

The Board voted to adopt amended § 204.4 of PERB's Rules of Procedure on October 23, 2018. The amended Rule will become effective upon publication in the State Register on November 14, 2018. Notice of Proposed Rule Making was published in issue 33 of the State Register on August 15, 2018, and comments were received for 60 days thereafter.

Below is a version of amended § 204.4 which shows the differences between the original and amended Rules. New additions are underlined, while bracketed material has been deleted in the new § 204.4.

Also below is an assessment of public comment.

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§ 204.4 Expedited determinations

(a) Immediately after the conference referred to in section 212.2 of Part 212 of this Chapter, and if one or more of the parties has made a request that a dispute involving primarily a disagreement as to the scope of negotiations under the act be processed expeditiously, or if the director shall deem it appropriate to do so, the director shall so notify the board and transmit the papers to the board. The board shall then inform the parties as to whether it will accord expedited treatment to the matter. If the board determines that the matter will be expedited, it will also notify the respondent of the due date for its answer, and the parties of the due date for briefs. The board may also direct that oral argument be held before it, or that a hearing be held before the full board, one of its members, or an administrative law judge. If the board determines that expedited treatment will not be accorded, the matter will be handled in accordance with sections 204.2(b) and 204.3 of this Part and Parts 212 and 213 of this Chapter.

(b) At the request of any party, or if the director shall deem it appropriate to do so, the director shall, within a reasonable period of time after a conference, make a preliminary determination whether a dispute presents an issue or issues of law relating to the scope of any duty of fair representation allegedly owed by an employee organization to a non-member, or to any member seeking to terminate membership in an employee organization, or related question. After such preliminary determination, the director shall, upon determining that the matter warrants expedited treatment, so notify the board and transmit the papers to the board. A determination by the director that the matter does not warrant expedited treatment shall not be subject to review by the board pursuant to Part 213. If the board determines that expedited treatment of the matter is warranted, it will so inform the parties. The board will notify the parties of the due date for briefs, and may also direct that oral argument be held before it, or that a hearing be held before the full board, one of its members, or an administrative law judge. If the board determines that expedited treatment will not be accorded, the matter will be remanded and processed in accordance with sections 204.2(b) and 204.3 of this Part and Parts 212 and 213 of this Chapter.

([b]c) If a hearing is held:

(1) Any objections to the conduct of a hearing, including objections to the introduction of evidence, may be oral or written, must be accompanied by a short statement of the grounds for such objection, and shall be included in the record.

(2) There shall be no intermediate report from a board member or an administrative law judge who may be assigned to hold the hearing. Upon the completion of the hearing, such board member or administrative law judge shall transmit the record to the full board for a determination without making any recommendations.

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ASSESSMENT OF PUBLIC COMMENT:

PERB received one comment agreeing that an expedited process is needed and warranted, but expressing concern that the process does not start until after a conference is scheduled and asking for consideration of a priority system for scheduling the conference.

PERB does not believe a formal priority system for scheduling the conference is necessary, as PERB's administrative law judges already schedule conferences based in part on the urgency of the matter before them.

PERB received one comment querying what topics are covered by the phrase "or related question" in the rule and specifically questioning whether the phrase would cover issues such as an employer ceasing the deduction of dues from current union members' wages unless the union "re-proves" union membership.

PERB intends that the phrase "or related question" be interpreted broadly to include issues arising from or concerning the recent amendments to the Taylor Law from which the subjects explicitly stated in the rule were drawn. Thus, the issue raised by the commenter would fall within the scope of the rule.

PERB received one comment questioning why expedited review was necessary and stating that the party saw no reason why PERB's normal processes should not

apply. The commenter also suggested that PERB should specifically state what “related questions” would receive expedited treatment. The commenter suggested that the public should again have the opportunity to comment on the proposed rule after PERB enumerated the “related questions” that would receive expedited treatment.

PERB believes that expedited review is necessary for the reasons given in the notice of emergency/proposed rulemaking. PERB notes that the application of the expedited rule is limited to specific cases which in the discretion of both the director of employment practices and representation and the board require such treatment to prevent destabilization of collective bargaining relationships and/or to minimize harm to public employers, public employee organizations, their members, and non-members employed within the bargaining unit. In view of the lack of judicial precedent applying *Janus v. AFSCME*, 138 S.Ct. 2448 (2018), and the recent Taylor Law amendments, PERB believes that the flexibility of a standard is warranted as opposed to a rigid proscription that might prove to be inadequate in dealing with unanticipated consequences.