences in language between sections 3502 and 3506 and analogous sections of the Labor Management Relations Act (LMRA). Unlike section 7 of the federal act, for example, section 3502 speaks in terms of "representation" rather than "collective bargaining." It omits the federal reference to "concerted activities." In connection with the right of employees to refrain from engaging in organizational activities, the state act omits the federal proviso which expressly permits union shop agreements. The significance of those differences will be discussed later in this article.

Minor differences notwithstanding section 3502 follows the federal model at least with respect to the right to affiliate, and section 3506 is broader in scope than the comparable LMRA provisions since it picks up the language of both sections 8(a)(1) and (3) of the federal act and adds the word "intimidate" for good measure. A reasonable conclusion, therefore, is that the two sections taken together were designed to prohibit not only such obvious forms of union discrimination as discharge for union membership but also more subtle forms of in-

39. Id.
40. The Ross & DeGialluly survey, supra note 20, at 10-14, 16-20, shows only three counties and five of the 36 cities over 75,000 in population having adopted such provisions.
42. Id. § 157 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."
43. Id. § 158(a)(1) makes it an unfair labor practice for an employer to threaten, restrain, or coerce employees in the exercise of their section 157 rights.
44. Id. § 158(a)(3) makes it an unfair labor practice to encourage or discourage union activity by discrimination in employment.
terference such as interrogation,\textsuperscript{45} surveillance,\textsuperscript{46} and threats or promises of reward which may have chilling effects upon union organizational efforts.\textsuperscript{47} The prohibition against interference would, in accord with federal precedent, preclude even neutrally motivated rules which unreasonably restrict organizational efforts.\textsuperscript{48}

The similarity which the MMB Act bears to the LMRA in its substantive provisions is lost when it comes to procedure; while the federal act provides an administrative tribunal for interpretation and effectuation of the protected interests,\textsuperscript{49} the only remedy for violation of the state act is through the courts. This procedure is normally more costly and time consuming than agency procedure.\textsuperscript{50} Its cumbersome nature tends to make difficult the effective protection of

\begin{itemize}
  \item Questioning of employees concerning union membership or activities is lawful or unlawful according to its justification and its likely effect upon employees. The NLRB currently holds that polling of employees as to union affiliation or support is unlawful \textit{unless} (1) its purpose is to determine the truth of a union's claim of majority status; (2) this purpose is communicated to employees; (3) assurances against reprisals are given; (4) the polling is in secret ballot; and (5) no other coercive atmosphere exists. \textit{Struksnes Constr. Co.}, 165 N.L.R.B. 1062 (1967).
  \item Deliberate surveillance of union activities by management representatives is unlawful per se under the LMRA. \textit{See, e.g., Dal-Tex Optical Co.}, 152 N.L.R.B. 1317 (1965).
  \item Section 8(c) of the LMRA, the so-called "free speech" provision, denies protection to speech which "contains . . . threat of reprisal or force or promise of benefit." \textit{29 U.S.C. § 158(c) (1970)}; \textit{cf. Dal-Tex Optical Co.}, 152 N.L.R.B. 1317 (1965).
  \item \textit{Radio Officers v. NLRB}, 347 U.S. 17 (1954).
  \item Reliance by state courts on federal precedent for interpretation of sections 3502 and 3506 finds support in \textit{International Ass'n of Fire Fighters v. County of Merced}, 204 Cal. App. 2d 387, 22 Cal. Rptr. 270 (1962), where the court stated: "In view of the fact that the provisions of section 1962 of the Labor Code are in part identical with the provisions of section 7 of the federal Labor Management Relations Act, the construction placed upon the language [of section 7] by the United States Supreme Court is helpful in determining the connotation of that language as used in our Labor Code." \textit{id. at 392, 22 Cal. Rptr. at 274.}
  \item In \textit{Ball v. City of Coachella}, 252 Cal. App. 2d 136, 60 Cal. Rptr. 139 (1967), involving application of \textit{Government Code section 3506}, the court referred to the \textit{Fire Fighters} case with approval and commented that the language of section 3506 appears "stronger and more explicit" than language of Labor Code section 1962.
  \item \textit{29 U.S.C. §§ 153-56 (1970)}.
  \item An alternative to a state court suit for the protection of organizational rights under the MMB Act, and one that offers some hope in terms of litigation costs for the winning party, is suit in federal court under the provisions of the \textit{Civil Rights Act of 1871}. \textit{See 42 U.S.C. § 1983 (1970)}. That statute has been held applicable to union discrimination on the ground that the right to join and participate in the activities of labor unions is part of the right of association protected under the First and Fourteenth Amendments. \textit{E.g.}, \textit{American Fed'n of State, County, & Municipal Employees v. Woodward}, 406 F.2d 137 (8th Cir. 1969); \textit{McLaughlin v. Tilendis}, 398 F.2d 287 (7th Cir. 1968). Punitive damages are available in such a suit, at the discretion of the trier of
employee rights. Moreover, judges seldom have the labor relations experience necessary to evaluate the many subtleties in unfair labor practice cases. Courts are also ill-equipped to perform the conciliatory function by which agencies such as the NLRB frequently bring about voluntary compliance, and they may be reluctant to provide the kinds of remedies, such as posting of notices, which often perform a valuable function in labor relations matters. California, in failing to provide administrative enforcement machinery, lags behind both the federal government and most states.

III. Recognition

A logical description of any statutory system of industrial relations should start by asking who is supposed to bargain with whom. As a practical matter, the answer may be more significant than what the law says they bargain about, or how they bargain, or what they do with the bargain once it is made. Bargaining structure is bound to have substantial effect upon what happens in the bargaining process no matter what the law may say. Unfortunately, it is precisely at this recognition stage that the MMB Act begins to bog down.

A. Systems of Recognition

The crux of the recognition problem is plain enough: the legislature has from the outset been ambivalent regarding the applicability of the private sector model to the public sphere. The private sector model contemplates bargaining in good faith between an employer and a union designated by a majority of employees within an appropriate unit as their bargaining representative. If doubt exists concerning the union's status, it is typically resolved through an election. If a dispute exists concerning the appropriateness of a particular unit, it is settled by an impartial administrative agency. Once selected by a majority, a union acts as exclusive bargaining representative for all employees within the unit, whether they are members or not. Individual employees may represent themselves in grievance matters, but only if the resolution of the grievance is consistent with the collective bargaining agreement.51


fact. Lee v. Southern Home Sites Corp., 429 F.2d 290, 294 (5th Cir. 1970) (a real estate corporation refused to sell a lot to a Negro). Still, the procedure is a poor substitute for administrative enforcement.
Clearly, the legislature did not adopt the private sector model in the Brown Act. That statute eschewed the term "bargaining," and spoke only of the obligation of public employer to meet and confer with representatives of employee organizations upon request, and [to] consider as fully as it deems reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. The language primarily connotes a duty to listen to each employee organization "on behalf of its members." The term "employee organization" was defined generally to include any organization having agency employees as members and having as one of its primary purposes the representation of such members in employer-employee relations. Hence, an agency presumably had a duty to meet and confer with as many organizations as its various employees might wish to join.

In the Meyers-Milias-Brown Act amendments of 1968, however, the legislature moved markedly closer to the private sector model. The legislative history of the act makes the rejection clear. The legislature had before it two bills, one sponsored by the California Labor Federation (AFL-CIO) calling for a system of collective bargaining on the private sector model, Cal. A.B. 2375 (1961), and the other sponsored by the CSEA, calling also for negotiation in good faith with majority representatives but providing unit rules strongly favoring large units, and therefore association-type organizations. Cal. A.B. 2045 (1961). Each organization opposed the other's proposal, and both were opposed by the League of California Cities, which favored local determination. The result was a compromise pleasing no one in particular. See Ross, supra note 20, at 3-4. It has been suggested that the act made it through the legislature precisely because it was ambiguous. Id. at 21.

To the same effect was CAL. GOV'T CODE § 3503 (West Supp. 1971), which spoke of the right of employee organizations "to represent their members in their employment relations with public agencies." On the issue of "primary purpose," an organization's constitution and bylaws have been held not to control. California School Employees Ass'n v. Willits Unified School Dist., 243 Cal. App. 2d 776, 779-80, 52 Cal. Rptr. 765, 766-67 (1966) (decided under the Winton Act which contains similar language).

This is not to imply that the legislature has adopted the private sector model for all purposes. On the contrary, the act is closer to what the Advisory Commission on Intergovernmental Relations (ACIR) calls a "meet and confer" approach rather than a "collective negotiations" approach. ACIR REPORT ON LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT (1969). The "meet and confer" laws, according to the commission are "generally less comprehensive," they usually treat questions of representation, administrative machinery, dispute settlement, and unfair practices "more superficially," and they "usually accord a different status—a superior one—to the public employer vis-a-vis employee organization." Id. In May 1970, the ACIR drafted a comprehensive model meet-and-confer bill and an alternate bargaining bill. These bills are reprinted in 51 GOVT EMPL REL REP. 211, 215. A California appellate court in California Fed'n of Teachers v. Oxnard Elementary School, 272 Cal. App. 2d 514, 523,
The duty to meet and confer became the duty to meet and confer "in good faith," the definition of the revised commandment made clear that the goal of the process was not simply communication but agreement. The terms of an agreement were to be incorporated in a written memorandum, and employees were to receive time off from work to engage in the meet-and-confer process. Public agencies were not to take legislative action on matters affecting employment.

77 Cal. Rptr. 497, 506 (1969) commented: "Although the Brown Act was amended in 1968 . . . to require that the governing body of a public agency should 'meet and confer in good faith' and should reduce its employment agreements to writing . . . only the Los Angeles Metropolitan Transit Authority Act . . . has adopted and applied to employees in public service in California the collective bargaining concepts of the National Labor Relations Act or similar state statutes."

Such generalized observations are not particularly helpful in deciding particular issues, however. The definition of good faith bargaining under federal law, for example, is in terms of the duty to "meet and confer in good faith." See 29 U.S.C. § 158(d) (1970). Moreover, the ACIR itself concedes there are many variations in "meet and confer" type statutes. ACIR REPORT, supra. This article assumes that the meaning of California's legislation is to be found in its language and in the court decisions which have interpreted it, rather than in such a general characterization. For a more recent study and recommendations, avoiding such characterizations see "Pickets at City Hall"—Report and Recommendations of the Twentieth Century Task Force on Labor Disputes in Public Employment (1970), in 51 Gov't Empl. Rel. Rep. 151.

57. The 1968 amendments are based on two parallel bills, Assembly Bill 1182 and Senate Bill 1228. In their original form, both bills called for a public employer to "negotiate in good faith" with employee organizations, but the senate bill contained no definition of that term, and the assembly bill simply provided that the duty included the right of an employee organization "to be informed" on matters within the scope of representation and to receive reasonable notice of proposed agency action. As the bills moved through the legislature, they were amended to retain the "meet and confer" language but added the words "in good faith" and the current definition of the revised terminology. The senate bill, as amended, was enacted into law. Cal. Stat. 1968, ch. 1390, § 6, at 2727, codified at CAL. Gov'T CODE § 3505 (West Supp. 1971).

58. CAL. Gov'T CODE § 3505 (West Supp. 1971) provides in pertinent part: "'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer within 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."

59. Id. § 3505.1. "If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination."

60. Id. § 3505.3. "Public agencies shall allow a reasonable number of public agency employee representatives of recognized employee organizations reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the public agency on matters within the scope of representation."
relations without giving written notice. In the event of disagreement in the meet-and-confer process, mediation was authorized. In short, and at the risk of some over simplification, what had been a duty to listen became a duty to bargain.

But bargain with whom? Not, according to the 1968 amendments, with every "employee organization" as the Brown Act required, but only with a "recognized employee organization." The duty to meet and confer in good faith runs only to (and from) recognized employee organizations. Only such organizations are entitled to notice of proposed policy changes; only their representatives must be given time off for the meet-and-confer process; the statute's provisions relating to mediation apply only to their disputes. All that remains, then, is to determine the procedure and conditions in accordance with which recognition is to be granted or withheld.

Under the act, section 3501(b) defines a "recognized" employee organization as

an employee organization which has been formally acknowledged by the public agency as an employee organization that represents employees of the public agency.

Thus, the public agency accords recognition, and it does so through a process called "formal acknowledgment," a term which is not defined. Conceivably, the section helps determine when an employee organization has been recognized within the meaning of the statute. A superior court has held, for example, that although the city of Los Angeles granted "informal recognition" to various organizations shortly after passage of the MMB Act, the organizations were not entitled to meet-and-confer rights until adoption of an implementing ordinance since the process of formal acknowledgment had not taken place.

61. Id. § 3504.5. "Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by such governing body, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or such boards and commissions and shall give such recognized employee organization the opportunity to meet with the governing body or such boards and commissions."

62. Id. § 3505.2. "If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations."


64. Los Angeles Fire & Police Protective League v. City of Los Angeles, Civ. No.
The section provides no help in determining the conditions, if any, under which the statute requires recognition to be granted or withheld—no help, that is, unless the section were interpreted to mean that any employee organization which represents employees of the public agency must be recognized.

This view, that the statute requires adoption of a general recognition policy, was expressed by the legislative counsel in an opinion which issued while the MMB Act amendments were awaiting gubernatorial signature in 1968. Moreover, Assemblyman Milias, one of the bill’s co-sponsors, recorded apparent agreement with the legislative counsel’s position. Support for that position may be found in section 3502, which protects the right of employees to be represented by organizations “of their own choosing,” and in section 3503 which declares the right of recognized employee organizations to represent “their members” in their employment relations with public agencies. If the latter section means a recognized organization may represent its members only, then a general recognition policy would provide recognition for all employees without coercing membership into a particular organization.

But sections 3502 and 3503 were subject to less restrictive interpretations, and the 1968 amendments run counter to the legislative intent. Assuming the right to “participate” in employee organizations “of their own choosing” included the right to be represented by such organizations, the phrase “of their own choosing” is adapted from the LMRA where, of course, it connotes choice by a majority of employees through democratic procedures. See 29 U.S.C. §§ 151, 158 (1970). The difficulties posed by the language of section 3503 could be resolved either by interpreting the word “members” to include members of the bargaining unit, or by reading that section not as a limitation on the scope of representation, but as a minimum standard which may be exceeded by local government through local rules.
counsel's view. Addition of the word "recognized" to the term "employee organization" itself implied selectivity in extension of meet-and-confer rights.\textsuperscript{68} Section 3507, which provides that a public agency may adopt "reasonable rules and regulations" for administration of employer-employee relations and lists various matters which may be included, was amended in 1968 by addition to that list of "provisions for recognition." If it were intended that recognition should follow automatically upon proof that an organization represents some members of a public agency, it is not likely that rules and regulations would be necessary. Finally, the general thrust of the amendments was in the opposite direction. To require a public agency to meet and confer in good faith, as that phrase is currently defined, with every organization which can prove it has members within the agency and to extend to all such organizations the privileges ancillary to recognition is simply not feasible for large public employers. Such a requirement would place too great a burden upon the public agency; it would foster rivalry and dissension among organizations; and, by making negotiations more complex and agreement more difficult, it would tend to frustrate the stated objectives of the statute.\textsuperscript{69} Meeting and conferring in the MMB Act sense could not effectively take place in such a framework.

Even prior to the 1968 amendments several cities and counties had implemented a policy of according recognition on the basis of majority representation within appropriate units.\textsuperscript{70} Most local governments which adopted recognition procedures in response to those amendments did so in the form of "differential recognition" systems, according formal recognition (with meet-and-confer rights) to ma-

\textsuperscript{68}. It is arguable that the word "recognized" was added simply to enable local governments to adopt procedures for determining whether an organization qualifies as an "employee organization" within the meaning of section 3501(a). However, they had the right under section 3507, even before the 1968 amendment, to adopt rules for "verifying that an organization does in fact represent employees of the public agency, so the only additional function rules could serve within the ambit of section 3501(a) would be to verify that an organization has representation of such employees "as one of its primary purposes." Assuming, \textit{arguendo}, that the "primary purpose" test calls for the exercise of judgment on the part of the public agency, it seems unlikely that the legislature would have resorted to such a cumbersome way of stating that the public agency may adopt rules on that subject as well.

\textsuperscript{69}. \textit{See} Schneider, \textit{Unit Determination: Experiments in California Local Government}, 3 CAL. PUB. EMP. REL. 8-9 (1969). It is perhaps a reflection of such concern that the League of California Cities, in its proposed model ordinance, rejects the general recognition approach in favor of a majority choice system.

\textsuperscript{70}. Ross & DeGialluly, \textit{supra} note 20, at 7-11.
majority-designated organizations and informal recognition (with the right of "consultation" only) to others.\textsuperscript{71} In 1969 Los Angeles County's differential recognition system was upheld in the courts against an attack based in part on the legislative counsel's theory,\textsuperscript{72} and the validity of such systems has since been generally assumed.\textsuperscript{73}

At the same time, many public agencies appear to have been under the impression that to grant "exclusive" recognition to a majority organization, without reserving consultation rights to other organizations, would violate the act.\textsuperscript{74} The legal foundation for that belief is doubtful, since the only express rights a nonrecognized organization has under the act is the right to consult with respect to adoption of rules under section 3507.\textsuperscript{75} If sections 3502 and 3503 authorize limitation of meet-and-confer rights to a majority-designated organization, it should make no difference under the act whether other organizations do or do not have the right to consult. In any event, that issue has been resolved by the 1971 legislature which amended section 3507 to authorize provision for:

exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an

\textsuperscript{71} Id. at 10-11. The League of California Cities model ordinance provided such a system. 1 \textit{CAL. PUB. EMP. REL.} B-2, B-3 (1969). The differential system in effect accords minority organizations Brown Act-type rights.

\textsuperscript{72} Los Angeles County Employees Ass'n v. County of Los Angeles, Civ. No. 939557 (Los Angeles Super. Ct., Feb. 20, 1969). The suit was brought by the Los Angeles County Employees Association on the ground, among others, that the majority representation provisions of the ordinance (\textit{LOS ANGELES, CAL. ORDINANCE NO. 9646}, adopted Sept. 3, 1968) conflicted with the act. The superior court initially granted a preliminary injunction against implementation of the ordinance (Oct. 2, 1968), but after trial the court rendered judgment for defendants, and the court of appeals declined to issue a writ of supersedeas. \textit{See} 1 \textit{CAL. PUB. EMP. REL.} B-1 (1969). A subsequent merger between the association and a union mooted the issue.

\textsuperscript{73} \textit{See}, e.g., Sacramento County Employees Organization v. County of Sacramento, Civ. No. 213728 (Sacramento Super. Ct., Memorandum and Order Denying Preliminary Injunction, Aug. 23, 1971). The case involved the validity of an exclusive dues checkoff. See text accompanying notes 130-34 infra. In upholding the validity of such a system, the court stated: "[A]part from the right of individuals to represent themselves, Gov't Code Sections 3502, 3503, the county may act as if the 'recognized employee organizations' were the exclusive bargaining agents or representatives." \textit{Id.} at 1.

\textsuperscript{74} \textit{Assemblyman Milias, who earlier expressed approval of the legislative counsel's interpretation, see note 66 supra, stated in August of 1970, at a conference sponsored by the U.C.L.A. Institute of Industrial Relations on the Meyers-Milias-Brown Act of 1968: "We intended that this section (3501(a)) would allow any type of recognition that the governing agency chose to implement after conferring with all employee groups. We did not preclude exclusive recognition, mutual recognition, majority recognition, or any other combination you wish to consider."}
appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502(e) . . . . 75

Whether the 1971 amendment 76 to section 3507 uses the term "exclusive" in the narrow sense described in the preceding paragraph, or whether it uses the term in a broader sense to include any system which accords meet-and-confer rights on an exclusive basis is unclear. In either event, the amendment retains the former authorization for public agencies to adopt rules pertaining to "recognition of employee organizations," 77 so it is apparent that "exclusive recognition," whatever that term may mean, is not the only permissible form. A differential system, whether or not embraced within the amendment, should therefore continue to be valid. While it is arguable, on grounds considered above, 78 that a general recognition system is not compatible with the aims of the current statute, it is unlikely, given the act's legislative history and ambiguous language, that a court would hold such a system to be impermissible per se.

The 1971 amendment makes clear that exclusive recognition is to be accorded "pursuant to a vote of the employees." 79 Whether or not a differential system is considered to be exclusive, the statutory right of employees to be represented by organizations "of their own choosing" would seem to rule out criteria other than employee choice as a basis for selective recognition. The provisions of section 3507 invite judicial scrutiny into the reasonableness with which that criterion is implemented.

B. Adoption of Rules

Section 3507, in dealing with the adoption of rules by public agencies, uses permissive language, and several trial courts have expressed the opinion, though mainly in dicta, that an agency is free to adopt or not to adopt rules as it chooses. 80 Section 3507 also requires

76. See id.
78. See text accompanying note 69 supra.
80. E.g., Orange County Employees Ass'n v. City of Anaheim, Civ. No. M-1606 (Orange County Super. Ct., Feb. 26, 1971). The county, without benefit of rules, recognized Service and Maintenance Employees Union, Local 399, as representative for a unit of 600 part-time and 30 full-time employees at the city's sports and convention center. The Anaheim Municipal Employees Association, claiming 16 of the full-time
that rules be "reasonable" and, since the 1968 amendments, that employee organizations be consulted prior to their adoption. A purely permissive reading of section 3507 would produce the anomalous result that an agency could implement unreasonable policies without consultation so long as it did so on an ad hoc basis. Moreover, the absence of formal rules tends to frustrate the legislative policy, expressed in the 1970 amendment, that employee organizations not be denied recognition unreasonably. In the absence of rules, an employee organization cannot know clearly what it must do in order to obtain recognition, and the courts are likely to have difficulty in measuring the agency's acts against the legislative standard. Thus, the potential for arbitrary or discriminatory action, with concomitant chilling effects upon employee organizations, would be enhanced.

employees as members, sought an injunction to restrain the city from recognizing or bargaining with Local 399 with respect to those 16 individuals, on the ground that the act permits each employee to designate his own representative. In a supplemental points and authorities memorandum filed with the court, the plaintiffs made the additional argument that at least in the absence of rules regarding units and representation, the city's action in according exclusive recognition to Local 399 was improper. In denying a preliminary injunction, the court stated: "[T]he act is very clear that the political body in question may or may not adopt rules to implement the act." Reporter's Transcript, Feb. 26, 1971, at 2. The court went on to suggest that rules be adopted "to prevent a recurrence of what we have here." Id. at 3.

To the same effect is Los Angeles Fire & Protective League v. City of Los Angeles, Civ. No. 955544 (Los Angeles Super. Ct., Aug. 26, 1969), in which the plaintiff sought to compel the city to meet and confer on a variety of matters. The city had previously granted all employee organizations only "informal recognition." The court denied relief, holding that the city would owe the duty to meet and confer only if it "formally acknowledged" the league.

It is significant that Cal. A.B. 498 (1970), the bill underlying the 1970 amendment of section 3507 and requiring that recognition not unreasonably be withheld, was sponsored by the California State Firemen's Association. See note 81 infra. The court in California Fed'n of Teamsters v. Oxnard Elementary Schools, 272 Cal. App. 2d 514, 77 Cal. Rptr. 497 (1969), suggested one of the differences between the Winton Act and the Brown Act was that the former "makes it compulsory, rather than discretionary, for the public agency governing board to formulate rules relative to employment relations." Id. at 529, 77 Cal. Rptr. at 510.

81. A consultant to the Senate Industrial Relations Committee, in an analysis of A.B. 498 (the 1970 amendment to Government Code Section 3507), stated: "If this bill were to become law, and a public agency failed to adopt such rules and regulations as it is allowed to promulgate under section 3507 of the Government Code, then questions pertaining to formal recognition of employee organizations necessarily would be answered without the benefit of any predetermined agency standards or guidelines.

"The apparent practical effect of the bill would be to force a public agency to adopt rules and regulations to verify that an organization does in fact represent employees of the public agency. In any event, recognition of an employee organization could not be unreasonably withheld by any public agency as defined in Sec. 3501(c) of the Government Code." Consultant's Analysis of A.B. 498 for the Senate Industrial Relations Comm. (Mar. 13, 1970), on file at Hastings Law Journal.
The legislative counsel in his 1968 opinion on the MMB Act predicted that courts would overlook the permissive wording of section 3507 and make rule-making mandatory.\(^2\) No court has yet squarely fulfilled that prediction, but one superior court has suggested a compromise position: the adoption of rules is optional, in the sense that an agency cannot be ordered to adopt them, but a failure to adopt rules renders any restrictions upon recognition "unreasonable" within the meaning of the act. Therefore, in the absence of rules an agency must recognize any employee organization that requests recognition.\(^3\) The result, although somewhat arbitrary, does convey a certain sense of Solomonic justice.

C. Unit Determination

Unit determinations are as critical to the bargaining process as districting is to the political process. Such determinations affect not only the number but also the character of the organizations which represent an agency's employees. The definition of units may determine, for example, such matters as whether traditional civil service employees associations gain or lose strength in comparison to unions, whether craft unions gain or lose strength in comparison to unions seeking to represent employees on departmental or cross-departmental bases, and the like. The procedure by which such decisions are made, and the criteria brought to bear upon the decisions, are among the most significant factors in any industrial relations system.

Concerning the criteria for unit determination, the MMB Act,

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\(^2\) Opinion of Legislative Counsel, supra note 55. It is noteworthy that in 1967 a measure, Cal. A.B. 2381 (1967), was introduced expressly permitting public agencies to adopt rules on such matters as impasse resolving and bargaining units; and the bill was dropped in the senate on the apparent basis of a legislative counsel opinion that the bill would not create rights not already enjoyed by local governments. The motion to drop and the opinion appear consecutively at 1967 JOURNAL OF THE CALIFORNIA SENATE, Reg. Sess. 4041-43.

\(^3\) American Fed'n of State, County and Municipal Employees, Local 1675 v. City of Oakland, No. 417229, consolidated with Sovulweski v. City of Oakland, No. 417135 (Alameda Super. Ct., Nov. 9, 1971). An election was conducted pursuant to rules which had been proposed but not formally adopted. The court ruled the election invalid. Its decision rested in part upon a resolution previously adopted by the city council and contemplating the adoption of rules and regulations before an election was conducted, and in part upon the view that any restrictions upon recognition are unreasonable without rules having been established through the meet and confer procedure; and the court's opinion concluded by saying: "To allow such an election to stand would violate the dictates of Section 3507 in that it would constitute an unreasonable withholding of recognition of employee organizations." Ruling on Application for Preliminary Injunction, Nov. 8, 1971.
characteristically, sheds little light. The only explicit criteria are contained in section 3508, which authorizes rules requiring not only separate units but separate organizations for peace officers, and section 3507.3, which provides that professional employees may not be denied the right to be represented separately from nonprofessional employees and by a professional employee organization.

Section 3507.3 gives rise to several questions. It defines the term "professional employees" in general terms but illustrates the definition by examples which imply a rather limited category of college trained personnel. An attempt to include licensed vocational nurses and psychiatric technicians among the explicit examples was adopted by the 1970 legislature but vetoed by the governor, and disputes over application of the present language have given rise to considerable litigation.

A second issue under section 3507.3 is whether professional employees have the right to be represented separately in a unit limited to their own profession, or whether they may be included, against their will, in a unit consisting of more than one professional group. A superior court in Alameda County has ruled in favor of the latter alternative.

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84. See notes 26-32 supra.
85. Section 3507.3 provides: "'Professional employees' . . . means employees engaged in work requiring specialized knowledge and skills attained through completion of a recognized course of instruction, including, but not limited to, attorneys, physicians, registered nurses, engineers, architects, teachers, and the various types of physical, chemical, and biological scientists." CAL. GOV'T CODE § 3507.3 (West Supp. 1971).
87. E.g., California Licensed Vocational Nurses, Inc. v. Squoia Hosp. Dist., No. 141277 (San Mateo Super. Ct., filed June 4, 1971); Licensed Vocational Nurses League of California, Inc. v. County of Sacramento, No. 207379 (Sacramento Super. Ct., filed Nov. 25, 1970). Both were unsuccessful attempts to obtain judicial endorsement of licensed vocational nurses as "professionals." Western Council of Eng'rs v. County of Santa Clara, No. 249039 (Santa Clara Super. Ct., Apr. 27, 1971), holding that engineers were entitled to representation in a unit separate from nonprofessional employees.
88. Alameda County Ass't Pub. Defenders Ass'n v. County of Alameda, No. 412309 (Alameda Super. Ct., May 21, 1971). The board of supervisors had established a county wide residual unit consisting of approximately 360 nonhealth-related professional employees in a variety of professions. Organizations representing engineers and public defenders claimed the unit violated section 3507.3. Held: "Under the provision of Government Code Section 3507.3 attorneys and engineers have a right to be represented separately from non-professional employees, but they do not have a right to be represented separately from other professional employees." Findings of Fact and Conclusions of Law, Alameda County Ass't Pub. Defenders Ass'n v. County of Alameda, supra. But see Western Council of Eng'rs v. County of Santa Clara, No. 249039 (Santa Clara Super. Ct., Apr. 27, 1971) where the issue posed and decided by the court's
Finally, section 3507.3 leaves unclear whether the right of professional employees to separate representation may be waived by majority vote, as under federal principles, or whether it is a right running to each individual employee. If the MMB Act permits a system of representation based upon majority choice, it would seem that the federal analogy should control.

The act appears to extend representation rights to supervisory and managerial employees without regard to their position in the administrative hierarchy—a highly questionable proposition to begin with in view of the inevitable conflicts of interest involved. To make matters worse, nothing is said about their unit placement. Most local governments have excluded employees designated as "management" from units altogether, so far apparently without challenge, and have established separate units for supervisors above the first-line level. Supervisory units are, however, in many cases represented by employee organizations which also represent nonsupervisory employees.

With respect to unit determinations generally, the statute establishes no criteria. Local practice has varied from the application of fairly detailed guidelines to ad hoc determinations based upon no memorandum of opinion was whether engineers were entitled to representation in a unit separate from nonprofessional employees. The findings of fact and conclusions of law, however, state a conclusion opposite to that reached in the Alameda County case. See Opinion of the Legislative Counsel No. 1546 (Jan. 28, 1970), to the effect that it would be consistent with section 3507.3 and applicable law to allow professions to be separately represented.

89. This result follows from the broad definition of "public employee" in section 3501(d), excluding only elected officials and those appointed by the governor. It is contrary to the situation under the LMRA, which excludes supervisory and management personnel from the definition of "employee." See 29 U.S.C. § 152(3) (1970).

90. See Reith & Rosen, Problems in Representation of Supervisors, 8 CAL. PUB. EMPL. REL. 1 (1971) [hereinafter cited as Reith & Rosen].

91. Id. at 3. See also Ross & DeGialluly, supra note 20.

92. Reith & Rosen, supra note 90, at 3.

93. Id.

94. E.g., LOS ANGELES COUNTY, CAL. ORDINANCE 9646, § 8(b), Sept. 1968, providing for the following six criteria:

"(1) Which unit will assure employees the fullest freedom in the exercise of rights granted under this [o]rdinance.

"(2) The community of interest of the employees.

"(3) The history of employee relations in the unit, among other employees of the County, and in similar public employment.

"(4) The effect of the unit on the efficient operation of the public service and sound employee relations.

"(5) Whether management officials at the level of the unit have the power to agree or make effective recommendations to other administrative authority or the Board of Supervisors with respect to wages, hours and other terms and conditions of employ-
identifiable standards. In such a situation the only basis for judicial review has been the vague standard of "reasonableness" expressed in section 3507. One court applying that standard found that a county ordinance establishing a single unit for the county's 600 employees, without permitting lesser units no matter what the showing, was invalid upon the ground (among others) that it had a deterrent effect upon organization by nonincumbent groups.

The 1971 "exclusive recognition" amendment to section 3507 uses the term "appropriate unit," arguably inviting reference to standards of appropriateness established elsewhere in the private and public sectors. It also refers, however, to a vote of employees "of the agency or an appropriate unit thereof," suggesting that exclusive recognition may be accorded on an agency wide basis without regard to whether lesser units would be appropriate. Such a result may be avoided by reading the phrase "or an appropriate unit thereof" to require the establishment of lesser units where, in accordance with generally accepted criteria, they can be shown to be appropriate. But, the statutory guidance is vague indeed, and the vagueness is compounded by the unsuitability of the judicial process to the task of review.

The principal defect in the statutory provisions pertaining to matters of unit determination, however, is its lack of some neutral procedure for establishment of units in the first instance. With or without statutory guidance on criteria, a procedure which leaves unit determination to the governing body of each agency or an agency official is seen by many employee organizations to be, and may in practice be,
unfair. The governing body, after all, often has a vested interest, as employer, in the outcome. Moreover, disputes over the establishment of units may subject the governing body to political pressures it would prefer to avoid. Some local governments have recognized these problems and established neutral or relatively neutral procedures by ordinance. The system in the city of Los Angeles is the most elaborate, providing for a five-man local employee relations board.\textsuperscript{99} The system in the County of Sacramento is the most simple, providing for determination by a neutral arbitrator.\textsuperscript{100} Both are exceptions to the general practice.

A 1971 addition to the statute improves the situation somewhat. Section 3507.1 provides:

In the absence of local procedures for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute shall be submitted to the Department of Industrial Relations for mediation or for recommendation for the resolving of the dispute.\textsuperscript{101}

The new section comes into play, however, only in the absence of local procedures. It does not require that local procedures conform to any particular standards of neutrality; it does not provide for any review of determinations reached through local procedures; and it does not result in any binding decision.

Courts could determine, under the current statutory provisions, that any system of unit determination which fails to provide for neutral determination in the event of dispute is at least presumptively invalid, but ultimately there must be standards of neutrality established on a statewide basis and administered by a statewide agency. This does not mean that a statewide agency should make all unit determinations for local governments. Conceivably some local governments would wish to utilize the services of the state agency rather than establish their own procedures, but it would be undesirable and, at this point, unworkable to attempt a uniform state unit determination system. A state agency could, however, review local determination

\textsuperscript{99} Los ANGELES City, CAL., ORDINANCE 141,527, Jan. 29, 1971, reprinted in 8 CAL. PUB.EMPL. REL. 64 (1971). Section 4.810(a) provides that the board is composed of five members appointed by the mayor. Id. at 65. When vacancies occur, the position is filled from a list of three nominees prepared jointly by the Advisory Management Council of the city, and a committee composed of representatives of currently qualified employee organizations. Id. § 4.810(c), 8 CAL. PUB.EMPL. REL. 65-66.

\textsuperscript{100} Units were determined for the county pursuant to decision by Arbitrator Morris Myers on May 3, 1971. 10 CAL. PUB.EMPL. REL. 9 (1971).

\textsuperscript{101} CAL. GOV'T CODE § 3507, added by Cal. Stat. 1971, ch. 1575, § 1 (West Cal. Legis. Serv.).
procedures to assure elemental fairness and compliance with statutory procedures and criteria.\textsuperscript{102}

D. Selection of Majority Representatives

Among local governments which grant recognition on a selective basis, there exists a broad range of established criteria and procedures for determining the selection of majority representatives. Apparently, some local governments do not even accept the principle of majority employee choice as the governing criterion.\textsuperscript{103} However, most accept this principle but apply it in different ways. A few provide for recognition based on petition, records, or cards alone,\textsuperscript{104} but the overwhelming majority provide for election by secret ballot in the event of challenge.\textsuperscript{105} Moreover, among local governments which provide some election procedure, the majority rule principle is applied variously. Some permit recognition based on a majority of the valid votes cast (the federal method);\textsuperscript{106} others insist upon a majority of employees.

\begin{itemize}
\item[102.] New York's Taylor Act, N.Y. Civ. Serv. Law §§ 200-14 (McKinney Supp. 1971), empowers local governments to establish representation procedures in accordance with statutory criteria. \textit{Id.} § 206. These criteria include:
\begin{enumerate}
\item define the appropriate employer-employee negotiating unit taking into account the following standards:
\begin{enumerate}
\item the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;
\item the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment . . . and
\item the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.
\end{enumerate}
\item ascertain the public employees' choice of employee organization as their representative . . . on the basis of dues deduction authorization and other evidence, or, if necessary, by conducting an election.
\item certify or recognize an employee organization upon (a) the determination that such organization represents that group of public employees . . . and (b) the affirmation . . . that it does not assert the right to strike . . . ." \textit{Id.} § 207. \textit{See} King, \textit{The Taylor Act—Experiment in Public Employer-Employee Relations}, 20 Syracuse L. Rev. 1 (1968); McHugh, \textit{New York's Experiment in Public Employee Relations: The Public Employees' Fair Employment Act}, 32 Albany L. Rev. 58 (1967).
\item This procedure is used mainly in smaller cities and counties. \textit{See} Ross \& DeGiallulu, \textit{supra} note 20. It is not clear what is supposed to happen in the event of a challenge. See note 98 \textit{supra}.
\item E.g., the Alameda County ordinance provides that if a petition for representation is filed containing the signatures of a majority of employees within the unit, and no challenging petition is filed within thirty days from notice thereof, the petitioning organization is certified. \textit{County of Alameda, Cal., Administrative Code} ch. 7, §§ 7-9.05 to .06 (1971).
\item E.g., \textit{id.}
\end{enumerate}
\end{itemize}
within the unit,\textsuperscript{107} or a majority in an election in which a specified percentage of eligible voters participate.\textsuperscript{108}

The current language of section 3507, referring to a “vote of the employees” as the basis for according exclusive recognition, casts doubt upon the validity of those local procedures which rely upon card check or petition to determine majority status. To view such methods as a form of “voting” would be to distort ordinary usage. Procedures established under differential recognition systems could be regarded as exempt from the requirements of section 3507 if “exclusive recognition” were given a narrow interpretation. However, why the legislature would insist upon a vote to establish exclusive recognition and allow other methods of according meet-and-confer rights to majority organizations under circumstances in which minority organizations have the right of “consultation” is not at all clear.

Even if the new language were held not to apply to differential systems, sections 3502 and 3506 would seem to require that any system of selective recognition utilize a procedure reasonably calculated to determine employee choice in a manner which does not unreasonably interfere with protected rights. By those standards an election is certainly the most appropriate technique. A case can be made for the use of authorization cards or petitions under circumstances in which there is no substantial challenge to majority status or where, as under federal law principles, an election has been held but set aside on the basis of interference with free choice.\textsuperscript{109} It is difficult to defend the use of such procedures otherwise.\textsuperscript{110} In any event, a requirement that an organization demonstrate its representative status through petitions or cards ought not to be upheld where the organization objects to disclosure of names and there can be no effective guarantee of anonymity.\textsuperscript{111}

Where an election is held, it follows from the same standards that it should be conducted by secret ballot. An atmosphere free from coercion should be a condition to its validity.\textsuperscript{112} Whether local rules may require something more than a majority of votes cast is debat-
able. Section 3507 remains silent with respect to such issues, providing only that exclusive recognition may be revoked by majority vote only after a twelve month period.

Much of this is unfamiliar territory to most judges, however, and to expect meaningful judicial supervision over the selection procedures under the current statute is probably unrealistic. In what the author considers an extreme case (not surprisingly since the author was a participant) an irrigation district declined two union alternatives for recognition, one on the basis of authorization cards to be shown to a neutral party and another by an election to be conducted by a neutral party. After first questioning and insisting upon proof of the union’s “jurisdiction” to represent its employees and deferring consideration of the union’s request for several months, the district ended up recognizing an “independent” association which had represented its employees in past years. In explaining its actions, the district contended there was no reason to have two organizations representing its employees, the association was better able than the union to perform that function, and the association had majority support. The conclusion as to majority status was based upon a conversation between the district manager and two supervisors in which the supervisors reported that most of the employees whom they had talked to preferred the association to the union. The evidence was both flimsy and improper—flimsy in the sense that it was unreliable on the question of majority choice and improper in the sense that it involved interrogation of employees concerning union affiliation or sympathies. Nevertheless, a superior court upheld the district’s determination on the ground that it was “not unreasonable.” The case is currently on appeal.

In the area of representation procedures, as in the area of ma-

113. The NLRB originally required a majority of all unit employees. In re Chrysler Corp., 1 N.L.R.B. 164, 170 (1936). However, the rule was quickly changed. See In re R.C.A. Mfg. Co., 2 N.L.R.B. 159, 176 (1936).
115. The union’s request for recognition was made January 23, 1970, and denied June 5, 1970.
117. Id. at 12.
achinery for protection of organizational rights, California is woefully behind the federal government and nearly all other states. The initial executive order establishing collective bargaining for federal employees provided for levels of recognition, but the new order provides for exclusive recognition based on majority representation within appropriate units. Disputes over units are determined by the assistant secretary of labor for labor-management relations in accordance with specified criteria and recognition is accorded only on the basis of elections by secret ballot. State legislation, while subject to some variation, follows a similar pattern. With the exception of Alaska, whose statute simply authorizes labor contracts, California is the only state which fails to establish procedures for determining recognition.

IV. Union Security and Dues Checkoff

Since section 3502 of the act protects the right of employees "to refuse to join or participate in the activities of employee organizations,"

120. Exec. Order No. 10,988, 3 C.F.R. 521 (1964). Executive Order No. 10,988 provided for formal, or exclusive, recognition to majority unions and informal recognition, with consultation rights, to minority unions. The Federal Labor Relations Study Committee, created to study experience under the order, reported as follows concerning those provisions: "Informal recognition was originally intended to serve as a transitional feature in order not to disrupt existing relationships with small union groups in the early, developmental phases of the program. Reported experience with this form of recognition indicates that while a small number of unions still find it to be a useful tool, a substantial number of both union and agency officials believe it has outlived its usefulness. "In general, union experience has shown that it detracts from the dignity and prestige of exclusive recognition . . . . Agency experience also has been largely on the negative side. Federal management officials have found that informal recognition is no longer meaningful; that it encourages fragmentation, creates overlapping relationships, and places an undue administrative burden on management; and that unions with such recognition lack the strength to contribute substantially to stable labor relations. . . ."


121. Exec. Order No. 11,491, § 10, 3 C.F.R. 510, 515 (1970). Unions may also be granted "national consultation rights" at the agency level. Id. § 9, 3 C.F.R. at 515.

122. "A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations. A unit shall not be established solely on the basis of the extent to which employees in the proposed unit have organized . . . ." Management officials, supervisors, and guards are excluded from units established after the adoption of the new order, and professional employees are guaranteed a right to separate units. Id. § 10, 3 C.F.R. at 515.

123. Id. § 10(a), 3 C.F.R. at 515.

124. See Seidman, supra note 2.

125. ALASKA STAT. § 23.40.010 (1962).
and since, unlike the LMRA, the act contains no exemption from that protection in favor of union security agreements, to require an employee to belong to a particular employee organization as a condition of his employment would violate the act. Whether the same is true of a requirement that an employee pay an agency or service fee to an employee organization which has been selected by a majority of employees within an appropriate unit as their representative under the act is not so clear. While a union shop and an agency shop are legal equivalents under federal law, some states distinguish between them for purpose of applying a state right-to-work law. If a public agency, on the basis of majority choice, recognizes a single organization as representative of employees within a unit for purposes of meeting-and-conferring, then presumably that organization owes all employees within the unit a duty of fair representation. This is the basis for justifying the claim to financial support from all employees. Arguably, to require the employee organization to carry "free riders" by prohibiting the agency shop would be inequitable. Therefore, to ascribe such an intent to the legislature is unreasonable in the absence of clear language of prohibition. The words "join" and "participate" in section 3502 need not be interpreted to include the payment of a service fee by an employee within a represented unit.

The courts have not had occasion to pass upon the validity of the agency shop, but a related issue involving exclusive check-off of

128. Steele v. Louisville & N.R.R., 323 U.S. 192, 202 (1944). "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own groups members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation." Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944).
129. Support for this view may be found in the 1970 rejection of Senate Bill No. 719 which would have amended the second sentence of section 3502 to read: "Public employees also have the right to refuse to join or participate in the activities of employee organizations, including the payment of any type of dues, fees, assessments, or service fees of any type, and shall have the right to represent themselves individually in their employment relations with the public agency." The bill was defeated in committee. FINAL CALENDAR OF LEGISLATIVE BUSINESS 203 (1970). The Legislative Counsel, however, had previously expressed the view that an agency shop clause would "make meaningless the right of employees not to join employee organizations." Opinion No. 12613 (June 24, 1969). It is arguable, therefore, that the committee considered the bill to be redundant.
dues has been litigated. The employee relations ordinances in a number of cities and counties provide for deduction of dues only from the payroll of members of the recognized employee organization in each unit. As a result, other employee organizations which may have members within the unit must collect dues on an individual basis. In the county of Sacramento, the county employee organization and Local 22 of the Service Employees International Union sued to enjoin implementation of such a rule on the ground that the Government Code which provides for dues deductions for public employees, does not permit discriminatory treatment. They relied on Renken v. Compton City School District in which the court of appeal ruled the Government Code invalidated a resolution of a local school board allowing deductions in favor of a particular organization if a minimum of 50 percent of the employees eligible for membership in that organization gave signed approval. But the trial court, in a well-reasoned opinion, distinguished Renken as involving an arbitrary classification of organizations in terms of size without regard to function. Under the MMB Act, the court reasoned, the county may treat recognized employee organizations as exclusive bargaining agents, and on that basis there exists a functional difference between those and other organizations which justified deduction of dues for the benefit of the one and not the others.

V. Meeting and Conferring

A. The Scope of Representation

Section 3505 establishes the mutual obligation of public employers and employee organizations to meet and confer in good faith

130. Ross & DeGialluly, supra note 20.

131. CAL. GOV'T CODE §§ 1157.1, 1157.3 to .5 (West Supp. 1971). Section 1157.1 provides: "Employees of a public agency . . . may authorize deductions to be made from their salaries or wages for the payment of dues in . . . any bona fide association (a) whose members are comprised exclusively of the employees of such public agency, or (b) whose members are comprised exclusively of the employees of such public agency and one or more other public agencies the payrolls of which are prepared by the same finance officer . . . ."


133. 207 Cal. App. 2d 106, 24 Cal. Rptr. 347 (1962). But see California State Employees' Ass'n v. Regents of the University of California, 267 Cal. App. 2d 667, 73 Cal. Rptr. 449 (1968) (University of California employees not state employees within the meaning of sections 1150 through 1157.5).

regarding "wages, hours, and other terms and conditions of employment" and defines the phrase "meet and confer in good faith" in terms of the obligation to bargain and attempt to reach agreement "on matters within the scope of representation." Section 3504 defines that term to 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.\(^{135}\)

The phrase "wages, hours, and other terms and conditions of employment" is taken verbatim from the LMRA,\(^{136}\) where it has been given a generous interpretation, including almost anything that might affect an employee in his employment relationship.\(^{137}\) The phrasing of the first part of section 3504 suggests the scope of representation under the MMB Act is even more broad, though it is difficult to imagine how that would be possible. In any event, state courts have given it a broad interpretation. The bargaining obligation has been held to extend to such matters as: the privilege of police captains to use city automobiles after working hours,\(^{138}\) the contracting-out of food services for a county hospital,\(^{139}\) a city's decision to move toward coverage of city employees under the state retirement system,\(^{140}\) and the interpretation of an ordinance relating to salary setting.\(^{141}\)

One California state court decision\(^{142}\) follows federal precedent in extending the scope of representation beyond meet-and-confer ses-

\(^{135}\) CAL. GOVT CODE § 3504 (West Supp. 1971).
\(^{137}\) The term "wages" has been held to include all emoluments of value to employees. Richfield Oil Corp. v. NLRB, 231 F.2d 717, 724 (D.C. Cir. 1956). The term "conditions" includes actions of the employer affecting job tenure. Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210 (1964).
\(^{138}\) Oakland Police Officers Ass'n v. City of Oakland, No. 406059 (Alameda Super. Ct., Nov. 25, 1971) (enjoining unilateral discontinuance of this practice which allowed use of vehicles).
\(^{139}\) San Mateo County Employee's Ass'n v. County of San Mateo, No. 142834 (San Mateo Super. Ct., Feb. 27, 1969) (granting temporary injunction against unilateral action on the ground that it would affect hours and working conditions).
\(^{140}\) Van Fleet v. City of Oakland, No. 403056 (Alameda Super. Ct., Aug. 28, 1971) (requiring the city to cease giving effect to individual waivers, or determining voting units for pension elections unilaterally, or unilaterally determine policy with respect to pension matters).
\(^{141}\) San Luis Obispo County Employees Ass'n v. Freeman, No. 38265 (San Luis Obispo Super. Ct., May 5, 1971).
sions to the representation of individual employees on grievance matters as well. The city of Oakland maintained an employee evaluation system whereby employees were evaluated periodically by their immediate supervisor, with right of appeal to a reviewing supervisor. The outcome of the evaluations was reflected in the employee's personnel record, where it could affect such matters as discipline or promotion. The superior court in Alameda County ruled that employees were entitled under the act to have their union representative present at the reviewing supervisor level since the matter was one affecting terms and conditions of employment.\footnote{143} A superior court in Los Angeles, on the other hand, arrived at a contrary result in a case involving the desire of a college professor to be represented by his employee organization in a grievance involving denial of his tenure; it held the professor had no right to such representation under the act.\footnote{144}

The effect of the latter portion of section 3504, which excepts from the scope of representation consideration of the "merits, necessity or organization of any service or activity provided by law or executive order," has not been determined. The language was added as part of the 1968 amendments—presumably as a protection against the expanded concept of bargaining which those amendments embraced—but its meaning is far from clear.\footnote{145} Unions rarely wish to

\begin{footnotes}
\item 143. Id. The same superior court by a different judge, ruled that employers could not insist upon union representation at an ad hoc meeting called by administrative officials to inquire into reports that some employers had used county vehicles for other than official business; and that they could, therefore, be disciplined for their refusal to attend on that basis. Social Workers Local 535 v. Alameda County Welfare Dep't No. 390290 (Alameda Super. Ct., Aug. 17, 1970). The case is distinguishable on the basis of the ad hoc investigatory nature of the meeting. The IBEW case involved a more formal appellate review from adverse action already taken.

\item 144. CSEA v. Trustees of the California State Colleges, No. 998263 (Los Angeles Super. Ct., Jul. 8, 1971). See 10 CAL. PUB. EMPL. REL. 22 (1971). Since the case involved a state employee, however, the 1968 Meyers-Milias-Brown Act amendments did not apply.

\item 145. According to Walter Taylor, attorney for the California State Employee's Association, the qualifying language was inserted as a result of a conference with the Governor on Senate Bill 1228, which became the Meyers-Milias-Brown Act: "The Governor did not want employees to negotiate on matters that had to do with organization or mission. And you hear the ringing down across the years, because he said then, as he says now, he didn't want 'those social workers negotiating with the welfare people on the level of benefits to the clients ...'"

"And so [I] was sent out to do some drafting. And I came back with those words 'except, however ...'. And the Governor said: 'Well, with that in the Bill, I will sign it...'."

"So we marched back over to Senate Finance. And it was one of those occasions, you know, where the Committees go until late at night. I think it was about 11:00 o'clock at night by the time they called up S.B. 1228."
\end{footnotes}
bargain over the merits or necessity of a service or activity, but they may wish to bargain over such matters as lines of supervision or assignment of personnel, or workload. These matters could be regarded as going to questions of "organization." Perhaps the limiting language should be read as applying only where the organization of the service or activity is itself determined by law; the reference to "executive order" could have little application to local government.

B. The Duty to Meet and Confer in Good Faith

The MMB Act's definition of the core duty to meet and confer in good faith closely follows the LMRA definition of good faith bar-
It makes clear that the duty is not satisfied by an exchange of correspondence. Instead, representatives of the public agency and employee organization must meet and confer "personally" to "exchange freely information, opinions, and proposals," and most significantly, that they are "to endeavor to reach agreement on matters within the scope of representation." Section 3505 was amended in 1970 to provide that the parties were to meet and confer "within a reasonable period of time," leaving to interpretation whether that meant they were to start their meetings within a reasonable period of time after request, or were to conduct them for a reasonable period after commencement, or both. As a result of 1971 amendments, the section now provides that the parties will meet and confer "promptly upon request by either party and continue for a reasonable period of time," including adequate time for impasse resolution procedures provided or agreed upon. Agreement, when reached, is to be reduced to a written memorandum of understanding and presented to the governing body for determination. Section

Section 3505 provides: "'Meet and confer in good faith' means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer within 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."

Section 158(d) provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." (emphasis added).

In San Joaquin County Employee Ass'n v. County of San Joaquin, No. 102482 (San Joaquin Super. Ct., Sept. 3, 1970) the court held that the Board of Supervisors was not required to participate in meet-and-confer process. The ruling is supported by the fact that in 1968, concurrent with the adoption of the Meyers-Milias-Brown Act, the legislature amended the Ralph Brown Act (requiring public bodies to hold public meetings) to permit executive sessions involving dealings with employee organizations over salaries, schedules or compensation. Cal. Stat. 1968, ch. 1272, § 2, at 2397, codified in CAL. GOVT CODE § 54957.6 (West Supp. 1971). The amendment thus enables governing bodies to meet privately with management representatives without becoming directly involved in the process.

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150. CAL. STAT. 1970, ch. 727, § 1, at 1355.
151. CAL. STAT. 1971, ch. 1676, § 1, at 3965.
3505.3 fortifies the process by requiring public agencies to allow employees reasonable time off for meeting and conferring.\textsuperscript{153} Presumably certain types of conduct—for example, a refusal by either party to meet, or to make proposals, or to respond to proposals with argument, or to exchange information reasonably relevant to the bargaining process—will be regarded as per se violations of the MMB Act, as they are of federal law.\textsuperscript{154} Far more difficult to deal with are claims of bad faith based upon evaluation of particular bargaining positions or tactics. The federal system has enough difficulty attempting to distinguish between “hard bargaining” on one hand and the sort of attitude or tactics deemed incompatible with a desire to reach a negotiated agreement on the other.\textsuperscript{155} The difficulty is compounded under the MMB Act which places the burden of such determination entirely upon the courts. Courts confronted with such claims will tend to react negatively, as indeed they have in the litigation to date.\textsuperscript{156}

C. The Ban on Unilateral Action

The reluctance of courts to intervene when the claim is subjective bad faith in bargaining disappears when a public agency has

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  \item \textsuperscript{153} Id. § 3505.3. See Confederacion de las Raza Unida v. City of San Jose, No. 247184 (Santa Clara Super. Ct., Jan. 13, 1971), denying preliminary injunction sought by a group of taxpayers to enjoin the city from allowing a police officer time off for police association business. See 8 CAL. PUBL. EMP. REL. 63 (1971).
  \item \textsuperscript{154} The language of section 3505 appears to incorporate the duty of employers under federal law, derived from the good faith bargaining obligation to furnish a union with information which it needs in order to bargain intelligently. See NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956) (financial ability to grant a wage increase, where employer has made that an issue); Texaco, Inc., 170 N.L.R.B. 142 (1968) (evaluation data); Sylvania Elec. Prods., Inc., 154 N.L.R.B. 1756 (1965) (health and welfare information).
  \item \textsuperscript{155} See NLRB v. General Elec. Co., 418 F.2d 736, 756 (2d Cir. 1969) (sustaining the NLRB in holding that an employer's overall bargaining stance, including a take-it-or-leave-it approach, constitutes bad faith bargaining).
  \item \textsuperscript{156} E.g., Santa Cruz City Civil Serv. Ass'n v. City of Santa Cruz, No. 44234 (Santa Cruz Super. Ct., July 9, 1970), where plaintiff complained that the city's negotiating team met with the city council in “secret session” and agreed to place a dollar limit on increases, and subsequently adhered to that position without making any counter-offers. The court denied relief. Similarly, in San Joaquin City Employees Ass'n v. San Joaquin City, No. 104282 (San Joaquin Super. Ct., Sept. 3, 1970), plaintiff complained that bad faith “whipsawing” tactics were involved when the county's negotiating team made certain proposals and then turned negotiations over to the Civil Service Commission which reduced the last offer of the negotiating team. The matter was then referred to the board of supervisors, which made offers more liberal than the commission's position but not as liberal as that of the negotiating team. The court denied relief. See 7 CAL. PUBL. EMP. REL. 37. And in Sacramento Fire Fighters Union v. City of Sacramento, No. 206076 (Sacramento Super. Ct., Oct. 19, 1970), 75 L.R.R.M. 2509 (1970), the Sacramento superior court rejected a claim that bargaining on the basis of an asserted predetermined 6% ceiling was in bad faith.
\end{itemize}
taken unilateral action without bargaining at all. In such situations, courts have been quite zealous in condemning the unilateral action and in granting appropriate relief. For example, in San Mateo County Employee's Ass'n v. County of San Mateo, a superior court found the proposed contracting-out of cafeteria services fell within the scope of representation under the act and issued a temporary injunction prohibiting the county from opening and declaring any bids by proposed contractors until the meet-and-confer obligations were met.\textsuperscript{157} Another court found the use by police captains of city automobiles to be a bargainable matter and enjoined the city from unilaterally restricting their use pending bargaining.\textsuperscript{158} A third court determined that the transfer from a city to the state pension system was subject to bargaining and issued a similar order.\textsuperscript{159}

The statutory basis for such relief is characteristically ambiguous. The proposition that the duty to bargain implies, without the necessity for express provision, an obligation not to act unilaterally on a matter within the scope of bargaining has become an accepted part of federal law.\textsuperscript{160} The right of employees to representation has little meaning if an employer may circumvent the process through a \textit{fait accompli}. The California legislature was not content to let the matter rest with implication. When section 3505 was amended in 1968 to require meeting and conferring in good faith, the legislature retained from the Brown Act the additional obligation on the part of a public agency to "consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action."\textsuperscript{161} If the duty to meet and confer itself implies a ban on unilateral action, what is the import of this explicit obligation, phrased in terms more passive than the definition of meeting-and-conferring?

Perhaps the quoted language can be explained by reading "consider fully" as if it meant "meet-and-confer until an impasse has been reached." However, no such explanation is available for section 3504.5 of the act added to the statute in 1968. Under this section, when a governing body of a public agency or a board or commission proposed to adopt an "ordinance, rule, resolution or regulation directly relating

\textsuperscript{157} No. 142834 (San Mateo Super. Ct., Feb. 27, 1969).
\textsuperscript{158} Oakland Police Officers Ass'n v. City of Oakland, No. 406059 (Alameda Super. Ct., Nov. 25, 1970).
\textsuperscript{159} See note 140 supra.
\textsuperscript{161} CAL. GOV'T CODE § 3505 (West Supp. 1971).
to matters within the scope of representation” it must give recognized employee organizations notice and the opportunity “to meet” with the governing body.

In several cases, public agencies have argued that a particular matter falls within section 3504.5 rather than section 3505, and, therefore, an opportunity to appear before the governing body, rather than an opportunity to meet and confer, is all that is required. One court has suggested drawing a line between “legislative acts,” to which section 3504.5 is applicable, and “administrative acts,” to which the more stringent requirements of section 3505 apply. The case was found not to involve a legislative act, and so the court held section 3505 to be applicable. However, the converse cannot be true in all cases. Plainly an employee organization is not precluded from bargaining over wages, for example, simply because action on wages takes the form of a salary ordinance. Another court has held that section 3504.5 rather than section 3505, applies to a city council’s decision to submit to referendum certain proposed changes in the prevailing wage provisions of the city charter. A city employees’ association contended the city should “meet and confer” regarding the proposed referendum, but the court held to the contrary. The court apparently accepted the city’s rationale that the action contemplated was of a “general nature, applying to employees generally” as opposed to “more specific matters, such as wages and hours for specific classes of employees,” on which bargaining is required.

Both courts assumed that sections 3504.5 and 3505 are mutually exclusive, imposing different standards applicable to different types of governmental action. That assumption is compelled neither by statutory language nor by legislative history. Section 3504.5 applies to actions “directly relating to matters within the scope of representation,” and section 3505 requires meeting and conferring on “matters within the scope of representation.” The language hardly suggests distinct categories. Meeting with the city council or a board of supervisors was an established form of communication between employee organizations, particularly independent associations, and local public agen-

164. See Points and Authorities and Declarations in Opposition to Application for Issuance of Preliminary Injunction for Defendant at 3, Sacramento City Employees Ass'n v. City of Sacramento, No. 205314 (Sacramento Super. Ct., Sept. 21, 1970).
cies in prebargaining days. Possibly, the legislature wished to preserve that form of communication as to some matters on which meeting and conferring had taken place. Once again, however, it is apparent that legislative clarification is required.

VI. Agreements and Their Enforcement

The MMB Act says nothing about enforceable agreements between a public agency and an employee organization. Parties in the meet-and-confer process are to endeavor to reach agreement, and if they succeed, the terms of agreement are to be incorporated in a jointly prepared written memorandum of understanding. However, the statute states categorically that the memorandum is to be non-binding. The memorandum is to be presented to the governing body or its statutory representative "for determination," but the statute is silent with respect to the alternative forms of determination or their legal effect. If, for example, the governing body proceeds to incorporate the terms of the memorandum in an ordinance, the ordinance is itself enforceable. But what if it merely, or at least preliminarily, adopts or ratifies the memorandum by resolution? Has it then entered into an enforceable agreement?

Notwithstanding the lack of explicit statutory authority, the courts have uniformly held that a memorandum of understanding, once adopted by the governing body of a public agency, becomes a binding agreement. For example, superior courts have issued writs of mandamus to compel compliance with memoranda provisions relating to a city's obligation to replace worn-out police vehicles, and to a city's promise to conduct a joint salary survey and implement its results in accordance with a state formula. An appellate court has stated the proposition even more broadly:

[When a public employer engages in [meetings pursuant to the duty to meet and confer] with the representatives of the public employee organization, any agreement that the public agency is authorized to make and, in fact, does enter into, should be held valid and binding as to all parties. . .

165. Ross, supra note 20.
168. San Jose Peace Officers Ass'n v. City of San Jose, No. 254096 (Santa Clara Super. Ct., June 6, 1971).
170. East Bay Municipal Employees, Local 390 v. County of Alameda, 3 Cal.
The quoted language comes from a decision involving a strike settlement agreement, where the question of enforceability is complicated by the probable illegality of the strike. The reasoning should apply a fortiori where no strike is involved.

If public agencies may enter into enforceable agreements with employee organizations under the MMB Act as the courts have indicated, there would appear to be no legal reason why the agreement could not provide for enforcement through grievance procedures leading to binding arbitration rather than through the courts. The MMB Act says nothing about that issue, and most jurisdictions which make

App. 3d 578, 584, 83 Cal. Rptr. 503, 508 (1970). But see Social Workers Union Local 535 v. County of Los Angeles, 270 Cal. App. 2d 65, 75 Cal. Rptr. 566 (1969), refusing to enforce a promise by county officials that striking employees would be reinstated without loss of fringe benefits. The court in the County of Alameda case distinguished the holding in the Los Angeles case on the ground that the promise was made without authority and in violation of the city's civil service rules. 3 Cal. App. 3d at 585-86, 83 Cal. Rptr. at 508-09.

171. Cf. State v. Brotherhood of Railroad Trainmen, 37 Cal. 2d 412, 232 P.2d 837 (1951), holding invalid a collective bargaining agreement between the Board of State Harbor Commissioners and various railroad unions. The union suggests that a governmental body requires statutory approval to enter into such an agreement, since "the terms and conditions of government employment are traditionally fixed by legislation and administrative regulations, not by contract." Id. at 417. It is significant, however, that the employees in question were covered by civil service and that various provisions of the agreement were found to conflict with civil service laws. Id. at 414. The holding may be limited, therefore, to the proposition that a governmental body may not enter into a collective bargaining agreement which conflicts with applicable statutes or regulations. In any event, East Bay Municipal Employees, Local 390 v. County of Alameda, 3 Cal. App. 3d 578, 83 Cal. Rptr. 503 (1970), strongly suggests that the MMB Act constitutes legislative approval of binding commitments on matters subject to the meet-and-confer process. Two superior courts have reached contrary conclusions under the Winton Act. Jefferson Elementary School Dist v. Joan Bent, Civ. No. 158146 (San Mateo Super. Ct., Nov. 15, 1971); Hayes v. Association of Classroom Teachers, No. 977964 (Los Angeles Super. Ct., Oct. 20, 1970), in 7 CAL. PUB. EMPL. REL. 49 (1970).


Apart from the general validity of binding grievance arbitration, questions arise with respect to the relationship between such procedures and traditional civil service review procedures, in many cases established by charter. See Amundson, Negotiated Grievance Procedures in California Public Employment: Controversy and Confusion, 6 CAL. PUB. EMPL. REL. 1 (1970). One solution is to provide for waiver of civil service procedures by an employee who prefers to rely upon a negotiated procedure. See Grodin & Hardin, Public Employee Bargaining in Oregon, 51 ORE. L. REV. — (1972).
provision for arbitration procedures, perhaps assuming that binding awards are not permissible, have made the arbitrator's award advisory only. An increasing number of agreements, however, provide for binding arbitration, and at least one court has ordered arbitration pursuant to such an agreement, through issuance of a writ of mandate. An amendment to the statute making clear the propriety of such agreements would be helpful.

VII. Strikes and Impasse Resolution Procedures

The view of California courts—or, more precisely, of two panels of the court of appeal with the supreme court declining hearing in both cases—is that strikes by public employees are unlawful in the absence of legislative validation. The MMB Act does not mention strikes, and evidence of legislative validation is difficult to find, particularly in light of section 3509 which specifically denies legislative intent to make the provisions of section 923 of the Labor Code applicable to public employees. Consequently, strikes by employees subject to the MMB Act have been held unlawful in the sense that they may be enjoined—subject, of course, to equitable defenses and constitutional safeguards.

173. Amundson, supra note 172; Ross & DeGialluly, supra note 20, at 7. Advisory arbitration inevitably causes serious problems when the advice is not accepted. For the furor created over the Los Angeles County advisory system see Communications: Los Angeles County Employee Relations Commission, 10 Cal. Pub. Empl. Rel. 37 (1971).

174. Agreements containing provision for binding grievances arbitration have been entered into by the cities of Concord, Anaheim, and Hayward, the county of Sacramento, and several special districts. The Employer-Employee Relations Chapter for the city of Los Angeles provides that each memorandum of understanding “shall provide for final and binding arbitration of all grievances not resolved in the grievance procedure...” Los Angeles City, Cal., Ordinance 41,527, § 4.865a. See 8 Cal. Pub. Empl. Rel. 70.

175. Orange County Employees Ass'n v. City of Anaheim, No. M-1768 (Orange County Super. Ct., Sept. 2, 1971). The county opposed arbitration on the ground that back pay for a terminated employee was not an arbitrable issue. The propriety of the procedure was not challenged.


177. Cal. Labor Code § 923 (West 1971) protects, inter alia, the right of employees to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” The section protects the right to strike in the private sector. Petri Cleaners, Inc. v. Automotive Employees, Laundry Drivers & Helpers Local 88, 53 Cal. 2d 455, 471, 349 P.2d 76, 86, 2 Cal. Rptr. 470, 480 (1960).

I tend to the view that a ban on strikes by public employees is both unwise and inequitable, unless it is limited to strikes which imperil public health or safety, but I do not argue that position here. The issue has been debated extensively and ably in other quarters.

The question raised here is, given such a strike-ban policy, whether the MMB Act makes adequate provision for failure of agreement in the meet-and-confer process. Most statutes which operate within a strike-ban policy attach special significance to participation by neutral third parties in the resolution of bargaining impasses. Such participation is no substitute for the strike, but it may serve to stimulate bargaining, satisfy a need for fairness, or both. Most states provide at least mediation facilities, available upon the request of either party. Many provide for fact-finding with recommendations. A few, mostly with narrow but explicit statutory strike bans, provide for compulsory and binding arbitration of bargaining disputes.


Regarding constitutional defenses see In re Berry, 68 Cal. 2d 137, 151, 436 P.2d 273, 283, 65 Cal. Rptr. 273, 283 (1968) (invalidating injunction on the basis of unconstitutional overbreadth).


181. See Seidman, supra note 2.


183. Seidman, supra note 2. For discussion of utility and legality of arbitration
The MMB Act does none of the above. Section 3505.2 provides that if the parties fail to reach agreement after a reasonable period of time, they may agree together upon the appointment of a mediator and share his costs. That is the sum total of the act’s impasse resolution procedures.\textsuperscript{184} Taken literally and in isolation, the section seems wholly unnecessary. Surely a public employer and an employee organization could agree to mediation without state legislative approval. In one case an employee association argued that in order to give section 3502.2 some practical meaning it should be read in conjunction with section 3505, to the effect that a party may violate its duty to meet and confer in good faith if it refuses mediation without reasonable cause.\textsuperscript{185} The superior court rejected that argument,\textsuperscript{186} and the case is on appeal.\textsuperscript{187} Whatever the outcome, it is apparent that the subject requires further legislative attention.

\textbf{VIII. Conclusion}

The most notable qualities of the Meyers-Milias-Brown Act are its sketchiness and its vagueness. It does not say very much about the critical issues which confront labor-management relations in the public sector, and what it does say it says with confusing lack of clarity.


184. Section 3507 permits local governments to adopt rules and regulations providing for “additional procedures for the resolution of disputes.” Most cities which have adopted rules on the subject provide for voluntary mediation, or in some cases voluntary fact-finding, with final determination by the city council if the parties do not agree. County ordinances follow a similar but more ambiguous pattern. A few cities and counties provide for mediation or fact finding at the request of either party, and several provide for voluntary submission to binding arbitration. Ross & DeGialluly, \textit{supra} note 20.

The city of Vallejo is unique among California public agencies in providing for compulsory and binding arbitration of negotiation disputes. \textsc{11 Cal. Pub. Empl. Rel.} 30. Voters in the city of Sacramento recently defeated a city charter initiative amendment which would have established such a system for that city. \textit{Id.} at 31.

185. Support for that view is found in the ACIR Report, \textit{supra} note 56, stating that the “good faith” concept “requires both parties to be receptive to mediation if bona fide differences of opinion produce an impasse.” But the recent amendment to section 3505 (\textit{supra} note 129), referring to resolution procedures provided or agreed upon, arguably supports a permissive view.


It would be a mistake, however, to attribute these characteristics simply to sloppy draftsmanship. There was some of that, to be sure, but to a greater extent the sketchiness and the vagueness reflect legislative indecision in the face of varying views and conflicting political forces. Unions, by and large, favored a system patterned closely after the federal private sector model. Independent associations were wary of the private sector approach, principally because they feared it would operate to their detriment. The League of California Cities was agreeable to some form of regulation but opposed state control on more than a minimal basis. The legislature, rather than attempting to resolve the differences, in effect incorporated them into the statute. Organizational rights are declared to be protected, but no means are provided for their protection. Local governments are directed to meet and confer with recognized employee organizations, but nothing is said about the criteria or the procedures by which recognition is to be affected. The duty to meet and confer in good faith is defined in terms similar to the federal duty to bargain, but it is hedged with ambiguous and arguably conflicting limitations. Mutual agreement is recognized as a proper goal of the meet-and-confer process, but the statute is unclear as to whether agreements, once approved by the governing body, become enforceable. The entire subject of strikes and impasse resolution procedures is avoided, except for the declaration that the parties may elect to engage a mediator. What emerges is a rather general legislative blessing for collective bargaining at the local governmental level without clear delineation of policy or means for its implementation. The courts have, on the whole, done an admirable job of exegesis, but their decisions cannot help but reflect the underlying weakness of the text.

There is something to be said for a statute which encourages local governments to adopt their own procedures for recognition and bargaining without subjecting them to needless uniformity. New York's Taylor Act, for example, is based on that premise. There is very little to be said for a statute which fails to provide either comprehensive guidelines or machinery to insure compliance with fundamental state policies. It is apparent, then, that the MMB Act requires major revamping. It is not only that act which needs attention; the legislature must, sooner or later, confront the broad range of public employee labor relations in California and consider whether it is appropriate that local government employees, state employees, and employees of school districts should be subject to substantially different forms of state regulation.
Whether the necessary task of revision can be accomplished satisfactorily in the normal course of the legislative process is, judging from past events, highly questionable. Many of the states which have developed more sophisticated public employee bargaining legislation have done so after careful study and report by a legislative or gubernatorial commission. There seems to be something in the nature of the subject matter, or its political environment, which renders ad hoc legislative efforts inevitably awkward. The legislative problem could be substantially alleviated if the various affected interest groups could develop a politically effective consensus on needed revision, and that is not as improbable as it might sound. The defects in California’s current statutory scheme are not one-sided. They plague public employers as well as employee organizations with obscurity and uncertainty; in city halls and county administration buildings as well as in labor temples and association offices one hears rumblings of the need for change. Moreover, the historically wide gap between the views of affiliated unions and independent associations has narrowed perceptibly in recent years. But, given the variety of interests at stake and the complexity of the issues, agreement on comprehensive revision seems unlikely without substantial prodding. It is time for California to rejoin the movement toward rational development of collective bargaining for public employees which it helped to start. Possibly the most effective way to do that is through the kind of commission approach which other states have found so helpful.

Author's Note: An appellate decision rendered after this article went to press holds that a city violated the MMB Act by granting exclusive recognition to an employee organization as representative of all city employees and denying recognition to a firefighters' union to represent those firefighters who are members. Los Angeles County Firefighters Local 1014 v. City of Monrovia, 2 Civ. No. 38648 (Ct. App., 2d Dist., March 22, 1972). Consistent with the reasoning of this article, the court rejected the city's contention that section 3500 allows a public agency to avoid the statute by adopting conflicting rules and policies; but the decision is unclear as to why there was a conflict. Contrary to the reasoning of this article, the case appears to adopt a requirement of general recognition. The same result could be reached by holding that a city-wide unit was inappropriate.